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THE  
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SUPREME AND APPELLATE COURTS OF ARKANSAS,  
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AND TEXAS.

PERMANENT EDITION.

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**WRITS OF ERROR**  
**WERE DENIED BY THE**  
**SUPREME COURT OF TEXAS**  
**IN THE FOLLOWING CASES IN THE**  
**COURT OF CIVIL APPEALS**  
**PRIOR TO FEBRUARY 5, 1908.**

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[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

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**FIRST DISTRICT.**  
Punchard v. Masterson, 103 S. W. 828.

**FIFTH DISTRICT.**  
Morrison v. Dean, 104 S. W. 505.

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106 S.W.

(xv)†





# THE SOUTHWESTERN REPORTER.

VOLUME 106.

## DAVISON et al. v. DAVISON.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

### 1. DOWER—AMENDMENT—DECREE—MISTAKE.

Where a decree assigning dower limits the estate to the widow's life or widowhood, the limitation to her widowhood is void as unauthorized by law, and cannot be enforced, and therefore the decree needs no correction in that regard.

### 2. JUDGMENT—CORRECTION AFTER TERM—ERRORS OF LAW.

A decree not appealed from, assigning dower and homestead to a widow, was entered by agreement of parties on report of commissioners, but by mistake of the clerk was made to read that the widow should hold the dower and homestead "during her natural life or widowhood." By a subsequent nunc pro tunc order, four terms after the decree was entered, it was corrected to read that "the homestead shall vest in her during her natural life or widowhood, and the dower shall be vested in her during her natural life." *Held*, that no appeal by the widow would lie from such order amending the judgment on the ground that she was entitled to dower in the homestead, since the first decree could not be corrected after the term as to errors of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 595.]

### 3. SAME—CLERICAL ERRORS.

The court may at any time correct clerical errors by the minutes of the judge or some record in the cause showing clearly that such a clerical error was committed, and it may correct a judgment entry so as to make the judgment that which the court in fact rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 598.]

### Appeal from Circuit Court, Jasper County.

Action to assign dower and homestead to a widow, by John L. Davison and others against Florence M. Davison. From a nunc pro tunc order amending the decree entered, defendant appeals. Appeal dismissed.

This cause is now before this court upon appeal by the defendant from a judgment admeasuring to her homestead and dower in certain real estate of which her husband died seised. We deem it unnecessary to reproduce the pleadings in this cause, therefore will be content with a mere reference to them indicating their nature and character.

The respondents, as the children and legatees of John Q. Davison, deceased, commenced an action in the circuit court of Jasper county, Mo., on the 2d day of June,

1902, against the appellant to assign and admeasure to appellant her dower in the real estate of her deceased husband, the said John Q. Davison. In her answer the appellant pleaded that a certain portion of said real estate was the homestead of her deceased husband and herself prior to his death, and prayed that the same, as well as her dower, be set off to her. By an interlocutory decree commissioners were appointed and directed to set off homestead and dower to appellant. The commissioners found the value of the real estate of the deceased to be \$6,885, and set off a tract to appellant of the value of \$1,500 for her homestead, and another tract of the value of \$795 for her dower; the value of the homestead and dower tracts being equal to one-third the value of all the real estate of the deceased. The report of the commissioners neither affirmed nor denied the right of appellant to dower in the homestead tract. The report of the commissioners was approved and confirmed by agreement of the parties; but in writing up the judgment the clerk concluded as follows, to wit: "It is therefore considered, adjudged, and decreed by the court that the said homestead and dower interest heretofore set off by the commissioners herein to Florence M. Davison, widow of John Q. Davison, deceased, be and the same is vested in the said Florence M. Davison during her natural life or widowhood."

The interlocutory decree made in this cause was at the November term, 1902. At the succeeding term, being the March term, 1903, said commissioners made their report to the court, which was as follows: "Having first taken and subscribed the oath required by law, which is herewith filed, to faithfully discharge our duties and honestly and impartially execute the trust imposed in us, respectively, we proceeded to the land and other real estate of the deceased, situated in Jasper county, Missouri, and described as follows, to wit (here follows description of the lands of the deceased, including the lands described in paragraph four of this stipulation), and all of which real estate above described belonging to said deceased at the time of his death, we find of the total value of \$6,885, out of which we set off to the defendant

for her homestead all of the interest of the deceased (being a five-seventh interest) in the 10 acres, the southwest quarter of the southeast quarter of the northeast quarter of section 10, township 28, range 3; and for the remaining two-seventh interest, belonging in fee to the plaintiffs, Orville B. Davison and Mary J. Keener, we set off four acres therefrom off of the west side thereof, and the remaining six acres off of the east side of said 10-acre tract, on which is situate the late residence of the deceased, we set off to the defendant, Florence M. Davison, as her homestead, valued by us at \$1,500, for and during her natural life or widowhood; and from the residue of the real estate of the deceased we set out and admeasured to the defendant as her dower, diminished by the amount of her interest in said homestead, the following described lots and parcels of land situate in said Jasper county, to wit: 52½ feet wide, east and west, off of the west end of the south half of lot 43, and 52½ feet wide, east and west, off of the west ends of lots 44 and 45 in Sarah A. Barker's addition to the city of Carthage, Jasper county, Mo., and a tract of land described as follows: Beginning at the southwest corner of lot 45 in Sarah A. Barker's addition to the city of Carthage, running thence west 30 feet, thence north 150 feet, thence east 30 feet, thence south, 150 feet, to the place of beginning—said above dower tracts in all fronting 82½ feet on Cedar street in the city of Carthage, on which is situated a house, and valued by us at \$795, said homestead and dower being valued at \$2,295, and said dower being for and during the natural life of the defendant." This report was at the same term, by agreement of the parties, both respondents and appellant, approved and confirmed by the court. The decree was entered in the record of the court by the clerk thereof, and it was in this entry of the decree in which the concluding part of it, as heretofore indicated, was embraced.

After the lapse of four regular terms of court, the appellant in this cause seems to have discovered the limitation which the decree in the concluding part sought to impose upon the enjoyment of her dower interest. Therefore at the November term, 1904, she filed her motion for a nunc pro tunc entry of judgment, seeking thereby to correct the error contained in the decree respecting the limitation placed upon her dower rights. The court sustained this motion and made a nunc pro tunc entry as of date of the original decree, April 4, 1903, in which the original decree was changed so as to read that the 6-acre homestead was vested in the appellant during her natural life or widowhood, and the dower tracts were vested in her for and during her natural life, conforming to the report of the commissioners and the docket entry of the judge. In other words, the court sustained the motion of the appellant herein and removed the limitation placed upon her dower

interest in the original decree. The record discloses that after the sustaining of this motion defendant filed her affidavit for appeal, and the court granted an appeal to this court, and the record is now before us for consideration.

H. L. Shannon, for appellant. M. G. McGregor, for respondents.

FOX, P. J. (after stating the facts as above). We are unable to see how this court, upon the disclosures of the record before us, is to in any way interfere with the judgment and decree rendered in this cause by the trial court. The record discloses that the commissioners were appointed at the November term, 1902. At the succeeding term, being the March term, 1903, they made their report assigning homestead and dower in the manner as indicated in the report. At the same term of court at which the report of the commissioners was filed, the record recites the appearance of the parties, and by agreement between said parties said report was approved and confirmed. The decree was therefore entered approving and confirming the report. It was in this decree that the objectionable features in the concluding part of the decree were embraced in which there was a limitation upon the enjoyment of the dower interest by the appellant to her natural life or widowhood. There was no appeal from this decree; but, as the record discloses, after the lapse of four regular terms of court, upon motion of plaintiffs, the objectionable features to the decree were eliminated by a nunc pro tunc entry made by the court.

In our opinion there was no necessity for the making of the nunc pro tunc entry correcting the phraseology of the decree as originally entered. In that decree the defendant's homestead and dower interest had been assigned, and the court had no power to place a limitation, other than that which is placed by the law, as to the length of time the widow should be entitled to enjoy such dower interest. That part of the decree was without any force or vitality and could, by no means, be enforced against the widow, and her right to enjoy the estate of dower in the lands of which her husband died seised was in no way affected by it. As to changes in the main body of the decree, which was entered in conformity to the agreement of respondents and appellant, the court had no power to correct any errors of law at a subsequent term of the court. The general rule is that no final judgment can be amended after the term at which it is rendered. The law does not authorize the correction of judicial errors under the pretense of correcting clerical errors. *Ross et al. v. Ross*, 83 Mo. 100; *Freeman on Judgments* (3d Ed.) § 69. A court may at any time correct clerical errors by the minutes of the judge or by some record in the cause showing clearly that such a clerical error was committed; and it may even correct a judg-

ment entry so as to make the judgment that which the court in fact rendered. *Robertson v. Neal*, 60 Mo. 579; *Fletcher v. Coombs*, 58 Mo. 430; *Hyde v. Curling & Robertson*, 10 Mo. 359; *State ex rel. v. Primm*, 61 Mo. 166. But, on the other hand, if the court renders a judgment which it intended to enter, it has no authority at a subsequent term to change such judgment by rendering one that was not in fact rendered, even though it may subsequently be discovered that some error of law was committed in the rendition of such original judgment. In this cause there is no dispute, so far as the main body of the decree is concerned, that the court entered the judgment it intended to enter, and furthermore entered it in conformity to an agreement by the parties to the proceeding.

Learned counsel for appellant insists in his brief that the widow was entitled to dower in the homestead of her deceased husband, and directs our attention, in support of that contention, to the case of *Chrisman v. Linderman*, 202 Mo. 605, 100 S. W. 1090. That case is unlike the case at bar, and it will suffice to say of it that the conclusions therein reached were predicated upon an entirely different state of facts to those in the case we now have under consideration. Hence it has no application to the controversy in this proceeding. Therefore we deem it unnecessary to review it or in any way discuss it.

In our opinion, at the November term, 1904, at which time the nunc pro tunc entry was entered upon the motion and suggestion of the appellant, there was no action of the court at that term of the court from which the defendant had a right to appeal.

We have given expression to our views upon the record before us, which results in the conclusion that the appeal in this case was inadvertently granted, and therefore should be dismissed.

It is so ordered. All concur.

#### STATE v. SOPER.

(Supreme Court of Missouri, Division No. 2  
Nov. 19, 1907.)

##### 1. LARCENY—QUESTIONS FOR JURY.

In a prosecution for larceny, whether complaining witness or defendant owned the property alleged to have been stolen, and whether or not there was a wrongful taking, *held* under the evidence a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 180.]

##### 2. INDICTMENT AND INFORMATION—JOINDER OF OFFENSES—ELECTION.

In a prosecution for larceny of a mare and three cows, the state was not required to elect upon which property it would proceed to trial, where the property was all taken at the same time, since the taking with intent to steal constituted but one offense, which was complete with the taking, and what defendant did thereafter was immaterial except in so far as it tended to show his guilt.

##### 3. CRIMINAL LAW—TRIAL—CURE OF ERRORS—STRIKING OUT EVIDENCE—INSTRUCTIONS.

In a prosecution for larceny of property belonging to the grandmother of defendant's wife, error in admission of evidence of a conversation between defendant and his wife, having no bearing on the issue, was cured by the trial court's sustaining defendant's objection thereto after its admission, and instructing the jury not to consider it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2122.]

##### 4. LARCENY—OWNERSHIP OF PROPERTY TAKEN.

Where an agent, entrusted by his principal with a check, on the agreement between them that he is to purchase certain property for the principal therewith, uses such check for other purposes, and purchases the property with his own means, which property he turns over to the principal, the property is as much the principal's as if it had been purchased with the identical check, and a subsequent taking and carrying away of such property by the agent is larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 19.]

##### 5. CRIMINAL LAW—APPEAL—EXCEPTIONS IN TRIAL COURT—NECESSITY.

Ruling of trial court excluding evidence will not be reviewed on appeal where no exception thereto was taken at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2632.]

##### 6. LARCENY—EVIDENCE—MATERIALITY—OTHER TRANSACTIONS.

In a prosecution for larceny of a mare and some cows alleged to have been purchased by defendant for prosecuting witness and subsequently to have been stolen by defendant, evidence as to the purchase of another mare for prosecuting witness, and as to his payment therefor by a check given defendant by prosecuting witness to pay for the mare and cows alleged to have been stolen, was immaterial.

##### 7. SAME—SUBSEQUENT ACTS OF DEFENDANT.

In a prosecution for larceny of a mare and some cows, evidence as to the publicity of defendant's action in shipping the property alleged to have been stolen, subsequent to the commission of the offense, was inadmissible in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 147.]

##### 8. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REQUESTS—OTHER INSTRUCTIONS.

In a prosecution for larceny, refusal of requested instructions was not error, where other instructions which were fair to defendant and covered the very point presented by the refused instructions were given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

##### 9. SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for larceny, error in instructions as to embezzlement is not ground for reversal where defendant is convicted of larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3161.]

##### 10. SAME—TRIAL—INSTRUCTIONS—FLIGHT.

In a prosecution for larceny, the evidence showed that immediately after the commission of the crime defendant, instead of returning home as he said he would, went out of the state, where he remained for several months; that when he returned to the state he did not return to his home town, but to a neighboring town, where he was arrested, and when arrested he stated to the arresting officer that he "ought to have known better than to have come back." *Held*,

that the evidence warranted an instruction on flight.

**11. SAME—INSTRUCTIONS—CURE OF ERROR—OTHER INSTRUCTIONS.**

In a prosecution for larceny, an instruction was not erroneous as placing the burden upon defendant to prove at the time he carried away the property he did so under the honest belief that it was his own under a fair color of title, where the instruction, when taken in connection with the instructions given at defendant's request upon the same proposition, fairly presented the question to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1990.]

**12. SAME—REPETITIOUS INSTRUCTIONS.**

The giving of numerous and repetitious instructions is disapproved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1991.]

Appeal from Circuit Court, Clinton County; Alonzo D. Burnes, Judge.

Edward Soper was convicted of larceny, and appeals. Affirmed.

R. H. Musser and W. S. Herndon, for appellant. The Attorney General and N. T. Gentry, for the State.

**BURGESS, J.** At the September term, 1906, of the circuit court of Clinton county, under an information filed by the prosecuting attorney, charging the defendant with the larceny on December 4, 1905, of one sorrel mare and three red cows, the property of Mrs. Euphemia Croft, the defendant was convicted, and his punishment assessed at two years in the penitentiary. The court having overruled motions for new trial, and in arrest of judgment duly filed by defendant, he appeals.

It appears from the evidence that the defendant, his wife, and wife's grandmother, the latter being Mrs. Euphemia Croft, the prosecuting witness, lived together on a farm  $3\frac{1}{2}$  miles from Cameron, Mo., and that they went on this farm in November, 1904; that Mrs. Croft, who was 75 years of age, owned the farm, and the defendant was in charge of and operated it, hiring the help, cultivating the crops, and paying the expenses in connection therewith, the money therefor being supplied by Mrs. Croft; that in addition to this, the defendant, on his own account, bought and shipped a good deal of cattle and other stock, which stock was kept and fed on the farm before being shipped to market. In March, 1905, Mrs. Croft received a draft for \$951.68, the proceeds of the sale of some lands in Illinois, which draft was deposited for her by the defendant in the Farmers' Bank of Cameron, less \$70 subtracted therefrom by the defendant, which he testified was used by him to pay some bills owing by Mrs. Croft. This deposit was afterwards augmented by the deposit of the interest on a note owing her, the whole amount to her credit in the bank being \$1,031. On April 20, 1905, Mrs. Croft gave a check to the defendant for \$763.58 on the Farmers' Bank, which check, according to her testimony, was given by her to pay for a young sorrel

mare, four milk cows, and some calves purchased for her by the defendant about that time, of the larceny of which mare and three of the said cows the defendant is charged in the information. On April 21, 1905, the check for \$763.58 was deposited by defendant in the Farmers' Bank, and out of which was deducted the sum of \$179.70 to cancel notes for which he was indebted to the bank, the residue of \$583.88 being placed to his credit in the bank. He had nothing more to his credit at the bank at the time, and the testimony showed that this balance was withdrawn by various checks of defendant prior to May 13, 1905. On trial the defendant offered an explanation of the disposition of the check in question, and to prove that of the money so deposited none was used to pay for the cows and horse in controversy, but his offers were refused by the court.

The defendant, on May 13, 1905, purchased from one Lee Hainline the sorrel mare in question, for which he gave check for \$85 on the Farmers' Bank, by reason of which check and others previously drawn his account with the bank was overdrawn to the extent of \$187.07, which overdraft was, on May 25, 1905, balanced by a note. The mare purchased from Hainline was but three years old, and unbroken at the time for driving purposes. She was used principally by the defendant as a saddle horse, and only on one or two occasions was she used by Mrs. Croft, the animal on each occasion being driven by the defendant. On December 4, 1905, the date of the alleged larceny, the defendant used this horse in driving 44 head of cattle to Cameron, he being accompanied by Roy Smith, a young man who worked on the farm at that time. Among the drove were seven red cows and two bulls. At noon that day the defendant shipped the horse from Cameron to Putnam, Ill., the cattle remaining at Cameron until the night of the next day, when they were shipped by defendant to Kansas City. It appears that the Farmers' Bank had a mortgage on all of these cattle to secure notes for money borrowed by the defendant to pay for some of them, and that the shipment was made in the name of the bank. The defendant did not return after making these shipments, but went to his father's home at Putnam, Ill., and this information against him was filed December 22, 1905. He was arrested the following spring at Altamont, Mo., a town some miles distant from Cameron, the marshal of Cameron having overheard the defendant talking over a telephone line between Cameron and Altamont, and the marshal of the latter town, being notified of defendant's presence there, arrested him. The marshal who made the arrest stated in his testimony that when he made the arrest he informed the defendant that he was charged with grand larceny, and that defendant remarked he "ought to have known better than to come back here"; that defendant also said that he and his wife had

had frequent quarrels, that he left her on that account, and that his object in coming there was to talk to her over the telephone and try to fix the matter up.

Mrs. Croft testified positively that she gave defendant the check for \$763.58 for the purpose of purchasing a horse and some cows for her, and that defendant did purchase them for her. She was an old woman and seldom went out, and she was unable to remember from whom the animals were purchased or to describe the cows accurately, but she knew "there was one red cow and one spotted cow." She stated that on the morning the defendant drove away the cattle she asked him what he was going to do with the mare, and that he said he was going to take her to town and would ride her back, that she did not know at that time that the cows in controversy were among the cattle which defendant drove away, but that Roy Smith told her about it next morning.

Roy Smith, testifying for the state, said that he worked on Mrs. Croft's farm from October 1 to December 8, 1905; that he assisted the defendant in driving 44 head of cattle from the farm to Cameron on December 4, 1905; and that among the cattle were several cows—"red cows, spotted cows, and roan cows." Witness said that after arriving at Cameron the defendant told him that he had sold the mare to one Howard Loomis, and requested him not to say anything about it. The mare, witness said, was shipped to Illinois by defendant about 1 o'clock on Monday, December 4th, and the cattle were shipped to Kansas City the following Tuesday night. Witness further said that defendant sold a lot of cattle in November, and that some of the cattle shipped in December were bought by the defendant, before he, witness, began to work on the farm, and some afterwards. Some time in October witness had a conversation with the defendant, and the latter said that he purchased 28 of the cattle on the farm from one McLaughlin, and that "Mrs. Croft furnished the money to buy the mare and stock." Witness milked the cows on the farm, and said there was one red cow, one spotted, and one roan cow.

Defendant testified on his own behalf, and stated that in the shipment of 44 cattle on December 4, 1905, were 7 red cows, and were purchased by him as follows: One of John Myers on January 21, 1905; two of John Gorrel in November, 1905; one of Everett Kester in November, 1904; one of E. M. Charlton on November 25, 1904; one of Dr. Franklin, at a sale in November, 1905; and one procured by a trade with William Hauger. The defendant, in support of his testimony, introduced in evidence the canceled checks paid for these cows, and his testimony was in no way disputed. The court refused to permit the defendant to show from whence the funds were derived for the purchase of the cattle, but the checks and bank books in evidence showed that none of the cows were

purchased with the checks for \$763.58 given him by Mrs. Croft on April 20, 1905. The testimony further showed that the sorrel mare which the prosecuting witness claimed as hers was not purchased until 22 days after the giving of this check, and was not paid for out of said check, but by an overdraft on the Farmer's Bank May 14, 1905, which overdraft was balanced by a note and mortgage given the bank by defendant May 25, 1905. The testimony of John Hainline, from whom the animal was purchased, was the same as that of the defendant regarding the date of the sale and the manner of payment, and it was further shown that defendant did not see the animal until a few days before the purchase. Defendant claimed all the animals shipped by him in December, 1905, as his own, and that not one of them was purchased with the proceeds of the check given him by the prosecuting witness, nor at the time stated by her in her testimony. The defendant offered to show that on the eighth day of February, 1905, he bought from one Henry Ziegenbein a certain sorrel mare, seven years old; that he paid Ziegenbein for that mare by executing to the Farmers' bank of Cameron a chattel mortgage on the mare and other animals; and that thereafter, about the 21st day of April, 1905, with the knowledge and consent of Mrs. Croft, the prosecuting witness, and by her direction, he took from the check given him by her a sum sufficient to pay off the note given for the purchase price of that horse. The court, however, sustained an objection to such testimony on the ground that this was not the mare in controversy.

J. Lake Jones, a witness for defendant, testified that he was a farmer living near Cameron, and that shortly after the defendant shipped the cattle away he saw Mrs. Croft and presented her with a bill for \$81 for corn which he had sold the defendant, and that she said "she wasn't going to pay it, because it had been fed to his cattle and he shipped them away."

Wm. Hauger testified for the defendant as follows: "I know Mrs. Croft, who just left the stand, and was at her place, as near as I can recollect, about two weeks after Ed. Soper left. Mr. Jones presented her a bill at that time for corn which she claimed was fed to cattle Mr. Soper took to Kansas City, and she said she was not liable for it because the cattle belonged to Ed. Soper, and she said he fed the corn to his cattle."

Three witnesses for the state testified that the defendant's reputation for truth and morality was bad; and one of said witnesses, on cross-examination, said that he had heard one or two people say that the prosecuting witness told entirely different stories about the matters in controversy.

At the close of the state's case the defendant asked the court for an instruction in the nature of a demurrer to the evidence, and a like request was made at the close of all

the testimony, both of which were refused by the court and defendant excepted.

The first contention is that there is no evidence to show that the property alleged to have been stolen was the property of the prosecuting witness, Mrs. Croft, or that there was any wrongful taking which would support a conviction of larceny, and that therefore the peremptory instruction to find the defendant not guilty, asked by the defendant at the close of the evidence on the part of the State and again at the close of all the evidence, should have been given. While it is true that the evidence on the part of the state as to the ownership and identification of the cows is not as strong and convincing as it should be, we are not prepared to say that there was no substantial evidence that the cows were the property of Mrs. Croft, as alleged in the information. If her evidence is to be believed, the property all belonged to her. On the other hand, if defendant testified truthfully, it all belonged to him, and he was not guilty of either larceny or embezzlement of the mare or cows. The evidence as to the identification and ownership of the property was for the consideration of the jury, and there was therefore no error in refusing the peremptory instruction. Neither did the court err in overruling the defendant's motion to require the state to elect, at the close of the state's evidence in chief, "upon which property in the information it will proceed to trial," as the mare and cows were taken from the farm at the same time, and that taking constituted but one offense. If the removal of the property from the farm by defendant was with the felonious intent of stealing the same, the larceny was then complete, and what he may thereafter have done with the property was immaterial except in so far as it tended to show his guilt.

It appears from the record that in February, 1906, defendant was in Altamont, Mo., and his wife was living on the farm, and that one Mrs. McCune, a witness for the state, was permitted to testify, over the objection of defendant, to a conversation between defendant and his wife over the telephone with respect to their domestic troubles, and which witness overheard. After this testimony was admitted it was objected to by the defendant on the ground that it was incompetent and immaterial and did not tend to prove or disprove any issue in the case. The objection was sustained by the court, and the jury instructed not to consider the testimony, as "it was not competent in any way, shape, or form." But defendant now insists that the evidence was prejudicial to the defendant, and, although stricken out, the poison it engendered in the minds of the jury was not removed. It is very clear that this testimony had no bearing whatever upon the issues in the case and was inadmissible; but as the court, immediately after its admission, directed the jury not to consider it, we are un-

able to see how defendant could have been prejudiced by its admission, and do not think the judgment should be reversed upon that ground.

It is next contended that the court erred in not permitting C. E. Packard, cashier of the Farmers' Bank of Cameron, to testify as to the disposition of that part of the \$763.58 check given by Mrs. Croft to defendant not deposited by defendant to his credit in said bank, and that the court further erred in refusing to permit the defendant to show what disposition was made by him of the balance of the check deposited by him in the bank. Defendant claims that this testimony, had it been admitted, would have shown that no part of said check was expended by him in the purchase of the mare or cows in controversy. It seems that at the time defendant received the check for \$763.58 from Mrs. Croft he owed the bank, in notes, \$179.70, and that this amount was deducted from the check, and the balance, \$583.88, placed to his credit in the bank. There is no contention that this balance was insufficient to pay for the mare and cows in question. In order to vest in Mrs. Croft the title to the property in controversy, it was not necessary that it should have been purchased for her with this identical check or its proceeds; but if defendant accepted the check with the understanding and agreement between himself and Mrs. Croft that he was to purchase therewith for her the mare and cows in question, and he used the check for other purposes, without the consent of Mrs. Croft and bought the mare and cows, or any of them, with other moneys or checks, and she afterwards by and with the consent of defendant had possession of the property thus purchased for her, such property was just as much hers as if paid for with the identical check in question. The law will not permit a person to accept with one hand a check for the specific purpose of purchasing property therewith for the giver, and with the other hand to apply money which he then has to accomplish the same purpose, and then, when the property thus purchased is claimed by the person who gave the check therefor, to claim that it belongs to him because he purchased it with money of his own and not with the check or its proceeds. Such double dealing should not for one moment be countenanced.

Complaint is made of the action of the court in striking out part of the evidence of A. J. Althouse, a witness for the defendant, but as the action of the court was not excepted to at the time, the question cannot now be considered. The court refused to permit the defendant to testify that on February 8, 1905, he purchased a sorrel mare from one Henry Ziegenbein, and executed a chattel mortgage to the Farmers' Bank of Cameron on said mare and other stock, and afterwards, with the knowledge and consent of Mrs. Croft, paid off said mortgage out of the check given by her. It was conceded

by defendant that this was not the mare in question, and it is difficult to see how such evidence could have thrown any light upon any issue in the case, nor do we think it would have done so.

It is also contended that the court should have permitted the defendant to testify in regard to the publicity of his action in the shipping of the cows and mare, and as to the persons who were present at the time of shipment. The argument is that evidence of such character was admissible as tending to show good faith upon the part of the defendant with respect to his claim of ownership. When "the evidence leaves it in doubt whether or not the property taken was the defendant's, or whether the defendant honestly believed either that he was the owner or that he had a right to the possession, publicity of taking is regarded as very strong evidence of the good faith of the defendant's claim." 18 Am. & Eng. Ency. of Law (2d Ed.) p. 525; Causey v. The State of Georgia, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269. No such evidence, however, is admissible after the completion of the offense and which, in the case, at bar, if committed at all, was committed and completed at the time defendant took the property from the farm of Mrs. Croft; and it was upon this theory the case was tried. No act or declaration of defendant, in his favor, as explanatory of the taking, was permissible unless it was done or made at the time of the taking or when he was first charged with the offense. The declarations and statements, if any, made at the time as explanatory of his possession of the property in question, were admissible. It is not recorded, however, that defendant made any such statement at the time of the taking.

Defendant asked six instructions which were refused, and this is assigned for error. But there was no error in this, for the court, at the instance of the defendant, gave seven other instructions which were exceedingly fair to him, and covered every point presented by the refused instructions.

The seventeen instructions given at the instance of the state are challenged upon various grounds, but upon a careful reading we find them free from substantial objection, especially so those upon grand larceny. As to the instructions upon embezzlement, the defendant has no right to complain, as he was not convicted of that offense. We do not, however, intend to be understood as holding that they, or either of them, are erroneous.

The defendant contends that there was no evidence upon which to predicate the sixth instruction for the state in regard to the

flight of defendant, after the commission of the alleged offense, for the purpose of avoiding arrest. But this we cannot admit. Immediately after the sale of the cattle in Kansas City, the defendant, instead of returning home as he had stated he would, went to Illinois, where he remained several months, or until the following spring, when he returned to this state, but not to his home or to Cameron, and was arrested at Altamont, Mo. He stated to the officer who arrested him that he "ought to have known better than to come back here." There was therefore ample evidence upon which to bottom said instruction.

The further contention is made that the burden of showing to the satisfaction of the jury that at the time defendant carried away the property in question "he did so under the honest belief that it was his own under a fair color of right and title" was erroneously placed upon the defendant by the state's seventeenth instruction. Upon this same question the court at the instance of the defendant, instructed the jury as follows:

"No. 5. The jury are instructed that even though they may believe from the evidence, beyond a reasonable doubt, that the defendant took and carried away the property in question, yet, if they further believe from the evidence that the defendant took the property under claim of title, honestly entertained, then he is not guilty of larceny, and, in such case, he should be acquitted.

"No. 6. The court further instructs the jury that, where property is taken under a claim of right, and there be any fair claim of right to the property, and the jury believe from the evidence that such claim is made in good faith, then it is the duty of the jury to find the defendant not guilty."

We do not think the instruction objected to is susceptible of the construction placed upon it by the defendant, but that it fairly submitted the question upon all the evidence. Certainly, when said instruction is taken in connection with defendant's above-quoted instructions, upon the same proposition, there can be no question that this feature of the case was fairly presented to the jury. The only criticism which we have to make upon the instructions is their number. Five or six pointed instructions upon the part of the state would have covered the entire case, and the issues been more easily comprehended by the jury than by the entire seventeen given. The giving of numerous and repetitious instructions has always been disapproved by this court.

Finding no error in the record prejudicial to the defendant, we affirm the judgment. All concur.

**VINCENT v. MEANS et al.**

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

**1. APPEAL—FINDINGS—CONCLUSIVENESS.**

A finding of the trial court trying a case without a jury has the effect of a verdict and will not be interfered with unless there is an absence of substantial evidence to sustain it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3992.]

**2. SAME—LAW OF THE CASE.**

Where a declaration of law was simply copied in the record, but no point was made thereon or any mention of it in the opinion, the declaration was not approved and was not the law of the case on a subsequent trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368.]

**3. ACKNOWLEDGMENT—DEEDS—DEFECTIVE EXECUTION—EFFECT.**

Where there was substantial evidence that one conveyed land to a grantee with intent to vest title in him, the conveyances, though not legally acknowledged, passed title to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 26.]

**4. LANDLORD AND TENANT—DISPUTING TITLE OF LANDLORD.**

Where a grantee in a defectively acknowledged deed claimed to own the land described therein and exercised acts of ownership thereof, possession by persons holding under him was not possession under the grantor within the rule that a tenant cannot dispute the title of his landlord unless he first surrenders possession.

**5. EJECTMENT—DEFENSES—EVIDENCE—SUFFICIENCY.**

In ejectment, defendant claimed under a grantee in a deed from plaintiff, and sought to show the existence of the deed by the admissions of plaintiff and the grantee and the latter's exercise of acts of ownership for many years, during which time a part of the land was condemned for a railroad right of way as the land of the grantee who received the compensation therefor. *Held*, to show the existence of the deed.

**6. EVIDENCE—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.**

Parol evidence of the existence of a deed by proof of its recognition by the grantor and grantee therein is competent and does not alter or contradict the deed.

**7. APPEAL—HARMLESS ERROR—ERRORS IN DECLARATION OF LAW.**

Where, in ejectment, a declaration of law was based on the theory that plaintiff's cause of action was barred and that plaintiff's grantee, under whom defendant claimed, was the owner of the land when a third person inclosed it for the grantee, the error in a declaration of law arising from a mistake as to the time the third person inclosed the land was not prejudicial to plaintiff.

Appeal from Circuit Court, Putnam County; Geo. W. Wanamaker, Judge.

Ejectment by Miner C. Vincent against John R. Means and another. From a judgment for defendants, plaintiff appeals. Affirmed.

See 82 S. W. 96.

John C. McKinley and Higbee & Mills, for appellant. N. A. Franklin, D. M. Wilson, and A. W. Mullins, for respondents.

**BURGESS, J.** This cause was before this court on a former appeal by the defendants, and was then reversed and remanded for

further trial. 184 Mo. 327, 82 S. W. 96. The last trial resulted in a judgment for defendants, from which judgment, after an unavailing motion for a new trial, plaintiff appeals, and assigns error.

The action is ejectment for a tract of land in Putnam county. The case was tried by the court without the aid of a jury. In the former opinion of this court the facts in the case were fully stated, but upon the last trial additional facts were shown by defendants which confirmed their position on the former appeal. As the cause was tried by the court, a jury being waived, the same presumption is to be indulged in favor of the correctness of the finding as the verdict of a jury, and it will not be interfered with by the Supreme Court unless there be an absence of substantial evidence to sustain such finding. *Irwin v. Woodmansee*, 104 Mo. 403, 16 S. W. 486; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Gould et al. v. Smith*, 48 Mo. 43; *Gaines v. Fender*, 82 Mo. 497.

Plaintiff contends that the court erred in refusing to give declarations of law No. 3, as asked by him, and in giving it in a modified form. As asked, it reads: "If the court, sitting as a jury, find from the evidence that plaintiff entered the land in question and made arrangements with his brother, A. B. Vincent, to look after the land and pay the taxes thereon, and his brother agreed to do so, and plaintiff went away and has resided abroad, relying upon his brother to pay the taxes on said land, and about the year 1835 said A. B. Vincent leased the land in his own name to witness Marshall, without disclosing that he was acting as agent for plaintiff, and witness Marshall fenced the land and paid taxes thereon under the terms of his lease for the use of the pasture, and remained in possession of said land under said agreement until March, 1891, when said A. B. Vincent sold and conveyed said land to defendant Means, then you are instructed the relation of said A. B. Vincent to plaintiff was that of agent, and the possession of witness Marshall was not under claim of ownership, either in himself or of A. B. Vincent, but was consistent with and not in opposition to nor adverse to plaintiff's title and ownership; in other words, the law presumes that Marshall's possession up to the time A. B. Vincent conveyed said land to Means in March, 1891, was in law and in fact plaintiff's possession, and this possession could not be changed to an adverse possession by any intent on the part of A. B. Vincent not disclosed to plaintiff. [Before this presumption of the law can be overthrown, defendant Means must show by the preponderance or greater weight of the evidence that actual notice was brought home to plaintiff 10 years before this suit was brought that A. B. Vincent claimed to be the actual owner of said land, and had repudiated the relation of agent for plaintiff as to said land, and that plaintiff had notice thereof more than 10-



years before this suit was brought, and unless the court so find the verdict will be for the plaintiff.]” The court eliminated from said declaration all of that part in brackets, being the last sentence, and then gave it as thus modified.

It is said by plaintiff “that this identical declaration, including the part in brackets, was given on the first trial, and was assigned as error by defendants, but received the approval of this court, and is the law of the case.” But this is a misapprehension of the facts as disclosed by the record. This declaration of law was simply copied in the record, as were all other declarations of law in the case, but no point was made thereon, nor was there any mention of it in the opinion. It cannot therefore be said that it was approved by this court, or is the law of the case. Judge Fox, speaking of a similar instruction in the recent case of *State v. Fogg* (not yet officially reported) 105 S. W. 618, held that the mere fact that an instruction given by the trial court is incorporated in the statement by the appellate court does not mean that such instruction is without objection or has the approval of this court. It is probable that the paragraph in question was stricken out by the court because it eliminated and removed from its consideration one of the vital issues in the case, and upon which the evidence was conflicting; that is, as to whether plaintiff had conveyed the land in question to his brother, A. B. Vincent, about the year 1867. The evidence tends strongly to show that A. B. Vincent, for more than 20 years before he sold the land to defendant Means, through Marshall as agent, claimed that the land belonged to him and had been conveyed to him by his brother, the plaintiff, by a deed of conveyance defectively acknowledged, such acknowledgment having been taken by a justice of the peace in the state of Ohio. Not being properly acknowledged according to the laws of this state, it could not be admitted to record here; but if, as there was much evidence tending to show, it was signed and delivered by M. C. Vincent to his brother, A. B. Vincent, with the intent and purpose of vesting the title in him, it was just as effectual to pass the title as if it had been properly acknowledged and recorded. Of course, it would not have been good against an innocent purchaser from M. C. Vincent. *Vincent v. Means*, 184 Mo. 827, 82 S. W. 96; *Parsons v. Parsons*, 45 Mo. 265; *Stevens v. Hampton*, 46 Mo. 404; *Tiedeman on Real Property*, § 849. It is said for plaintiff that even if A. B. Vincent did from the first claim ownership of the land, Marshall’s possession was none the less plaintiff’s possession, and that neither Marshall nor Means could claim any right against plaintiff which A. B. Vincent could not rightfully claim, and neither “could dispute the title of the landlord until and unless he first surrendered possession of his land.” If, as contended by defendant, A.

B. Vincent owned the land as far back as 1867, it is not a little difficult to see how Marshall’s or Means’ possession was plaintiff’s possession, for neither of them took or held under him, but under A. B. Vincent, who claimed to own the land and exercised acts of ownership over it.

Plaintiff also claims that the evidence introduced by defendants as tending to show the existence of the deed in question was not sufficient for that purpose. *Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742, which is relied upon by plaintiff as supporting his contention, was an action in ejectment to recover possession of an undivided one-fifth of a tract of land in Grundy county. In that case it was sought by verbal testimony to control the express provisions of the deed, and this court said “it would be too hazardous to divest titles upon such uncertainties.” But that is not this case. Here only was sought to be shown the admission by both M. C. Vincent and A. B. Vincent of the execution of a deed from the former to the latter for the land in question, and the claim by A. B. Vincent of the land, and his exercise of acts of ownership over it for many years, during which a small portion of it was condemned as his property for a railroad right of way, and his receipt of the damages allowed therefor, and the sale of the balance of the tract to Means for \$800, of which purchase price Means paid him \$200, and the execution by Means of a mortgage on the land to secure the payment of the balance of the purchase money. No attempt whatever was made to alter or in any way change or contradict the deed, but the fact of its existence and its recognition by both plaintiff and his brother could properly be shown by evidence, and facts and circumstances were as competent for that purpose as for the purpose of establishing any other fact or issue in the case.

Plaintiff challenges declaration of law No. 3, given in behalf of defendant upon the ground that it assumes that Marshall took possession and fenced the land in 1884, while the evidence shows that possession was taken by him for A. B. Vincent in the spring of 1885. Conceding that the time mentioned in the declaration was erroneous, and should be fixed as in the spring or summer of 1885, instead of 1884, we are unable to see how plaintiff was prejudiced by this mistake, because, according to the evidence and the theory upon which this declaration is based, plaintiff’s cause of action was barred by the 10-year statute of limitations long before the institution of this suit on February 23, 1901. This declaration is based, of course, upon the theory, as to which there can be no question, that A. B. Vincent was the owner of the land when Marshall inclosed it by fence for him, after which he held it adversely to all the world, and that when defendant Means purchased the land from him and took actual possession of it he succeeded

to Vincent's possession, which continued to be adverse, and nothing that A. B. Vincent could do after said sale and purchase could change the nature of such possession.

The declarations of law given by the court presented the case very fairly for both parties, and the finding and judgment were well warranted by the evidence.

The judgment should be affirmed. It is so ordered. All concur.

### CORDER v. O'NEILL.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### BROKERS—RIGHT TO COMMISSIONS—RECEIVING COMMISSIONS FROM BOTH PARTIES.

Where plaintiff was employed by defendant to sell a mining lease, as a broker, for \$90,000, out of which defendant agreed to pay plaintiff \$5,000 commission, and plaintiff thereupon agreed with the agent of the purchaser to pool commissions, so that plaintiff received a portion of the commissions paid by the purchaser to his agent, plaintiff was not a mere middleman, and, having contracted to receive commissions from both parties without defendant's knowledge, he could not recover from defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 52-54.]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Hal Corder against James O'Neill. From a judgment for defendant, plaintiff appeals. Affirmed.

This cause reaches this court by appeal on the part of the plaintiff from a judgment of the Jasper county circuit court in favor of the defendant. This action results from a transaction between the plaintiff and the defendant concerning the sale of a certain mining lease placed in the hands of plaintiff for sale by the defendant, and an agreement and contract entered into by which the sum of \$5,000 was to be paid plaintiff as commission for the consummation of such sale. This is the second appeal of this cause to this court. The first appeal was upon the part of the defendant, and the cause was reversed and remanded. This appeal, as before stated, is on the part of the plaintiff.

The nature and character of this proceeding is fully set forth in the case of *Corder v. O'Neill*, 176 Mo. 401, 75 S. W. 764. It is therefore not essential to reproduce in detail the entire pleadings, but it will be sufficient to a full understanding of the issues presented in the last trial of this cause to briefly refer to some of the allegations in the petition and answer. The petition alleged that the plaintiff "was at all times hereinafter mentioned engaged in the business of selling real estate, mines, mining property, and leases on mining property in Jasper county, Mo., as agent for such persons or concerns as might employ him therefor, and on March 22, 1899, the defendant, James O'Neill, was the owner of a certain lease known and described as the 'Get There' lease, in or near the

city of Cartersville, in said county and state, and on said day he was desirous of selling the same; that at the same time the plaintiff had, as customer for a piece of mining property, one C. C. Playter, who desired for himself and others, and especially for one R. Tibbets, of Boston, Mass., to purchase a mining lease in Jasper county, Mo., and on said date the defendant entered into a contract with the plaintiff, whereby he agreed that if said Playter or his assigns should take the lease of the defendant, known as the 'Get There' lease, and should comply with the conditions of a contract made with the said Playter or his assigns for said lease, and should pay to the defendant the sum of \$90,000 in cash for said lease on or before the 1st day of May, 1899, then the defendant will pay the plaintiff the sum of \$5,000 in full for all commissions and compensation for services rendered by the plaintiff in and about the sale of the said 'Get There' lease; \* \* \* that during the existence of said contract the said Tibbets, through his said agent, requested of the defendant that he would extend the time for the payment of the balance of the purchase money for said lease until the first day of June, 1899. Said contracts are herewith filed, marked 'Exhibits A and B.' Plaintiff further states that, at the time of procuring said property for sale defendant only asked the sum of \$85,000 therefor, and, by agreement with defendant, offered and contracted said property for the sum of \$90,000; it being agreed that the excess over \$85,000, to wit, \$5,000, should be paid by defendant to plaintiff for making said sale; that within the time limited plaintiff sold said property for \$90,000 to one Fredk. R. Tibbets on March 22, 1899, and \$5,000 of the purchase price was thereupon paid by said Tibbets to plaintiff, and the balance was to be paid by said Tibbets on or before May 1, 1899." The foregoing averments were followed by allegations asserting that there was a verbal agreement entered into between Tibbets, the purchaser procured by the plaintiff, and the defendant, to extend the contract for 30 days, giving said Tibbets that much more time to purchase said property. Then follows the averment alleging a breach of such oral agreement, and the prayer for relief that by reason of the breach of such verbal agreement and promise to extend said original contract by the defendant, and by reason of the fraud thereby practiced upon the plaintiff, plaintiff is damaged in the sum of \$5,000, for which sum he prays judgment. After this cause was remanded to the circuit court of Jasper county for a new trial, the defendant filed an amended answer on January 4, 1904. The first paragraph of said amended answer was a general denial.

The new matter set up in the amended answer was as follows:

"Second. Further answering, defendant states that, without his knowledge or consent, the plaintiff agreed to and did receive

money as commission or compensation for services in and about the alleged sale from the purchaser of the property described in the petition, and thereby forfeited all his claim against defendant, and is not entitled to recover herein.

"Third. Further answering defendant states that, without the knowledge or consent of defendant, the plaintiff entered into an agreement with the representatives of the purchasers of the property described in the petition to 'pool,' or divide, the commissions received and to be received from the defendant and the purchaser of said property in the petition described; that said agreement was made before the consummation of the sale of said property; that, in pursuance of said agreement, the agent of the said purchaser did receive money from the latter as commission or recompense for services in and about said purchase, and did carry out said agreement and pay a portion thereof to defendant; by reason whereof, plaintiff forfeited all his claims against defendant and is not entitled to recover herein." To this amended answer the plaintiff filed a reply, which embraced a general denial of the new matter, and, "further replying, plaintiff avers that plaintiff procured and introduced the purchaser to defendant and that plaintiff had no hand in the negotiations between them; that said purchaser and defendant made their own bargain without plaintiff having anything to do with fixing of the price or terms of said sale, and without plaintiff's interference in anywise. Wherefore plaintiff prays judgment as in his petition prayed." Upon the issues thus presented, the trial of this cause proceeded. It is practically conceded that the facts developed at the trial of this cause are substantially the same as in the trial of the cause upon the former appeal, except as to the evidence introduced upon the issue presented by the new matter in the amended answer of defendant. Hence we deem it unnecessary to undertake to again repeat the facts developed which fully appear in the case of *Corder v. O'Neill*, supra; and shall confine our reference to the testimony to the issue presented by the new matter in the amended answer of the defendant.

The testimony, as disclosed by the record upon this issue, is quite voluminous; but doubtless the trial court sustained a demurrer to the evidence upon certain statements testified to by the plaintiff and witness Mr. Geddes, who was also interested in the transaction. Therefore we deem it sufficient to refer briefly to the testimony of the plaintiff and Mr. Geddes upon the issue presented in the answer of the defendant, and upon which the court's action in sustaining the demurrer to the evidence was predicated.

The plaintiff was introduced as a witness; and upon the subject of his employment by the defendant to make this sale said: "Q. Who named the price at which this property would be sold—who fixed the price? A. Mr.

Bruen. Q. What was said in that connection, Mr. Corder, about the price of the property and the commission? A. We asked Mr. Bruen what his price was, and he said the price was \$85,000. Then I said, 'Mr. Bruen, will you allow my commission out of that?' and he said, 'You will have to add it to it'; and I said to him, 'If I add my \$5,000 to it, will you then hold the price at \$90,000, and give me a contract back for the \$5,000?' and he said, 'Yes.' That was the agreement between us."

As applicable to this same subject of employment and the nature of the employment, witness Mr. Geddes testified as follows: "Q. You may state if you went there by arrangement between you and Mr. Corder at the time. A. Yes, sir. Q. Now, go ahead. A. Col. O'Neill said it was for sale, but was in such shape he couldn't give an option. \* \* \* I told him the parties were cash purchasers, and didn't care for an option if he could sell it, and he said he could. Said his price was \$85,000. \* \* \* I told him I would add my commission to that amount. Q. Did you state what it was? A. No; I didn't at that time tell Col. O'Neill. I think I didn't. I am not sure. Q. State further all that was said. A. Well, he said he would want an immediate payment for the property, and would give time on the balance."

The plaintiff again, in testifying as to the information that he acquired from the defendant in relation to the property, said: "Q. Now, what, if any, statistics did you get up in regard to the property and send to any of the parties you were putting this property to? A. I furnished a regular statement of it, together with a prospectus of it written up and describing the property. Q. Well, probably the jury would not understand what a regular statement was? A. Statement of the production and earnings, etc., and royalties, what the royalties amounted to. Q. Covering what period of time? A. I don't remember now, but very probably—I don't know whether ran back as far as six months, or what time. Q. From whom did you obtain the data you used in making up this statement? A. Mr. Bruen. Q. Where were you when you obtained them? A. I am trying to think where that was gotten—whether got it from Mr. Bruen—whether Mr. Geddes got it or I. We were trying to deal together, you know, and I don't know whether Geddes went for a fact or I. Q. To whom did you send those statements or prospectus? A. I furnished it first to Mr. House, who was getting the statement originally for the Playters. Q. And the statement went to the Playters? A. Yes, sir. \* \* \* I presented these facts first to Mr. House. Q. Going to Playters—for the Playters? It was the medium you adopted to get it to the Playters? A. Yes, that is right."

Plaintiff also testified as to the meeting between the defendant and the purchaser,

Mr. Playter, who was with plaintiff and Mr. Geddes, as follows: "Q. And you were present the time that [the contract of sale] was agreed to between Playter and Bruen? A. Yes, sir. Q. And took part in that discussion? A. Yes, sir. Q. And you wanted the thing to go through, and assisted in whatever you could to get them together? A. Yes, sir. Q. Who fixed the terms—who agreed upon the terms? A. I arranged the terms with Mr. Bruen. Q. I mean between Playter and Bruen? A. We were all together, all three of us, discussing the matter together, you know."

Upon this same subject witness Geddes testified, and made answer to the following questions: "Q. What I mean: You gentlemen came in there and talked back and forth? A. Yes. Q. And, to some extent, more or less discussion between you, and the result of all the discussion there was these contracts, the terms of these contracts, were agreed upon and afterwards reduced to writing? A. Yes, sir. Q. That is a fact, isn't it? A. Yes, sir."

Upon the subject of dividing the commissions to be paid by the purchaser and the seller, who was the defendant, the plaintiff as the record discloses testified as follows: "Q. You and Mr. Geddes in all this matter were in together? A. Yes, sir. Q. Now, I will ask you if it isn't a fact that Mr. Geddes and you had a contract at that time, by which you were to receive a commission from the purchaser of this property for the making of the sale? A. When we first entered into the agreement, Mr. House, who at that time was hunting for a property for Playter, said to me that 'I will make something out of this, and I will divide it with you,' which he afterwards done. Q. He gave you a part of the commission he had received from the purchaser? A. Yes, sir. Q. And that was the arrangement during all this time, commencing prior to the contract of March 22d? A. Yes. Q. You never told Col. O'Neill that? A. I did not. \* \* \* Q. As a matter of fact, you were interested on both sides in the way of commissions all through this matter? That is a fact? A. Yes; I said that."

Witness Geddes, upon the subject of the division of commissions, testified as follows: "Q. You and Mr. Corder were working together? A. Yes, sir. Q. Under an agreement to divide what you made? A. Yes, sir. Q. And you did divide what you received from the purchaser? A. Yes, sir. It was divided between four of us. Well, we never received any. It was to be divided. Q. You did get some? From the purchaser now—not Col. O'Neill's side, but the other? A. Yes; we received a payment from Mr. Playter. Q. And there had been an understanding to that effect that you were to receive that all the time? Col. Corder had an agreement with them for \$3,000? A. That is my recollection. Q. Out of the commission? A. Yes; as commission. Q. And that agreement was

in existence during all the time of these transactions? A. I presume so. Q. You knew of it before this contract was signed, didn't you? A. Yes, sir. Q. You never advised Col. O'Neill of that fact? A. No, sir."

While the record discloses numerous other answers to questions propounded to plaintiff upon his examination which might be construed as being in conflict with the answers to questions as heretofore recited, yet we do not deem it necessary to reproduce all the questions and answers propounded to the plaintiff. We will give such other answers as are disclosed by the record, and referred to by learned counsel for the plaintiff, such attention as they merit during the course of the opinion.

At the close of the evidence, the court sustained a demurrer to the evidence and instructed the jury that, under the law and the evidence in the cause, their verdict should be for the defendant. To the action of the court in so declaring the law plaintiff properly preserved his exceptions. Upon the giving of such instruction the plaintiff took an involuntary nonsuit, with leave to move to set the same aside. Plaintiff then filed his timely motion to set aside the nonsuit and grant the plaintiff a new trial, which was by the court overruled, and judgment was rendered in conformity to the verdict which the jury was directed to return; and, from this judgment, the plaintiff prosecutes this appeal, and the record is now before us for consideration.

Thomas & Hackney, for appellant. A. E. Spencer, for respondent.

FOX, P. J. (after stating the facts as above). The record before us in this cause presents but one legal proposition; that is, under the facts developed upon the trial of the issue presented by the new matter in the amended answer of the defendant, is the plaintiff entitled to recover? In other words, was the action of the court in sustaining a demurrer to the evidence offered by plaintiff proper or was it erroneous?

We have carefully analyzed the facts developed at the trial, as disclosed by the record, and in our opinion the agreement or arrangement with Mr. House, who was representing the purchaser in this transaction, by which the commissions paid by the purchaser and the commissions to be paid by the defendant were to be divided between the agents representing both the buyer and the seller, clearly falls within that class of contracts which have been repeatedly condemned by the appellate courts of this state and in numerous other jurisdictions, upon the ground that such contracts and arrangements between agents and brokers are contrary to public policy, and therefore absolutely void. The appellate courts of this state have spoken in no uncertain or doubtful terms concerning transactions similar to the one in the case at bar. In *Norman v. Roseman*, 59 Mo. App. 682, the

facts developed in that case upon which the court predicated its announcement of the rule of law which would govern it were about as follows: The defendant owned some lots on Cleveland avenue, which he valued at \$20,000. A syndicate, of which Sawyer was a member, owned a business lot on Franklin avenue, which they valued at \$50,000. Sawyer, who is also a real estate agent, had the Franklin avenue property for sale or exchange. The plaintiff occupied a desk in Sawyer's office. Previous to the negotiations for the trade in controversy, he had endeavored to exchange with the defendant other property which Sawyer had on his list for the Cleveland avenue property. Finally, the defendant employed him to trade with Sawyer on the following basis, to wit: The Franklin avenue property to be put in at \$49,500, the defendant to convey to Sawyer the Cleveland avenue property at a valuation of \$20,000, the defendant to assume a mortgage debt of \$20,000 on the Franklin avenue lot, and execute a second mortgage to Sawyer for \$9,500. The defendant agreed to pay plaintiff \$200 if he succeeded in making the trade. Sawyer agreed to make the exchange; and the defendant backed out of the trade. Plaintiff admitted on his cross-examination that, if the trade had been consummated, he and Sawyer would have "pooled" and divided their respective commissions; that this was their universal way of doing business in such cases. The plaintiff also admitted that he had not communicated this arrangement between himself and Sawyer to the defendant. Upon this state of facts, it was announced as the settled rule that a real estate agent cannot legally charge or receive commissions from both parties to a sale or trade, unless they consent to it, and that the "pooling arrangement" embraced in the recitation of facts as heretofore indicated, which was testified to by the plaintiff in that cause, while it may not be construed as strictly speaking a double agency, but that it was tantamount to it and possessed all of its ugly features. Touching such "pooling arrangement," the court said that, under it, the plaintiff and Sawyer were attempting to do indirectly what the law would not permit them to do directly—that is charge commissions on both sides—and thereby depriving the defendant of a disinterested judgment and effort of the plaintiff in effecting to the best advantage to himself an exchange of his property with Sawyer, to which, under the contract of employment, he was justly entitled.

In *Chapman v. Currie*, 51 Mo. App. 40, it was announced as a general rule that "a man cannot act as the agent or representative of both parties to a trade; and, if he puts himself in so unworthy a position, the law will not recognize any of his pretended rights growing out of it. Such contracts are held to be absolutely void, as being contrary to public policy, and it makes no difference that such common agent was guilty of no actual

wrong. The courts refuse to countenance such employment, not for the sake of the principals, but for the sake of the law"—and it was announced by the court that the great weight of authority is with this view. This case was cited approvingly by this court in *Connor v. Black*, 119 Mo., loc. cit. 184, 24 S. W. 184. In *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458, it was held that "a broker acting at once for both vendor and vendee assumes a double agency disapproved by the law, and which, if exercised without full knowledge and free consent of both parties, is not to be tolerated." It was said by the court in that case: "As agent for the vendor, his duty is to sell at the highest price; as agent for the vendee, his duty is to buy for the lowest; and, even if the parties bargain for themselves, they are entitled to the benefit of the skill, knowledge, and advice of the agent, and at the same time to communicate with him without the slightest fear of betrayal, so that it is hardly possible for him to be true to the one without being false to the other." In *Everhart v. Searle*, 71 Pa. 256, it appeared that the agent was acting for the purchaser as well as the seller. It was there held that such an arrangement, unless made with the consent of both parties, was void as against public policy, and it was said by the court that "the danger of temptation from the facility and advantage of doing wrong, which a particular situation affords, does out of mere necessity work a disqualification." In *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, the law as applicable to this subject was very clearly stated. It was there said that "contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. \* \* \* Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases when it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency." The reason of the rule of law applicable to the subject now under discussion is nowhere better stated than in *De Steiger v. Hollington*, 17 Mo. App., loc. cit. 388. The reason for such rule was given in this language by the court in that case: "Agency or employment for two parties in antagonistic interests is not a worthy position to occupy. It is not possible for a man to serve two masters with opposing interests honestly, at the same time. The rights of one, or the other, or both, will necessarily suffer. The temptation for wrong is too great for ordinary human nature. So jealous is the law as to the relation between principal and agent that in passing on questions of this character arising between them the mere fact of the discovery of no actual fraud or bad faith does not relieve the case in the least. The cases are nearly, if not quite, uniform

where the double employment exists, and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of designed duplicity and fraud, but in consequence of established policy." The doctrine announced by the Courts of Appeals of this state are fully recognized by this court in *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Atlee et al. v. Fink*, 75 Mo. 100, 43 Am. Rep. 385. In the case last cited, Judge Henry, in speaking for this court, said: "One employed by another to transact business for him has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer. The interests of the defendant's employers, and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests."

In the case at bar it is clear from the testimony of plaintiff and witness Geddes that the plaintiff in this cause was to share in the commissions to be paid by both the purchaser and the seller. In treating of a transaction of a similar character, the Supreme Court of Colorado, in *Lery v. Spencer*, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303, thus emphatically condemned it. It was there said: "In our judgment this agreement comes clearly within that class of contracts that is inhibited by public policy, and consequently void. By its terms, each agent was to share in the commissions paid by both principals. The compensation to be jointly shared was contingent upon the consummation of the trade or sale, and this would have a tendency to induce them to disregard, if not sacrifice, the interests of their principals, if necessary, to effect that result. The fact that a sale price was fixed by the principals upon their respective properties does not answer this objection. Each was entitled to the benefit of the unbiased judgment of his agent as to the value to be placed upon the other's property, and to a reasonable effort on the part of such agent to obtain a reduction of the value to be allowed therefor in the exchange. Their pecuniary interests might have prevented such disinterested action on the part of these agents; and, it appearing from the allegations of the complaint that they 'did effect the trade or sale of the property as between their respective principals,' the transaction is as objectionable as those universally condemned, wherein one agent acts for both principals without their knowledge or consent. This objection is not answered by the claim that the evidence as introduced shows a transaction different from that pleaded, that their principals negotiated the trade between themselves, and that, in fact, plaintiff and defendant act only as mid-

dlemen in bringing Nix and Jones together."

Learned counsel for appellant earnestly and very ably present the contention that the court erred in sustaining the demurrer to the evidence offered on the part of the defendant, and in directing a verdict for the defendant. This insistence by counsel for appellant is predicated upon that line of cases which hold that if the agent or broker is not employed to negotiate the sale or purchase, but simply to bring two parties together and permit them to make their own bargain, in such cases the agent or broker is a mere middleman, and may recover an agreed compensation from either or both, though neither may know that compensation from the other is expected. That there is a class of cases maintaining such rule there is no dispute. They are fully cited in the brief of learned counsel for appellant. However, we do not feel called upon to express an opinion as to the soundness of the doctrine announced in those cases, for the reason that the facts developed upon the trial of the issue presented in the new matter embraced in the amended answer of defendant in this case by no means places the plaintiff in a position to invoke the doctrine announced in those cases. An analysis of plaintiff's petition, which is the foundation of this action, together with his admissions as a witness, and the testimony of his co-worker, Mr. Geddes, clearly demonstrates that the plaintiff was not a mere middleman, but was acting as the agent of the defendant in the sale of this property. We find in the petition an averment that "plaintiff further states that at the time of procuring said property for sale defendant only asked the sum of \$85,000 therefor, and by agreement with defendant offered and contracted said property for the sum of \$90,000, it being agreed that the excess over \$85,000, to wit, \$5,000, should be paid by defendant to plaintiff for making said sale." Plaintiff in his petition makes the further allegation "that within the time limited plaintiff sold said property for \$90,000 to one Frank R. Tibbets on March 22, 1899, and \$5,000 of the purchase price was thereupon paid by said Tibbets to defendant, and the balance was to be paid by said Tibbets on or before May 1, 1899." In our opinion it is manifest from the disclosures of the record that, while the plaintiff may not have committed any wrong or perpetrated any fraud upon either the seller or the buyer of the property involved in this transaction, yet it is apparent that he was acting for two parties occupying antagonistic positions. He was to receive commissions from the defendant, the seller, and also commissions from the purchaser. In other words, he was acting for both parties. The defendant, the owner of the property, it is true, had fixed a definite price for the property. The price being fixed, it was a matter of interest to find a purchaser. Plaintiff, referring to information concerning this property in his testimony, says that he procured statistics in reference to

production, earnings, and royalties, and what the royalties amounted to from Mr. Bruen, who was managing the property for the defendant. This information, doubtless, and as the plaintiff states, was procured for the purpose of inducing the party they had in hand to purchase. Now, it is clear that he was to receive commissions for making the purchase of this property from the purchaser. Therefore we are unable to see how it can be seriously contended, even upon the question of presenting this information to the purchaser with the purpose of inducing him to purchase, that the plaintiff occupied a disinterested position, and unsurrounded by any incentive to act unfairly with the defendant or the purchaser, from both of whom he was to receive commissions. We do not mean to say that he in any way colored the information he received in respect to the output, earnings, and royalties of the property to sell to the purchaser, but we do say that he was deeply interested in the consummation of that sale, and the incentive to unduly color the information he had received, when presenting it to the purchaser, was present. Therefore it follows that he was acting as well for the purchaser as he was for the seller, and in presenting this property to the purchaser, who was one of his principals, there was at least present the incentive for him not to act in that fair and disinterested manner which his duty would require him, under the circumstances, to do. While it may be said that a misrepresentation as to the value of the property and its output and earnings would not prejudice the interests and rights of the defendant, the seller, yet it must not be overlooked that this plaintiff was acting for both parties, and that if he in any way misrepresented the property to the purchaser, with a view of inducing him to purchase, he was committing a wrong against him from whom he was receiving a commission to make such purchase. But, aside from this, the plaintiff admitted upon the witness stand that he was present at the time the contract of sale was agreed to between Playter and Bruen, and also that he took part in the discussion at that meeting. When the inquiry was made of the plaintiff as to who fixed the terms or who agreed upon the terms, he answered: "I arranged the terms with Mr. Bruen." The further inquiry was propounded, "I mean between Playter and Bruen"; and the plaintiff answered that "we were all together, all three of us, discussing the matter together, you know." It is true that the plaintiff in testifying in relation to this transaction made some answers which seemingly are in conflict with those recited in the statement of this cause. Such questions and answers are embraced and referred to in the brief of counsel for appellant. It is sufficient to say upon that question that, even though the answers referred to in the brief of counsel were to be construed as in conflict with the other an-

swers made by the plaintiff, yet we take it that the court, if the plaintiff in responding to questions made answers which were against his interest, would be justified in acting upon the statement contained in those answers, for the reason that they were presumptively true.

We see no reason to further discuss the propositions disclosed by the record. We are of the opinion that the plaintiff does not fall within that class of cases which would designate him as a middleman. The appellate courts of this state, as indicated in the citations heretofore made, evidently do not look upon with favor any doctrine which would encourage agents and brokers in accepting commissions in deals from both parties occupying antagonistic positions in such deal. Agents engaged in the sale of real estate should have but one principal, who is entitled to the best judgment, disinterested advice, and assistance and service of such agents respecting the deals which they may have in hand, and we are unwilling, where the proof shows that commissions and arrangements have been entered into by which the agent or broker is to receive commissions from both sides, to indulge in any refined theories to make him a middleman, when seeking to recover the amount of the commission agreed upon between one of such principals.

We have given expression to our views upon the leading legal propositions disclosed by this record, which results in the conclusion that the action of the trial court in sustaining the demurrer to the evidence was proper, and its judgment should be affirmed. It is so ordered. All concur.

FLAHERTY v. ST. LOUIS TRANSIT CO.  
(Supreme Court of Missouri, Division No 1.  
Nov. 27, 1907.)

1. DAMAGES—EXCESSIVE DAMAGES.

In an action for personal injuries, it appeared that plaintiff was an unmarried woman, 33 years of age, in good health, earning \$5 per week as a domestic; that blood poisoning set in soon after the injury, and plaintiff's physical condition made amputation impossible for over two months; that both flesh and bone of her foot sloughed away, finally necessitating amputation; that the injured limb would be two inches shorter than the other, necessitating a halting walk; that her doctor bill was \$500; that she was bedridden for several months and was bound for expenses for medicine and nursing. Held, that a judgment for \$7,500 was not so excessive as to warrant setting it aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 380, 381.]

2. CARRIERS—INJURY TO PASSENGER—INSTRUCTIONS—CONFLICTING THEORIES—PRESENTATION.

In an action against a railway company for injuries to a passenger, where plaintiff's testimony tended to show that the car had stopped at the proper place to receive passengers, that there was an implied invitation to enter, that while she, in the usual way and with proper care, was entering the car, there was a

sudden movement forward throwing her down with one foot under the wheels, and defendant's testimony tended to show either that plaintiff was forced against and under the car by a crowd pushing to get on, or that she negligently undertook to mount a moving car before it reached the stopping place, and was injured by her own inadvertence, each party was entitled to instructions on their respective theories of the case.

### 3. TRIAL—INSTRUCTIONS—SUFFICIENCY.

An instruction ought not to be read as if it stood solitary and alone, independent of other instructions, neither should a general instruction covering the whole case ignore essential elements of the case made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623, 703-717.]

### 4. SAME—GENERAL INSTRUCTIONS.

An instruction which puts certain facts to the jury, and tells them that if they find that way plaintiff is entitled to recover, is a general instruction.

### 5. CARRIERS—ACTION FOR INJURY TO PASSENGERS—INSTRUCTIONS—CONSTRUCTION.

A general instruction for plaintiff, which, among other things, charged that, if defendant's servants in charge of the car received plaintiff as a passenger thereon, and if while she was on the run-board thereof, etc., they caused or suffered the car to start and move forward, etc., in the absence of contributory negligence, plaintiff could recover, in effect requires the jury to find that plaintiff was invited to enter the car, and had accepted the invitation, and is not open to the objection that it permits plaintiff to recover without a finding that the car had stopped when plaintiff sought to enter.

### 6. TRIAL—INSTRUCTIONS.

If the instruction was vague as to requiring the jury to find that the car had stopped when plaintiff attempted to board it, in order to recover, the jury could not be misled, where other instructions plainly required them to find that the car had stopped at a point where defendant usually received passengers, to entitle plaintiff to recover, and further charged that plaintiff must establish by the greater weight of evidence that she received the injuries in the manner she alleged, and that otherwise the verdict must be for defendant, and that, before they found for plaintiff, they must find she got on the run-board when the car was stopped, and that her injury must be found to be the result of a subsequent forward movement, and that if plaintiff was in a crowd, which was trying to board the car before it stopped, and plaintiff, notwithstanding warnings, attempted to board the car before it stopped, etc., or if the pressure of the crowd, combined with her attempt, threw her under the wheels, or if it was a mere accident without fault on either side, she could not recover.

### 7. SAME—SUDDEN JERKS—DANGER OF POSITION.

Where plaintiff's testimony placed her with one foot on the run-board of an electric car and one on the floor of the car raising herself to pass into it at the time the car started up, it is not error in presenting her theory to assume that plaintiff was in a position of danger at the time of the alleged start.

### 8. SAME—REFUSAL OF INSTRUCTIONS—ELEMENTS ALREADY GIVEN.

Refusal of an instruction is not error when the vital elements thereof have been given in other instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

### 9. DAMAGES—MEASURE OF DAMAGES—NURSING.

Where there is proof that plaintiff remained for a few days at a hospital and was there attended by a nurse, who was a stranger to her.

expense of nursing was a proper element of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 243.]

### 10. TRIAL—INSTRUCTIONS—MORE SPECIFIC INSTRUCTIONS—REQUESTS—NECESSITY.

Where there is evidence of nursing at a hospital by a stranger, as well as by a sister at her home, and the value of nursing generally is shown, in the absence of a request limiting recovery to nursing at the hospital, it is not error to give a general instruction permitting recovery for nursing, since the fault, if any, was in nondirection, and not misdirection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

### 11. SAME—NURSING—LIMITATION AS TO AMOUNT.

In an action by a passenger for injuries, where the petition asks no specific amount under any head or item of damages, but the elements of damage are set forth with particularity, and a general verdict is prayed covering them all, an instruction putting the question of damages to the jury, as the petition did, is not bad, in the absence of a request for a more specific instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Kate Flaherty against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest and Glendy B. Arnold, for appellant. A. R. Taylor and Albert E. Hausman, for respondent.

LAMM, J. Plaintiff had judgment, nisi, for \$7,500 in an action for negligence. From that judgment, the defendant appeals here.

The petition charges, and the proof shows, that defendant, on the 12th day of June, 1904, was a corporation operating a railroad and the cars running thereon to Creve Coeur Lake, in St. Louis county. It is further charged, as follows: That "whilst defendant's in-bound car was stopped at said place to receive passengers therein, the plaintiff was by defendant's servants in charge of said car received as a passenger thereon, and whilst she was on the run-board or step of said car, and whilst she was stepping from said run-board or step of said car, up and into said car, to a seat on said car or a place to ride in security on said car as a passenger, and before she had a reasonable time or opportunity to reach a seat or place to ride in security on said car, defendant's servants in charge of said car negligently caused and suffered said car to start and move forward and to sustain a severe shock, whereby plaintiff was thrown from her said position on said car to the ground, and her left foot was thereby thrown under the wheels of said car and so badly mangled as to require amputation of all the foot except the heel. Plaintiff was thereby otherwise injured both externally and internally. That by her injuries so sustained plaintiff has suffered and will suffer great pain of body and mind, has been and will be permanently disabled from



labor, and has lost and will lose the earnings of her labor, and has incurred and will incur large expenses for medicines and for medical and surgical attention and nursing, and has been permanently maimed and rendered a cripple for life, to her damage in the sum of \$25,000, for which sum she prays judgment." The answer was a general denial, and, further, "that plaintiff's alleged injuries were caused by her own negligence directly contributing thereto, in attempting to board a moving car, before same had come to a stop for the purpose of receiving passengers."

The uncontradicted testimony tends to show that defendant's railroad runs from the city of St. Louis to Creve Coeur Lake, some distance in the country, via Delmar Garden; that there was an aggregation of so-called fetching allurements there, besides a possible pleasing prospect of land and water, to wit, a scenic railroad or "switch-back," popcorn and peanut stands, etc.; that at the entrance of said switch-back defendant's track makes a loop which-outgoing cars pass around, and, when turned towards the town, become incoming cars. As we grasp it, the place for receiving and discharging passengers is at a platform after the cars have passed around this loop. There is evidence indicating this was a Sunday evening, and as many as 2,000 or 3,000 people were at Creve Coeur Lake for an outing. Plaintiff, an unmarried woman, in good health, was a domestic in the service of Mrs. Shannon at a weekly wage of \$5. Late in the afternoon, at about 4 p. m., a Mrs. From, Mrs. Shannon, and Miss Flaherty boarded one of defendant's cars and rode to Creve Coeur Lake. They remained there until about 9 p. m. The evening was fine and the locus in quo well lighted. So, too, there is no dispute as to the character of the injuries received by plaintiff. In that regard, the record shows she proved the allegations of her petition. She was permanently injured. Her left leg, the injured one, is two inches shorter than the other, and her foot was amputated at the heel; the lower extremity of the tibia and fibula and calcaneum (heel bone) being sawed off. Her doctor's bill is \$500. She was bedridden for several months and is confessedly bound for expenses for medicines. Having remained for a few days at St. John's Hospital, she was taken to the home of a married sister, and there nursed day and night while helplessly bedridden. At St. John's she was attended by one of the nurses employed there. There is no testimony she was nursed at her sister's home by any one, save her sister, or members of her sister's family. There is no testimony she had been a member of that family. To the contrary, she was 33 years old and living out at service earning her own living. In connection with her nursing, she offered to prove, and did prove (without objection from defendant), that reasonable pay for a nurse rendering similar day and night service was

\$5 per day. But plaintiff tendered no proof of an express contract of pay. So, too, it was shown by all the testimony that these three ladies undertook to board one of defendant's return cars to go home. The car was an open summer car with a canvas roof, known as a "moonlight car." It was about 47 feet long; its seats ran crosswise and would accommodate, say, 96 passengers. Along one side of it there was a "run-board" or "running board," about 19 inches above the rail. This run-board from end to end was the step used to enter and leave the car on its open side, and from this run-board there was a rise of a few inches to the main floor of the car.

So far, there is accord; but, as to the incidents of the injury and the cause of it, the evidence is in irreconcilable conflict. Thus, on plaintiff's part there was evidence tending to show that the car reached the place designated by defendant for passengers to get on and off; that it stopped; that at the time plaintiff undertook to board the car it was standing still, and there were few, if any, passengers on the car; that there was no crowd about the car, and no particular rush, it being practically empty at the time; that the three ladies were together and awaiting a car; that Mrs. From got on first, and took a seat about the middle of the car; that Mrs. Shannon then followed her and seated herself in the same seat; that thereupon Miss Flaherty followed to get into the same seat; that she got hold of an upright in the car and got on the run-board; that with one foot on the run-board and one on the floor of the car she was raising herself to get into the car to take a seat, and when in that ticklish fix, poised on a balance, so to speak, the signal bell rang, and the car suddenly started forward a distance of from two to six feet and threw her violently backward and caused her left foot to get on the rail, and either the forward or back wheels of the hindmost truck caught her foot, whereat the car again stopped, this time with the wheel resting on her foot smashed and pinned fast to the rail. Plaintiff introduced evidence tending to show, further, that there were three cars in a row, all standing still; that the car in question was the middle one; that the forward car was moved ahead; and that the middle car then hitched up, following the forward one.

Defendant's evidence was strongly contrary to the foregoing. For instance, it introduced testimony tending to show there was a rush to board the car before it stopped and as the car came around the loop; that the conductor and motorman were crying out to the people to stand back, to keep away and not get hurt or killed, and could not control the crowd; that there was a crowd congregated there, eager to return to town; that the car came around the loop slowly, the motorman feeding his power gently by moving up a notch, now and then;

that he did not stop the car at all until it reached the platform; that, when he stopped to allow passengers to enter the car, one of the rear wheels was found to be on plaintiff's foot; that, when notified of that fact, he backed the car off her foot; that the movement off her foot was the only movement the car made after it stopped; and that there was no signal bell to go on after the car stopped for passengers. Neither defendant's motor-man nor conductor saw plaintiff or her friends getting on the car, or anything of the accident, until a halloo was raised that the car was on a lady's foot. One of defendant's witnesses, however, did testify that the car, before smashing plaintiff's foot, stopped a little while, a short ways off, and then started forward. To offset this, he further said that, at the time the car stopped the first time, plaintiff and her companions were not close enough to it to get on. At least, the witness was at the spot and trying to keep the crowd back, and then went forward. We do not understand that he saw plaintiff at the time she was trying to board the car. No other eyewitness introduced by defendant testified to seeing plaintiff trying to board the car. The broad and open inference from defendant's testimony is that plaintiff was either pushed by the crowd on the rail while the car was moving, or, that, in undertaking to unnecessarily and negligently mount a moving car, she met with her mishap. However, there seems to be little, if any, contradiction as to the fact that when plaintiff fell she fell backwards, straight out from the car. It seems the run-board projects quite a distance beyond the rail and the wheels; and defendant's learned counsel argue that the position in which she fell and her awkward explanation of how she fell into that position are "physical facts" destroying the theory that she was thrown in that way with her foot on the rail by the movement of the car. It is allowable to say, possibly, that the way a person would fall, and the position he would occupy when prone upon the ground, would depend too much upon the play of instantaneous and convulsive muscular energy to be predetermined, or determined at all, according to any known rule. It might be a physical fact that a person would fall and lie in a given way under given circumstances; and it might also be a physical fact that the same person falling under the same circumstances would lie or roll in an entirely different way. If the crowd rushed upon plaintiff and pushed her foot under the wheels, or if in a rush she carelessly got on a moving car, it is not any more apparent why she could fall backwards than that she should be thrown backwards out of a car by a forward jerk.

The court, among others, gave the following instructions:

"(1) If the jury find from the evidence in this case that the defendant, on the 12th day of June, 1904, was operating the car mention-

ed in the evidence as injuring the plaintiff as a carrier of passengers for hire, and if the jury find from the evidence that on the evening of said day, at or near Creve Coeur Lake, at the place mentioned in the evidence, defendant's servants in charge of said car received the plaintiff as a passenger on said car, and if the jury find from the evidence that whilst the plaintiff was on said car and the running board thereof, and before she had a reasonable time or opportunity to reach a seat on said car, or a place of safety on said car, defendant's servants in charge of said car negligently caused or suffered said car to start and move forward and sustain a shock, and that thereby plaintiff was thrown from said car, and run upon, and her foot crushed and injured by the wheel of said car, and if the jury find from the evidence that plaintiff was exercising ordinary care at the time of her injury, she is entitled to recover.

"(2) The court instructs the jury that, if they find from the evidence in this case that defendant was on the 12th day of June, 1904, operating the car mentioned in the evidence as injuring the plaintiff, for the purpose of carrying passengers for hire, and if the jury find from the evidence that on the evening of said day, at or near Creve Coeur Lake, defendant's servants in charge of said car stopped said car at the platform mentioned in the evidence, and that said place was one of the points where defendant usually received passengers on said car, then the court declares the law to be that defendant's servants in charge of said car were in duty bound to keep said car stopped until all passengers intending to become passengers on said car had a reasonable time and opportunity to do so, and before starting said car (if they did so start said car), to use ordinary care to see that no passenger was in danger from a movement of said car.

"(3) Plaintiff alleges as her cause of action in this case that on the 12th day of June, 1902, at Creve Coeur Lake, in St. Louis county, Mo., while defendant's car was stopped at said place to receive passengers thereon, the plaintiff was by defendant's servants in charge of said car received as a passenger thereon, and that while plaintiff was on the running board or step of said car, and while she was stepping from said running board or step of said car up and onto said car to a seat in said car, or to a place to ride in security on said car, and before she had a reasonable opportunity to reach a seat or place to ride in security on said car, defendant's servants in charge of said car negligently caused and suffered said car to start and move forward and to sustain a severe shock, whereby plaintiff was thrown from her position on said car to the ground, and that thereby she received the injury of which she complains. The act of negligence complained of and alleged in the petition is that, when plaintiff was on the running board or step of the car, the servants of defendant in charge

of the car negligently caused or suffered said car to start and move forward and to sustain a shock, and that such negligence in causing or suffering said car to move forward, and by such moving or suffering said car to move forward to cause a shock, threw plaintiff to the ground and caused the injury of which she complains. The burden is on plaintiff throughout the whole case to prove, to the satisfaction of the jury, by the greater weight of the evidence, that said alleged act of negligence caused the injury, if any, of which plaintiff complains, and unless the jury believes that plaintiff has proved, by the greater weight of the evidence, that defendant's said servants were negligent in the manner alleged as aforesaid, and that said alleged act of negligence caused the injury, if any, which plaintiff suffered, then the verdict must be for defendant.

"(4) Defendant in its answer denies the negligence alleged as the cause of plaintiff's alleged injuries, and, in addition thereto, defendant alleges that said injuries, if any, were caused by plaintiff's own negligence directly contributing thereto in attempting to board a moving car before the same had come to a stop for the purpose of receiving passengers. While the burden is on defendant to prove the allegation of its answer to the purport that plaintiff was injured by her own negligence, yet that does not relieve the plaintiff from the burden of proving, by the greater weight of the evidence, that her injuries, if any, were caused by the negligence of defendant and its servants in the manner in which plaintiff charges it was done. In other words, plaintiff must prove, to the satisfaction of the jury, by the greater weight of the evidence, that she received the injuries, if any, of which she complains, in the way she alleges she received them, and, unless she has so done, then the verdict must be for defendant."

"(7) Before the jury can find for the plaintiff in this case, they must believe from the greater weight of the evidence that plaintiff got onto the running board or step of the car when it had stopped, and that while she was in that position the car was started forward and sustained a shock, by which she was thrown from the car and received her injuries, and, unless they so believe, then she cannot recover in this case, although the jury may believe that defendant was negligent in some other way or manner.

"(8) If the jury believe from the evidence that, when the car on which it is alleged plaintiff received her injury was approaching the stopping place, there was a crowd of people trying to board the car before it stopped, and that plaintiff was in the crowd, and that the car was moving slowly, and the conductor and others were warning the crowd to keep off or back from the car until it stopped, and that notwithstanding such warnings plaintiff attempted to board the car before it stopped, and that before it stopped she fell, and her

foot was caught under the car, and that she was not on the car and was not thrown off the car by any sudden shock of the car in starting forward after she had got onto the car, then the plaintiff is not entitled to recover in this case, and the verdict must be for defendant.

"(9) Although the jury may believe that plaintiff had not boarded the car, but was trying so to do, and that the pressure of a crowd about and around her, combined with her attempt to board the car, threw her down, and that thereby her foot was caught under a wheel of the car and injured, and that she was not thrown from the car by its moving forward and said car sustaining a shock, then plaintiff cannot recover, and the verdict must be for defendant.

"(10) If the jury believe from the evidence that neither plaintiff nor defendant was guilty of negligence, as defined in other instructions, but that the injuries, if any, sustained by plaintiff, were the result of an accident, then the jury should find for the defendant."

"(12) If the jury find for plaintiff, they should assess her damages at such sum as they may believe from the evidence will be a fair compensation to her: First, for any pain of body or mind which the jury may believe from the evidence she has suffered or will hereafter suffer by reason of her injuries and directly caused thereby. Second, for any loss of the earnings of her labor which the jury may believe from the evidence she has sustained or will hereafter sustain by reason of her injuries and directly caused thereby. Third, for any expenses necessarily incurred for medicines, medical or surgical attention, or nursing which the jury may believe from the evidence the plaintiff has incurred by reason of her injuries and directly caused thereby."

Of the foregoing instructions defendant now complains of No. 1 and No. 12.

Defendant, among other instructions refused, asked No. 17, reading as follows: "While it was the duty of defendant, as a carrier of passengers, to exercise a high degree of care, in receiving and protecting plaintiff if she sought to enter defendant's car as a passenger, yet plaintiff ought on her part to exercise ordinary care when seeking to become a passenger, and if she entered, or attempted to enter, defendant's car while it was in motion, she did so at her own peril, unless the jury further believe that defendant's servants in charge of the car by their conduct invited her to enter before the car stopped; and if the jury further believe that defendant's conductor, and others, if any, acting upon the request of defendant's servants, publicly warned those seeking to become passengers to stay off the car until it stopped, and that notwithstanding plaintiff entered, or attempted to enter, the car before it stopped, then plaintiff was not received as a passenger and was not exercising

ordinary care on her part, and the verdict must be for defendant."

On this record it is argued that the verdict is the result of passion and prejudice and against the overwhelming preponderance of the evidence. The further errors assigned relate to the giving and refusing of instructions. In that behalf, it is argued that: (a) Instruction No. 1 is erroneous because it assumes that plaintiff was in a position of danger at the time the car is alleged to have been set in motion, when that was a disputed fact on the foregoing record. (b) That said instruction is further erroneous because it fails to require the jury to find that the car was standing still at the time she got aboard the same; and, contrary to the petition, it authorized a verdict for plaintiff merely upon a finding that there were jerks or shocks in the motion of the car as it rounded the curve and before it stopped to receive passengers at the platform. (c) That the twelfth instruction is erroneous, in that it permitted a recovery for any expenses incurred by plaintiff for nursing; the evidence showing there was no such liability. (d) That said instruction was further erroneous in not limiting the amount which plaintiff was entitled to recover on account of expenses incurred for medicines, medical and surgical attention, and nursing; all these expenses being definitely fixed in her evidence. (e) That there was error in refusing defendant's instruction No. 17; the question whether plaintiff was received as a passenger being a material one (not submitted), and defendant's evidence showing she was not so received. On such assignment, is there reversible error in the case?

1. The testimony shows that blood poisoning set in presently after plaintiff's injury; that her resulting physical condition made an amputation impossible for over two months; that parts of her foot (both flesh and bone) sloughed away; and that, with an amputation of the kind finally rendered necessary in her case, no hand, however cunningly it wrought, can so adjust a mechanical appliance as to avoid a halting walk. That she suffered greatly in mind and body from her pains goes without saying. In the presence of such facts, we are not willing to say that a judgment of \$7,500 of itself indicates such passion or bias in the jury as would poison it. Twelve very cool, dispassionate, and just men (through no heat of passion or twist of prejudice, and out of no flippancy in mere form or veneering of gallantry), put to it by their oaths and the facts, might well have rendered such a judgment as adequate compensation to a young woman handicapped throughout life as Miss Flaherty is shown to be, for true it is the race is not always to the strong and the swift, and yet a happy mind at ease in a sound body is of the essence of good. Bunyan held this in mind when he made his immortal hero loosen and lose the burden weighing him down in his journey to the Celestial City and the Delectable Moun-

tains; and, peradventure, Diogenes hinted at it when he waived Alexander's princely offers to one side and asked him (and Bucephalus, too, maybe) to get out of his sunlight. The point is ruled against defendant.

2. Plaintiff's testimony, as said, tended to show the car had stopped at the proper place to receive passengers; that there was an implied invitation to enter the car as a passenger; that she, in the usual way and in the exercise of proper care, was mounting the car; and that while so mounting it, with one foot on the run-board and the other on the floor, there was a sudden car movement forward, and she was cast off, thrown down, and injured. Defendant's testimony, to the contrary, as said, tended to show one of two things: Either that Miss Flaherty was forced against and under the car by a crowd vulgarly pushing and struggling to get on, without regard to the safety or personal rights of ladies present, or else that she negligently undertook to mount a moving car that had nearly reached its stopping place, and was injured by her own inadvertence; and that, in either event, defendant acquitted itself of fault by timely protests and careful conduct. In this condition of the proof, it must be held that plaintiff was entitled to an instruction on her theory, and defendant to instructions on its theory, of the case. It is argued by learned counsel that, with the proof as it was, the question of whether the car had stopped to receive passengers was vitally material, and that the proof looked both ways on that question. Therefore, they say, an instruction ought not to fail to put it to the jury, in some form, to find that the car had stopped when Miss Flaherty sought to enter. So far we agree with them. They say, moreover, that instruction No. 1 did so fail to put that material and controverted fact to the jury to find; but we cannot agree this is so. On the one hand, an instruction ought not to be read as if it stood solitary and alone, independent of every other instruction. On the other hand, a general instruction, covering the whole case, ought not to ignore essential elements of the case made. Applying these rules to instruction No. 1, it will be seen it is a general instruction. It puts certain facts to the jury, and tells them, if they find the facts that way, then plaintiff is entitled to recover. It will be seen, also, that one of the facts put to the jury to find is that "defendant's servants in charge of said car received the plaintiff as a passenger on said car." If they found that to be so, then, by necessary implication, they rejected defendant's theory that she was forced under the car by a rushing crowd, or that she negligently strove to enter a moving car about to stop at the platform for the ingress and egress of passengers. The instruction, in effect, requires the jury to find that the plaintiff was invited to enter the car, had accepted the invitation, and was in the act of en-

tering the car. Now, if the jury found this to be so, then Miss Flaherty was a passenger and entitled to a passenger's care, for defendant had received her as a passenger in the eye of the law. *Devoy v. Transit Co.*, 192 Mo., loc. cit. 210 et seq., 91 S. W. 140, and cases and authorities cited. Moreover, by its terms, the instruction required the jury to find she was on the run-board, had not had a reasonable time or opportunity to reach a seat, and that defendant's servants threw her to the ground and injured her by a negligent act, to wit, by causing or suffering the car to move forward and to sustain a shock. It is argued that the instruction is so worded as to apply precisely as well to the fact that the car had not stopped at all when plaintiff tried to enter; that the forward movement referred to might be an accelerated motion given to a then moving car, and not to a forward movement following a standstill; that the state of the whole proof pro and con was of such a character as to make this a delicate, but turning, point in the case; and therefore the instruction should have been guardedly rounded out with such precision as to confine plaintiff to her own theory as outlined in her petition, to wit, that the car had actually come to a stop at the proper place when plaintiff undertook to enter.

It may be conceded the instruction is in the shadow of a little vagueness, taken by itself and eyed critically. But in ordinary speech, if A. says B. "moved forward," there is a fair implication, at least, that A. means that B. was in a condition of repose when the movement began. If A. was bent on expressing the idea that B. was going at the time, but then and there began to hasten his pace, he would naturally have inserted some word to convey the accelerated motion. The absence of such modifying word, here, is not without significance. If, now, it be remembered that the instruction required the jury to find that plaintiff had been received as a passenger; and if, with that fact in mind, the other instructions are looked to, we think it sufficiently appears that the jury could not have been misled. The fair intendment of the whole body of the law delivered to the jury confined plaintiff to the case made in her pleading. Thus: By instruction 2 the jury were required to find that the car had stopped at one of the points defendant usually received passengers. Instruction 3 outlines the element in plaintiff's cause of action, and one of these elements was that the car had stopped when she entered. Instruction 4 outlined the elements in defendant's answer. One of these elements was that the car had not stopped for the purpose of receiving passengers; and the instruction tells the jury that plaintiff must establish by the greater weight of the evidence that she received the injuries of which she complains "in the way she alleges she received them, and, unless she has done so, then the verdict must be for the defendant."

Instruction 7 told the jury that, before they found for plaintiff, they must find she got on the run-board when the car had stopped, and that her injury must be found to be the result of a subsequent forward movement of the car. Instruction 8 put defendant's defense to the jury as outlined in the answer, and they were told that if plaintiff was in a crowd of people who were trying to board a car before it stopped, the car was moving slowly, and the conductor and others were warning the crowd to keep back until it stopped, and notwithstanding such warning plaintiff attempted to board the car before it stopped, etc., and fell and was injured, then she could not recover. Instruction 9 told the jury that if the pressure of the crowd, combined with her attempt to board the car, threw her under the wheels, and that she was not thrown there by a forward movement of the car, then she could not recover. Instruction 10 told them that if it was a mere accident, without fault on either side, she could not recover. With these instructions submitted in a series, consecutively, as one charge by the court, it cannot well be seen how the jury were misled, as defendant fears. The point in hand is also ruled against defendant.

3. In this connection it is argued by defendant's counsel that instruction No. 1 is erroneous, in assuming that plaintiff was in a position of danger at the time the car is alleged to have been set in motion, when that was a contested fact under the proof. It is pointed out that the petition does not allege that the act of starting forward was unusual or different from the ordinary manner of starting cars with passengers aboard; that it is not alleged the jerk or shock was unusual; that the precise and fair legal intendment of the allegations in the petition is that any starting of the car when plaintiff was in the position she says she was, to wit, balanced and poised with one foot on the run-board and one in the body of the car, would be a negligent act; that the duty violated was the duty to keep the car still while plaintiff was getting on, and until she had reasonable opportunity to seat herself. It is conceded by counsel that, if the plaintiff was in the very act of passing from the foot-board into the body of the car, then "any starting of the car under her theory was negligence"; but it is argued that, if she was on the car, then the mere starting of the same without any unusual motion or jerk would not be negligent. Based on the theory that plaintiff introduced testimony tending to show that she was on the body of the car at the time she was thrown off, it is contended that the instructions erroneously assumed that she was in a place of danger. But we do not think there is any substance in this contention. It is a misapprehension to say that plaintiff's testimony put her in a place of safety on the car. That testimony placed her in a situation of passing from the run-board to the body of the car, and in a

place where any sudden start of the car would unbalance her, and did, especially if accompanied by a movement so sudden and pronounced as to be said to cause the car to "sustain a shock," as set forth in the instruction criticised. This point is also ruled against defendant.

4. Instruction No. 17, refused to defendant, was a proper declaration of law; and had the elements of that instruction not been given, in substance, to the jury in others, it would have been palpable error to refuse it. But, as we read it, its vital elements had been given to the jury in other instructions, and the assignment of error predicated of its refusal is disallowed.

5. Instruction 12, on the measure of damages, is criticised from two sides. It is argued that, under the proof, there is no liability resting on plaintiff to pay any nurse hire. In fine, that she was a member of her sister's family, and that (without an express contract) there is no contract implied to pay for care and attention. It is assailed on another side, to wit, that the evidence definitely fixed the liability for medicines, medical and surgical attention, and nurse hire. Therefore, it is argued, the instruction should not have been general, but should have limited the amount of her recovery on these items. Of these in their order.

(a) It is overlooked, in the first assault on this instruction, that there was evidence that plaintiff remained a few days in St. John's Hospital, and there was attended by a nurse, a stranger to her. There can be no question but the law raises an implied contract to pay for services under such circumstances. True it is that the great body of her nursing was in her sister's home. She was allowed to prove that nursing by her sister without objection. She was allowed to prove (without objection) the value of nursing generally, without confining it at St. John's. In this condition of her proof, plaintiff was clearly entitled to an instruction including expenses for nursing; and, if defendant desired to have the nursing limited to St. John's Hospital, it should have asked an instruction so limiting the recovery. The instruction, as it was, was well enough. The complaint made is in effect a complaint of mere non-direction, not misdirection. Therefore it is without substance. Defendant may not stand by mute, and ask no instructions on a given point, if there is evidence to sustain the instruction given, and if it is good as far as it goes. Shortcomings of that character do not constitute reversible error. *Browning v. Railroad*, 124 Mo. 55, 27 S. W. 644, *infra*.

It is contended by plaintiff's learned counsel that, under certain conditions, the law raises an implied promise to pay for services rendered by one relative to another,

and that these conditions are met with in this case. Counsel put their finger on a line of cases, telling under what circumstances the usual rule of "something for nothing" in the case of the care of one relative by another does not obtain, viz.: *Callahan v. Riggins*, 43 Mo. App., loc. cit. 137; *Moore v. Renick*, 95 Mo. App., loc. cit. 208, 68 S. W. 936; *Lillard v. Wilson*, 178 Mo., loc. cit. 157, 77 S. W. 74. But it is not necessary in the disposition of this case to enter that inviting field of exploration; the point being determined before that field is reached.

(b) Finally, it is insisted that instruction 12 is erroneous, "because it does not limit the amount which plaintiff was entitled to recover on account of expenses incurred for medicines, medical and surgical attention, and nursing, as all of these expenditures were definitely fixed in her evidence." We are cited to *Smoot v. Kansas City*, 194 Mo., loc. cit. 522, 92 S. W. 363, as sustaining this assignment of error. The reasoning of the *Smoot Case* must be read in the light of the facts in that case. There the instruction allowed the jury to find that doctors' and surgeons' hire for the plaintiff did not exceed an amount of \$350—this in the face of a petition limiting the amount to \$200. In that case, also, the petition "claims the sum of \$250 for loss of time from his means of livelihood"; whereas, the instruction quite took the bridle off of that item and told the jury that "if you further find and believe from the evidence that plaintiff had, on account of said injury, if any, been compelled to lose time from his means of livelihood, you may also take that fact into consideration, and allow him therefor such an amount as, under the evidence, would reasonably compensate him for said loss of time, if any," etc. It appears, therefore, in the *Smoot Case*, that a general instruction was not only given where the petition was specific on one item, but that in another item the petition alleged one amount, and the instruction submitted another. The case does not sustain defendant's point. Here the petition asks no specific amount under any one head or item of damage. The elements of the damage are set forth with particularity, and a general verdict is prayed covering them all. The instruction put the matter to the jury precisely as the petition did, and was not bad. If the defendant desired a more specific instruction, it should have asked it. *Browning v. Railroad*, 124 Mo., loc. cit. 71 et seq., 27 S. W. 644. The instruction questioned follows an approved precedent. *Mirrieles v. Railroad*, 163 Mo., loc. cit. 483, 63 S. W. 718.

There being no reversible error, the judgment must be affirmed.

It is so ordered. All concur.

## STATE v. BRAGG.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

**1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—FILING—EXTENSION OF TIME—AUTHORITY OF COURT.**

Where the time for filing a bill of exceptions was extended until the first day of a term of court, and on that day court met and adjourned without further extension of time, an extension made on the following day was void, and the bill of exceptions filed during the second extension cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2847.]

**2. SAME—EFFECT OF FAILURE TO FILE BILL OF EXCEPTIONS IN TIME.**

Where the bill of exceptions is not filed in time, all that can be reviewed on appeal is the record proper.

Appeal from Circuit Court, Adair County;  
Nat. M. Shelton, Judge.

Everett Bragg was convicted of seduction under promise of marriage, and appeals. Affirmed.

H. F. Millan, for appellant. The Attorney General and N. T. Gentry, for the State.

BURGESS, J. On the 28th day of July, 1904, at the May adjourned term of the circuit court of Adair county, the defendant was convicted of seducing one Ethel May Sewell under promise of marriage, and his punishment fixed at six months in the county jail and a fine of \$1,000, under an information filed by the prosecuting attorney of said county charging him with said offense. In due time defendant filed motions for a new trial and in arrest, which were overruled, and he appeals.

After several extensions by the court of the time given defendant within which to file his bill of exceptions, the time was again, on the first day of the May term, 1905, of said court, extended to the first day of the October term following. It appears from the record that the court met on said first day of the October term, and, without doing anything further, adjourned until the next day, upon which day, which was the second day of the term, the court extended the time for filing the bill of exceptions to the January term, 1906, and afterwards, at said January term, again extended the time until and during the following May term, during which term the bill of exceptions was filed by defendant and signed by the trial judge. The state insists that, as defendant failed to file his bill of exceptions on or before the first day of the October term, 1905, of said court, or to have the time in which to do so extended by the court on said day, the court had no authority thereafter to extend the time; that its order so doing was null and void; and that defendant, for that reason, cannot have the errors alleged to have occurred during the trial reviewed on this appeal.

It has uniformly been held by this court

that when the time for filing the bill of exceptions in a criminal case has expired, the court or judge is without authority to extend the time, and a bill of exceptions filed during the time fixed by a void order cannot be considered on appeal. State v. Cutberth, 203 Mo. 579, 102 S. W. 658; State v. Paul, 203 Mo. 681, 102 S. W. 657. In State v. Eaton, 191 Mo. 151, 89 S. W. 949, it is ruled that when a bill of exceptions does not appear to have been filed within the time allowed, nor an order made within that time by the court or judge extending the same, there is nothing before us for review except the record proper. In this case the court made an order extending the time for filing the bill to the first day of the October term, 1905, but the bill was not filed on that day, nor was the time for filing same extended upon that day. The consequence is that there is nothing before this court for review except the record proper. The information is in due form, the record in all material respects free from error, and the judgment is therefore affirmed. All concur.

## GOULD v. ST. JOHN et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

**1. APPEAL—REVIEW—PRESUMPTIONS.**

When the trial court in granting a new trial gives its reasons for so doing, as required by Rev. St. 1899, § 801 [Ann. St. 1906, p. 764], it will be presumed on appeal from such order that the ruling was based only on the grounds stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3775.]

**2. SAME—DISCRETION OF COURT—NEW TRIAL.**

The action of the trial court in granting a new trial on the ground that the verdict was against the evidence will not be disturbed on appeal, no abuse of discretion being shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3871.]

**3. BROKERS—COMPENSATION—ACTION—EVIDENCE.**

In an action for a broker's commission, evidence held not to preponderate in favor of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116-120.]

**4. NEW TRIAL—GROUND—VERDICT AGAINST EVIDENCE.**

Where the trial court is satisfied that the preponderance of the evidence is against the party who has received the verdict, it is his plain duty to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 146, 147.]

**5. APPEAL—REVIEW—PRESUMPTIONS.**

It is presumed that the action of the trial court in granting a new trial is correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772-3776.]

Appeal from Circuit Court, Morgan County;  
James M. Hazell, Judge.

Action for broker's commissions by Fred J. Gould against John P. St. John and another. From an order setting aside a verdict in favor of plaintiff and granting a new trial, plaintiff appeals. Affirmed.

Scott J. Miller and William Forman, for appellant. John F. Gibbs and Moore & Williams, for respondents.

**BURGESS, J.** This is an appeal from an order of the circuit court of Morgan county setting aside a verdict for \$5,854.50 in favor of the plaintiff, and granting a new trial to defendants, the reasons given by the court for sustaining the motion for a new trial being specifically stated as follows: "First. Because the court erred in overruling the demurrer to the evidence offered by defendants at the close of plaintiff's case. Second. Because the court erred in overruling the demurrer to the evidence offered by defendants at the conclusion of the case. Third. Because the verdict is against the weight of the evidence."

The action brought by plaintiff against the defendants was founded upon the following contract: "Versailles, Mo., Dec. 4th, 1902. Fred J. Gould, Versailles, Mo.—Dear Sir: We will give you one-half of all the gross profits made by us in the sale of any real estate to customers brought or sent us by you. When the party is sent us, you must give them a letter of introduction, or otherwise notify us, before such sale is made that such buyer is your customer. We will pay you your share in each sale as soon as the same is completed. You to transact this class of business in this county solely through our firm. You to bear your own expenses; we to bear ours. This arrangement to be terminated at the will of either of us, but such termination not to interfere with any deal on hand, or otherwise made. Very truly yours, St. John & Noyes. I hereby accept the above conditions, and will use my best efforts for the success of the undertaking. Fred J. Gould." The petition alleges that the defendants had an option on a large tract of land, comprising 5,111 acres, in Morgan county, and known as the "Halderman Tract"; that plaintiff, after having entered into said contract with defendants, began trying to find customers for said land, and did obtain customers, to whom defendants sold said land at a profit to the defendants of \$37,054.75, for one-half of which sum, \$18,527.37, plaintiff prayed judgment.

The defendants, during the years 1902 and 1903, were real estate agents and brokers, with headquarters at Versailles, Morgan county, and plaintiff, who was also a real estate agent, resided at Chillicothe. He came to Versailles in the fall of 1902, and, prior to this contract, had been handling some deals for himself and another party. It appears that, besides the tract of land in question, the defendants had several coal properties for sale. About the date of the contract between plaintiff and defendant, there came from Illinois to Versailles some parties who were trying to purchase coal lands owned by Hubbard & Moore, among them being Sult Brothers, prospective purchasers, and C. W.

Waldeck and George H. Lucas, real estate agents. Waldeck, it would appear, came with Sult Brothers to inspect the mine, and Lucas was acting as an agent for Hubbard & Moore, and had become acquainted with Gould, the plaintiff. According to plaintiff's evidence, while negotiations in reference to this Hubbard & Moore coal mine were pending, he got into conversation with Lucas, and mentioned to him the coal lands for sale by defendants, whereupon Lucas said "Mr. Gould, I can procure some buyers for these coal lands." Plaintiff took Lucas to see Mr. St. John, one of the defendants, and Lucas told St. John that he knew of parties in Peoria who were very much interested in coal. Mr. St. John said, "We will be willing to give you, Mr. Lucas, if you can make a sale to these parties, 5 per cent." That the plaintiff agreed with St. John to bear one-half of said 5 per cent. It would seem also, according to plaintiff's evidence, that there was an understanding between Lucas and Waldeck that the latter should receive one-half of the said 5 per cent. commission promised by St. John in the event Waldeck secured any purchasers for said land, and that Waldeck and Lucas were practically partners. The tract of land in question was not sold until some time in 1903, before which time, on February 28, 1903, the contract between plaintiff and defendants had been terminated by the latter, and what part plaintiff took in the negotiations which finally resulted in the sale of the land is shown only in a telegram which, on January 5, 1903, he sent to C. C. Magenheimer, who, with others, purchased said land. Plaintiff had heard of Magenheimer through Lucas and Waldeck. The latter had interested Mr. Magenheimer in the land negotiations, and on January 5, 1903, he came to St. Louis on business, and while there he accidentally met plaintiff, who, as he supposed, was a partner with St. John & Noyes. Waldeck said to plaintiff, "Magenheimer can't hear a word from St. John & Noyes," and then suggested that he (Gould) send a telegram to Magenheimer, at Peoria, Ill., which he did. This telegram was as follows: "St. Louis, Mo., 1-5, 1903. C. C. Magenheimer, Peoria, Ill. Send on mining engineer to examine coal lands, Morgan county. When can you send him? Answer. Fred J. Gould, for St. John & Noyes." This message was answered by Magenheimer, on January 7th, as follows: "Peoria, Ill., Jan. 7th, 1903. To Fred J. Gould, care of St. John & Noyes, Versailles, Mo. Just received message. Will be there first of the week to examine coal lands. Letter. C. C. Magenheimer." Magenheimer did not know Gould, and before sending him said telegram he inquired of Waldeck who Gould was, and Waldeck told him that he was a partner with St. John & Noyes.

It appears from the evidence on the part of the defendants that St. John first met Waldeck at Versailles at the time the latter, with the other gentleman mentioned, had



come there to look at the Hubbard & Moore property. St. John, who was introduced to Waldeck by the clerk of the hotel where the party stopped, suggested to Waldeck that his firm had several tracts of coal land for sale, specially mentioning a tract of 1,000 acres known as the "Bailey Tract," belonging to a General Hudson, and offering to give Waldeck 5 per cent. commission on all sales to purchasers brought to his firm by him. Waldeck accepted the proposition, stating that he knew of parties in Peoria, Ill., whom he thought he could interest and influence to purchase this Bailey tract, as well as other lands which defendants had for sale. In a day or two, Waldeck, with Sult Brothers, left for Illinois, the latter failing to buy the said Hubbard & Moore property. Before leaving, Waldeck made arrangements with St. John to have a description and plat of the Bailey land sent to him at Pekin, Ill., where he resided, and St. John sent him the same a few days after. Shortly after receiving the description and plat of the Bailey land at his home in Pekin, Mr. Waldeck went to Peoria, and showed them to C. C. Magenheimer, and got him interested as a prospective purchaser of the lands, and wrote a letter on December 27th to defendants acquainting them with such facts. On the same day Magenheimer also wrote the defendants, stating that a letter sent by them to Waldeck had been handed to him for answer, that he was favorably impressed with the proposition therein stated, and promising to come to Versailles with a mining engineer and examine the coal land after receiving a reply to his letter. St. John answered this letter promptly, and invited Magenheimer to come at once. This letter was misdirected and delayed, so that Magenheimer did not get it in due time, and he wrote or telephoned Waldeck that he had not received an answer to his said letter to St. John. Waldeck went to St. Louis where, as stated before, he accidentally met with Gould, and, thinking Gould was a partner with St. John & Noyes, he told him that Magenheimer had not heard from St. John & Noyes, and suggested that he send Magenheimer the telegram heretofore referred to. On January 8, 1903, three days after receiving said telegram, Magenheimer notified Waldeck by letter that he would start for Versailles the Monday following, and see what could be done when he got there. Waldeck telephoned defendants on January 13th that he would be there Monday morning with three parties, and he went to Versailles with Magenheimer and Mr. Collier, an engineer who accompanied Magenheimer to examine the coal property. With them was Jephtha Ryan, who came from Leavenworth, Kan., and met them at Tipton. On the arrival of the Magenheimer party in Versailles, they were introduced to defendants by Waldeck as his customers, or men whom he had brought to look at the coal lands. Gould appeared on the scene after the Magenheimer party had begun ne-

gotiations with the defendants, and, as appears from the evidence, against the wishes of St. John, Magenheimer, and Ryan, joined the party on their visit to the coal property. They first went to the Bailey coal land, which was the only property called to their attention prior to their visit, then to the Hubbard & Moore mines, and, next day, at the suggestion of St. John, the party went to the Halderman lands, and examined what was known as the Stover Coal Bank located there. On the return of the party to Versailles, Magenheimer and Ryan made an option contract with defendants for the purchase of the Bailey tract, but afterwards forfeited the money they had paid on it and the sale was not completed. At the request of these men, St. John also negotiated with Hubbard & Moore for a sale of their property. Hubbard & Moore made the deal, and Magenheimer and Ryan made a payment of \$2,000 thereon, but this deal also fell through, and the money paid was forfeited. The defendants also, at the time of this visit, agreed to sell Magenheimer and Ryan the Halderman tract, being the lands described in plaintiff's petition, and on which defendants had an option. The offer, however, was such that defendants did not feel authorized to make the contract proposed, and St. John, therefore, took it to Mrs. Halderman, the owner, who was at the time at Hot Springs, Ark., and got her signature to the contract which was also signed by Magenheimer and Ryan. St. John had told Gould some time in December that his firm had an option on this Halderman tract, but Gould said that such was not the fact, as the lands had been sold, and stated that he had just come from St. Louis, and knew they had been sold to the "Hanna Crowd"; so that it would seem that Gould had nothing to do with negotiating the sale of this tract. The terms of this contract between Mrs. Halderman and Magenheimer and Ryan do not appear in evidence, but St. John testified, without contradiction, that the contract of purchase fell through by reason of failure of the purchasers to meet the terms of payment, and they forfeited the amount paid. Afterwards a second contract was made, but expired late in the fall of 1903. After the second contract fell through, the defendants no longer represented Mrs. Halderman, their option on the land and contract with her having expired. Some time afterwards Mrs. Halderman conveyed the lands to the Morgan County Coal Company, which, as appears, was organized by Magenheimer, Ryan, and the Eberhardt Brothers. of Mishawaka, Ind., and this deal was effected by the assistance of Mr. St. John. Before this was done, Magenheimer and Ryan came to St. John, stating that they had been unable to buy the lands from Mrs. Halderman, and that they had enlisted the Eberhardt Brothers. They made a proposition to St. John that if he would go to New York and succeed in buying the lands for them at

a stipulated price they would give him \$10,000. St. John accepted the proposition, and after two or three trips to New York succeeded in buying the property, and Eberhardt Brothers, who were with Magenheimer and Ryan in the deal, paid St. John \$10,000, which was no part of the consideration received by Mrs. Halderman, who was represented in the deal by Mr. Athana, her son-in-law. Out of the forfeited payments on the previous contracts for the sale of this land St. John & Noyes also received or retained, as their compensation, the sum of \$1,309, sending the remainder of the forfeited money to Mrs. Halderman.

On the trial, plaintiff Gould claimed that it was his influence with George H. Lucas and Mr. Waldeck that resulted in bringing Magenheimer and his associates to Versailles to look at the lands. However, in a letter dated January 22, 1903, written by Magenheimer to the defendants, in which he inclosed the telegram of January 5th sent him by Gould, he says, "I did not know Mr. Gould until I received this telegram, but this was long after our first correspondence and my correspondence and interview with Mr. Waldeck. I do not consider Mr. Gould in the deal whatever, so far as I am concerned. I did not act on this telegram, but upon your own correspondence." From the evidence of Lucas, who testified for the plaintiff, it appears that some time after he was at Versailles with Sult Brothers and Mr. Waldeck, and after he had dropped his connection with Hubbard as land agent at Versailles, he wrote St. John to get a contract as agent to find purchasers for lands defendants had for sale, and that he got such contract, the terms of which, do not appear in evidence. In a letter dated December 24, 1902, sent to defendants, Lucas names various persons whom he had been trying to interest in the Bailey tract, stating to them that he had no coal lands to sell, and giving to them the address of the defendants who, he said, had coal lands. The letter also stated that Waldeck had seen Magenheimer in Peoria, and that the latter was interested and willing to look at the 1,000 acres (Bailey tract), provided he could get an option and take experts to examine the land before buying. This letter was written the same day as that of Waldeck to defendants, and the same day that Magenheimer wrote them proposing to come to Versailles as soon as he could hear from them. But it does not appear that Lucas ever had any correspondence or negotiations with Magenheimer. It appears from the evidence of Lucas and Waldeck that they had been associated as land agents in some transactions in Illinois, as also in attempting to make a deal for Sult Brothers at the time Lucas met St. John at Versailles, but St. John at the time had no knowledge of such fact. Waldeck said that he intended, on account of their past joint transactions, and because they had failed to effect a trade for Sult Brothers, to divide his commission with

Lucas on the Bailey tract, if a sale of that tract had been made, and that he so informed the defendants at a later period. According to St. John's testimony, his firm had never authorized plaintiff Gould to act with Waldeck or to use the name of the firm in sending telegrams or letters. He stated that Gould introduced Lucas to him on the 4th or 5th of December, 1902, and that as Lucas wanted to sell real estate for his firm he offered to give him 5 per cent. commission on all sales made to customers whom he might bring them, but that he did not remember having any agreement whereby Gould was to pay one-half of such 5 per cent. commission and his firm the other half. He also testified that he had met Waldeck and entered into the contract with him in regard to commissions before meeting Lucas. Many letters and telegrams which passed to and fro between the various parties mentioned in this statement were introduced in evidence, most of which however, have no bearing upon the issues in this case, and only such as seems pertinent are referred to.

It thus seems that the only question presented by this appeal is whether the action of the court in setting aside the verdict and granting a new trial can be sustained upon either of the grounds assigned by the court for sustaining the motion. In *Millar v. Madison Car Co.*, 130 Mo. 517, 31 S. W. 574, it is held that when the trial court, in granting a new trial, recites the reasons therefor as required by section 801, Rev. St. 1899 [Ann. St. 1906, p. 764], it will be presumed on an appeal from such order that the ruling of the court was founded alone on the grounds as stated. In the case at bar, the reasons assigned are, in effect, that there was no evidence to sustain the verdict, and that the verdict was against the weight of the evidence. The court, unless it abused its discretion in so doing, had the right to grant a new trial upon either ground. It is well established that courts, in granting new trials, have large discretionary powers, and especially when the weight of the evidence is involved, and the Supreme Court will not interfere with such discretion unless it appear to have been unwisely exercised. We do not think the evidence preponderated in favor of the plaintiff, and the court in effect so held in sustaining the motion for a new trial. This being the case, it was not only the province of the court to grant a new trial, but it was its plain duty to do so. *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Taylor v. Gulf Ry. Co.*, 163 Mo. 183, 63 S. W. 375. In *McKay v. Underwood*, 47 Mo. 187, it is held that the granting of a new trial on the ground that the verdict is against the weight of the evidence rests peculiarly with the judge presiding at the trial. To the same effect is *Baughman v. Fulton*, 139 Mo. 557, 41 S. W. 215; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *Eldemiller v. Kump*, 61 Mo. 342; *Cook v. Railroad*, 56 Mo. 380; *Reld v.*

Insurance Co., 58 Mo. 429. Besides, the presumption is to be indulged in favor of the correctness of the court in granting the new trial, and there is nothing disclosed by the record to overcome this presumption.

The judgment is affirmed. All concur.

### STATE v. McCORD.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. INTOXICATING LIQUORS — LOCAL OPTION — SUBMISSION TO VOTE—RECORD.

The petition, as well as the order submitting local option questions to voters, is a part of the record, the petition being an indispensable prerequisite to the making of the order.

#### 2. SAME—SIGNING BY VOTERS.

Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733], provides for the submission of local option questions to a vote on a petition signed by "one-tenth of the qualified voters" of any county, etc. A petition recited "We, the undersigned legal voters" in C. county, petition for the submission to vote on the question of whether dram shop licenses shall be granted in the county, commonly called local option, according to section 3027. The county court found that this petition was signed by "one-tenth of the qualified voters and taxpayers of the county"; the order further reciting that it appeared to the court from sworn testimony produced in open court by certain witnesses that the required number of petitioners had signed and presented the petition. *Held*, that the court having found that the petition was signed by the required number of legal voters, jurisdiction attached and was not lost by the mere fact that the words "and taxpayers" followed the words "one-tenth of the qualified voters" in the order of submission.

#### 3. JUDGMENT — JURISDICTION — COLLATERAL ATTACK.

A petition for the submission of local option questions having been sufficient to confer jurisdiction on the court to determine whether it was signed by the requisite number of petitioners, the court's determination that it was so signed could not be attacked collaterally in a proceeding to convict accused of violating the local option law put in force pursuant to such election.

#### 4. INTOXICATING LIQUORS — LOCAL OPTION — ELECTION—PETITION.

Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733], provides that the county court on petition shall order an election "to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold" in the county, etc. *Held*, that a petition praying the county court to submit to the voters of the county the proposition to vote on the question whether dram shop licenses should be granted in the county, commonly called local option, according to section 3027, while not in the exact language of the statute, constituted a substantial compliance therewith.

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

John L. McCord was convicted of violating the local option law, and he appealed to the St. Louis Court of Appeals, which certified the case to the Supreme Court (100 S. W. 1129). Affirmed.

Harrington & Long and G. A. Watson, for appellant. G. Purd Hays and Leonard Walker, for the State.

BURGESS, J. This case was certified to this court from the St. Louis Court of Appeals, upon a division of opinion in that court, a majority of the members thereof concurring in an opinion reversing the judgment of the circuit court, the other member dissenting. There is no controversy as to the facts, which are stated by Judge Norton substantially as follows: The defendant was convicted on a charge of selling intoxicating liquors in violation of the local option law, and, after unsuccessful motions for new trial and in arrest of judgment, appealed to the St. Louis Court of Appeals. The main question raised was as to the adoption of the local option law in Christian county; the defendant maintaining that the local option law is not in force in said county, in support of which contention he points to what he terms irregularities in the proceedings antecedent and leading up to the publication of notice declaring the same to have been adopted.

It appears that on the 4th day of May, 1905, a petition was presented to the county court of Christian county praying that the proposition of adopting the local option law be submitted to the voters of that county. The county court found such petition to have been signed by "one-tenth of the qualified voters and taxpayers of Christian county, Mo.," and upon such finding ordered an election for July 10th, "to determine the proposition whether or not spirituous and intoxicating liquors, including wine and beer, should be sold" in that county. The election was held. A majority of the votes cast were found to be in favor of the adoption of the local option law, and in due time the county court published the result, in compliance with section 3031, Rev. St. 1899 [Ann. St. 1906, p. 1737], thereby putting the provisions of the law in force.

The defendant contends that the judgment and order of the county court, of date May 4th, by which it submitted the proposition to adopt the law, is void for the reason that it is not predicated upon the petition of one-tenth of the qualified voters of such county, as required by section 3027, Rev. St. 1899 [Ann. St. 1906, p. 1733], which provides: "Upon application by petition, signed by one-tenth of the qualified voters of any county who shall reside outside of the corporate limits of any city or town having at the time of such petition a population of twenty-five hundred inhabitants or more, who are qualified to vote for members of the Legislature, in any county in this state, the county court of such county shall order an election to be held in such county at the usual voting precincts for holding any general election for state officers, to take place within forty days after the reception of such petition, to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of such county

lying outside of such corporate limits of such city or town."

The petition to the county court for the submission of the question of local option to the qualified voters of the county is in substantial compliance with the requirements of the statute. It recites: "We, the undersigned legal voters in said Christian county, do hereby petition your honorable body to submit to the voters of said Christian county the proposition to vote on the question whether dramshop license shall not be granted in said county, commonly called local option, according to section 3027, Rev. St. 1899, of the state of Missouri." Upon the presentation of this petition, as stated before, the county court found that it was signed by "one-tenth of the qualified voters and taxpayers of Christian county"; but the order of the court further recited that it appeared to the court "from the sworn testimony produced in open court by Rev. W. H. Son, J. A. Wasson, and S. D. Wells and William McVeigh that the required number of petitioners have signed and presented said petition for their consideration," etc.

The question, then, is, were the petitioners qualified voters of the county? In determining this question we must not ignore the petition, nor any part of the record, but consider it all together. The petition is as much a part of the record as the order submitting the question of local option to the voters, and is an indispensable prerequisite to the making of the order. It says, "We, the undersigned legal voters," etc., and the order of submission recites that the petition prayed the court to make an order submitting to the qualified voters of said county an election to determine whether or not spirituous liquors should be sold, and, further, that the requisite number of petitioners had signed and presented said petition.

It will be observed that the only petition presented to the court shows upon its face that it was signed by legal voters, and there is no showing to the contrary. It was only upon a petition signed by one-tenth of the legal voters of the county that the court was authorized to submit the question of local option to the qualified voters of the county, and the court having jurisdiction of the matter had the right to determine whether the petitioners were legal voters or not. Having so decided, its judgment cannot be attacked collaterally. The mere fact that the words "and taxpayers" follow the words "one-tenth of the qualified voters," in the order of submission, did not deprive the court of its jurisdiction, it having already attached, and did not, in our opinion, render the order void. Besides, where the order of submission recites that the requisite number of petitioners had signed and presented said petition for the consideration of the court, it has reference to the petition signed and presented by the persons who represented themselves therein as legal voters, and none

others. It is not essential that such jurisdiction should appear from any particular part of the record. *State v. Schneider*, 47 Mo. App. 669. In determining this question in the case in hand, the petition and order should be taken together, because they constitute but one record, and it is sufficient if jurisdiction appears from the entire record. *Sappington v. Lentz*, 53 Mo. App. 44; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; *Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052. To our minds it is clear that the question was fairly submitted to the legal voters in the county; that "taxpayers" not legal voters did not, so far as the record discloses, sign the petition or vote at the election; and that the words "and taxpayers" were inadvertently, and without authority, inserted in said order of submission.

When the petition was presented to the county court by the requisite number of legal voters of the county, asking said court to submit to the voters of said county the proposition to vote on the question whether or not spirituous and intoxicating liquors should be sold in the county, it acquired jurisdiction of the subject-matter of controversy and of the petitioners; and the validity of its proceedings thereafter with respect to the same matter is not subject to collateral attack, as is sought to be done in this case.

As the petition presented to the county court on which the order for the local option election was based petitioned the court "to submit to the voters of said county the proposition to vote on the question whether dramshop license shall not be granted in said county, commonly called local option, according to section 3027, Rev. St. 1899, of the state of Missouri," while said section provides that the county court, after the reception of the petition, shall order an election to be held "to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold," it is claimed by defendant that the petition in question was insufficient to authorize the court to take jurisdiction of the matter and make the order for election. While the petition is not couched in the exact language of the statute, we think it a substantial compliance therewith, and when considered in connection with the words "commonly called local option, according to section 3027, Rev. St. 1899, of the state of Missouri," which words form part of the petition, it seems well enough. Certainly, no one signing the petition or voting at the election could have been misled by its informality. As was said by Smith, P. J., speaking for the court in *State ex rel. Church v. Weeks*, 38 Mo. App. 566: "If it appeared by the petition of the requisite number of the qualified voters that such was their will, that fact would authorize the exercise of the jurisdiction, no difference what the form of the petition may be. \* \* \* When proceedings under the local option statute are drawn in question as for

sufficiency, we are not disposed to invoke the application of the strict rules of construction by which are usually tested proceedings for the condemnation of private property for public use." State v. Smith, 38 Mo. App. 618.

Our conclusion is that the petition was a sufficient compliance with the requirements of the statute to justify the making of the order for the election.

For these considerations the judgment of the circuit court is affirmed. All concur.

### BEATTIE MFG. CO. v. CLARK et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. CONTRACTS — RIGHTS OF THIRD PERSONS — AGREEMENT FOR BENEFIT OF THIRD PERSON.

Where plaintiff adopts a valid contract, made between other persons for his benefit, he may sue on it, though he is not named therein, and did not know of it at the time it was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 798-804.]

#### 2. SAME—CONSTRUCTION.

The owner of a building and the lessee made a written agreement, collateral to the lease, whereby it was agreed that the lessee intended to expend at least \$10,000 in improving and equipping the premises for their intended use, and that in order to insure the owner that the lessee would take possession and make the improvements, and to insure the payment of the rent, the lessee agreed to deposit with the owner \$10,000 to be used by him in paying for the improvements. The improvements and equipments were to remain the property of the owner as security only for the payment of rent and performance of the lessee's obligations under the lease. When the \$10,000 had been actually expended on the premises, then the agreement was to become *functus officio*, and the lease thereafter was to be the sole agreement between the parties. *Held*, that the deposit was to insure the owner that possession would be taken under the lease, and that the rent would be paid and the improvements, etc., made, and was not intended to secure a third person for services rendered or materials furnished in equipping the premises.

#### 3. APPEAL—HARMLESS ERROR—IMPROPER DECLARATIONS OF LAW.

Where a case is tried by the court, and the finding and judgment could not have been otherwise than they were, the giving of an improper declaration of law is not reversible error.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the Beattie Manufacturing Company against Charles Clark and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. F. & R. H. Merryman, for appellant.  
Boyle & Priest and Edward T. Miller, for respondents.

**BURGESS, J.** This is a suit to recover judgment against defendant Clark for the sum of \$6,000, with interest at the rate of 6 per cent. per annum from June 16, 1893, for which amount plaintiff claims he is indebted to it by reason of a written contract between him and defendant Annie Gerardi, whereby, for certain improvements to be

made on premises leased by him to her, she placed in his hands \$10,000, which he agreed to pay the parties making such improvements; and as plaintiff made said improvements it claims that said contract was made for its express benefit, and that it can maintain its action thereon.

The petition, after alleging the incorporation of plaintiff, states that on the 27th day of January, 1893, the defendants Charles Clark and Annie Gerardi, wife of defendant Joseph Gerardi, entered into a written contract, whereby Clark leased to Mrs. Gerardi, for a term of 10 years, to commence the 24th day of February, 1893, and end on the 23d day of February, 1903, the building and premises known as 218 and 215 North Broadway, in the city of St. Louis, together with the lot of ground on which same were situated; that the object and purposes of the parties to the lease were to alter and improve said building and premises to fit the same for the purpose of establishing and conducting a first-class restaurant, saloon, and bar, and in order to carry into effect such purpose and object they entered into a collateral written agreement, in which Clark is named as party of the first part and Annie Gerardi as party of the second part, the material parts of which agreement being as follows: "It is understood and agreed that the party of the second part intends to use said premises for the purpose of conducting the business of a first-class restaurant, saloon, cigars, and tobacco, game and table furnishings, and that portion of the premises above the first or ground floor for office, cooking, and living purposes, and that she intends to spend at least the sum of \$10,000 for the purchase of the necessary equipment of said building for such uses. Now, in order to insure the said party of the first part that the party of the second part will take possession of the said premises under the lease, and will expend the money aforesaid for equipping the restaurant, saloon and other departments aforesaid, and in order to further insure the party of the first part in the payment of his rent from time to time as and when the same accrues under the terms of said lease, the party of the second part now agrees to turn over and pay unto the said party of the first part the sum of \$10,000 in money, the same to be paid out by the said party of the first part in payment of the equipment of said restaurant, saloon and other departments as the same shall be placed in said premises by the party of the second part. \* \* \* It is further understood and agreed that the equipment of whatever kind and nature the same may consist, after the same shall have been placed in said building, shall become and be the property of the party of the first part, as security, however, only for the payment or rent, and for the performance of the obligations specified to be performed by the party of the second part under the lease." It was

also agreed in the contract that Clark should expend, as soon as possible after February 24, 1893, the sum of \$2,500 in making alterations in the front of said building, according to plans and specifications to be furnished by Mrs. Gerardi.

The petition further states that, in pursuance of the aforesaid agreement, Isaac Taylor was employed to draw the plans and specifications and to superintend the improvements and equipments aforesaid, and that the plans and specifications were prepared by him and presented to defendants Charles Clark and Annie Gerardi and Joseph Gerardi, her husband, who acted as her agent, and were approved by them, and that said plans and specifications were then presented to plaintiff, with request that plaintiff consider the subject and take the contract to furnish the materials and equipments and execute the work aforesaid; that plaintiff knew that Annie Gerardi and Joseph Gerardi were insolvent, and declined to consider any proposition for furnishing the materials and equipments and constructing the work according to the plans and specifications till further advised as to the person who would pay plaintiff for said material and work. "Plaintiff was never shown said collateral agreement, nor did it know of its existence, but plaintiff caused its agent to call on defendant Charles Clark and to learn of him, as one of the parties interested, as to who would pay for said material and work. The said Charles Clark then assured plaintiff's agent that the defendant Annie Gerardi had deposited \$10,000 with him to pay plaintiff for furnishing and executing the work according to the plans and specifications aforesaid. Plaintiff, in consideration of the assurance that defendant Charles Clark had on deposit \$10,000 for the purpose of paying for the material and work aforesaid, providing plaintiff would do the work and furnish the materials aforesaid, thereupon on account of the aforesaid assurance plaintiff on or about the 2d day of March, 1893, entered into a contract with Annie Gerardi to furnish the material and labor aforesaid in accordance with plans and specifications furnished by Isaac Taylor, and under his superintendence and directions, said superintendent having the power to reject any of the materials or work furnished by plaintiff under the contract, and plaintiff was to make any alterations in said plans and specifications and do any extra work under the directions of said architect." The petition further alleges that plaintiff, under its said contract with Annie Gerardi, was to be paid for its services and for the labor and material to be furnished the sum of \$16,701.28, and for doing any extra work, according to the terms of said contract, it was to receive additional consideration, with all of which defendant Clark was made acquainted, and consented thereto; that plaintiff performed all the conditions of said contract, according to the directions of the architect

and the defendants, for which it was to receive \$16,701.28, and furnished extra work and materials amounting to \$3,120.43; that said plans and specifications included the making of the alterations in front of said building for which Clark was to pay \$2,500 and for which he did pay that sum on or about June 8, 1893; that Annie Gerardi deposited with defendant Clark the \$10,000 referred to in said collateral agreement, and that the plaintiff is the party who furnished the equipments of said restaurant, saloon, and other departments and for whose benefit Clark held said deposit, all of which equipments were furnished and completed by plaintiff by the 16th day of June, 1893; that plaintiff, and no one else, was entitled to the said \$10,000, but that said Clark never paid to plaintiff any of said amount except \$4,000, on April 12, 1893, and although plaintiff demanded the balance, \$5,000, on or about the 16th day of June, 1893, and many times since, said defendant Clark has not paid same; that, with the exception of the two amounts referred to, which were paid by defendant Clark, none of the amount due plaintiff has ever been paid by any one, except \$1,000 paid by Annie Gerardi on September 8, 1893, but which plaintiff says was in no way connected with the collateral agreement upon which the suit is based.

The separate amended answer of defendant Charles Clark to said petition contains five defenses: (1) Denies each and every allegation in said petition contained; (2) pleads the statute of frauds; (3) pleads the statute of limitations; (4) that the matters and things alleged in the petition are res adjudicata; (5) that the defendants Annie Gerardi and Joseph Gerardi are improperly united in this action, and are not necessary parties thereto. Plaintiff's replication denied each and every allegation in said answer contained.

Mrs. Annie Gerardi, testifying in behalf of the plaintiff, identified the lease and the collateral contract between herself and defendant Clark, both of which were introduced in evidence. She also identified a contract which she had entered into with the plaintiff to alter the premises leased to her, and the specifications in that connection, which were also offered in evidence. This contract between herself and plaintiff was made and entered into the 2d day of March, 1893. By its terms the plaintiff agreed to make, do, build, and finish, entire and complete, all alterations and additions to be done in and to the building in question, according to the drawings and specifications made for same by Isaac S. Taylor, architect, the entire work to be finished and completed by the 2d day of May, 1893, the defendant, Annie Gerardi, agreeing to pay for the performance and completion of said work the sum of \$16,701.28 to the plaintiff in manner as follows: \$3,350.64 when the work was finished; \$2,350 by a 30-day note; \$2,000 by a 60-day note; \$2,000

by a 90-day note, and \$2,000 by a 120-day note. The witness stated substantially that plaintiff, the Beattie Manufacturing Company, had performed the work under its contract, that she had paid part of the money to Clark for plaintiff, and that she was still indebted to plaintiff in a sum over \$12,000. Two orders were given by witness on Clark in favor of plaintiff, one of which orders was for \$4,000, dated April 12, 1893, and one for \$2,500, dated June 4, 1893. The witness then testified as follows: "Q. I will ask you if you gave the Beattie Manufacturing Company any other orders on Mr. Clark? A. Yes, sir. Q. When? A. Well, I suppose they are on record. I presume Mr. Clark has them. I have not got them. Q. They were given to the Beattie Manufacturing Company? A. Yes, sir. Q. Do you remember the amounts? A. Well, I cannot recall the amounts just now. Q. When was it? A. It was in July of '93." On cross-examination the witness identified 13 other orders made by her on Clark in favor of other parties for furnishings, decorations, etc., for the building in question, which orders were afterwards introduced in evidence over the objection of plaintiff.

John F. Bates testified that he was in the employ of plaintiff in 1893; that he met Mr. Gerardi on the cars, and that Gerardi told him that he was going to put up a restaurant on Broadway and that the plans and specifications were at Mr. Taylor's office; that witness then had a conversation with Mr. Clark, the defendant, and showed Clark the plans and specifications which had been given him by Gerardi, and that Clark told him that the Gerardis had \$10,000 deposited there to pay for this work. "Q. When was this conversation? Was that before you entered into the contract? A. Before we entered into the contract, because I wanted to assure myself, your Honor, that the money would be coming to pay for this work, because it took a great deal of time to look it up. And after Mr. Clark \* \* \* told me that there was \$10,000 there to pay for this work that the Beattie Manufacturing Company was to put in there you may depend upon it that I looked for it pretty closely to get it and secure it." The witness then stated that after this the plaintiff closed the contract with the Gerardis for the alteration of the building, that the Gerardis gave him numerous orders for the money and for the full amount. He said he collected two of these orders, one for \$4,000 and one for \$2,500, and that they gave him other orders at different times. "I delivered these orders to Mr. Clark's clerk down here in his office. I failed to see Mr. Clark only once or twice, and had a very pleasant talk with him each time. The orders, to my knowledge now, were given to the clerk, Mr. Clark's clerk, for him to give us the money on those orders. I never got them. I never got to see Mr. Clark after." Witness said that the person to whom he delivered those orders was the same person to whom he had

delivered other orders, and from whom he had received Mr. Clark's checks in payment thereof. "Q. Were they given after the order for \$4,000 and the order for \$2,500, or before it? A. Oh, after; yes, after. Q. Were they given before the completion of the work? A. Yes, sir; to the amount of \$10,000. Yes, sir; you see we did more than \$10,000 worth of work there. Q. You say these orders were given for the balance of the \$10,000 after the payment of \$4,000 and \$2,500? A. Yes, sir. Q. How many orders were there? A. Well, there was three or four; I do not know which. Q. And the orders did not exceed the balance of \$10,000? A. No, sir; it was to cover that amount of money that they had there. Q. That is, the aggregate amount of all the orders? A. Yes, sir." On cross-examination the witness was examined at some length as to the party to whom he presented the orders and as to the time when he first saw Mr. Clark and had the conversation with him in regard to the deposit of \$10,000 and as to whether it was before or after the contract entered into by the Gerardis with the plaintiff. On this point, the witness on cross-examination testified as follows: "Q. How long before? A. Well, perhaps three weeks. \* \* \* Q. You say it was before? A. I saw Mr. Clark about the \$10,000 before the contract was made; yes, sir. Q. You know that Mr. Clark told you when you went to see him before the Beattie Manufacturing Company made the contract with the Gerardis \$10,000? A. Yes, sir."

Joseph Gerardi testified that at the time they made the deposit of \$10,000 Mr. Charles Clark agreed to expend \$2,500 on the alteration of the front part of the building. That the \$2,500 order was in payment of the alteration of the front part of the building. On this point the witness testified: "Then we went to work and made this contract, and we gave the Beattie Manufacturing Company orders for this money. The first order they received, I think, was for \$4,000. The second order was for \$2,500 for the front they put in that building, and we left the remainder of \$6,000 in Mr. Clark's hands, and then we further gave them an order, I think, for \$4,000. \* \* \* Q. Well, the further order after that, was that for all the balance that was in his hands, the last order? A. I think at that time; yes, sir. Q. Now, did you go down there to see Mr. Clark with Mr. Bates? A. I went down with Mr. Bates on one occasion, and Mr. Clark was not in. His representative was there, and he said he would hand the order to Mr. Clark when he came in. Q. Do you remember what that visit was? A. I could not say. It was about that time that the thing was being finished." The witness then stated that the building was finished about the middle of June, 1893. "Q. And when the Beatties had turned that over to you they had put in, had they not, \$19,000 into that building? A. I think that was about the amount." The witness on cross-

examination identified certain orders of vouchers afterwards introduced in evidence over the objection of the appellant and to which appellant then and there excepted at the time. As to the thirteenth voucher, same being for \$2,120.28, and purporting to be a check in favor of Mrs. Gerardi for that amount, the witness stated: "Well, this money was not paid to us. This money Mr. Clark kept for rent."

William J. Beattie, the president of the Beattie Manufacturing Company, in regard to the orders, testified: "One was for \$4,000 and the other was the difference between the \$8,000 due under the order and \$8,000 and some odd dollars under the contract that we were to receive in cash. Q. Let me understand you. You mean you excluded in your answer there the \$2,500 payment from Mr. Clark? A. I certainly do, as it was a separate transaction. Q. And you mean by that then that you received two orders outside of the one order for \$4,000? A. That is right. Q. Now, what were those orders? A. One was for \$4,000, and one was the balance on the contract." The witness then stated that he had a conversation with the agent of Mr. Clark a few days after the \$2,500 was paid; that on the 8th day of June, 1893, this agent of the defendant Clark paid the witness \$2,500; "that two or three days after that check was paid him he appeared at our office with these papers in his hands. Q. What papers did he have? A. He had the order on Mr. Clark for \$2,500. Q. What else? A. He had a receipt of our representative for the \$2,500. Q. What did he want you to do then? A. He wanted me to release Mr. Clark from all further responsibility in the premises. Q. What did you say to him? A. I told him I would not. Q. Then what did he say? A. He said if you do not you will not receive another cent. Q. Another cent of what money? A. Of the balance we held. Q. What did the agent say? A. He said if I did not sign a release of Mr. Clark in the premises he would not pay another cent of the balance. Q. Then what did he say? A. He parted with me. He said I would find it out for myself. Q. Did Mr. Clark pay you any sum after that? A. Never a cent." In regard to the written agreement between Mr. Clark and the Gerardis, according to which agreement the Gerardis deposited \$10,000, the witness testified: "Q. When did you first learn of this written agreement that is in this case? A. Not until a few years ago, and it was after the trial and decision of Judge Valliant. Q. You mean in the mechanic's lien suit? A. That is right. It was the appearance of this contract. I understand that it appeared in a fight between Mr. Gerardi and Judge Laughlin." On cross-examination the witness testified that this contract was never offered in evidence in the mechanic's lien suit, and that he had a full recollection of that suit; that he never pleaded this contract in the replication in that cause, and he knew that

to be a fact. The contract between the Beatties and the Gerardis relating to the payment was then read to the witness, in which the Gerardis agreed to pay the plaintiff \$8,350.64 when the work should be set up and finished and accepted by the said architect. "By the Court: Q. Now, I understand you to say that you had received \$4,000 on that and that you got another order for \$4,000 and a third order and a further order for \$2,500—the third order for the balance of \$8,000? A. That is right. Q. Why did you include the note in your order? A. It was then due, I think. Q. Well, that was a note from Mr. Gerardi? A. It was the amount of a note, but the note was never issued. There was never any note issued. The contract called for a note, but the notes were never issued." The contract was then produced and the second item was \$2,350.60 to be paid by a 30-day promissory note, dated from time of acceptance of the work; the first item being \$8,350.64, and the second \$2,350.60.

Charles Clark, introduced by defendants, testified that he was a party to the contract which was offered in evidence between Annie Gerardi and Charles Clark, dated the 27th of January, 1893, and that Mrs. Gerardi made the first deposit of \$5,000 under the terms of that contract on the 8th day of February, 1893, and the second deposit on the 13th day of February, 1893. The witness then testified as to certain payments made by him, and identified certain vouchers and a certain balance sheet from his books, all of which was introduced over the objection of the plaintiff, with the exception of the two items paid to the plaintiff, namely, one for \$4,000, on April 12th, and one for \$2,500 on June 8, 1893. The witness denied that he had ever had the conversation with Mr. Bates in regard to the deposits of \$10,000 by the Gerardis, and stated that he left St. Louis on the 16th day of February, 1893, and returned on March 3d, and that he never knew that the Beattie Manufacturing Company had the contract until the order for \$4,000 was presented to him. On cross-examination the witness stated that his first official notice, so to speak, of the fact that the Beattie Manufacturing Company, had the contract was when he paid the order for \$4,000.

The cause was submitted to the court upon the pleadings and evidence, a jury being waived. Plaintiff excepted to the action of the court in refusing to give the following declarations of law asked by it: "(1) The court, sitting as a jury, declares the law to be that under the law and pleadings in the case and under the evidence that all the evidence as to payments and as to the 13 vouchers and the balance sheet introduced by the defendant Clark are to be disregarded and stricken from the record except voucher No. 1, relating to the \$4,000 paid to the plaintiff on April 12, 1893, and voucher No. 7, relating to the payment of \$2,500 made by the defendant to plaintiff. (2) The court, sitting as a



jury, declares the law to be that if the jury believe from the evidence that the defendant Charles Clark and the defendant Annie Gerardi entered into a certain written contract on or about the 27th day of January, 1893, as set out in plaintiff's petition, and if the jury further believe from the evidence that in pursuance of said contract the defendant Annie Gerardi deposited with the defendant Charles Clark the sum of \$10,000, the same to be paid out by the said defendant Charles Clark in payment of the equipment of a certain restaurant and saloon on the premises as stated in said contract, and in pursuance of said contract the defendant Charles Clark also agreed to expend the sum of \$2,500 in making alterations in the front of said building according to the plans and specifications of the said Annie Gerardi, the same being \$12,500 in all to be expended in the alterations of a certain building known as 213 and 215 North Broadway, said building being owned by the defendant Charles Clark and leased to the defendant Annie Gerardi, and if the jury further find that after the execution of said contract the plaintiff entered into a certain contract with the defendant Annie Gerardi, wherein in pursuance of said contract plaintiff furnished certain material and furnished certain moneys for labor on the premises owned by said defendant Charles Clark and leased by the defendant Annie Gerardi, and that under and by the terms of said contract the plaintiff for his services and for the material and labor furnished and for the improvements was to be paid the sum of \$16,701.28, and also to perform certain extra work according to the terms of said contract, and if the jury believe that the plaintiff did perform said services and furnished said labor and material to the extent of \$16,701.28, and also certain extras to the extent of \$3,120.43, and if the jury further find and believe from the evidence that the defendant Charles Clark, under and in pursuance of the contract set out in plaintiff's petition, and in consideration of the material furnished and labor performed by the plaintiff under and by virtue of its contract with the defendant Annie Gerardi, made certain payments to the plaintiff, to wit, \$4,000 on April 12, 1893, and \$2,500 on June 8, 1893, in payment for making alterations on front wall as required by said contract to be paid by said defendant Clark himself, and if the jury further find that the defendant Annie Gerardi was on or about July 1, 1893, indebted to plaintiff in or about the sum of \$12,000 or more and is still so indebted to plaintiff in addition to the sums received from the said defendant Charles Clark for the labor and material furnished by it on the premises aforesaid under and by virtue of the terms of its contract with said Annie Gerardi, if the jury believe any such sums were so received under the terms of said contract, then the jury are instructed to find for plaintiff (against the defendant Charles Clark) for

the difference between the sum of \$4,000, the amount of the aforesaid payment made by the defendant Charles Clark, and the sum of \$10,000, the amount of the deposit of Annie Gerardi with the defendant Clark, with interest at the rate of 6 per cent. per annum from July 1, 1893." At the request of the respondent, Charles Clark, the court gave the following instructions, to the giving of which plaintiff excepted: "(1) The court declares the law to be that, under the pleadings and all the evidence, the plaintiff is not entitled to recover in this action. (2) That the contract sued upon was not made with the object of benefiting the plaintiff, but only as a security to the defendant, and the plaintiff is not entitled to recover thereon. (3) That if the plaintiff, at any time previous to five years prior to May 9, 1902, could have brought its action, then it is not entitled to recover because of the statute of limitations. (4) That if the defendant Clark paid out the sum of \$10,000 for rent due himself from Mrs. Gerardi and for equipment for restaurant in building No. 213 and 215 Broadway upon her order, then the plaintiff is not entitled to recover." The court rendered judgment in favor of defendant, Charles Clark, and against plaintiff for costs, and dismissed as to defendants Annie Gerardi and Joseph Gerardi, there being no relief or judgment prayed for or against them. Plaintiff duly filed motion for a new trial, which motion was overruled by the court, and plaintiff appealed.

Notwithstanding the evidence introduced by plaintiff tending to show a verbal contract or agreement between Bates, agent for plaintiff, and defendant Clark, by the terms of which Clark was to pay the debt to the Beattie Manufacturing Company, or rather to pay a portion thereof equal in amount to the \$10,000 deposited with Clark, this action is not based upon such promise, but upon the written contract; so that the decision of this cause turns chiefly upon the construction to be placed upon the contract entered into by Annie Gerardi and Charles Clark upon the day the \$10,000 was deposited by her with him. Plaintiff's position is that the contract was made for its benefit for a valid consideration, and may be enforced by it, though it be not named in the contract, or may not have known of it at the time, if it was adopted after it was made. Upon the other hand, the defendant's contention is that before a third party can maintain an action upon such a contract, it must, first, be made for his benefit as its object, and he must be the party intended to be benefited, and, second, there must be some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally. Whatever the rule may be in other jurisdictions, it has been uniformly held by this court that a contract, upon a valid con-

sideration made between two or more persons for the benefit of a third party, may be enforced by the party for whose benefit it is made, if he adopts it after it is made, though he is not named in the contract or may not have known of it at the time. *Rogers v. Gosnell*, 58 Mo. 589; *State ex rel. v. Gaslight Co.*, 102 Mo. 482, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; *Ellis v. Harrison*, 104 Mo. 276, 16 S. W. 193, and cases cited; *St. Louis, to use, v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District of Kansas City ex rel. v. Livers*, 147 Mo. 580, 49 S. W. 507; *City of Bethany v. Howard*, 149 Mo. 504, 51 S. W. 94; *Beattie Mfg. Co. v. Gerardi et al.*, 166 Mo. 142, 65 S. W. 1035; *Kansas City ex rel. v. Schroeder*, 196 Mo. 281, 96 S. W. 405. Defendant, however, contends that, notwithstanding the rule announced, it does not help plaintiff's case because the contract and circumstances in proof show that the collateral contract upon which plaintiff bases this action was entered into the same day on which the lease of the premises was entered into by Clark and Mrs. Gerardi, which contract was in a measure explanatory of the lease; that Mrs. Gerardi's intention was to equip the building for restaurant and other similar purposes; that possession could not be immediately given, and that Clark had no assurance other than the personal obligation of Mrs. Gerardi that the building would be equipped or that Mrs. Gerardi would take possession of it and pay the rent after possession was taken; that in order that Mrs. Gerardi might have the means at her command to equip the building for the purposes indicated, and at the same time give to Clark the security that he demanded, she agreed to and did deposit with him \$10,000 to be expended upon her orders in the equipment of the building and in putting material therein which would be to him the equivalent of that amount of money as security for the rental. Defendant Clark contends that the last clause of the contract makes it clear that this is the only fair and logical meaning of the contract, which said clause is as follows: "And it is finally agreed that when the \$10,000 contemplated by this agreement has been actually expended for equipment of the premises, and has been converted into such equipment as the second party may place in the building, and shall thus have been brought under and subject to the provisions of said lease, then this extraneous agreement shall at once become *functus officio*, and thereafter null and void, and the lease from that time forward shall constitute the sole agreement between the parties." While a party may sue upon a valid contract made between other parties competent to contract for his benefit, although he may not know of it at the time or be named in it, if he adopt it after it is made, yet, in order to be in a position to maintain an action upon it, he must bring himself within the rule be-

fore announced. But if it appear from the contract itself that it was made or the benefit of the contracting parties therein, and no other, an action by a third party cannot, of course, be maintained thereon. Plaintiff, as supporting its contention, relies chiefly upon what was said in the opinion of this court when the case was before us upon a former occasion (166 Mo. 142, 65 S. W. 1035), wherein was announced the same rule as in the cases cited. The first count of the second amended petition in that case contained the necessary averments to bring plaintiff within the said rule, and while it was held that the petition stated a cause of action upon that feature of the case, a demurrer to the petition was sustained upon other grounds. The contract in question was not before the court for consideration on that appeal.

It seems from the terms of the contract that its prime object was, as declared in the instrument itself, to insure Clark that Mrs. Gerardi would take possession under the lease, and in order to further insure Clark in the payment of his rent as it accrued under the lease Mrs. Gerardi deposited with Clark the sum of \$10,000, to be used by him in payment of the equipment of said restaurant, said equipment, when placed in the building, to become the property of Clark as security only for the payment of the rent and for the performance of the obligations of the contract. According to the express terms of the contract, Clark was to pay out this money for the equipments as they were put in by Mrs. Gerardi. There was no restriction as to the value of the equipments to be placed in the premises, but the party of the second part (Mrs. Gerardi), not some other person, was to expend at least \$10,000 for that purpose. There is nothing in the contract which seems to indicate that its purpose was to secure the plaintiff for services rendered or for materials furnished by it in the equipment of the premises in question. It does not seem that any estimate of the cost of the equipments was made at the time the contract was entered into, or that the cost was to be restricted to any particular amount, but it does appear from the evidence that Clark paid out to plaintiff \$6,500 out of this \$10,000. It further appears that this contract was interpreted by the parties thereto as security for the benefit of Clark, and him alone. That such was the interpretation is further evidenced by the fact that on August 8, 1903, Mrs. Gerardi and Mr. Clark had a full settlement, Mrs. Gerardi receiving from him the sum of \$2,120.28, being the balance in full, with all interest accrued, remaining in the hands of Clark of the said \$10,000 theretofore deposited with him by her, the receipt given by her reciting that the other portion of the said \$10,000 had been expended by him, upon her order, in pursuance of the terms of the agreement. Clark testified that said \$2,120.28 was not paid by him directly to Mrs. Gerardi, but by an exchange of checks

between him and her by which she paid him the difference between said last-mentioned sum and the sum of \$3,060, and in addition thereto the sum of \$67.50, making a total of \$3,127.50 which she paid to Clark for rental on that date.

It is clear, we think, under the facts disclosed by the record in this case, that plaintiff cannot maintain this action upon this contract, and it follows that no error was committed by the court in refusing declarations of law Nos. 1 and 2, asked by plaintiff, or in giving the first, second, and fourth, asked by defendant. Declaration of law No. 3, given at the instance of defendant, to the effect that if plaintiff, at any time previous to five years prior to May 9, 1902, could have brought its action, it was not entitled to recover because of the statute of limitations, should not have been given as it had no place in the case; but as the cause was tried by the court, and the finding and judgment could not have been otherwise than it was, the judgment should not be reversed on that ground.

Our conclusion is that the judgment is for the right party, under the law and the evidence, and should be, and is, affirmed. All concur.

### DEE v. NACHBAR.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. PLEADING—JUDGMENT ON PLEADINGS—INCONSISTENT DEFENSES.

Where, in an action involving a boundary dispute, the answer pleaded the statute of limitations and estoppel, plaintiff was not entitled to judgment on the pleadings though the plea of limitations was insufficient where the plea of estoppel was good, as the defenses were not inconsistent, and if they had been plaintiff's remedy was by motion to strike out or to require defendant to elect upon which one he would stand, and not by motion for judgment on the pleadings.

#### 2. TRIAL—PLEA—INSUFFICIENCY—RIGHT TO PEREMPTORY INSTRUCTION.

Where, in an action involving a boundary dispute, the plea of limitations, in an answer pleading both limitations and estoppel, was insufficient, plaintiff was not entitled to an instruction to find for him, the plea of estoppel being good.

#### 3. SAME—INSTRUCTIONS—REQUEST—INSTRUCTIONS ALREADY GIVEN.

The refusal of a requested instruction practically covered by a correct instruction given by the court on its own motion was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

#### 4. APPEAL—RECORD—QUESTIONS PRESENTED—SETTING OUT EVIDENCE—NECESSITY—REVIEW OF INSTRUCTIONS.

Refusal of trial court to give requested instruction would be held proper on appeal, where there was no evidence in the abstract on which the instruction could be predicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2933-2935.]

#### 5. ESTOPPEL—EVIDENCE—DECLARATIONS—PERSONS ENTITLED TO BENEFIT OF.

Where a landowner made statements to an adjoining landowner in regard to a stake and

boundary line between their respective lands, such statement was admissible on the issue of estoppel in favor, not only of the person to whom it was made, but also in favor of the persons claiming title through him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 289.]

#### 6. BOUNDARIES—ESTABLISHMENT—INSTRUCTIONS.

In an action involving a boundary dispute, a requested instruction on the issue of estoppel that unless the jury believe that a stake and line pointed out by plaintiff as the true line to defendant's predecessor in title "has always since that time been taken and agreed between plaintiff and defendant" and his grantor, to be such boundary, they must disregard all evidence as to the pointing out of the stake, was properly refused, since it was only necessary that the possession of the adjoining landowner and his grantees continue long enough to indicate what their intention was, and the requested instruction authorized the jury to find for plaintiff if he had at any time after the pointing out of the line, even up to the time of the submission of the case to the jury, changed his mind or denied that such line was the proper one.

#### 7. APPEAL—RECORD—QUESTIONS PRESENTED—SUFFICIENCY OF EVIDENCE.

Where the entire evidence is not preserved by bill of exceptions, the court, on appeal, will not pass upon a question controlled entirely or practically by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911-2915.]

#### 8. TRIAL—INSTRUCTIONS—ASSUMING FACTS—UNCONTRADICTED EVIDENCE.

The giving of an instruction assuming a certain fact as established was not ground for reversal on appeal, where there was no evidence in the record controverting such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

#### 9. APPEAL—REVIEW—HARMLESS ERROR.

Rulings by the trial court on evidence and motions are not ground for reversal on appeal, and will not be passed upon where they could not have changed the result of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4033, 4034.]

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Thomas J. Dee against Joseph Nachbar. From a judgment for defendant, plaintiff appeals. Affirmed.

This suit grows out of a controversy over the boundary line between two building lots in Kansas City, the petition alleging that on the 1st day of March, 1903, plaintiff was, and still is, entitled to the possession of property described as the south 3¼ feet of lot No. 272, block 5, of the resurvey of Whipple's second addition to Kansas City, Mo., and that on or about said day the defendant entered upon said premises, and unlawfully withheld from plaintiff the possession thereof. Plaintiff prays judgment for the recovery of said premises, \$50 damages, and \$1 for monthly rents and profits from the rendition of judgment. Defendant's amended answer to the petition states:

"First. That he denies each and every allegation and averment in said petition made and contained.

"Second. For another and further answer to said petition, this defendant alleges that

he and his grantors have been in the actual, continuous, undisputed, adverse possession, under claim of title, for more than 10 years prior to the filing of the plaintiff's petition herein of the following described property, to wit: Beginning on the easterly line of Allen avenue, in Kansas City, Mo., at a point 164.70 feet northeasterly from the intersection of the easterly line of Allen avenue, with the south line of the resurvey of Whipple's second addition; thence northeasterly along the easterly line of said Allen avenue, 54.90 feet, more or less, to a stake set by Koehler Bros., said stake being on a line about 5 feet and  $6\frac{1}{2}$  inches north of the house on lot 273 of block 5, of said resurvey of said Whipple's second addition, at the northwesterly corner of said house; thence east, or easterly and parallel with the south line of said resurvey of said Whipple's second addition, to a stake set by Koehler Brothers; thence continuing along said line to another stake set by Koehler Brothers; thence continuing easterly along said line to a point on the line running northeasterly and southwesterly through the center of said block 5 to the south line of lot 274, of block 5, of said resurvey of Whipple's second addition, thence westerly to the beginning. That he disclaims any title to, and denies that he is in possession of, any property north of the line herein described.

"Third. For another and further answer to the petition of plaintiff, this defendant says that the plaintiff, on or about the year 1894, pointed out to this defendant's grantor, N. B. Vaughn, a certain stake at or near the line of Allen avenue and on a line 5 feet and  $6\frac{1}{2}$  inches north of the northwest corner of the house on said lot 273, as being on the line between the property of the said plaintiff and the said N. B. Vaughn; and that said stake and line so pointed out by plaintiff, as being the correct boundary line between said properties, has always been taken and agreed to be the south boundary line of plaintiff's property, and this defendant and his grantors have made improvements upon this defendant's property in accordance with, and relying upon, said boundary line so pointed out by plaintiff. That said boundary line so pointed out by plaintiff is the north line of the property, specifically described in paragraph 2 hereof. Wherefore, defendant says that the plaintiff is estopped from claiming or asserting any other line to be the boundary line between the property of plaintiff and this defendant. Wherefore, having fully answered, this defendant prays that plaintiff take nothing by his petition, and that defendant have and recover of plaintiff his costs in this behalf expended. Wherefore this defendant prays the court to adjudge that the plaintiff has no valid right in law or equity to the property specifically described in the second paragraph of his answer, and thereupon to enter judgment that plaintiff, and all persons claiming by, through,

or under him, be forever barred and estopped from having or claiming any right or title adverse to this defendant and those claiming by or through him to any of the property described in the second paragraph of this answer." Plaintiff's replication was a denial of each and every averment of the answer.

The cause was tried before the court and jury, but before any evidence was offered plaintiff orally moved the court for judgment on the pleadings, upon the ground that the pleadings show upon their face that plaintiff was entitled to a verdict for the recovery of the property, with nominal damages, and, as part of said motion, plaintiff requested the court to give the following instruction: "The court instructs the jury to find a verdict for plaintiff, in the following form: 'We, the jury, find for plaintiff, and do assess his damages at one cent.'" The court overruled said motion and refused to give the instruction asked, and plaintiff duly excepted.

N. B. Vaughn, a witness for defendant, testified that he formerly owned the Nachbar house, purchasing it in January, 1894, and selling it in October, 1897, to Nachbar, and that he had had occasion to talk to Mr. Dee about the dividing line between the two lots. "Q. What was that occasion—state how it came about? A. There was a spring with a gutter we made, or water drain along the street at that time, as I had no well, and I spoke to him about this spring, and it was just about on the line, or a little over on his right division line, and so he said all right, I could fix it, so I went there to fixing it, and the stake was there which he said was the corner stake between the lots. Q. Who said that? A. Mr. Dee. Q. I asked you what was the occasion for your talk about the line and his telling you that. Now, you wanted to move this so this spring would come out up there by your house, as I understand it? A. Yes, sir. In digging, I followed the stream until I reached the rocks, and got it over on my lot and some 10 or 12 feet from where I started, before I got it as far towards the house, to get it out of the sidewalk. We didn't exactly make it on account of the rocks. In the course of the digging I dug up a stake. Mr. Dee was there with me at the time, and said that this stake was the corner of the lot. The stake was about six feet from where the line would run by the stone wall—from the corner of the house projected out to Allen avenue. There used to be a fence or was a fence when I purchased this property, running from about the rear of this house down to Allen avenue. The fence in front was a post, and one or two planks on it, and after it got back to the back end about even with Mr. Dee's kitchen, then it was a paling fence—the boards stood up straight, is my recollection. The front post of the fence I pulled up and used. Mr. Dee made a statement about that fence. I asked about the line after I purchased in reference to that fence. When I purchased, that

fence was about six feet from Nachbar's house. I remember the drain that has been talked about here—it was inside, on Nachbar's side of the old fence, when I purchased. My recollection is very distinct as to about the distance the fence I spoke of was from the house. The fence was right by the stake—just south of it. The land was slanting, and the spring was down here, and the stake was at the edge of the lot line, and the fence there didn't commence until up here a few feet, and it was right on a line with the stake. The stake I dug up was on an even line with the fence. My recollection is it was just inside the stake, on Nachbar's property—my property it was then. I remember a door in the wall when I purchased. I went up to it on the north side. The old fence ran down the hill on the rear of the lot then. It was on a line with the fence I testified about on the front part of the lot, and on a line with the stake I dug up. It was through there when I went there. With reference to the trough, the fence was about—it was from the house, probably a couple of feet—something like that; and then the trough was about a foot or eighteen inches wide, and then the fence was probably four feet or three and one-half feet from that. The fence was there. I purchased it from Homer Reed. I was there in the neighborhood, along about 1897, when I sold to Nachbar. I never heard of any landslide to the north that moved the fence to the north." On cross-examination, witness testified: "I bought it in January, 1894, and sold it in 1897. I never lived there—I rented it out. I did not have a survey made when I went there. The old spring I spoke of was first discovered in front of the Dee lot, right on the line. The fence then in existence was six feet north of the Nachbar house. It didn't run right down to the front. It went down the hill. We fenced up to it right down to the spring. This old fence on the rear part of the lot at the time I left there, in 1897, or sold it in 1897, was kind of wabby, but it was all there—the most of it. Between the time of my purchase and sale, in 1897, I went around there every month to collect the rent, and sometimes between times. No slide ever occurred on the back part of that lot, which moved this old fence over to the north, during the time I had any connection with it." Witness would not undertake to say that the fence running on the rear part of the lot was standing exactly in the same position as when he lived there, but his judgment was that it stood "in exactly the same place, and the post holes in the same place, without any moving, until a year ago." Witness also testified that he removed the front fence in the fall of 1894. Augustus McWilliams, testifying for the defendant, said that he used to live in the lower part of the Nachbar house, and remembered that there was then an old fence along the north side. The fence was about two feet south of Dee's house. He could not remember how far it

was from Nachbar's. In a conversation had with Mr. Dee about buying the house, witness said he asked Mr. Dee where the line ran, and that the latter said "this old fence is about on the line." Upon being asked when this occurred, witness said he thought it was about nine years ago. John Siebold, a witness for defendant, testified that he remembered seeing the old fence in question, and heard Mr. Dee talk about it. "Q. Where was the fence—the one you talk about? A. Well, I was standing on the old fence, and I worked for him on Sunday, and I shingled his house, and Tom Dee was standing on the old porch. I said I could push that fence over. He said that old fence is the line—that is what Mr. Dee said."

The plaintiff excepted to the action of the court in refusing to give the following instructions asked by him at the close of all the testimony:

"(1a) If you find from the evidence in the case that plaintiff purchased lot 272, and obtained a deed thereto in 1886, and that in person and by tenants he used and occupied any part of said lot under claim of ownership of the whole thereof, under said deed, for 10 years thereafter, and that during the whole of said 10 years such claim and such use and occupation under said deed was open, notorious, continuous, exclusive, and adverse to all others, your verdict must be for plaintiff for the strip of ground lying south of the fence, erected by defendant, running east from Allen avenue, and particularly described in paragraph 2 of defendant's amended answer." "(3) If you find from the evidence in the case that plaintiff purchased lot 272, and obtained a deed thereto in 1886, and that in person and by tenants he used and occupied any part of said lot, under claim of ownership of the whole thereof, under said deed, for 10 years thereafter, and that during the whole of said 10 years such claim and such use and occupation, under said deed, was open, notorious, continuous, exclusive, and adverse to all others, you are instructed that he thereby obtained a good title thereto." "(6) The court instructs you that it is admitted by the pleadings that at the date of the filing of this suit, defendant was in possession of the irregular strip of land, described in paragraph 2 of defendant's answer, and that said strip was and is in the south  $3\frac{1}{2}$  feet of lot 272, sued for by plaintiff, and described as follows, to wit: Beginning on the easterly line of Allen avenue, in Kansas City, Missouri, at a point 164.70 feet northeasterly from the intersection of the easterly line of Allen avenue with the south line of the resurvey of Whipple's second addition; thence northeasterly along the easterly line of said Allen avenue 54.90 feet, more or less, to a stake set by Koehler Brothers, said stake being on a line about 5 feet and  $6\frac{1}{2}$  inches north of the house on lot 273 of block 5, of said resurvey of said Whipple's second addition,

at the northwesterly corner of said house; thence east, or easterly, and parallel with the south line of said resurvey of said Whipple's second addition, to a stake set by Koehler Brothers; thence continuing along said line to another stake set by Koehler Brothers; thence continuing easterly along said line to a point on the line, running northeasterly and southwesterly through the center of said block 5; thence southwesterly along the said center line of block 5, to the south line of lot 274, of block 5, of said resurvey of Whipple's second addition; thence westerly to the beginning. (7) If you find and believe from the evidence in the case that defendant never intended to claim any part of the land north of the sewer box on the north side of his dwelling, unless he should ascertain or become convinced, by a survey thereof, or otherwise, that the north line of his lot was further north than said sewer box, then you are instructed that, no matter where said true line may be, he cannot in this action set up title thereto by adverse possession, as said possession is defined and described in other instructions herewith given you." "(11) Although you may find and believe from the evidence in the case that plaintiff pointed out to one Vaughn the south line of his property, as being substantially the same line where defendant built the fence, yet unless you further so find and believe that said Vaughn relied upon said act, and thereafter continuously claimed right and title up to the line, and pointed out the same to defendant in plaintiff's presence, at the time defendant bought from Vaughn as being the south line, and unless both Vaughn and defendant continuously used, occupied, and claimed the property up to that line, and made valuable and substantial improvements thereon, relying upon such act of plaintiff, plaintiff is not estopped to recover the land, south of said line and north of the sewer box, mentioned in evidence, if otherwise entitled to recover. (12) Although you may find and believe from the evidence in the case that on or about the year 1894 plaintiff pointed out to defendant's grantor a certain stake at or near the line of Allen avenue, and on a line 5 feet 6½ inches north of the northwest corner of the house on said lot 273, as being on the line between the property of plaintiff and said grantor, yet, unless you further find from the evidence that said stake and line, so claimed to have been pointed out by plaintiff, has always since that time been taken and agreed between plaintiff and defendant and his grantor to be the south boundary line of plaintiff's property, and that defendant and his grantor have made improvements upon defendant's property, in accordance with, and relying upon said boundary line, you must disregard any and all evidence in regard to any alleged pointing out of said stake or line by plaintiff to said grantor as having no bearing upon the question as to

where said boundary line should be located."

"(14) If you find from the evidence in the case, under the instructions herewith given you, that plaintiff is entitled to the possession of the whole of lot 272, and that when this suit was filed defendant was in possession of a part of said lot, you will in your verdict state where the south line between said two lots, to which you may find plaintiff is entitled to possession, is located, and your verdict will be in the following form: 'We, the jury, find for the plaintiff, and we further find that the line between lot 272 and defendant's lot, up to which plaintiff is entitled to recover possession, is a line parallel with the north foundation wall of defendant's house and located ——— inches north of said wall.'"

At the instance of defendant, the court gave the following instructions to the jury: "(1) The court instructs the jury that the burden is upon the plaintiff to prove his case by the greater weight of the credible testimony. (2) The court instructs the jury that if they believe from the evidence that the division fence built by Nachbar, and extending from near the west end of the property in question to about the rear of Nachbar's house, is on the dividing line of lots 272 and 273, in block 5, of the resurvey of Whipple's second addition, or that said division fence is south of the dividing line between said lots, and if they believe from the evidence that the defendant has never placed any division fence north of the true dividing line, and that plaintiff has never had actual possession of any part of the land south of the fence built by the defendant along the line of the survey made by Koehler Brothers, as shown by the evidence, then your verdict must be for the defendant. (3) The court instructs the jury that if they believe from the evidence that the defendant and his grantors have been for a period of 10 consecutive years or more prior to March 20, 1903, in the actual, open, notorious, continuous, exclusive, and adverse possession of that portion of the property in controversy, which lies south of the old division fence (which said fence extends from the east end of the property in question to about the rear of the plaintiff's house), and that portion of the property in question which lies south of that portion of the line located and staked out by Koehler Brothers, from Allen avenue to the west end of said old division fence, then your verdict must be for the defendant. (4) The court instructs the jury that if they believe from the evidence that any witness has willfully sworn falsely to any material fact in the case, that the jury may disregard the whole or any part of such witness' testimony."

The court, on its own motion, gave to the jury the following instructions: "(3) If you find from the evidence in the case that plaintiff purchased lot 272, and obtained a deed thereto in 1886, and that in person and by

tenants he used and occupied any part of said lot, under claim of ownership of the whole thereof, under said deed, for 10 years thereafter, and before this suit was begun, and that during the whole of said 10 years such claim and such use and occupation under said deed was open, notorious, continuous, exclusive, and adverse to all others, you are instructed that he thereby obtained a good title thereto. (11) Although you may find and believe from the evidence in the case that plaintiff pointed out to one Vaughn the south line of his property as being substantially the same line where defendant built the fence, yet, unless you further so find and believe that said Vaughn relied upon said act, and thereafter continuously claimed right and title up to that line, and pointed out the same to defendant at the time defendant bought from Vaughn as being the south line, and, unless both Vaughn and defendant continuously used, occupied, and claimed the property up to that line, and made valuable and substantial improvements thereon, relying upon such act of plaintiff, plaintiff is not estopped by that act to recover any land, if any, south of said line, which you believe from the evidence he is otherwise entitled to recover. (14) If you find from the evidence in the case, under the instructions herewith given you, for the plaintiff, and that plaintiff is entitled to the possession of the whole of lot 272, and that when this suit was filed defendant was in possession of a part of said lot, you will, in your verdict, state where the south line between said two lots, to which you may find plaintiff is entitled to possession, is located, and your verdict will be in the following form: 'We, the jury, find for the plaintiff, and we further find that the line between lot 272 and defendant's lot, up to which plaintiff is entitled to recover possession, is a line parallel with the north foundation wall of defendant's house and located ——— inches north of said wall.'" To the giving of each and every of said instructions by the court, of its own motion, and for defendant, plaintiff at the time objected and excepted. The jury returned a verdict in favor of defendant, and judgment was rendered accordingly.

Plaintiff duly filed a motion for judgment on the pleadings, notwithstanding the verdict of the jury, and also, on the same day, filed his motion for new trial, both of which motions were overruled by the court, plaintiff excepting. Plaintiff appeals from the judgment of the court.

Wm. C. Forsee, for appellant. Stubenrauch & Thurmond, for respondent.

BURGESS, J. (after stating the facts as above). The first contention of plaintiff is that his motion for judgment on the pleadings should have been sustained, because the defendant by the third paragraph of his answer admits that in 1894 the property north

of the line described in paragraph 2 was plaintiff's property, or, in other words, that the defendant by the second paragraph of his answer admits that the defendant was in possession of the land sued for, and that because the defendant pleads that in 1894 the plaintiff pointed out this same line as the correct boundary line, therefore the defendant and his grantors could not have been in possession for a period of 10 years next preceding the institution of this suit on March 20, 1903, and plaintiff was entitled to judgment. But the evidence shows that there was possession of the land prior to 1894. Vaughn, a witness for defendant, testified that when he bought the property in question from Homer Reed, in January, 1894, there was an old fence on the line marked by the stake which he (Vaughn) dug up, and which Dee said was the correct line. Besides, the answer pleaded three separate and distinct defenses, a general denial and two affirmative defenses, i. e., the statute of limitations and estoppel, and even though defendant failed on the plea of the statute of limitations, if he sustained the defense of estoppel, plaintiff could not recover. These defenses were not inconsistent, and, even though they were, plaintiff's remedy was by motion to strike out or to require the defendant to elect upon which one he would stand, and not by motion for judgment on the pleadings.

It is claimed by plaintiff that instruction 1a should have been given. The argument is that, as defendant's answer admitted that the land described therein is the same land sued for, and plaintiff had held adverse possession of it under color of title since 1883, he had thereby perfected right and title of possession in himself, and that, as the second paragraph of defendant's answer admitted that he was in possession, no bar remained to plaintiff's recovery. This is in effect and substance the same argument that was made in support of the contention that plaintiff's motion for judgment on the pleadings should have been sustained, and, for the same reason given by us upon that matter, the instruction was properly refused. But in any event, instruction No. 3, given by the court of its own motion, was all that plaintiff was entitled to upon this feature of the case. Nor was there error in the refusal of instruction 3, asked by plaintiff, because practically the same instruction, in almost the same language, was given by the court of its own motion, and it is no error to refuse an instruction asked for when the court gives a correct instruction of its own motion covering the theory of the one asked and refused. *Smith v. Eno*, 15 Mo. App. 576.

Plaintiff complains of the action of the court in refusing instruction No. 6. It is apparent, we think, that this instruction, when read in connection with paragraph 2 of the defendant's answer, under which it was evidently drawn, was drawn under a

misapprehension of the allegation. This instruction says that the irregular strip of land described in paragraph 2 of defendant's answer was and is the south  $3\frac{1}{2}$  feet of lot 272, sued for by plaintiff, and then proceeds to describe it minutely, but not as described in said paragraph 2 of the answer, which is as lots 273 and 274, thus describing both of defendant's lots (one of which is not in question), and then gives an exact description of the property claimed by defendant. It fixes as the correct north boundary line of defendant's property the Koehler line. This description describes land 54.90 feet wide, while the instruction asked the court to tell the jury that it is the south  $3\frac{1}{2}$  feet of lot 272.

Plaintiff further complains of the action of the court in refusing instruction No. 7, asked by him to the effect that if the jury "believe from the evidence that defendant never intended to claim any part of the land north of the sewer box as the north side of his dwelling," etc., he cannot in this action set up title thereto by adverse possession. There is an entire absence from the abstract of any evidence upon which to predicate this instruction. The only evidence about the "sewer box" was that of Vaughn, where he speaks of a "trough," probably meaning the same thing.

Plaintiff next insists that instructions Nos. 11 and 12, asked by him, were erroneously refused, and also insists that instruction 11, given by the court, should not have been given. The language of said instruction No. 11, given by the court, differs from that asked by plaintiff in this, that it leaves out the words "in defendant's presence" and the words "and north of the sewer box," and incorporates therein the words "if any" after the word "land," as it appears in the next to the last line in the instruction. In order that plaintiff's statement to Vaughn in regard to the stake and boundary line should be admissible against him in favor of the defendant, it was not necessary that it should have been made in defendant's presence, for, as defendant holds under Vaughn, plaintiff's statements at the time, and his act in pointing out the stake and boundary line, are just as binding upon him by way of estoppel, in favor of defendant, as they would have been in favor of Vaughn, had he been the defendant.

Instruction No. 12, asked by plaintiff, and refused by the court, is vicious, in that it tells the jury that unless they believe that said stake and line, so claimed to have been pointed out by plaintiff, has always since that time been taken and agreed between plaintiff and defendant and his grantor to be the south boundary line of plaintiff's property, etc. It needs but a glance at this instruction to discover its infirmity. If the line, as contended for by defendant, was pointed out by plaintiff to Vaughn as the true line, as testified by the latter, it was

only necessary that the use or possession continue long enough to indicate what was the understanding of the adjacent landowners (Brummell v. Harris, 148 Mo. 430, 50 S. W. 93), yet, under this instruction, had it been given, the jury would have been authorized to find for plaintiff if he had at any time thereafter, even up to the time of the submission of the case to the jury, changed his mind or have denied that the line pointed out by him to Vaughn was the true line. Such is not the law as we understand it.

Another insistence of the plaintiff is that instruction No. 2, given for the defendant, was calculated to mislead the jury, in that it speaks of "the dividing line," "the line made by Koehler Bros.," and "the true dividing line," thus placing, as plaintiff contends, three lines before the jury. Upon the other hand, defendant insists that the three designations are as to one and the same line, as would clearly appear if all the evidence were before the court. It is admitted by plaintiff that the entire evidence is not preserved by the bill of exceptions, in the absence of which this court will not undertake to pass upon a question controlled entirely, or at least practically so, by evidence not before us. To do so would be mere guesswork, in which we are not permitted to indulge.

Plaintiff also criticises instruction No. 8, given for defendant, upon the ground, as he contends, that "it states to the jury, as an established fact, that the fence therein mentioned extended from the east end of the property in question to about the rear of the plaintiff's house." The evidence disclosed by the record upon this question was all one way, and, as the fact was in no way controverted, plaintiff's criticism of the instruction is without merit.

Other errors are assigned by plaintiff to the action of the court in admitting testimony in behalf of defendant over the objection of plaintiff, and in overruling motions by plaintiff to strike out certain testimony introduced by defendant; but this testimony was of such a character that, whether the ruling of the court upon its admissibility were right or wrong, it would not justify a reversal of the judgment, nor could it have changed the result; hence, it seems unnecessary to pass on these questions.

The instructions given covered the entire case, which seems to have been well tried. Finding no reversible error in the record, the judgment is affirmed. All concur.

McKENZIE et al. v. DONNELL et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

# 1. TRIAL — TRIAL BY COURT — FINDING OF FACTS—NECESSITY.

A special finding of facts is not necessary where not requested, and a judgment in such a case is not erroneous because of no finding of



facts, especially where the pleadings show clearly what the court found as a basis of its decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 908, 909.]

**2. SAME—JUDGMENT—CONCLUSIVENESS — BAR OF SUBSEQUENT ACTION.**

Plaintiffs obtained a decree quieting title to land, and the court stated and settled an account for rents and profits up to the date of the decree, but defendants appealed, gave bond, and remained in possession. Subsequently plaintiffs brought ejectment against a tenant, in which suit defendants were parties, and recovered possession, and afterwards brought a bill to enforce the decree as to an accounting and also for an accounting for the rents, etc., accruing subsequent to the decree, and while it was superseded by defendants' appeal bond. Held, that the judgment in ejectment was not a bar to the later suit, especially where the petition in ejectment specifically alleged that plaintiffs did not sue for the rents, because they had already been adjudged them as against defendants, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1284-1289.]

**3. SAME—SPLITTING CAUSE OF ACTION.**

Plaintiffs did not split up their cause of action by bringing more than one suit.

**4. QUIETING TITLE — DECREE — FAILURE TO OBEY PROVISIONS — EFFECT ON ADVERSE PARTY.**

Where title to land was revested absolutely in plaintiffs by a decree quieting their title, defendants' rights are not affected by the fact that plaintiffs have not paid to a third person a sum which the decree made a lien on the land.

Appeal from Circuit Court, Jackson County; Shannon C. Douglas, Judge.

Action by Ella McKenzie and others against Catherine E. Donnell and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

See 52 S. W. 222.

Edward P. Garnett, for appellants. Wash Adams and N. F. Heitman, for respondents.

**GANTT, J.** This is an appeal from a judgment of the circuit court of Jackson county for an accounting, and to enforce the decree of this court rendered on the 12th of July, 1899, wherein the plaintiffs herein were plaintiffs in error, and the defendants herein were appellants in a cross-appeal. The petition sets forth at length the bringing of the bill in equity by the plaintiffs as the children and heirs at law of Jedediah E. McKenzie to recover certain lands, and set aside a deed of trust thereon, and for an accounting on the ground that a certain deed of conveyance, to wit, a deed of trust made by the said Jedediah McKenzie on April 1, 1875, to Charles H. Vincent, trustee for Patterson Stewart for \$3,000, was invalid, because of the insanity of the said Jedediah McKenzie at the date of its execution, and that a certain trustees' deed made by the sheriff of Jackson county under and by virtue of the power of sale contained in said deed of trust to Catherine E. Donnell was invalid for the same reason, and that such proceedings were had that a decree was rendered by the circuit court of Jackson county in favor of plaintiffs on the 15th of July, 1895, whereby it was adjudged that at the date of the execution of said deed of trust

said Jedediah was insane, and ordered and decreed that the said deed of trust of March 15, 1875, be set aside, and for naught held, and that the trustees' deed by the sheriff as aforesaid to Catherine E. Donnell should also be set aside and for naught held on account of the invalidity of the deed of trust under which said trustees' deed was made, and that a certain other deed of trust given by the said Catherine E. Donnell and M. S. C. Donnell, her husband, to Oliver H. Dean as trustee for Israel B. Mason, of date July 29, 1886, and duly recorded in Jackson county to secure a note of even date therewith for \$15,000, which had been transferred and delivered to the Citizens' National Bank of Kansas City, should also be set aside, and that a certain other deed of trust by the said Catherine E. Donnell and her husband to James S. Botsford, trustee for George F. Ballingal, of date October 27, 1892, and for \$500, and duly recorded in Jackson county, and which had been transferred to the Citizens' National Bank of Kansas City, should also be set aside and for naught held. And it was further adjudged and decreed in the said action that the fee-simple title to the above-described real estate should be, and the same was thereby, vested in the children and grandchildren of the said Jedediah McKenzie, the plaintiffs in this suit. It was further ordered and decreed that the defendants Catherine E. Donnell and M. S. C. Donnell, her husband, and the said Citizens' National Bank, and the trustees in the said deed of trust and all persons claiming by, through or under them, should be forever debarred and enjoined from having or claiming any right or title whatsoever to the said real estate adverse to the plaintiffs therein the children and grandchildren of the said Jedediah McKenzie, and the title to said property was forever quieted in the said heirs. It is also alleged that the said circuit court charge the said Donnells with the rents and use and occupation of said real estate and for certain rock quarried out of said premises by the said Donnells during their occupation of the same, which the court found to be in the aggregate, up to the time of entering the said judgment, \$3,223, and, on the other hand, the court charged the said real estate with the purchase price paid by the said Donnell therefor, to wit, \$2,105, and also with the taxes thereon since the year 1877 up to the time of said decree, with interest thereon, and with certain attorney fees paid by the said Donnell in resisting the condemnation of a part of said land for Twenty-Third street, and in resisting a certain other tax bill against said property for the grading of Locust street, in all amounting to \$1,250, and for certain repairs thereon, the whole amounting in the aggregate to \$11,113.14, and deducted from the said sum the said sum of \$3,223 rents and interest thereon and rock quarried up to the time of the entering of the said decree, and found a balance of \$7,890.14, and decreed

the same as a charge against the plaintiffs on said real estate, and ordered and adjudged that the same be paid to the Citizens' National Bank within 12 months of the rendition of the judgment and to bear 6 per cent. interest. It was ordered, adjudged, and decreed that the defendants immediately deliver possession of the said real estate unto the plaintiffs. In default of payment of the said \$7,890.14 within the 12 months allowed by the court, it was decreed that the said real estate should be sold to satisfy the same, and out of the proceeds of said sale the sheriff should first pay the costs and expenses of said sale, and no other costs, and next pay to the Citizens' National Bank the said sum of \$7,890.14, with interest thereon at the rate of 6 per cent. per annum from the date of judgment until paid, provided, however, that, if the cost adjudged in said cause against said Catherine and M. S. C. Donnell had not been paid on execution or voluntarily at the time of the sale of the said land under said execution, then the amount of the said cost adjudged in said cause should be deducted from the said sum of \$7,890.14, and the balance of said sum paid to the Citizens' National Bank; and, thirdly, the balance if any, of the proceeds of said sale, should be paid to the plaintiffs in this case. Plaintiffs were also charged with certain other items of costs, which are not necessary to be noted at this time. The plaintiffs filed a motion to modify the said decree, which motion the court overruled, and the plaintiffs excepted. The defendants also filed a motion for new trial in arrest of judgment and a motion to tax the costs against the plaintiffs, all of which motions the court overruled, and the defendants excepted. The plaintiffs brought their exceptions to this court by writ of error, and the defendants appealed.

The circuit court made a further order in the cause, whereby it permitted the said Donnell to pay any and all taxes, general and special, which might be levied or charged on the property in controversy pending their appeal, except a certain special tax bill, which was then pending in the Supreme Court, and ordered that they be allowed all such payments as liens upon such property, with interest thereon from the time of payments until the decree should be carried into effect if affirmed by the Supreme Court, and further decreed that the said Donnells should be charged with the actual rents of the said premises received by them during said appeal, with interest thereon at the rate of 6 per cent., and for all moneys received by them for rock, if any, quarried by them on the said property during said appeal and until said judgment was affirmed and carried into effect. It is thereupon further alleged that on the 12th day of July, 1899, the Supreme Court of Missouri rendered an opinion in the said cause, which is reported in the 151 Mo. 461-472, 52 S. W. 222, and affirmed the said decree in all respects, except

that it disallowed the sum of \$375 attorney's fees allowed the said Catherine E. and M. S. C. Donnell in defending the tax bills then in suit in the Supreme Court; thus leaving the amount with which said lands were to be charged in favor of the Citizens' National Bank to be \$7,515.14. It further appears that the Supreme Court modified the judgment of the circuit court so as to extend the time to plaintiffs to pay said charge on said land, for 90 days after August 1, 1899. It is then alleged that afterwards the city of Kansas City, Mo., by the exercise of its power of eminent domain, took and appropriated for public use, to wit, for the boulevard and parkway known as "North Gillham Road," about two-thirds of the said tract of land, leaving a tract uncondemned of the following description: "Beginning at the northwest corner of the southeast quarter of section eight, township forty-nine, range thirty-three, and running thence south 440 feet; thence east 196 feet; thence north 440 feet; thence west 196 feet to the place of beginning." And plaintiffs state that on the south part of this last-described tract there was at the rendition of said decree a frame house, which still remains on the said premises; that the said house had been rented by the said Donnells for \$10 per month ever since the said decree; that after the rendition of the opinion in the Supreme Court the plaintiffs requested the said Donnells to account for the said rent, which had accrued since the rendition of the said decree, and demanded possession of the same, and the said Donnell promised to make an accounting and turn over the possession of said property, but delayed until a short time prior to the April term, 1903, of the circuit court of Jackson county, at which time the plaintiffs brought an action in ejectment against one Henry Ising, who was then the tenant of the said Donnells, residing in said house, and recovered judgment in the circuit court of Jackson county at the April term, 1903, for the recovery of the said house and the south 127 feet of said tract; that said judgment was rendered against the said Ising and the said Catherine Donnell, who had entered her appearance in said suit as a landlord of the said Henry Ising; that before the commencement of the said suit that the defendants Donnell refused to account to the plaintiffs for the said rentals, contrary to the terms of the decree, and still refuse to account for the same, and that the same amount to \$960, with the interest thereon. It is also alleged that the defendants Donnell also caused a lot of rock to be quarried out of said lands, and received payment therefor, and appropriated the same to their own use; that plaintiffs do not know the amount of the rock so quarried or the amount of money received therefor by the said Donnells, and prayed for an accounting of the amount of money so received for the said rock so quarried.

It is also alleged that the said defendants

Donnell have never paid any of the taxes on said land or any part thereof since the date of the said decree, and that plaintiffs have paid all the taxes, state, county, and city, that have accrued since the year 1877. It is further alleged that prior to the decision of the Supreme Court in the said appeal Kansas City had commenced said proceedings to condemn a part of said land as above stated, and that said proceeding culminated in an award to plaintiffs as the owners of said land of the sum of \$16,150 for the part of the said land so taken, and that a benefit of \$2,000 was assessed against plaintiffs in said proceedings against the tract of land which was not taken; that said city afterwards paid plaintiffs for that part of said land, which was taken, and out of the moneys awarded plaintiffs for the taking of said land plaintiffs paid the Citizens' National Bank all the moneys which they were required to pay it by the decree of the circuit court and Supreme Court, and had in all other respects complied with the said decree as far as they were concerned; that at the time plaintiffs paid the said Citizens' National Bank the amount which they were required to pay it by said decree the said sum of \$883.64 had not been paid by the said Donnells or any one else. Plaintiffs allege, further, that at the time of the payment by plaintiffs the amount decreed to the Citizens' National Bank a question arose as to the fund which should bear interest under the said decree on account of the failure of the said Donnells to pay the said \$883.64, plaintiffs insisting that the said interest-bearing fund was \$6,631.50, and not \$7,515.14, but the said bank fearing that under the said decree it would render itself liable to the said Donnells in case it settled with the McKenzie heirs, the plaintiffs herein, on the basis of permitting the interest-bearing fund to be \$6,631.50, instead of \$7,515.14, a stipulation was entered into, whereby it was agreed that the difference arising between the parties from the different methods of computation aforesaid was \$341.29, and that the said amount should be retained by the said bank, and that the bank would at once commence a proceeding to determine the rights of the parties thereto as well as the rights of Catherine E. and M. S. C. Donnell to said sum of \$341.29, and the bank agreed that no charge should be made against the parties or the said fund for counsel fees, save the court cost in said proceeding. It is then alleged that the bank had brought no suit to determine the rights of the parties to said sum of \$341.29 in the hands of the said National Bank, and that the same belonged to the plaintiffs. The petition then prayed judgment that the bank pay over said money to plaintiffs, and that the defendants Donnell show cause, if any, why the bank should not pay the same to the plaintiffs. There was a prayer then that the court require the said defendants Catherine E. and M. S. C. Don-

nell to make an accounting of all rents received by them for the house heretofore described since the 15th of July, 1893, up to the 20th of July, 1903, and also for all rock quarried on said land, and all moneys received and appropriated by them for the rock so quarried. Plaintiffs further allege in their petition that the defendants Donnell in their answer to the suit, which was determined in the Supreme Court, set up and pleaded the statute of limitations to defeat plaintiffs' claim, and that said plea of the statute of limitations was by said decree adjudged against the said defendants. Plaintiffs further allege that the defendants Donnell are now in contempt of said decree, and in defiance thereto are setting up claims to the said lands adverse to plaintiffs, and are still receiving and taking to their use all the benefits by way of rents of the said land. It is further alleged that, when the plaintiffs brought their action of ejectment against the said Henry Ising, they did not ask for rentals, for the reason that their remedy at law was inadequate because the said Henry Ising was insolvent, and, moreover, had only been in possession of the said property as defined for about one year before the institution of this ejectment suit, and because there was no assurance that the said defendants Catherine E. and M. S. C. Donnell would enter their appearance in said ejectment suit, and for the further reason that the obligation of the said defendants Donnell to pay said rentals had been adjudged and decreed by the said decree of the circuit court of Jackson county and affirmed by the Supreme Court, upon which decree the plaintiffs rely, and because the said Donnell had repeatedly promised to account for said rentals, and did not refuse to do so until a short time before the institution of said ejectment suit.

It is further alleged that the said Donnells are refusing to yield possession of said land, and are threatening to appeal from the said judgment in said ejectment suit. Plaintiffs state that they have no adequate remedy at law for the wrongs perpetrated against them by the said defendants, wherefore they pray the court to make such orders and issue such writs of possession as to the court seem necessary to fully execute and carry out the foregoing decree of the circuit court as affirmed by the Supreme Court, and for all other orders and judgments in the premises. To this petition the Citizens' National Bank filed its answer, and admitted that the plaintiffs had commenced and prosecuted their suit against the said Donnells, and that the decree, as set forth in the petition, was duly rendered, and was affirmed in the Supreme Court. It admits that Kansas City by eminent domain took that portion of the real estate in controversy in said action, leaving the balance thereof as set forth in plaintiffs' petition, and that in said proceedings there was awarded to the plaintiffs the sum of \$16,150, and the said lands were charged with

a benefit of \$2,000. Said defendant bank further admitted that it was paid the amount due it as provided by the said decree, and that it retained the \$341.29, according to the said stipulation referred to in the petition, and admitted that it had not brought suit to determine the ownership of the said \$341.29, because of litigation between the said bank and the said Donnells, which was then pending, and allege that it had made divers attempts to reach an adjustment with the said Donnells, and allege that it should not be charged with any interest on the said sum as it had been ready at all times, and is now willing to pay said sum in accordance with the decree of this or any other court which might lawfully adjudge the ownership thereof, and ask to be protected by the decree of the court. The defendants Donnell demurred to said petition, which demurrer was overruled, and they thereupon filed their answer, in which they allege that the plaintiffs are not entitled to prosecute this suit against them, first, because it fully appears from the petition that all the matters complained of have been passed upon and adjudicated by the circuit court of Jackson county and the Supreme Court of Missouri in the suit between the plaintiffs and the defendants in the case which culminated in the decree copied in plaintiffs' petition, and all matters herein complained of were either fully adjudicated and determined in that suit, or should have been fully determined therein, in order that the defendants should not be subjected to a multiplicity of suits growing out of the same matter; second, because it appears from the face of the petition that the plaintiffs commenced another action in this court to recover possession of a part of the said premises, and was prosecuted to final judgment and appealed to the Supreme Court of this state, where it is still pending undetermined, and that the plaintiffs claimed and obtained judgment therein for rents of the premises in question under the decree which was set out in their petition, and that the rents so claimed accrued subsequent to the time for which the plaintiffs are claiming rents on said premises, and that plaintiffs are estopped from now claiming the other portion of said rents in this case, and are not entitled to split their alleged cause of action and subject defendants to a multiplicity of suits, and defendants plead said prior suit in bar of any recovery herein; third, defendants say in regard to the differences between the defendant bank and plaintiffs in regard to the sum of money plaintiffs claim said bank in the condemnation proceedings these defendants never had any part in the alleged agreement, and, not being parties to such agreement, are not bound thereby in this proceeding, that the court in which such proceedings of condemnation were had was the proper tribunal to determine how the fund in court should be paid out, that these defendants and all others in-

terested in said funds were parties to said proceedings, and said court had full jurisdiction to determine the differences between all parties claiming said fund, and that these defendants have never waived their rights to have said court pass upon the rights which they have to said fund, and they say this court has not jurisdiction to hear and determine the same; fourth, defendants allege that the plaintiffs did not comply with the terms of the decree set forth in their petition, and did not within the time required thereby pay to these defendants or to the defendant bank the money required to redeem said land, and said time of payment has never been extended by any act or authority of these defendants, and plaintiffs did not repay these defendants the amount of taxes and interest thereon, which were paid by defendants after the rendition of said decree as required by the terms of said decree, that the statement in plaintiffs' petition that defendants had paid no taxes on the property since the judgment was rendered in said decree is not true, and they allege that they have paid large amounts of taxes since that time, wherefore they say that the plaintiffs are not entitled to prosecute this action, and they ask to be discharged, with their costs. The plaintiffs filed a reply wherein they denied all the new matter alleged in the answer, and again show to the court that, by reason of the condemnation proceedings, an agreement was entered into between the plaintiffs and the bank that the said bank should and would take out of the moneys awarded to plaintiffs in said condemnation proceedings the amount due it by said decree, and would refrain from issuing an execution as allowed by the decree, and allege that under the terms of the decree the plaintiffs were required to deal entirely with the bank in the matter of paying off the restitution money provided for by said decree, and plaintiffs did comply with said decree in all respects, and plaintiffs, while not admitting that defendants have paid any taxes on said lands since the date of said decree, say that, if it is true that defendants have paid any such taxes, plaintiffs are willing that the defendants shall have credit therefor as an offset to the rents which defendants have been collecting and appropriating to their own use on the said land since the date of the said decree. The cause was heard at the October term, 1904, of the circuit court of Jackson county, and a decree rendered that plaintiffs have and recover of and from the defendants Catherine E. and M. S. C. Donnell \$482.85 on account of rent collected and appropriated by said defendants of and from the house and premises described in plaintiffs' petition, and interest thereon; the said sum being the balance due the plaintiffs after giving the defendants credit for all taxes paid by them on the land described in the petition and all repairs on said house and all other credits to which defendants are enti-

tied, said rents having accrued after the decree which had been rendered by the circuit court and affirmed by the Supreme Court up to the 1st day of July, 1903, and, also, that plaintiffs have and recover of the said defendants \$262.76 on account of moneys collected by the defendants and appropriated by them for rock quarried by the defendants out of plaintiffs' land described in the petition, together with the interest thereon from the 1st day of May, 1897, making a total of \$382.97, and it was also ordered and decreed that plaintiffs have and recover the \$341.29 referred to in the petition as being in the custody of the Citizens' National Bank under the stipulation set forth in the petition, and it is further ordered and decreed that, under the decree of the circuit court affirmed by the Supreme Court of Missouri, the said Catherine E. and M. S. C. Donnell have no claims to the lands described in the petition, and under said decree ought not set up any claim to the lands or any part thereof adverse to the plaintiffs, and that plaintiffs are entitled to the immediate possession of all of the real estate described in the plaintiffs' petition, except that part which was condemned and taken for a public park by Kansas City. It was further ordered, adjudged, and decreed that the defendants Catherine E. and M. S. C. Donnell, and all persons claiming by, through, or under them or either of them, were hereby forever debarred and enjoined from having or claiming to have any title whatsoever to the real estate last above described adverse to the plaintiffs, the children and grandchildren of Jedediah E. McKenzie or their heirs or assigns, and the title to the said last above described real estate was forever quieted in the said McKenzie heirs. It was further decreed that the said Catherine Donnell and Mack S. C. Donnell deliver immediate possession of the following real estate in Jackson county described in plaintiffs' petition: "Beginning at the northwest corner of the southeast quarter of section eight, township forty-nine, range thirty-three, thence running south 440 feet; thence east 196 feet; thence north 440 feet; thence west 196 feet to the place of beginning." And the writ of possession was awarded to the plaintiffs and against the said defendants Donnell, and judgment for all the costs of the suit. A motion for new trial was filed in due time, heard, and overruled; but, as no bill of exceptions was filed in the cause, it is apparent that there is nothing before this court for consideration save and except the record proper.

1. As to the objection that the judgment is erroneous because there is no finding of facts, we think it is without merit. Special findings of facts are not necessary, unless requested, and there were no requests in this case. When reference is had to the pleadings in the case, there is no trouble whatever to ascertain what the court found as a basis of its decree.

2. As to the insistence that there is another suit pending for a part of the same subject-matter, which suit had been commenced prior to this, we take it that this assignment of error must refer to the ejectment suit against Ising, the tenant of the Donnells. It is plain, we think, that the ejectment suit against Ising constituted no bar whatever for the bill in this case, which calls for an accounting for the rents in accordance with the decree of the circuit court, which was affirmed by this court in 151 Mo. 431, 52 S. W. 214, and 151 Mo. 472, 52 S. W. 222. It was specifically alleged in the petition that plaintiffs did not sue for the rents in the Ising Case because those rents had been adjudged to the plaintiffs as against these defendants, and defendants required to enter into an accounting with the plaintiffs therefor, and for the further reason that the said Ising was absolutely insolvent, and hence the action of ejectment afforded plaintiffs no adequate remedy at law for those rents. In no sense could the judgment in the ejectment suit be regarded under all the facts pleaded in the petition as a bar to the plaintiffs' right to an accounting for the rents by the defendants in accordance with the decree of the circuit court and this court. In order that any matter can be said to have passed in *rem judicatum*, it must have been tried and adjudicated by the court. It is clear that no such issue was tendered to the circuit court in the ejectment case, and consequently could not have been adjudicated by that court in that case. Moreover, defendants are in error as to the allegation of the petition. The petition does not allege that there is an appeal pending from the judgment in the ejectment case. It simply alleges that the defendants threatened an appeal, which is a very different proposition. The ejectment suit and the judgment therein present no bar to this suit, and, besides, in no event could plaintiffs have recovered from Ising the rents and profits for more than a year during which Ising occupied the premises as the tenant of the defendants. Under this head we take it there is no contention that so much of this suit as seeks an accounting of and from defendants Donnell for the rents received by them pending their appeal to this court from the judgment of the circuit court of July 15, 1896, which was affirmed by this court July 12, 1899, and for the rock taken from the quarry on said land after said appeal was taken, and before it was affirmed, was and is *res judicata*, inasmuch as in the very nature of things said rents had not then accrued and said rock quarried, and therefore could not have been the subject of an accounting or ascertained so that a judgment could have been rendered therefor. Only the rents accrued and the value of the rock quarried up to the date of that judgment could be and were included in that judgment, and, had defendants not have appealed and superseded that decree, so

much of the present suit as seeks an accounting for the rents subsequent to that decree and the rock quarried since then would have no foundation. In *Garland v. Smith*, 164 Mo., loc. cit. 22, 64 S. W. 193, it was ruled by this court in banc that, "where the subsequent action is upon a different claim, the former judgment only bars those things which were in issue or included in the issue in the former action or suit, nor will the judgment bar another cause which might have been joined with the former cause of action, but was not, and, if different proofs are required to sustain two actions, the judgment in one is no bar to the other." *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195. But the defendants insist plaintiffs have split up their action; and upon the familiar doctrine that this will not be tolerated they say plaintiffs upon their own petition have no standing in court. As we have already said, plaintiffs included in their first action all the rents and damages which had accrued up to the date of the judgment, but they did not and could not include rents which must accrue after the decree was entered and pending the appeal. This was no splitting up of a cause of action. It is a suit to enforce the first decree, and for an accounting for the rents and rock quarried subsequent to the decree and while the decree was superseded by defendants' appeal bond. *Adams' Equity* (8th Ed.) \*415, \*416; *Story's Eq. Pl.* § 429, and cases cited; *O'Hara v. Shepherd*, 3 Md. Ch. 306. As was said by this court in *Baumhoff v. Railroad Co. (Mo.)* 104 S. W. 5, loc. cit. 9: "The present proceeding is in the nature of an equitable execution issued on the judgment already determining plaintiff's right." Plaintiffs had obtained a decree quieting their title to the lands in suit, and the circuit court had stated and settled an account up to the date of the decree, including rents and rock quarried to that date, but defendants appealed and gave bond, and remained in possession. Obviously plaintiffs recovered nothing for these subsequent rents and for the rock afterwards quarried. When plaintiffs asked for an accounting as to these and for possession of their lands, they were met by defendants Donnell's refusal to account and claim that plaintiffs had forfeited all the benefits of their decree by their failure to pay the balance which the court had decreed as a lien on the land to the bank in the time fixed by this court.

The contention of defendants that plaintiffs show no equity in their bill, because they did not pay the bank the amount fixed in the decree can avail them nothing, because the revesting of the title to their lands in plaintiffs, was absolute, and not conditional upon their raising the balance. The bank was simply given the right to issue an execution if not paid in the time specified, and defendants had nothing to do with that payment. By the decree plaintiffs were required

to satisfy the bank, and not the defendants Donnell. In their present suit they show they have entirely liquidated every claim held by the bank. The doctrine of strict foreclosure has nothing to do with the matter.

The decree finds ample basis in the pleadings, and the bill brings the case within the jurisdiction of a court of chancery. The decree of the circuit court is in all things affirmed.

FOX, P. J., and BURGESS, J., concur.

#### SIMONTON v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 2  
Dec. 10, 1907.)

#### CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action against a street railway company for injuries to a passenger received by his being knocked from the inner foot board by collision with a passenger on the inner foot board on a car going in the opposite direction, the issue as to plaintiff's contributory negligence was sharply presented by the pleadings, and there was substantial evidence introduced tending to establish plaintiff's negligence, it was proper to instruct that it was the plaintiff's duty in going upon the inner foot board to exercise such care as the position rendered reasonably necessary to prevent his being struck by passengers on the car, or by the car passing on the other track, and, if he could by standing upright thereon have avoided being struck by a passenger on or by the passing car and failed to do so, in consequence of which he was injured, he is not entitled to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1403.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by W. F. Simonton against the St. Louis Transit Company to recover for personal injuries. From an order awarding plaintiff a new trial, defendant appeals. Reversed, with directions to render judgment on the verdict for defendant returned by the jury.

This cause is here by appeal on the part of the defendant from an order in the circuit court of the city of St. Louis awarding the plaintiff in this cause a new trial. This was an action for personal injuries, in which the amount of damages was laid at \$10,000.

The issues presented in this cause were substantially as follows: The petition alleges that on June 17, 1903, defendant received plaintiff as a passenger on an east-bound Olive street car, gave him a transfer to the Jefferson avenue line, and received him as a passenger on one of its north-bound cars of the latter line at the place where passengers were usually received; that, the car being crowded, plaintiff was invited to ride, and did ride, on the running board of said car; that while he was thus riding, near the intersection of Olive street and Jefferson avenue, he was struck and knocked from the

car, crushed and dragged by the south-bound car and its passengers, and was thereby injured. Negligence was charged as follows: "And the plaintiff avers that he was caused to be so struck and injured, first, because defendant's track, at and near where injury was so sustained, was in a defective and insecure condition; that at said place, which was just south of Olive street, the track was worn loose and defective, the joints of the rails of said north-bound track were separated and too low, and caused the car to jolt and sway, so as to bring passengers riding on said foot board into contact with passengers on the foot board of the south-bound car, and, as the car on which the plaintiff was such passenger was passing, a south-bound car of the defendant at said point, owing to said defects of said track said car, was caused by said defective condition of said track to sustain jolts and jerks, to sway laterally, and plaintiff's body to be brought into contact with the body of another passenger on defendant's south-bound car, and he was thereby caused to fall from said car, and sustain injuries as aforesaid. And plaintiff further avers that defendant's tracks at said point were constructed so near to each other as to make it dangerous for persons riding as passengers upon the running boards of passing cars, and that the defendant was, and its agents and servants in charge of said car were, negligent in failing to warn plaintiff of said danger, and thereby directly contributed to cause plaintiff's said injuries." The answer was a general denial, and contributory negligence pleaded as follows: "For further answer and defense, defendant says that plaintiff's alleged injuries were caused by his own negligence in standing upon the inner foot board of the car upon which he was riding in a position then known to plaintiff to be attended by the danger of being struck and injured when said car should be passing a south-bound car on said Jefferson avenue, and, while plaintiff was in such position, he was struck and injured when passing such south-bound car." The reply was a general denial.

Upon the trial of the cause plaintiff's evidence tended to prove that at the time he was injured, to wit, on June 17, 1903, he was employed as a painter on Berlin avenue, in the city of St. Louis. At that place he boarded an east-bound Olive street car, paid his fare, and received a transfer to the Jefferson avenue line at its intersection with the Olive street line. Defendant operated cars over double tracks on Jefferson avenue and Olive street; the west-bound Olive cars using the north track, the east-bound the south track, and the north-bound Jefferson cars using the east track, and the south-bound the west track. Late in the afternoon there was much traffic at the intersection of these streets, and persons frequently boarded north-bound Jefferson avenue cars, and were received as passengers, on the south

side of Olive street rather than at the proper place on the northeast corner. Plaintiff alighted from the east-bound Olive car on the west side of Jefferson avenue at about 5:30 in the afternoon, waited for a south-bound Jefferson car to pass, and walked to the north-bound Jefferson car, then stationary, about 40 feet south of Olive. He took a position about 10 feet from the rear end of the car on the west, or inner, running board, which extended the entire length of the car. There were three or four other persons on this running board, all of whom were north of him, nearer the front of the car, and the seats in the car, as well as the outer running board, were crowded. When plaintiff was struck, he was standing on the running board, holding to the back of a seat, with the portion of his body above the hips leaning in towards the seats in the car. When his car started, he saw the south-bound car approaching, and there was a passenger, Ellerman, on its inner running board near the rear end. When the north-bound car had traveled about 25 or 30 feet, plaintiff and Ellerman came in collision with each other, Ellerman's elbow or arm striking plaintiff in the breast, and plaintiff was rolled for about 15 feet between the cars, and fell to the ground when the cars had entirely passed each other. Ellerman testified that he boarded the south-bound car while it was north of Olive street, and stood on the east, or inner, running board about the center of the car. He was facing south, but turned his face toward the car to see if there were any vacant seats. As his car was crossing Olive street, he looked south, saw the north-bound car approaching, and thereupon leaned in toward the car as much as the seated passengers would permit, in order not to be struck as the cars passed. He did not see any one on the north-bound car's running board, and did not know what struck him or what he struck. The cars were simply moving forward pretty close to each other, and he did not observe that either of them had any other than a forward motion or movement. On the day following the accident A. G. Torrence, an insurance agent, who had been employed by plaintiff to effect a settlement with defendant, went to the scene of the accident, and gave the following testimony over defendant's objection as to what he saw there: There is a joint in each one of these various Olive and Jefferson tracks, four or five feet from the actual point of intersection, and from each of these joints is a short rail, laid almost at right angles to the nearest intersecting rail. These joints south of the Olive street track appeared to be loose where the wheels had apparently battered the rail down in passing. He saw single truck cars—that is, cars with four wheels under the center—pass this point, and, when the two front wheels would reach the joint, the front of the car would tip, and when the two rear wheels would reach the joint the

rear of the car would tip, thereby producing a rocking motion. The short rails before mentioned were out of alignment, in that they did not strike the Olive track exactly at right angles, giving the single truck cars also a lateral motion. The running boards on the cars that he saw extended about a foot from the car, and the two inner running boards of passing cars came within about a foot of touching each other, and this was the nearest point of approach of the cars that he saw.

Defendant's evidence tended to prove that about the year 1900 the city established a regular grade for Jefferson avenue, embracing its intersection with Olive street, and the tracks were laid to the new grade at the direction and under the supervision of the city. The city also prescribed the line, height, and manner of constructing the tracks, and they were laid in conformity to the city's specifications, including the slight deflection in the line of the Jefferson tracks at their intersection with the Olive tracks. This was testified to by the city engineer, who had personal charge of the work. The tracks remained at the date of the accident exactly as they had been constructed, and, while necessarily worn some, were not worn to such an extent as to involve at all the service and movement of the cars, nor were the joints of the rails loose at all. A number of motormen and conductors who had traveled over the Jefferson line that day in charge of cars testified that the track at the place in question was in good condition; one of the witnesses stating that with over a year's experience with single truck cars passing that point he had never seen any two of them sway in passing so as to come near together, but that there was always lots of room between them. In addition to these witnesses, Christopher Heimers, a lumber commission merchant, who was a passenger on the south-bound car facing Ellerman, testified that he saw Ellerman on the running board of the south-bound car leaning out, apparently trying to find a seat. He also saw the plaintiff leaning out from the running board of the north-bound car, and saw the two men strike against each other, roll between the cars, and fall to the ground. There were a number of other people on both the inner running boards. This testimony was partly corroborated by Bert Inman, a passenger on the south-bound car. Martin Stark was standing immediately behind Ellerman on the running board of the south-bound car, and there were several passengers directly in front of Ellerman, also on the running board. He saw four or five passengers on the inner running board of the north-bound car, and all of these passengers on both running boards passed in safety except Ellerman and the plaintiff. Rev. D. E. Standard was a passenger on the south-bound car, and saw a number of passengers on both running boards. He testified that he saw Ellerman and the plaintiff leaning out over

the running boards, and witness wondered why they did not get in closer to the car. They alone of all the foot board passengers were struck. There was other testimony on the part of the defendant tending to show that during the month immediately preceding the accident plaintiff had been over this same line, making the same transfer, a number of times, many times riding on the inner running board and had never been injured himself, nor had he seen others on the running board injured. Upon cross-examination of the plaintiff he made this statement: "Well, gentlemen of the jury, it is inexplicable, as I said. I may have been leaning further out than I thought I was, and he struck me. He could move past two or three people on the car, and I may have made some movement after they were passed, and then it was he struck me. That is all the way I can account for it." At the close of the evidence, the court instructed the jury and the cause was submitted to them, and they returned a verdict finding the issues for the defendant. A timely motion for new trial was filed by plaintiff on the 26th day of March, 1904. This motion was continued to the April term, 1904. On the 2d day of April, 1904, and at the April term of said court, the motion for new trial was sustained, for the reason that the court erred in giving instruction No. 5, requested by defendant, to which action of the court in setting aside the verdict returned by the jury and granting plaintiff a new trial the defendant properly preserved its exceptions. From the order granting plaintiff a new trial, defendant prosecutes this appeal, and the record is now before us for review.

Boyle & Priest, Morton Jordan, and Edw. T. Miller, for appellant. A. R. Taylor, for respondent.

FOX, P. J. (after stating the facts as above). It is apparent from the record in this cause that there is but one legal proposition presented for our consideration; that is, the error assigned upon the action of the court in awarding a new trial, based upon the ground that the trial court erroneously gave instruction No. 5 in behalf of defendant. We are not favored in our consideration of this cause by a brief or any suggestions by learned counsel for respondent in support of the action of the trial court; hence, our attention is not directed to any reasons forming the basis of the action of the trial court other than the one assigned by the court, that the new trial was granted on account of the error in giving instruction No. 5. An independent investigation and analysis of the record fails to disclose any other grounds as a basis for the action of the court in awarding plaintiff a new trial; hence we are confronted with the single proposition involving the correctness of instruction No. 5. This instruction was as follows: "The jury are instructed that it was the duty of the plaintiff, in going upon the western or inner foot board



of the car upon which he entered, to exercise such degree of care as the position he was in rendered reasonably necessary to prevent his being struck by passengers on the car or by the car passing on the other track; and if the jury believe from the evidence that the plaintiff, while upon such running or foot board, could, by standing upright thereon, and not leaning outwardly towards the cars on the other track, have avoided being struck by a passenger on or by the passing car, and that he failed to maintain such upright position and in consequence of such failure was struck and injured, then the plaintiff is not entitled to recover, and your verdict must be for the defendant." An instruction substantially embracing the same legal features as the one now before us was in judgment before Division No. 1 of this court in *Allen v. Transit Co.*, 183 Mo. 411, 81 S. W. 1142. In that case the defendant requested instructions Nos. 16 and 17, declaring the law upon the facts developed at the trial in that cause, as before stated, substantially the same as instruction No. 5 in the case at bar. Judge Valliant, speaking for the court, in treating of the complaint lodged against the action of the court in refusing the instructions requested by defendant, said: "Instructions 16 and 17, asked by defendants, were refused. They were to the effect that, when the plaintiff stepped on the inner foot board, it became his duty to exercise such degree of care as the position he was in rendered reasonably necessary to prevent his being struck by a passing car, and, if by standing upright and not leaning out, he would have avoided being struck, yet failed to observe that care, he was not entitled to recover. \* \* \* The evidence for the defendants, upon which these instructions were predicated, tended to show that the space between the passing cars in which it was available for a man to stand was from 28 to 30 inches. If that testimony was true, then it was a legitimate inference for the jury to draw that the plaintiff would not have been struck if he had stood erect on the foot board, and not leaned outward. The defendants were entitled to those instructions, and it was error to refuse them." It is plainly manifest that, if the *Allen Case* is to be followed, it is decisive of the proposition now under consideration, and the action of the trial court in granting a new trial for the reason assigned must be held erroneous. The conclusions reached in the *Allen Case* respecting the propriety of the instructions requested and refused finds support in the cases of *Nugent v. Railway*, 73 Conn. 139, 46 Atl. 875; *Flynn v. Traction Co.*, 67 N. J. Law, 546, 52 Atl. 369; *Moylan v. Railway*, 128 N. Y. 585, 27 N. E. 977; *Ashbrook v. Railway*, 18 Mo. App. 290.

The issue as to contributory negligence of the plaintiff was sharply presented by the pleadings in this cause. There was sufficient substantial evidence introduced by the defendant tending to establish that the plaintiff's

injuries were the result of want of proper care and caution while riding upon the inner foot board of defendant's car to warrant the court in directing the attention of the jury to that subject as was done by instruction No. 5. While it may be said, upon the facts disclosed by the record, that the plaintiff had the right to ride upon the inner board of defendant's car, yet it is equally clear that his position in so riding was attended with danger of being hurt. Therefore in our opinion it was very appropriate under the circumstances to direct the attention of the jury to the necessity of plaintiff exercising due care and caution to avoid injury.

Again, it will be noted that the court in its instruction No. 1, given for the plaintiff, fully recognized that the principal danger of injury from riding on the inner board of defendant's car was that to which the attention of the jury was directed by instruction No. 5.

We have indicated our views of the proposition disclosed by the record, which results in the conclusion that the action of the trial court in granting a new trial in this cause was erroneous, and its order and judgment should be reversed, with directions to render judgment in conformity with the verdict returned by the jury; and it is so ordered. All concur.

#### RUSSELL et al. v. WOERNER et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

##### 1. COURTS—JURISDICTION.

An action to recover the amount paid for a void city tax deed and subsequent taxes, costs, etc., incurred on account thereof, does not involve the title to real estate so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12 [Ann. St. 1906, p. 218].

##### 2. SAME.

An action to recover the amount paid for a void city tax deed and subsequent taxes, costs, etc., incurred on account thereof, does not involve a construction of the revenue laws, so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12 [Ann. St. 1906, p. 218].

Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge.

Action by L. D. H. Russell and others against Eugene Woerner and others. From a judgment for defendants, plaintiffs appeal. Transferred to Kansas City Court of Appeals.

L. A. Laughlin, for appellants. Gage, Ladd & Small, for respondents.

GANTT, J. This is an appeal from the circuit court of Jackson county. The action was brought January 11, 1901, under section 59 of article 5 of the Kansas City Charter, to recover taxes, interest, and penalties paid out under a void city tax deed, recorded November 13, 1897.

There is no controversy about the facts.

The petition alleges that, at a public sale of land for delinquent taxes, held by the treasurer of Kansas City, beginning on the first Monday of November, 1895, the following described real estate in said city was duly sold to C. A. Wills for \$5.76, being the amount of taxes, with legal penalties duly levied and assessed by said city for the year 1895, against said real estate, to wit: the west 32¼ feet of north 40 feet of lot 23 and west 32¼ feet of lot 24 in Woodcock Park, an addition to the city of Kansas, in Jackson county, Mo. That the certificate of purchase to said Wills was duly issued and recorded, and afterwards, on the 1st day of November, 1897, was assigned to plaintiffs; that on the 13th day of November, 1897, the city treasurer executed the tax deed conveying said real estate to the plaintiffs, and afterwards, on the 18th day of September, 1900, plaintiffs brought suit against the defendants Eugene and Louise Woerner, William W. Johnson, and J. D. S. Cook, trustee, to recover possession of said real estate under said tax deed, in which said action plaintiffs were defeated. The petition then proceeds to aver that, in addition to the \$5.76 paid by Wills at the delinquent tax sale for the land, other moneys, to the amount of about \$80, had been paid out by the plaintiffs and their assignor for their state, county, and municipal taxes on said real estate since the date of the said purchase. It is then alleged that the defendants Woerner are in possession of said real estate, and the defendants Johnson, John D. S. Cook, trustee for Mary D. Gossett herself, and the Knickerbocker Trust Company have, or claim to have, some interest in said real estate as owners, incumbrancers, or otherwise. The prayer of the petition was that the defendants be adjudged to pay the plaintiffs the amount paid by said Wills at said tax sale, together with 10 per cent. of such amounts immediately added as a penalty, with 24 per cent. per annum on the whole of such amount so paid, from the date of its payment, together with the costs of the tax deed and fees for recording the same, and all costs in the case brought to recover the possession of said real estate, and all the costs of the present action, and that the sum so adjudged be declared a lien on said real estate. The answer of the defendants Woerner was a general denial, and plea of the statute of limitation that the suit was not commenced within three years from the time of recording the tax deed, and a special statute that the deed was not recorded within 20 days after the delivery of the deed, and a further answer that these defendants Woerner were simply tenants from month to month of the said premises.

The Knickerbocker Trust Company in its answer pleaded a general denial, and then set up in full the proceedings in the ejectment case, and the final determination thereof in favor of the defendants therein, and then pleaded especially that, prior to Decem-

ber 11, 1900, the said company, though not a defendant in said suit, offered to pay plaintiffs the full amount of insurance, with penalties and interest, and the amount of taxes paid by the plaintiffs, with penalties, interest, and costs, as provided by section 59, art. 5, of the charter, which offer the plaintiffs declined, for the reason that it was said real estate they were after, and not said money. Said Knickerbocker Trust Company then pleaded the statute of limitation of three years against said tax deed, and that the defendants Woerner were made tenants who had no interest in the real estate, and that the other defendants had no interest therein, and that plaintiffs had never been in possession of said real estate. In the third paragraph of the answer, the said trust company alleges that the said real estate was sold for the taxes of 1895, but the deed described said taxes as for the year 1894; that the tax deed was void on its face, and the real estate was not correctly described in the advertisement, or in said tax deed; that the plaintiffs paid the other taxes, set forth in the petition, long before they were delinquent, and before the said trust company could get an opportunity to pay them, as appears by the dates on which the said several amounts were paid; that said payments were voluntary, and cannot be recovered. The answer further pleads that this action was not commenced within three years from the time of recording the tax deed, as required by section 60, art. 5, of the city charter. The plaintiffs filed a reply to the answer to the Knickerbocker Trust Company, admitting all the facts alleged in the second, third, and fourth paragraphs of the answer. The cause was tried in the circuit court on the 8th of August, 1904, and judgment rendered for the defendants. Motion for new trial was duly filed, heard, and overruled, and exceptions saved, and an appeal allowed to this court.

It is clear that the title to real estate is not involved in this action. *State ex rel. v. Elliott*, 180 Mo. 658, 79 S. W. 696. The only ground upon which this court could possibly have jurisdiction would be under that section of the Constitution of this state which confers jurisdiction upon this court in appeals involving "the construction of the revenue laws of this state. Constitution of Missouri, art. 3, § 12 [Ann. St. 1906, p. 218]." We are referred to the case of *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979, in which this court took jurisdiction of the appeal, but an examination of the record in that cause, and the decision of this court, will show that this court maintained its jurisdiction of the appeal because, "the exemption claimed applied to all state and county taxes, as well as to the municipal taxes." It is clear to us that, upon the face of the pleadings and the record, the revenue laws of this state are in no manner involved, either directly or indirect-

ly. There is no pretense that this case belongs here for any other reason. The Kansas City Court of Appeals has jurisdiction of this appeal, and accordingly it is ordered that the appeal be transferred to that court for its consideration.

FOX, P. J., and BURGESS, J., concur.

#### STATE v. KLUG.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### CRIMINAL LAW—APPEAL—AFFIRMANCE—BILL OF EXCEPTIONS AND RECORD.

In the absence of a bill of exceptions, the information being in proper form, and the record in other respects free from error, judgment will be affirmed.

Appeal from Circuit Court, Miller County; Jno. W. Moore, Judge.

William Klug appeals from a conviction. Affirmed.

Barney Reed and L. N. Musser, for appellant. The Attorney General and N. T. Gen-try, for the State.

BURGESS, J. At the March term, 1906, of the circuit court of Miller county, the defendant, under an information duly filed by the prosecuting attorney of said county charging him with assault with intent to kill one Marion F. Capps, was convicted of said offense, and his punishment fixed at two years in the penitentiary. He appeals.

No bill of exceptions was filed in this case. The information is in proper form, and the record in other respects free from error. The judgment is therefore affirmed. All concur.

#### STATE v. HODGES.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### CRIMINAL LAW—DETERMINATION OF CAUSE—APPEAL BEFORE SENTENCE—REMAND.

Where, on appeal, it appears that no judgment has been entered on the verdict of conviction, the submission of the appeal will be set aside, and the case remanded with directions to enter judgment against the defendant upon the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2595.]

Appeal from Circuit Court, Shannon County; Wm. N. Evans, Judge.

George G. Hodges was convicted of killing fish with dynamite, and appeals. Remanded, with directions to enter judgment against defendant on the verdict as returned by the jury.

E. J. Shuck and Clark & Yount, for appellant. The Attorney General and N. T. Gen-try, for the State.

FOX, P. J. The defendant in this cause was charged in the circuit court of Shannon

county with throwing dynamite in certain waters of this state, whereby the fish in said waters might have been killed, injured, or destroyed, and whereby a large quantity of fish in said waters were killed, caught, and taken from said waters, in violation of section 7456, Rev. St. 1899 [Ann. St. 1906, p. 3593]. The defendant was convicted of said offense and fined in the sum of \$100, and the cause is pending in this court upon appeal from the verdict of the jury returned in said cause.

The index to the record in this cause designates that the judgment may be found on page 3 thereof. Doubtless this erroneous index occasioned the misapprehension by the Attorney General, as well as counsel for appellant, as to what the record really disclosed. Counsel on both sides submitted this case upon the idea that a final judgment had been rendered. We considered the questions presented to our consideration by the briefs of the Attorney General and counsel for appellant, and handed down, at our last sitting, the conclusions reached upon those questions. The clerk of this court since the last sitting of this division has called our attention to the fact that the record fails to disclose any final judgment rendered in this cause. Upon this state of the record it is apparent that this appeal was prematurely taken. Appeals in cases of this character are only provided for from final judgments.

Adopting the course of procedure which is fully recognized in *State v. Holland*, 160 Mo. 667, 61 S. W. 620, *State v. McClain*, 137 Mo., loc. cit. 317, 38 S. W. 906, *State v. Shea*, 95 Mo., loc. cit. 95, 8 S. W. 409, *State v. Gullic*, 170 Mo. 334, 71 S. W. 62, *State v. Hesterly*, 178 Mo., loc. cit. 48, 76 S. W. 983, *State v. Clapper*, 196 Mo. 42, 93 S. W. 384, *State v. George*, 105 S. W. 598, and *State v. Smith*, 105 S. W. 598 (decided at the last sitting of this court and not yet officially reported), it is ordered that the opinion filed in this cause be withdrawn, and the submission of this appeal be, and is hereby, set aside, and the cause remanded to the circuit court, with directions that the defendant be brought into court, and that the court enter up judgment against him upon the verdict as returned by the jury in this cause. All concur.

#### CORNOVSKI et ux. v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907.)

#### 1. TRIAL—QUESTIONS OF LAW—UNCONTRACTED EVIDENCE.

Where the evidence is undisputed, all one way, and of such cogency, that but one conclusion can be drawn by a rational mind, or where the thing proves itself, the court may deal with it as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 336.]

#### 2. STREET RAILWAYS—DANGER LINE.

In an action against a street railway company for running over a four year old child it is

not error to assume that, as to her, the curb line of a city street is the danger line in crossing the street.

### 3. SAME—INSTRUCTION—CONSTRUCTIVE LINE OF DANGER.

An instruction that if the motorman in charge of a car saw, or by keeping a vigilant watch would have seen, plaintiff's intestate crossing the street, and in a position of danger, etc., did not assume that the curb line was the danger line.

### 4. SAME—SUFFICIENCY—PROXIMATE CAUSE.

An instruction that if defendant's motorman saw, or by keeping a vigilant watch would have seen, the decedent crossing the street, and in a position of danger, and by stopping the car within the shortest time and space practicable, etc., with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of the car and persons thereon, could have avoided running over and killing decedent, and neglected to do so, plaintiffs are entitled to recover, etc., in the absence of contributory negligence, is sufficient to submit to the jury the question of causal connection between the negligence of defendant and the death of the child, though it did not use the expression "proximate cause."

### 5. TRIAL—CURE OF INSTRUCTIONS.

If the instruction was not sufficient to correctly submit the question of the proximate cause of the injury, it was cured by other instructions that, before the jury could find for plaintiff, they must find that the death of the child was actually caused by defendant in the manner submitted to them by the instructions; that, if her death was not actually caused by such specified negligence, plaintiffs had no case, even if the child was killed by being run over by defendant's car, and that they could not infer negligence from the fact of the child's injury by the car, and that, though the burden was on defendant to establish plaintiff's contributory negligence, it did not relieve plaintiff of the burden of proving that the injury and death of the child were solely caused by defendant's negligence.

### 6. NEGLIGENCE—IMPUTED NEGLIGENCE—INSTRUCTIONS—CIRCUMSTANCES IN LIFE.

In an action against a street railway company for running over plaintiff's four year old child, it was not error to instruct that, in determining whether plaintiffs by their negligence in the custody and care of the child contributed to her injury and death, the jury was to consider whether or not they exercised that degree of care, caution, and watchfulness over the child, which was reasonable and proper for parents in their circumstances of life, as shown by the evidence.

### 7. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where the evidence as to "circumstances in life," mentioned in an instruction as to imputing the negligence of parents to a child run over and killed by a street car, went no further than to show the employment and duties of father and mother at the immediate time the child escaped into the street and was injured, and there was no proof as to plaintiffs' financial condition in life as such, the instruction, if erroneous, would not be prejudicial.

Graves, J., dissents as to the propriety of the instruction permitting consideration of plaintiffs' circumstances in life. Valliant, P. J., and Woodson, J., dissent from the criticism of the Levin and Czezewska Cases.

Appeal from Circuit Court St. Charles County; H. W. Johnson, Judge.

Action by Hymen Cornovski and wife against the St. Louis Transit Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Boyle & Priest, Edward T. Miller, and T. E. Francis, for appellant. Wm. L. Bohnenkamp and Wm. R. Gentry, for respondents.

LAMM, J. Plaintiffs, husband and wife, the parents of Esther Cornovski (the said Esther having been run over and killed by one of defendant's cars on the evening of the 18th of March, 1903, in the city of St. Louis), sued defendant for statutory damages as for her wrongful death, and recovered a judgment for \$5,000. Perfecting an appeal on due and seasonable steps, defendant brings the cause here for review.

One of the charges of negligence related to a negligent failure to put in motion and drop the fender on the car, as provided in a city ordinance. This charge was taken from the jury by instruction. Another charge of negligence was a failure to sound the gong or give any other warning to the deceased of the danger from an approaching car. That charge also was taken from the jury by instruction. Esther was a minor of tender years. She was killed on Eleventh street, and the ground of negligence charged in the petition and put to the jury was a violation of an ordinance of the city of St. Louis known as the "Vigilant Watch Ordinance," in that defendant's motorman "negligently and carelessly failed to keep a vigilant watch for all persons on foot, and especially the daughter of these plaintiffs, moving towards the track or upon the track, and that said motorman failed on the first appearance of danger to the daughter of these plaintiffs to stop the said car within the shortest time and space possible." The defense interposed was a general denial and a plea of contributory negligence, viz., that the child's death was caused by the negligence of her parents, in that she was of immature years, and they allowed her to be upon a street after dark where they knew street cars were being operated, unaccompanied by a person of mature years. Defendant demurred to the evidence at the close of plaintiffs' case and again at the close of the whole case. These demurrers were overruled and defendant saved an exception, but does not assign error here on said rulings.

The case is presented to us on the theory that plaintiffs made a case for the jury, and the errors assigned pertain to the way it was put to the jury. In this condition of things, the determination of the case may proceed understandingly by fetching a small compass on the facts. Thus: Esther was two or three months short of four years old. She was struck and literally cut to pieces on the evening of March 11, 1903, between half-past 6 and 7 o'clock by a street car manned by defendant's employes. Defendant had a single track on Eleventh street, used for south-bound cars. Plaintiff, Hyman Cornovski, kept a grocery store on the east side of that street—the wife helping in the store. They lived back of the store, at least they ate

there, and possibly had their living and sleeping rooms over the store. There was a little, narrow yard, so called by courtesy, between the cooking and eating apartments and the store proper, or back of all of them, and this yard was connected with Eleventh street by a passageway shut off from the street by a gate. On the evening in question some of the plaintiffs' children had been upstairs taking a music lesson. The music teacher, passing out on the street, saw Esther sitting quietly on a box in front, and the child threw her a kiss. It seems she had been in the kitchen with her mother, who had just washed her face, combed her hair, and given her her supper, and then told her to tell the other children to come to the table. The mother, busy and preoccupied with her evening household cares, for the instant forgot the child, who went out the back door and into said yard. Soon the mother, hearing screaming in the street, ran out and learned her daughter was dead. She testified the family were new and strange on the street; Esther wasn't used to it; they had moved there in January past, in the winter time; and that when she played out doors it was always in the little yard. The mother did not know she had gone on the street. The father said, in substance, that he was busy in the store waiting on customers, and vending his wares; that glancing out of the front window or door he saw Esther sitting on a little box, hard by the door, a few minutes before she was killed. This was the last time he ever saw her alive, and then she was alone. He did not see her in the street that evening, and never saw her cross it before at any time. It appears, as of course, that both parents knew that defendant's cars ran on a schedule of short intervals on Eleventh street. There was a fire-engine house opposite, or nearly opposite, Cornovski's place. Its door was open, the evening was mild and bright. What lured the child across the street is unknown; but she did cross it, and was seen on the west side by the engine house, going along the sidewalk with another girl aged about seven—a neighbor's. From the west curb to the nearest rail of defendant's track is 12 feet. Presently these children left the west sidewalk and ran from the curb, somewhat diagonally, east toward Esther's home. The elder girl, being in advance, crossed the track and escaped the oncoming car, but Esther was caught and killed at the west rail.

On plaintiffs' side it was shown that, when the children left the curb and passed towards the track, the car was about 60 feet away. Contra, there was evidence on defendant's side that it was only about 12 or 15 feet away. No witness placed the speed of the car in excess of seven miles an hour. There was a very small grade, if any, at the place of the accident—a very slight dip down. The car was equipped with an "ordinary goose neck hand brake, an ordinary controller, and

an ordinary reverse." The street was in good condition, the track dry; and in this condition of track, grade, and appliances, the car, according to plaintiffs' experts, could have been stopped within 15 feet. According to defendant's experts, it could not have been stopped within less than 40 or 45 feet. On plaintiffs' side there was evidence tending to show that for a little while before the child was struck, and up to the very instant, the motorman was inattentive to his duties. He was at his post, possibly, but did not have a hand on the brake or controller, was not looking in front, and did not see Esther at all. One of plaintiffs' witnesses, riding on the front platform with the motorman, said that employé was looking back "as if he was looking back to see something just before the accident happened." Then there came a halloo or a scream, and the motorman "made a sudden dash for the brake." As he grabbed the brake, he asked the witness "what was the matter, what was the trouble, and wanted to know if he had run over somebody, was somebody hurt?" Two of plaintiffs' eyewitnesses said the motorman seemed to be looking sideways towards the enginehouse, west, and not to the front or towards Esther. Contra, on defendant's side it was shown that the motorman was at his post of duty, was keeping a vigilant watch ahead of him at the time, and that at the instant the children left the sidewalk he saw them and at once applied the brake, reversed his power, and did everything possible to stop without avail. There was undisputed evidence that the immediate place was "thickly populated, and of a pleasant evening there were always large crowds of children around there." On that particular evening it was as usual.

Plaintiffs were allowed three instructions (number 1 and number 3 being excepted to), viz.: (1) "If the jury find from the evidence that on the 18th day of March, 1903, the defendant was using the car mentioned in the evidence; and if the jury further find from the evidence that on said date the plaintiffs were husband and wife and were the father and mother of the child, Esther Cornovski, and that said Esther was then a minor and unmarried; and if the jury further find from the evidence that at said time Eleventh street, at the point mentioned in the evidence, was an open public street in the city of St. Louis; and if the jury further find from the evidence that on said day, while the plaintiffs' said child, Esther, was attempting to cross Eleventh street, she was run over and killed by the car mentioned in the evidence, which was being operated by the defendant, St. Louis Transit Company, through its motorman; and if the jury further find from the evidence that the said motorman in charge of said car saw, or by keeping a vigilant watch, would have seen the plaintiffs' said child, Esther, crossing said street, and in position of danger of being struck by said car, and by stopping said car within the shortest

time and space practicable, under the circumstances, with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of said car and of the persons on said car, could have avoided running over and killing said child, and neglected to do so—then plaintiffs are entitled to recover of the defendant the sum of five thousand dollars (\$5,000), unless you further find from the evidence that the plaintiffs, or either of them, were guilty of negligence in the care and custody of their child, which contributed to cause the death of said child.” (2) “By the term ‘ordinary care,’ as used in these instructions, is meant such care as would be exercised by a reasonably prudent person under the same or similar circumstances.” (3) “The court instructs the jury that in determining whether or not the plaintiffs contributed by their negligence in the custody and care of their child, Esther, to her injury and death, you are to consider whether or not they exercised that degree of care, caution, and watchfulness over their said child, Esther, which was reasonable and proper for parents in their circumstances in life, as shown by the evidence. You are further instructed that the burden of proving contributory negligence on the part of the plaintiffs rests upon the defendant.”

The defendant prayed twelve instructions—all of them allowed. Of that series, No. 4, No. 5, and No. 6 bear somewhat on the contentions made here. They run as follows: (4) “The mere fact, if true, that the said Esther Cornovski was injured and killed by a car of defendant gives plaintiffs no right to sue defendant and recover damages. Before, under any circumstances, plaintiffs are entitled to a verdict, you must find from the evidence that the injuries and death of the said Esther were actually caused by the negligence of defendant in the manner submitted to your consideration in these instructions. If her injury and death were not actually caused by such specified negligence, then plaintiffs have no case and cannot recover, even if the said Esther was injured and killed by being struck or run over by defendant’s car. But even if you find that the said Esther was injured and killed by such negligence, still plaintiffs cannot recover if, by their own act or conduct, as specified in instruction No. 1, given on behalf of defendant, they negligently contributed to her injury and death.” (5) “The court instructs the jury that they cannot infer negligence from the fact that the plaintiffs’ child was injured by the defendant’s car, but that the negligence charged against defendant is a fact which must be proved, and the burden of proving same by the greater weight of the evidence is upon the plaintiffs.” (6) “While the burden of proof is upon the defendant to establish the contributory negligence of plaintiffs, yet this does not relieve plaintiffs of the burden of proving that the injury and death of the said Esther were

solely caused by the negligence of defendant, as set out in other instructions. The burden of proving that fact rests upon the plaintiffs throughout the whole case, and if the jury find that the negligence of plaintiffs, as set out in other instructions, either in whole or in part, caused, or directly contributed to cause, the injury and death of the said Esther, then your verdict must be for the defendant.”

On the foregoing record, defendant assigns error, viz.: Error in giving instruction 1, for that (a) it assumes the child was in a position of danger the moment she started across the street, instead of leaving that question to the jury to determine as a fact, for that (b) the instruction did not require the jury to find that defendant’s negligence was the proximate cause of the injury. And error in instruction 3, in that (c) it directed the jury in determining the issue of contributory negligence to take into consideration plaintiffs’ “circumstances in life.” And (d) if that were proper, then there was no evidence tending to show what plaintiffs’ circumstances in life were; ergo, there was no testimony in support of the instruction. Of these seriatim.

1. Assuming for the nonce that the instruction itself assumed the curb line was the danger line, then, to say whether an assumption is erroneous, the state of the proof in the identical case-made is a prime prerequisite to correct judgment. Where the evidence is undisputed, is one way, and of such brand of cogency that but one just conclusion can be drawn from it by any rational mind, or where the thing proves itself, the court may deal with it as a matter of law. Why, indeed, frame an issue for a jury in a practical tribunal, administering the laws of a practical people in a practical way, requiring that jury to find and solemnly determine a fact not a fit subject of controversy, and which can be determined only one way by all just men? If Esther had been an adult in the possession of mature judgment, or had passed the years of infancy, and was arriving at years of judgment and sense, then, unless the motorman saw she was bent on crossing the track and was oblivious to her danger, it would have been error to have assumed that she was in danger from the very time she left the curb until she reached the track. Where the danger line would lie (with reference to the running of street cars) for an adult, or for one possessed of some years and some discretion, in crossing the street, might very well be a matter of difference between good average men, and therefore, a question for the jury. Now, the sidewalk of a street is for foot travelers—children and grown. Between the curbs is for traffic; there, horses, wagons, vans, carts, and cars pass to and fro, and the wheels of commerce go clattering and roaring round and round in a confusion as bewildering as the wheels in Ezekiel’s vision. Our very instincts teach us that

when a four year old child, unattended, leaves the curb of a sidewalk—that is, leaves a place of comparative safety—and heads across a street devoted to traffic in a great city, with a car track 12 feet away on which a car is approaching (as here), the little one as surely and instantaneously plunges into danger, as that the square of the hypotenuse of a right angled triangle equals the sum of the squares of the other two sides, i. e., it is axiomatic. Danger to the child and duty on the motorman's part began the instant such a child left the sidewalk, bound headlong for the track. *Cytron v. Transit Co.* (not yet officially reported) 104 S. W., loc. cit. 117. See, also, *Livingston v. Railroad*, 170 Mo. 452, 71 S. W. 138. The finding of twelve men in the box on that question under this record would not instruct any court, or subserve any purpose of the law. And this is so because the thing speaks for itself, and in speaking it says, as well before as after a jury's finding, that as for Esther the curb was the danger line. It would be no more sensible to put that question to the jury than it would be to put to them to find where the danger line in firing a barn was chalked out, when a burning brand was cast into a mow of tow, or where such line lies when an infant is in a den of asps or rattlesnakes. If, then, the learned counsel for defendant are right in their contention that plaintiffs' instruction No. 1 assumes Esther Cornovski entered the danger zone when she left the curb and ran towards defendant's track, there was no error. However, that contention is not right. The instruction assailed did not assume the curb was the danger line, and the entire street the danger zone. It says nothing about "curb" but refers the jury generally to the child's "crossing said street and in a position of danger of being struck by said car." That is, wherever the danger line lay, the jury should locate it and consider it. Hence, it is not open to the criticism leveled at it. The point is ruled against defendant.

2. It is urged that vice lurks in instruction 1 because it did not directly put it to the jury to find that the negligence of defendant was the "proximate cause" of the injury to plaintiffs' child. It is true the instruction does not use the phrase "proximate cause." That phrase is one of a large and learned terminology, and it involves a refinement in mental processes and reasoning not of the essence of a good instruction, provided the thing to be got at is put to the jury in another way and within easy, everyday comprehension. The phrase "proximate cause" is not an everyday or hearthstone phrase. The average men who compose the body of the county, from which jurors are drawn, daily and shrewdly reason well from cause to effect, and doubtless not one in a thousand of them in so reasoning use that formidable and bookish phrase. They use other expressions from their mother tongue meaning the same thing.

It is elementary that there must be a causal connection between the negligence and the injury in order for the negligence to be actionable. *Harper v. Terminal Co.*, 187 Mo. 575, 86 S. W. 99. Here the jury were told that if they found from the evidence the motorman saw, or by keeping a vigilant watch would have seen, Esther crossing said street and in a position of danger of being struck by said car, and by stopping said car within the shortest time and space practicable, under the circumstances, with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of said car and of the persons on said car, could have avoided running over and killing said child, and neglected to do so, then plaintiffs are entitled to recover, unless they found plaintiffs were guilty of negligence in the care and custody of the child directly contributing to cause its death.

Now, the case at bar is one in which it is not contended the deceased child was of age to be guilty of contributory negligence. *Holmes v. Railroad*, 190 Mo., loc. cit. 108, 88 S. W. 623. That, then, is out of the case.

Nor is it one in which there is an iota of testimony that any other cause produced death except the act of the motorman in running his car over the child. With so much assumed, the issue to be tried is separable into three elements: First, the contributory negligence of the parents. That was put to the jury fairly by instruction 1, and by other instructions for defendant. Second, the negligence of defendant. There was ample evidence to show that, and the question was submitted properly. Third, the causal connection between the negligence and the death. As to this element, the jury were told, in substance, that if defendant's motorman could have avoided killing the child by the use of ordinary care, after it was seen or might have been seen in peril, and neglected to exercise such care, then defendant is liable. It might have been better to have inserted in the instruction some such clause as this: "And if the jury further find that such failure, if any, to exercise ordinary care directly caused the injury and death of Esther," or "was the proximate cause of her injury and death, then the jury should find," etc. But though no such phrase, totidem verbis, is used, yet in fair logical intentment the instruction must be held sufficient to put to the jury the causal connection between the negligence of defendant and the death of the child—i. e., that one was caused by the other. Thus, if A. kill B., and it is once determined that he could have avoided killing B. by the exercise of due care, it would seem that, in the domain of reason and in ultimate analysis, the connection is made between the killing and the failure to exercise due care; that the two things bore the relation of cause and effect. An instruction in similar form has been sustained by the reasoning of this court. For example: *Rapp v. Transit*

Co., 190 Mo., loc. cit. 154 et seq., 88 S. W. 865; *Hilz v. Railroad*, 101 Mo., loc. cit. 40 et seq., 13 S. W. 946. In the latter case (page 54 of 101 Mo., page 951 of 13 S. W.) it was held that where the failure to discover decedent was the result of the omission of the measure of duty required by the law, and where a due observance of the duty would have avoided the injury by the use of reasonable care, then such omission and want of reasonable care are under the law held the proximate cause of the injury.

But we need not allow the foregoing reasons to be alone determinative of the point. In this case the doctrine of *alder* may be invoked, for if it be admitted there be doubt as to whether plaintiffs' instruction squarely put the causal connection to the jury, or if that causal connection was put feebly or obscurely or only impliedly to them, yet defendant's own instructions turned on full light, cleared up all obscurity, and removed all doubt, if any existed on that question. By defendant's instruction number 4 the jury were told that, before they found for plaintiffs, they must find that the injuries and death of Esther were actually caused by defendant in the manner submitted to them by the instructions; and that if her death was not actually caused by such specified negligence then plaintiffs have no case, even if Esther was killed by being run over by defendant's car. By instruction 5 they were told that they could not infer negligence from the fact that the child was injured by the car. By instruction 6 they were told that though the burden was upon defendant to establish contributory negligence of plaintiffs yet that did not relieve plaintiffs of the burden of proving that the injury and death of Esther were solely caused by the negligence of defendant. The same point was under exposition in *Deschner v. Railroad*, 200 Mo., loc. cit. 332 et seq., 98 S. W. 737, and was ruled as herein indicated. The instruction must be read as one body of law, and the assignment of error is, therefore, disallowed.

3. It is next argued that plaintiffs' instruction number 3 was erroneous in form, and unsupported by the testimony. That instruction follows approved precedents. *Czezewzka v. Railroad*, 121 Mo. 201, 25 S. W. 911; *Levin v. Railroad*, 140 Mo. 624, 41 S. W. 968. It is of the essence of good sense that if an appellate court has got on the wrong track it should get on the right track—the sooner, the better. Nevertheless, it is no light thing for a court to have persuaded litigants into the belief that a certain instruction announces a correct rule of law, and is applicable to a given state of facts, then, when that belief has crystallized into action in a concrete case, to face the other way, and destroy a judgment the product of its own teaching.

Much might be said and well said against the use of the phrase "circumstances in life" in measuring the duty of a parent to a

child where the question hinges on the parents' contributory negligence; and appellant's counsel have not been amiss or remiss in saying it. At first blush, the use of that phrase seems to involve a question of poverty or riches, of high or low social status, and to invite (or squint at the invitation of) proof of the fact in one case, that the parents are poor and needy, downcast and humble, and in another case that they are opulent and exalted, loling in the lap of wealth and seated in a high place. Such a field of exploration in a jury trial in a negligence case is full of pitfalls and snares, insidiously appeals to class prejudice, and runs counter to the broad proposition that there is but one rule of law for the high and the low, for the rich and the poor. Doubtless the courts would shut the door on such proofs, if offered. Nevertheless, it may be said that those who of necessity are preoccupied with the toil of their own hands to earn their daily bread might not in a given case be guilty of negligence in allowing a little child to escape to the street of a city, when other persons because of other circumstances and conditions might be found by a jury to be remiss in a given case—due care being a care that adjusts itself automatically to the circumstances of the case. *Dean v. Railroad*, 199 Mo., loc. cit. 408, 97 S. W. 910.

Contributory negligence is but negligence with an expletive. Negligence is but the absence of due care. Due care is ordinary care. Ordinary care is defined as the care that would be exercised by a reasonably prudent person under the same or similar circumstances. That definition is a landmark of the law. "The old way is the safe way," says Chancellor Kent in *Manning v. The Executors of Manning*, 1 Johns. Ch. (N. Y.) \*530. "The beaten way is the safest," says Lord Coke (10 Coke, 142). That definition may well be taken as both the old way and the beaten way. To try to improve on it is but to add "wasteful and ridiculous excess"; is but "to gild refined gold, to paint the lily." King John, Act. IV, § 1. If a close case were here, we would be disinclined to follow the *Czezewzka* and the *Levin* cases. If such case were here involving a consideration of the phrase "circumstances in life," we would deem it our duty to consider the question of its use open and serious; but in the case at bar its use must be held harmless error, if error at all. Here, there was no proof of plaintiffs' social or financial condition in life, as such. The evidence pictured to the jury the business and surroundings of plaintiffs and their home. In the evidence, the jury were told the facts upon which to base their verdict on the issue of contributory negligence. The employment and duties of the father and mother at the immediate time the child escaped to the street were before the jury. The evidence went no further than this, and we think was entitled to go as far



as it did; and it would be audacious to say that the phrase "circumstances in life" produced any effect on their verdict.

There being no error affecting the merits, the judgment is affirmed.

VALLIANT, P. J., and WOODSON, J., concur in the result and in all of the opinion except the criticism of the Levin Case and the Czezewska Case. GRAVES, J., concurs in the result and in all of the opinion except paragraph 3. He holds that the instruction discussed in that paragraph is bad, but, under the facts of the case, harmless.

#### STATE v. KENNEDY.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

##### 1. MARRIAGE — ESSENTIALS — COMMON-LAW MARRIAGE.

Evidence that defendant and a woman lived together in open notorious cohabitation, with nothing to indicate that a marriage contract by words *de presenti* had ever been entered into between them, was insufficient to show a valid common-law marriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 16.]

##### 2. HOMICIDE—MANSLAUGHTER — PROVOCATION — INSULTING REMARKS.

Mere words of reproach and insulting remarks, without any personal violence by deceased towards defendant, were not sufficient provocation to reduce the killing of deceased from murder to manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 69.]

##### 3. WITNESSES—IMPEACHMENT — CROSS-EXAMINATION—RECORD OF CONVICTION.

Where defendant's paramour was a witness in his behalf, the state was authorized by Rev. St. 1890, § 4680 [Ann. St. 1906, p. 2549], to impeach her on cross-examination by her own testimony, and by the record of her conviction of having lived with defendant in open and notorious adultery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1140-1143.]

##### 4. CRIMINAL LAW—APPEAL — OBJECTIONS IN LOWER COURT—EVIDENCE.

An objection to the introduction of the record of the conviction of a witness must be made at the time it is offered, and cannot be taken for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2639-2642.]

##### 5. HOMICIDE—EVIDENCE—THREATS.

Where it was undisputed that defendant shot and killed deceased when deceased was going away from him, and was making no attempt to carry any previous threats into execution, evidence of such threats was inadmissible to explain defendant's possession of a pistol at the time of the homicide, under the rule that threats alone, unaccompanied by an overt act or outward demonstration, will not justify hostile acts toward those making the threats, but that the danger must be immediate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 399-413.]

##### 6. CRIMINAL LAW—EVIDENCE—RES GESTÆ — STATEMENTS OF THIRD PERSON.

Where defendant killed deceased as he was leaving defendant's tent, where deceased had gone after eating his dinner, evidence that a man came to deceased and told him that de-

fendant wanted him to come up after he had finished his dinner, and that, after he had done so, deceased went to defendant's tent, though incompetent to prove that defendant in fact sent for deceased, was admissible as *res gestæ*, to show that deceased received the information, and as explaining why he went to defendant's tent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 812, 815.]

##### 7. HOMICIDE — APPEAL — PREJUDICE — EVIDENCE.

Where defendant shot deceased as he was leaving defendant's tent, and there was no evidence that deceased went to the tent to have a difficulty, defendant was not prejudiced by evidence that a man came to deceased, and told him that defendant wanted him to come up to defendant's tent after deceased had eaten his dinner, and that deceased went.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 700-718.]

##### 8. SAME—PROTECTION OF FEMALE.

Where defendant was living in adultery with a woman at the time deceased was alleged to have committed an assault on her, defendant's relation to her was not such as to authorize him to kill deceased because of such assault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 72, 73, 177-181.]

Appeal from Criminal Court, Greene County; Jno. T. Moore, Special Judge.

David Kennedy was convicted of murder in the second degree, and he appeals. Affirmed.

Gorman, Sherwood & Delaney, for appellant. The Attorney General and John Kennish, for the State.

GANTT, J. At the July term, 1906, of the criminal court of Greene county, the prosecuting attorney of said county filed an information in open court charging the defendant, David Kennedy, with murder in the first degree of Walter Williams at said county August 2, 1906. The defendant being without means to employ counsel to conduct his defense, such counsel was assigned him by the court. Several dilatory pleas were filed by the defendant and overruled by the court, of which ruling but one, namely, the action of the court in overruling motion to quash the panel of the petit jury, was preserved in the motion for a new trial, and therefore is now before this court for review. A change of venue from the regular judge on the ground of the prejudice of the judge was granted, and Judge Moore, of the Thirty-First judicial circuit, was requested to, and did, preside at the trial of the cause. The defendant was duly arraigned, tried, and convicted of murder in the second degree, and his punishment assessed at 50 years' imprisonment in the state penitentiary. A motion for new trial was filed in due time, and, being overruled and exceptions saved, sentence was pronounced in accordance with the verdict. After judgment had been rendered and sentence passed, a motion in arrest of judgment was filed, overruled by the court, and exceptions saved to such ruling. The defendant has appealed to this court.

On the part of the state the evidence tended to prove that the defendant, David Ken-

nedy, commonly known as "Yank," was an unmarried negro laborer, and at the time of the homicide was working at Root Bros.' camp, about four miles southwest of the city of Springfield, in Greene county. Root Bros.' camp was a railroad construction camp, at which the laborers lived in tents. The defendant had worked at said camp a greater part of the year, and for some time before the homicide had occupied a tent with an unmarried negro woman named Eva Parks. Walter Williams, the deceased, lived at the Root Bros.' camp, and had been employed there as a teamster, and had known the defendant for several months before the date of the homicide. In the forenoon of the day of the homicide, the defendant did not work, and was heard in his tent engaged in an altercation with the Parks woman. The witness Ray Williams went to the tent, and saw the defendant oiling a revolver. The defendant stated to the witness that he did not feel well. While the deceased was at his dinner, he was informed that the defendant desired to see him at his (defendant's) tent, and, after eating his dinner, the deceased went to defendant's tent, and sat down on the outside. The testimony for the state does not show that any conversation occurred between Williams and the defendant, but that they were seen together after Williams went to the defendant's tent. Just after the gong had sounded summoning the men to work after dinner the deceased got up and started in the direction of the corral to get his team to go to work. When he had walked a distance of about 75 feet from the tent, the defendant appeared outside of the tent and fired a pistol shot at the deceased. The latter stopped and looked back over his shoulder, then walked on towards the corral. A second shot was then fired by the defendant at the deceased, at which the deceased flinched, and started in a run through the corral and to the blacksmith shop beyond. Upon examination it was found that the deceased had received a bullet wound, the bullet entering at the back part of the right hip, passing through the large intestine and lodging in the front part of the left groin. The wound was fatal, and from its effects the deceased died about 8 o'clock on the evening of the next day.

On the part of the defendant the testimony tended to prove that, when he returned from his work on the evening preceding the homicide, he found the Parks woman in a distressed condition of mind, and was informed by her that she had been assaulted by Walter Williams, the deceased; that, when the latter came to defendant's tent after dinner, the next day, he asked him concerning the treatment of the Parks woman, and said to him, "Strong, how came you to make Eva have you?" and deceased said, "Who says so?" and the defendant said, "She did," and thereupon the deceased got up and the defendant said to him, "You ought to be ashamed," and the deceased answered he was not ashamed, and

left and went up to another tent, and when the gong rang he came by the tent and defendant again said to him, "You ought to be ashamed to look at that girl," and deceased replied, "I ain't, and, if you don't like it you black s— of a b—, come out here, and we will fight," and then the deceased walked about as far as the stove, and defendant shot. They were both walking south when the deceased applied the epithets to him. Defendant further testified: "When I first shot, he put his hand in his pocket, and said, 'Never mind, I will get you.'" Defendant testified further: "I was never married. I lived with Eva Parks since March 1st, have never lived with a woman here. I did down home. I looked on Eva as my wife. I supported her and her child. She did my work."

Eva Parks testified: That she had one child. That she had lived with Dave Kennedy out at the Root Bros.' camp since March. "I have never been married. Dave cared for me and my little boy, and I was known in camp as Mrs. Yank. I knew the deceased. He came to our tent the day before he was shot. I told Dave that Strong [meaning deceased] had imposed upon me." On cross-examination she testified that she had pleaded guilty before C. A. Hubbard, a justice of the peace, of having lived in open and notorious adultery with Dave Kennedy. Two other witnesses testified to the fact that Kennedy, the defendant, and Eva Parks lived together in the defendant's tent at Root Bros.' camp. Other facts may be noted in the course of the opinion.

1. It is assigned as error that the criminal court erred in excluding evidence tending to show the existence of a common-law marriage between the defendant and Eva Parks; but an examination of the record discloses that the court did not exclude any evidence offered for the purpose of proving a marriage between the defendant and Eva Parks.

2. It is insisted that the testimony tended to show that the woman Eva Parks was the common-law wife of the defendant, Dave Kennedy, and that the killing of the deceased was of no higher grade of crime than manslaughter in the fourth degree. We have in the statement set forth the substance of the testimony of both the defendant and the woman Eva Parks, and in our opinion it utterly fails to establish a common-law marriage between them. In the recent case of *Topper v. Perry*, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777, we had occasion to examine the law upon this point, and it will be unnecessary to repeat what was there said, further than to say that, in order to establish a valid common-law marriage, there must be not only reputation and cohabitation as a sequence thereof, but a present contract through words by which the man agrees to take the woman as his wife, and the woman agrees to take the man as her husband. The record in this case entirely fails to establish any such agreement, but in our opinion simply established

a case of open, notorious, and lascivious conduct on the part of these two parties. With the question of a marriage relation between the defendant and Eva Parks, out of the case, the contention that the killing of the deceased by the defendant was only manslaughter must rest upon the provocation, if any, which the deceased gave the defendant for killing him. As there was no evidence even by the defendant himself tending to prove personal violence by the deceased toward him, whatever provocation there was consisted in the contemptuous and insulting remark and epithet which the defendant testified the deceased applied to him, and it is the settled law of this state that words of reproach how grievous soever are not sufficient provocation to free the party killing from the guilt of murder. *State v. Gordon*, 191 Mo., loc. cit. 125, 89 S. W. 1025, 109 Am. St. Rep. 790; *State v. Gartrell*, 171 Mo. 516, 519, 71 S. W. 1045; *State v. Elliott*, 98 Mo. 150, 11 S. W. 566; *State v. Branstetter*, 65 Mo. 149; *State v. Wieners*, 66 Mo. 13; 1 East, Pl. of the Or. 233. Accordingly it must be ruled there was no basis in the testimony for an instruction on manslaughter in the fourth degree.

3. Error is assigned on the admission in evidence of the testimony of Eva Parks that she had pleaded guilty, and been convicted, on a charge of adultery with the defendant, and also the record of the justice of the peace before whom the said charge was preferred, establishing that she had been so convicted. There was no error in the admission of this testimony, for the reason that Eva Parks was a witness for the defense, and under the statute (section 4680, Rev. St. 1899 [Ann. St. 1906, p. 2549]) it was competent for the state to impeach her by her own testimony on cross-examination, and by the record showing that she had been adjudged guilty of that criminal offense. *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027. Moreover, no objection was made to the introduction of the record of her guilt in evidence at the time it was offered, and it is too late to complain of the ruling in that respect in this court.

4. It is next urged that error was committed in the exclusion of the evidence of Eva Parks to prove a threat by the deceased against the defendant in order to explain the possession of the pistol by the defendant. The evidence on behalf of the state, as well as that on behalf of the defendant himself, established that at the time the defendant shot and killed the deceased he was not only making no attempt whatever to carry out any such threat, but that the conduct of the deceased in no manner threatened any violence toward the defendant, and out of the mouth of the defendant himself it appeared that the deceased was walking away from the defendant, with his back towards him, and that the defendant shot at him twice in this position. In *State v. Smith*, 164 Mo.,

loc. cit. 587, 65 S. W. 274, this court said: "So with respect to the communicated threats, defendant being the aggressor, in the absence of evidence that deceased was attempting to carry them into execution, such evidence was inadmissible." Thus, in *State v. Clum*, 90 Mo. 482, 3 S. W. 200, it was said: "Threats alone, unaccompanied by an overt act or outward demonstration, will not justify any one in hostile acts towards those making the threats. The danger must be immediate. Bishop Crim. Law (5th Ed.) § 843; 1 Bishop Crim. Proc. § 619. And, if a person thus threatened, with no excuse in the way of self-defense, because of outward demonstration being made against him, kills the threatener, the slayer will not be allowed to lay before the jury before whom he is tried for the homicide the known threats on which he bases his unlawful action." *State v. Clum*, 90 Mo. 482, 3 S. W. 200; *State v. Reed*, 137 Mo. 125, 38 S. W. 574; *State v. Privitt*, 175 Mo. 207, 75 S. W. 457.

5. Again, it is said the court erred in allowing statements of a third party made prior to the homicide to be detailed in evidence. While the learned counsel for the defendant does not specify the testimony to which this assignment is directed, we take it from the reading of the record that it refers to the testimony of Ray Williams. This witness, when on the stand, was asked to state why the deceased went to the defendant's tent if he knew, and he stated that a man came to the deceased and told him that the defendant wanted him to come up after he had eaten his dinner, and that, after the deceased had finished his dinner, he went to the defendant's tent. This was objected to as hearsay and incompetent. Of course, it was not competent to prove that the defendant in fact did send for the deceased to come to his tent, but it was competent to show the fact that the deceased received the information whether it was true or not, and as explanatory of why he went to the defendant's tent, and to that extent was properly a part of the *res gestæ*. 2 Bishop's New Crim. Proc. § 625. But, in any event, we think this was clearly not a reversible error, for the reason that there is an entire absence of any evidence tending to show that the deceased went to the defendant's tent for the purpose of having any difficulty. The defendant's own testimony completely negatives any such criminal or unlawful purpose on the part of the deceased, and his own evidence shows that the deceased was going away from him, with his back to the defendant, and unconscious of the intention of the defendant to shoot him when the firing commenced.

We have considered the other assignments of error, especially the refusal of the instructions asked for by the defendant, and in our opinion they constitute no ground for reversing the judgment. Those based upon the supposed right of the defendant to kill the deceased on account of an alleged assault upon

Eva Parks were clearly not the law. She bore no such relation to the defendant as would authorize him to wreak his vengeance upon the deceased for some alleged wrong upon her. The instructions given on behalf of the state by the court fully covered the case, and it was not error to refuse others offered by the defendant.

The judgment of the criminal court is affirmed.

FOX, P. J., and BURGESS, J., concur.

### STATE v. KUEHNER.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### COURTS—APPELLATE JURISDICTION—GROUNDS OF JURISDICTION — CONSTITUTIONAL QUESTION.

To give the Supreme Court jurisdiction on appeal, on the ground that a constitutional question is involved, the specific provision of the Constitution infringed must be pointed out in the trial court; a mere general allegation that a statute is unconstitutional and void, in a demurrer to an information, or in a demurrer to the evidence, or in a motion for a new trial and in arrest, is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 658.]

Appeal from St. Louis Court of Criminal Correction; Wilson A. Taylor, Judge.

Louis Kuehner was convicted of willfully and unlawfully laboring on Sunday, and he appeals. Case transferred to the St. Louis Court of Appeals.

N. P. L. Rosch, for appellant. Rush O. Lake, Atty. Gen., and Clarence T. Case, for the State.

BURGESS, J. On the 22d day of July, 1907, the assistant prosecuting attorney of the St. Louis court of criminal correction filed an information in said court charging the defendant with willfully and unlawfully laboring on Sunday, contrary to the form of the statute in such case made and provided. The defendant demurred to the information, alleging as grounds therefor: (1) That the facts alleged in the information do not constitute any offense under the laws of this state; (2) that section 2240, Rev. St. 1899 [Ann. St. 1906, p. 1240], upon which the information was based, is unconstitutional. The demurrer was overruled, the case went to trial, and the defendant was convicted, his punishment being assessed at \$25 and costs. After filing ineffectual motions for a new trial and in arrest of judgment, defendant appealed to this court.

It is evident that this court has no jurisdiction of this appeal, unless it be upon the ground that a constitutional question is involved, and this question could only have been raised by the defendant in the trial court by in some way pointing out the specific provision of the Constitution infringed upon. A general allegation, as in the case at

bar, that a statute is unconstitutional and void, is not sufficient. *Ash v. Independence*, 169 Mo. 77, 63 S. W. 888; *State, to Use of, v. O'Neill Lumber Co.*, 170 Mo. 7, 70 S. W. 121. Nor is a demurrer to the evidence, on the ground that the statute on which the proceeding is based is unconstitutional and void, sufficient; nor yet is it sufficient that the same claim is made in the motion for new trial and in arrest. *St. Joseph v. Metropolitan Life Ins. Co.*, 183 Mo. 1, 81 S. W. 1080.

This court being without jurisdiction, the record is ordered transferred to the St. Louis Court of Appeals. All concur.

### STATE v. BALLANCE.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. HOMICIDE—INFORMATION—SUFFICIENCY.

An information for murder, which charges "that defendant made an assault on decedent, and did willfully" etc., "shoot off a revolving pistol loaded with gunpowder and leaden balls, which defendant had in his hand, at and against decedent, and with the pistol and balls did feloniously, etc., strike, penetrate, and wound decedent in a vital part of his body, giving to him with the pistol aforesaid and the gunpowder and leaden balls aforesaid a mortal wound," etc., sufficiently alleges that the mortal wound was inflicted by and as a result of the assault, though not employing the words "thereby giving," but others of similar import.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 217.]

#### 2. INFORMATION—REQUISITES—AUTHORITY TO FILE.

An allegation in the charging part of an information that the prosecuting attorney "upon his own knowledge, information, and belief, and under his oath of office as such prosecuting attorney, now here informs the court," etc., is sufficient without an allegation of his title to the office and his compliance with all the prerequisites to his right to perform its duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 157.]

#### 3. HOMICIDE — TRIAL — INSTRUCTIONS — INSTRUCTION ON MANSLAUGHTER IN MURDER CASE.

In a murder case, where the state's evidence tended to show accused guilty of first or second degree murder, and the testimony of accused, which tended to prove that he was acting in self-defense, showed no personal violence of decedent towards him, but only that decedent used insulting and opprobrious language towards him, a failure to charge on manslaughter was not error, especially where the court was not requested to do so, since mere words, however insulting, do not amount to such a provocation as will reduce a homicide from murder to manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 650-652.]

#### 4. SAME — MURDER — OPPROBRIOUS WORDS — KILLING IN HEAT OF PASSION.

Mere words or epithets, however opprobrious or insulting, cannot justify the killing of the person who uses them, but his killing by one while in a violent passion aroused by such language, though not deliberate, is murder in the second degree, if done willfully, premeditatedly, and of malice aforethought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 39, 40.]

## 5. SAME—TRIAL—INSTRUCTIONS.

In a murder case, where decedent was shot and killed in a field which he had rented from accused and in which the crop was still standing, a charge that threats alone will not justify an assault, but, if decedent had made threats against accused, and if at the time of the difficulty he indicated by act or speech his intent to then carry the threats into execution by killing accused, etc., then the threats could be considered with the other circumstances in determining decedent's purpose and the reasonableness of accused's apprehension of his safety at the time of the killing, but, notwithstanding decedent's threats, he had a right to be in the field to transact his affairs, and if while so doing he did not seek or bring on the difficulty, but if accused was the aggressor, then the threats did not constitute an excuse for the killing—is not objectionable as in effect telling the jury that decedent had a right to go into the field and assault accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

Appeal from Circuit Court, Maries County; Wm. H. Martin, Judge.

George W. Ballance was convicted of murder in the second degree, and appeals. Affirmed.

Watson & Holmes and Jos. J. Crites, for appellant. The Attorney General and N. T. Gentry, for the State.

GANTT, J. At the October term, 1905, of the circuit court of Maries county, the prosecuting attorney of said county filed the following information in said court: "State of Missouri, Plaintiff, v. George W. Ballance, Defendant. Leslie B. Hutchinson, prosecuting attorney within and for the county of Maries and state of Missouri, upon his own knowledge, information, and belief, and under his oath of office as such prosecuting attorney, now here informs the court that George W. Ballance, at the county of Maries and state of Missouri, on the 22d day of September, A. D. 1905, in and upon one Jasper Copeland then and there being feloniously, willfully, premeditatedly, deliberately on purpose and of his malice aforethought did make an assault, and with a dangerous and deadly weapon, to wit, a revolving pistol, loaded then and there with gunpowder and leaden balls, which he, the said George W. Ballance, in his hands then and there had and held at and against him, the said Jasper Copeland, then and there feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did shoot off and discharge and with the revolving pistol aforesaid, and the leaden balls aforesaid, then and there feloniously, willfully, premeditatedly, deliberately, on purpose and of his malice aforethought did shoot, strike, and penetrate and wound him, the said Jasper Copeland, in and about a vital part of the body of him, the said Jasper Copeland, giving to him, the said Jasper Copeland, at the said county of Maries and state of Missouri, on the 22d day of September, A. D. 1905, with the dangerous and deadly weapon, to wit, the revolving pistol aforesaid, and the gunpowder and the

leaden balls aforesaid in, and upon the left breast of him, the said Jasper Copeland, one mortal wound of the width of about one-half inch and the depth of about eight inches, of which said mortal wound he, the said Jasper Copeland, at the county of Maries and state of Missouri, on the 22d day of September, A. D. 1905, then and there of the mortal wound aforesaid, instantly died; and so Leslie B. Hutchinson, prosecuting attorney aforesaid, upon his oath as such prosecuting attorney, and his own knowledge, information, and belief aforesaid, does say that he, the said George W. Ballance, him, the said Jasper Copeland, in the manner and by the means aforesaid, feloniously, willfully, premeditatedly, deliberately on purpose, and of his malice aforethought at the said county of Maries and state of Missouri on the 22d day of September, A. D. 1905, did kill and murder, against the peace and dignity of the state. Leslie B. Hutchinson, Prosecuting Attorney. Leslie B. Hutchinson, being duly sworn, upon his oath, says that the matters and facts stated in the above and foregoing information are true according to his best knowledge, information and belief. Leslie B. Hutchinson. [Seal.] Subscribed and sworn to before me this 2d day of October, A. D. 1905. L. N. Hawkins, Circuit Clerk." The defendant was arrested and was duly arraigned on the same day, and the case was continued until the April term, 1906. At the April term, 1906, to wit, August 9, 1906, the defendant was put upon his trial and convicted of murder in the second degree, and his punishment assessed at 14 years in the state penitentiary. And, after unsuccessful motions for new trial and in arrest of judgment, the defendant was duly sentenced in accordance with the verdict of the jury, and from that sentence he appeals to this court.

The state's evidence tended to prove that the deceased married a daughter of a brother of the defendant, and that the defendant and the deceased were farmers. In the spring of 1905 the defendant rented a farm to the deceased, and the latter was to pay one-third of the crops as rent therefor. About a week prior to the day of the homicide the deceased made an arrangement with one Spencer to meet him on this rented place on the 22d of September, to trade corn for a horse; Spencer desiring to look at the crop of corn before trading. On the 22d of September the defendant and his son were in this field, cutting corn, when the deceased came into the field, and walked up near where they were at work. The deceased had been at work that day on another place and in an opposite direction from his house, and in returning to his house passed through this cornfield where the defendant was. The deceased had a corn knife with a gunny sack wrapped around it which he was carrying on the elbow of his left arm, and a bunch of grapes in his left hand. Two persons in passing near the said cornfield that afternoon heard three pistol

shots in the direction of the place where the body of the deceased was afterwards found. Later on in the afternoon Ed Ballance, who was a brother of the defendant and the father-in-law of the deceased, went over to where the deceased's body was lying, and found that the deceased had been shot twice, and was lying on his back. The gunny sack was still wrapped around the corn knife, and both were under the body of the deceased. The bunch of grapes was under his left hand. The ground being soft, there was no difficulty experienced by this witness and Gibson, Hodges, and Bede, who came over later, in seeing the tracks along the ground. These tracks led from the place where the deceased entered the field and up close to where the defendant and his son were at work. The deceased's tracks further led past where the defendant was at work, and into some corn that was still standing and up to the body of the deceased. Tracks made by the defendant, which were smaller tracks, were also found going from the direction of where he was at work in the corn row, and going in the direction that the deceased was walking. These tracks did not go all the way up to the deceased's body, but turned and came back to the corn row. Near where the defendant's tracks turned were found three empty shells and one loaded cartridge; all being the kind used in a .38-caliber pistol. When Ed Ballance saw the defendant later in the afternoon, he asked the defendant why he had killed the deceased, to which the defendant replied, "I had to." Ed Ballance then said, "If you had to, why did you follow him?" The defendant at first denied following him, but afterwards said he did run after him because he was scared. Dr. H. J. Von Gremp testified that he was acquainted with the deceased, and was called to hold a post mortem examination on the 24th day of September. The first wound was one on the left side, about two inches above the nipple, and six inches from the point of the shoulder. The ball passed downward an inch or more before passing into the cavity, passing between the third and fourth rib. The second wound entered on the right side near the center of the hip bone; the ball passing forward. In the opinion of this physician the wound that entered on the left side near the heart was fatal; and the deceased probably died within a few minutes. The evidence further shows that the deceased was a little over six feet tall, while the defendant was not more than five feet and nine inches in height. James Cisco, who was a member of the coroner's jury, assisted in washing the body of the deceased on the evening of the shooting, and discovered grape juice and grape hulls in the mouth of the deceased. He also discovered that the teeth and tongue of the deceased looked like he had been eating grapes. Constable McDaniel testified that he arrested the defendant the day after the shooting, and that the defendant had a .38-

caliber pistol in his pocket at the time, which pistol was loaded. About a week before the shooting the defendant tried to borrow a pistol from John Houtz. He visited Houtz's place, stayed all night, and talked to Houtz about getting his pistol, but Houtz refused to let him have it. The next day Houtz's pistol disappeared, and this was the pistol with which the shooting was done.

The defendant's evidence tended to prove that he and his son were working in the corn-field in question on the afternoon of the 22d day of September, when the deceased came up behind him and said, "What are you God damn sons of bitches doing here?" When the defendant replied that they were cutting corn, the deceased said, "If you God damn sons of bitches don't get out of here, I will kill you both." The defendant's evidence further tended to prove that the deceased drew a corn knife on him, and that the defendant backed off some 20 steps and into some standing corn, when he shot deceased in the breast. The deceased turned, and, as he turned, the defendant fired the second shot. The defendant denied shooting more than twice, but did not explain how he happened to empty from his pistol the three shells and one loaded cartridge near the place where the deceased's body was found. The defendant further proved that the deceased made some threats against the defendant prior to the day of the difficulty. In rebuttal the state proved that there were no tracks made by the defendant back into the growing corn. At the close of the evidence, the court of its own motion instructed the jury on murder in the first and second degree, self-defense, threats both communicated and uncommunicated, and the credibility of witnesses. And, at the request of the defendant, the court gave two instructions. The defendant saved his exceptions to all the instructions given on behalf of the state.

1. The information in this case is assailed as insufficient, because it is asserted that it does not allege that the mortal wound was inflicted by or was the result of the assault, and because the words "thereby giving" are omitted from the information and their legal equivalent nowhere appears therein, and we are cited by the learned counsel for the defendant to the cases of *State v. Brown*, 168 Mo. 449, 68 S. W. 568, and *State v. Birks*, 199 Mo. 271, 97 S. W. 578. We think this criticism of the information is not well founded. It charges, in substance, that the defendant on the 22d of September, 1905, at the county of Maries and state of Missouri, in and upon one Jasper Copeland, then and there, being feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did make an assault, and a certain revolving pistol, then and there, loaded with gunpowder and leaden balls, which he, the said defendant, in his hand then and there had and held at and against him, the said Jasper Copeland, then and there feloniously,

willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did shoot off and discharge and with the revolving pistol aforesaid and the leaden balls aforesaid, then and there feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did shoot, strike, and penetrate and wound him, the said Jasper Copeland, in and about a vital part of the body of him, the said Jasper Copeland, giving to him, the said Jasper Copeland, at the said county of Maries and state of Missouri, on the 22d day of September, 1905, with the dangerous and deadly weapon, to wit, the revolving pistol aforesaid, and the gunpowder and the leaden balls aforesaid, in and upon the left breast of him, the said Jasper Copeland, one mortal wound of the width of one-half inch and the depth of eight inches, of which said mortal wound he, the said Jasper Copeland, at the county of Maries and state of Missouri, instantly died. This information is distinguishable from the one condemned in *State v. Green*, 111 Mo. 585, 20 S. W. 804, and *State v. Williams*, 184 Mo. 261, 83 S. W. 756, in that this information clearly charges that the defendant with the leaden balls did strike, penetrate, and wound the said Jasper Copeland in a vital part of his body. It is also distinguishable from the indictment in *State v. Brown*, 168 Mo. 452, 68 S. W. 568, in that the information in that case wholly omitted the allegation of giving the deceased a mortal wound, whereas this information, as already seen, after alleging that the defendant did strike, penetrate, and wound the deceased in a vital part of his body, it proceeds to charge that the defendant did give to him, the said Jasper Copeland, at the county of Maries and state of Missouri, on the 22d day of September, 1905, with the dangerous and deadly weapon, to wit, the revolving pistol, aforesaid, and the gunpowder and leaden balls aforesaid, one mortal wound, etc.; thus using words of similar import to the words, "thereby giving," and for this reason this information is also easily distinguished from the case of *State v. Birka*, 199 Mo. 271, 97 S. W. 578; *State v. Arnewine*, 126 Mo. 587, 29 S. W. 602; *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588; *State v. Scott*, 199 Mo. 150, 97 S. W. 1134. It is next insisted that this information is fatally defective because it does not state in the charging part that Lealie B. Hutchinson was at any time prior thereto duly sworn and took upon himself an oath of office as prosecuting attorney of Maries county. By reference to the information it will be seen that the prosecuting attorney alleges "that upon his own knowledge, information, and belief, and under his oath of office as such prosecuting attorney, now here informs the court," etc. This was sufficient. It has never been required that the prosecuting attorney or the Attorney General in presenting an information shall allege his title to his office and his compliance

with all the prerequisites to his right to perform its duties. We think there is no merit in this objection to the information, and a similar objection made to the conclusion of the information for the same reason must be held unavailing.

2. Error is predicated upon the failure of the circuit court to give an instruction upon manslaughter in the fourth degree. This instruction could only have been based upon the testimony of the defendant and his son, and an inspection of that testimony very clearly indicates that there was no lawful or reasonable provocation—that is to say, no personal violence whatever by the deceased upon the defendant—and it is a settled law of this state that mere words, however opprobrious and insulting, do not of themselves constitute lawful or reasonable provocation so as to reduce a homicide from murder to manslaughter. This subject has been so recently reviewed in *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045, that further discussion is deemed unnecessary. The evidence upon the part of the state tended to show that defendant was guilty of murder in the first or second degree, and the testimony on the part of the defendant tended to prove that he was acting entirely in self-defense. There was no error in failing to instruct upon manslaughter, even if the court had been requested so to do, or if this record showed any exception to the failure of the court in that regard, which it does not.

3. Instruction No. 6, given by the court of its own motion, is alleged as error. That instruction advised the jury that if the defendant shot and killed Copeland while he, the defendant, was in a violent passion, suddenly aroused by opprobrious epithets or abusive language, then such killing was not deliberate, but, although such killing was not deliberate, yet, if it was done willfully, premeditatedly, and of malice aforethought as those terms had been already explained in the other instructions, the killing would be murder in the second degree. This instruction is a correct statement of the law of this state on this subject. *State v. Gartrell*, 171 Mo., loc. cit. 515-519, 71 S. W. 1045.

4. Instruction 11, given by the court, is also assailed. To understand this instruction, it must be borne in mind that the deceased was shot and killed by the defendant in a field which the deceased had rented from the defendant that year, and in which his corn crop was still standing. The court in this eleventh instruction told the jury that "threats alone will not justify an assault, but if they believe from the evidence that the deceased had before the killing made threats against the defendant, and that at the time of the difficulty he by any act or said anything which indicated a purpose on his part to then carry said threats into execution by killing the defendant or doing him some great bodily harm, then they would take such threats into consideration, together with all

the other circumstances in evidence, in determining the purpose of the deceased and the reasonableness of the defendant's apprehension, if he had any, of his safety at the time of the killing, but notwithstanding such threats, if any, the deceased had the right to be in the cornfield for the transaction and conduct of his affairs, and if, while so conducting himself, he did not seek or bring on the difficulty which resulted in his death, but that the defendant was the aggressor, then such threats did not constitute an excuse or justification of the defendant for the killing of Copeland." This instruction is in no way obnoxious to the criticism of defendant's counsel that it, in effect, told the jury that the deceased had a right to go into the field and assault the defendant. The language, "that he had a right to be in the cornfield for the transaction or conduct of his affairs," cannot reasonably be distorted into the meaning ascribed to them by the learned counsel for the defendant. The instruction was entirely proper in the circumstances of the case, and in no way unfavorable to the defendant.

5. Instruction No. 13 is challenged. In these words the court instructs the jury "that no words or epithets, however opprobrious or insulting, can justify the killing of the party who uses them." It is insisted that the word "alone" should have been added after the word "insulting." This instruction correctly declared the law of this state. Insulting or opprobrious epithets may arouse the passion to such an extent that if the person to whom they are applied, acting under the heat of passion engendered thereby, kills his adversary, such provocation will reduce the killing to murder in the second degree, but they do not amount to a justification of the killing of the party who uses them. *State v. Gartrell*, 171 Mo., loc. cit. 516, 517, 71 S. W. 1045; *State v. Gordon*, 191 Mo., loc. cit. 125, 89 S. W. 1025, 109 Am. St. Rep. 790.

We have carefully examined all the assignments of error in connection with the record in this case, and are of the opinion that the defendant had a fair and impartial trial, and that there is no reversible error in the record; and the judgment is affirmed.

FOX, P. J., and BURGESS, J., concur.

#### STATE v. BETZ.

(Supreme Court of Missouri, Division No. 2  
Dec. 10, 1907.)

##### 1. SALES—CONSTRUCTION OF CONTRACT—CONDITIONS.

A delivery of an article at a fixed price, to be paid for or returned, constitutes a sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 8, 418, 559.]

##### 2. SAME—DISTINCTION BETWEEN OPTION TO PURCHASE AND "SALE OR RETURN"—PASSING OF TITLE.

An option to purchase if one likes is essentially different from an option to return a purchase if one should not like it, and in the

one case title will not pass until the option is determined, while in the other the property passes at once, subject to the right to rescind and return.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 559.

For other definitions, see Words and Phrases, vol. 7, p. 6309.]

##### 3. SAME.

Accused requested a jewelry company to send him by express on memorandum one or two diamonds, about 1 kt., and in response the jewelry company sent four diamonds, and wrote him: "The goods described below are sent at your risk for examination and selection, but none are considered sold nor does the title pass until the regular bill of sale has been sent you," etc., describing four diamonds of about the size indicated in the request. *Held*, that the arrangement was only an option to purchase if accused liked them or one or more of them, and was not a sale or a "sale or return," and the title did not pass to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 8, 559.

For other definitions, see Words and Phrases, vol. 7, p. 6309.]

##### 4. EMBEZZLEMENT—EMBEZZLEMENT BY BAILEE—STATUTORY PROVISIONS—SUFFICIENCY OF EVIDENCE.

Where accused received diamonds for examination and selection under an option to purchase one or more of them, but he made no selection, and gave the company no notice of any selection, but fraudulently disposed of them and converted them to his own use, with the fraudulent intent to deprive the company of its property without its consent, he was guilty of embezzlement, under Rev. St. 1899, § 1914 [Ann. St. 1906, p. 1306], prohibiting embezzlement by a bailee.

##### 5. SALES—BAILMENT DISTINGUISHED—EFFECT OF SENDING AT BUYER'S RISK.

The fact that the goods were consigned to accused at his own risk was not conclusive that the transaction was a sale and not a bailment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 8.]

##### 6. EMBEZZLEMENT—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for embezzlement, where the evidence showed that accused was a bailee of four diamonds, which he converted to his own use, and that under no interpretation could he claim to be a buyer of more than two of them, an instruction that, if certain circumstances existed, defendant became the bailee of the prosecuting witness as to all but two of the diamonds, was harmless error.

Appeal from Circuit Court, Gentry County; William C. Ellison, Judge.

Jacob L. Betz was convicted of embezzlement as a bailee, and appeals. Affirmed.

J. W. Peery, for appellant. The Attorney General and N. T. Gentry, for the State.

GANTT, J. This is an appeal from a conviction of the defendant in the circuit court of Gentry county for embezzlement as a bailee, under section 1914, Rev. St. 1899 [Ann. St. 1906, p. 1306]. The indictment contained three counts; the first charging embezzlement under said section, being the one upon which defendant was convicted, and the second also attempting to charge embezzlement under both sections 1912 and 1914 [pages 1304, 1306]; and the third count charging grand larceny. The second count was, upon mo-



tion, quashed, and after the trial was entered into a nolle prosequi was entered as to both the second and third counts, and the cause was submitted to the jury on the first count alone.

The evidence showed that defendant was a retail jewelry merchant in the city of Stanberry, in said county, and had been dealing with and buying jewelry and diamonds from the C. B. Norton Jewelry Company, of Kansas City, for six or seven years. On January 4, 1905, defendant wrote to this company the following letter or order:

"J. L. Betz, Jeweler and Optician.

"Stanberry, Mo. 1-4-'05.

"C. B. Norton Jewelry Co., Kansas City, Mo.—Dear Sir: Please send me by exp. on memo. one or two nice diamonds, 1 to 1½ kt., and oblige, Yours very truly,

"J. L. Betz."

In response to said order the company sent to defendant by express the four diamonds described in the indictment, together with the following bill:

"C. B. Norton, Pres. and Treas. H. N. Norton, Vice Pres. W. M. Lewis, Sec.

"Established 1873.

"Bills not paid at maturity subject to only by special request sight draft. and at risk of party Particular attention ordering. paid to filling orders.

"Consigned on memorandum by C. B. Norton Jewelry Company, Jobbers of Diamonds, Watches, Jewelry, Clocks, Silverware, Tools, Materials, and Optical Goods.

"1013 and 1015 Grand Ave.

"Bell and Home Tel., 2073 Main.

"Kansas City, Mo. 1-6-'05.

"J. L. Betz: The goods described below are sent at your risk for examination and selection, but none are considered sold, nor does the title pass, until a regular bill of sale has been sent you. Please make returns within ——— days of their receipt.

"1 Dia.	5252 1¼	1/64c	135.00	170.88
1 Dia.	5819 11/16	1/64c	138.00	148.78
1 Dia.	3550 1¼c		125.00	140.63
1 Dia.	3503 11/12	1/16c	140.00	218.75"

Upon cross-examination the president of the company testified as follows: "Q. Mr. Norton, I believe you stated awhile ago that defendant's exhibit No. 1 is the bill which you sent to defendant with the shipment of this lot of diamonds? A. Yes, sir. Q. And how long had you been doing business with the defendant? A. Probably six or seven years. Q. You commenced doing business with him and selling him goods when he was at Maitland, did you not? A. Yes, sir. Q. And continued there and after he moved to Stanberry. A. Yes, sir. Q. How many goods did you sell him during those years—approximately? Few or many bills? A. Why, we

sold him a good many goods. Q. The prices named in this bill, to wit, \$170.88; \$148.78; \$140.63, and \$218.75, were the wholesale prices of these diamonds? A. Yes, sir. Q. And you said in answer to the court's question that the title to these diamonds were to remain in you until he made his selection? A. Until they were reported on. Q. Until he made his selection, is what you said, is it not? A. It reads in there just exactly what it is. Q. Then this printed matter here in this bill head constitutes the only agreement or arrangement you had with Mr. Betz? A. Yes, sir. By the Court: You mean arrangement or agreement under which the goods were shipped to him? A. Under which the goods were shipped to him. The letter says 'memorandum,' just exactly as the bill says. Q. Mr. Norton, you had many times, in the six or seven years intervening before the sending to Mr. Betz of this bill, sent him goods on like bills, had you not? A. Yes, sir. Q. And he would either return the goods to you or pay for them? A. Yes, sir; yes, sir. Q. And that course of dealing has existed for six or seven years? A. Why, yes, sir. Q. And if you had received from Mr. Betz a draft for six hundred odd dollars—whatever it is—for these diamonds, he would have been within his rights, under your arrangement and dealing with him, would he not? By Mr. Showen, counsel for plaintiff: Wait a minute. If the court please, we object to that for the reason that, if Mr. Peery is going to stand on his bill of sale here, as he starts out, it certainly is not competent to show some other arrangement, if that is his defense. By the Court: Well, I don't know about that. Go ahead. Q. That is true, isn't it, Mr. Norton? A. Yes, sir. We would have given a regular bill for it then. Q. You would have taken the money, and they would have been his goods? A. Yes, sir; and sent him a regular bill for the goods. Q. They would have been his goods? A. They certainly would. Q. In other words, he had the option of returning the goods to or paying for them? A. He had the option to return the goods or pay for them. He certainly did; yes, sir."

The defendant admitted upon the trial that he appropriated the goods mentioned in Exhibit No. 1 and described in the indictment to his own use. Shortly after receiving the diamonds, he sold stock of jewelry in Stanberry, and went to Lincoln, Neb. The diamonds in question were pawned by him in that city, together with other diamonds of the value of \$1,500 or \$1,800. The defendant was arrested in Lincoln, and state's witnesses, Norton and Solon, visited him in jail at that city, and had a conversation with him. They asked defendant why he had done that way, and he replied: "I can't tell you why I done this. I don't understand why I did the way I did. You have always treated me all right, and I had no need to have used you in this way."

At the close of the state's case, the defendant asked a peremptory instruction directing the jury to acquit the defendant, which was refused, and exceptions duly saved. The defendant offered no evidence, and made five requests to the court for instructions on certain propositions, the substance of which was that, under the law and the evidence, the transaction between the C. B. Norton Jewelry Company and the defendant was a conditional sale or "sale or return" and not a bailment, and that defendant could not therefore be convicted as a bailee under section 1914 (page 1306). These requests were refused by the court, and the defendant excepted. Thereupon the court instructed the jury, in substance, that under the letter or order and bill hereinbefore set out the defendant became a bailee of the company "as to all but two of said diamonds," and if he converted them he was guilty under the first count of the indictment. The defendant excepted to each of the instructions given by the court, because the court had failed to instruct on all questions of law arising in the case necessary for the information of the jury in making up their verdict. Under the instructions the jury found the defendant guilty of embezzlement as a bailee under the first count of the indictment, and assessed his punishment at two years' imprisonment in the penitentiary. In due time defendant filed his motion for a new trial, alleging numerous grounds therefor. This motion was continued until the next December term, 1906, term of said court, when it was overruled, to which action of the court defendant duly excepted, and thereafter duly perfected his appeal to this court.

1. The learned counsel for the defendant rightfully, we think, urges that the main proposition for decision in this case is whether, under the evidence in the case, the defendant was a bailee of the four diamonds which were sent to him by the Norton Jewelry Company on the 6th of January, 1905. If the transaction evidenced by the letter of the defendant to the jewelry company and their letter to him on the 6th of January, 1905, constituted a sale, then, of course, defendant was not a bailee, and not subject to prosecution under section 1914, Rev. St. 1899 [Ann. St. 1906, p. 1306], as he would not answer the description of the person against which that section was leveled. The learned counsel insists that this transaction, as shown by the correspondence between the jewelry company and the defendant, falls within that class of sales known in the law as "sale or return," in which it is held that title to goods so sold passes to the vendee upon delivery, subject to a defeasance by exercising the option to return the goods. The general proposition that a delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving to pay for or return the goods received, the uniform current of authorities

is that such an alternative agreement is a sale. *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 532. In *Sturm v. Boker*, 150 U. S., loc. cit. 328, 14 Sup. Ct. 104, 37 L. Ed. 1093, the Supreme Court of the United States said: "The class of contracts known as contracts of 'sale or return' exists where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely on the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser subject to his option to return the property within a time specified or a reasonable time, and if before the expiration of such time or the exercise of option given the property is destroyed, even by inevitable accident, the buyer is responsible for the price." The true distinction is pointed out by Wells, J., in *Hunt v. Wyman*, 100 Mass. 198, 200, as follows: "An option to purchase if he likes is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return." Judge Story in his work on Bailments (9th Ed.) § 2, after criticising the definitions given by Sir William Jones, Chancellor Kent, and Blackstone of bailment, himself defines bailment as "the delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust." It will be seen from this definition that bailment, in his opinion, need not always contemplate a redelivery of the goods to the bailor. In many cases when personal property is delivered by the owner to another it becomes of great importance to determine whether the title to the property had been transferred or not, and the facts in each case, construed in the light of the law, must determine whether the transaction is a sale or a bailment. Applying the foregoing general statements of the law to the transaction between the Norton Jewelry Company and the defendant in this case, was this a case of "sale or return," or was it a bailment? The defendant in his letter of January 4, 1905, requested the Norton Jewelry Company "To send him by express on memorandum one or two nice diamonds, 1¼ karat." In response to this letter, the jewelry company wrote him as follows:

"J. L. Betz: The goods described below are sent at your risk for examination and selection, but none are considered sold, nor does the title pass, until the regular bill of sale has been sent you. Please make return within ——— days of their receipt.

1 Dia.	5252 1¼	1/64c	135.00	170.86
1 Dia.	5819 11/16	1/64c	138.00	148.78
1 Dia.	3550 1½		125.00	140.63
1 Dia.	3503 11/12	1/16c	140.00	218.75"

Now was this an option to purchase if he was satisfied with the diamonds, or was it a

sale of these four diamonds, with an option to return them if he should not like them? In our opinion, it was but an option to purchase if he liked them, or any one of them or any number of them. He had not requested the company to send him more than two diamonds. Obviously, there had been no agreement as to the price of either one of the diamonds, and a delivery of a specific diamond to him, with the privilege of returning the same in a specified time if he should become dissatisfied therewith. Moreover, assaid by the Supreme Court of the United States, the class of contracts known as contracts of "sale or return" exists where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. Now, in this case, the diamonds were sent to the defendant for his examination and selection, and thus whether the defendant would become the purchaser was dependent upon the character or quality of the property, and he was under no obligation to take either until after he had examined and selected one or more of them. As already seen in *Hunt v. Wyman*, 100 Mass. 198, the title to the diamonds under this agreement did not pass until the defendant exercised his option and selected one or more of them, and advised the Norton Jewelry Company of his selection. In this connection, we are referred by the learned counsel to that class of cases in which it is said that, if the person to whom the property is delivered has the option to pay for it in money or other property or restore it, such option is inconsistent with the character of bailment, and the transaction is in law a sale, regardless of what the parties to the transaction may have called it or have thought it to be; but if we are right in holding that these diamonds were delivered to the defendant under a special agreement for his examination and selection, then clearly, in our opinion, this was but an option to purchase at the prices designated in the letter of the jewelry company to the defendant, and it was entirely competent for the company to reserve as it did the title, and to notify the defendant that these goods were not sold until he had made his selection and notified the company, and received his bill of sale for the same. There was nothing offensive to sound morals or to any positive rule of law which prevented the jewelry company from imposing this condition upon their delivery of the diamonds to the defendant as between the defendant and the company, and we have no question before us in this case of the rights of an innocent purchaser for value and without notice. Judge Story in his work on *Bailments* (9th Ed.) §§ 31, 32, and 33, announces the doctrine to be that the legal responsibility of a bailee may be narrowed by any special contract, either expressed or implied, and so it may in like manner be enlarged. The stipulation in the memorandum of the bailment expressly negatives any right

in the defendant to dispose of such diamonds until he shall have made his selection and notified the company, and received a bill of sale therefor. We think it is too clear for discussion that the correspondence between the jewelry company and the defendant did not amount to a sale of all four of the diamonds, nor of any particular one of them, as the minds of the two contracting parties never met upon any such proposition. The goods were simply delivered to him temporarily, in order that he might, if he was satisfied therewith, make a selection therefrom; and, as he never made any selection or choice, and notified the jewelry company of his selection, in our opinion, the title did not pass to him, and he was a bailee thereof, within the meaning of section 1914, Rev. St. 1899 [Ann. St. 1906, p. 1306]. Had the defendant ordered a definite number of diamonds of a certain value and fineness, and promised to pay for them either upon delivery or at a future date, and in response thereto the jewelry company had sent him the exact number of diamonds that he ordered, and of the exact value, and had accepted his terms to pay for the same upon delivery at some future date, and included the option for return within a specified time, then the defendant could have invoked the doctrine of "sale or return," as announced in the numerous decisions cited by learned counsel for the defendant. But in our opinion the facts of this case do not bring it within that rule, and when the defendant, after receiving the diamonds under the correspondence had between him and the jewelry company, made no selection of the said diamonds or either of them, and gave the company no notice of such selection, but fraudulently disposed of the same, and converted the same to his own use, with the fraudulent intent to deprive the company without its consent of its property therein, then and there he was guilty of embezzlement, within the meaning of section 1914. Nor do we agree with the defendant that the fact that these goods were consigned to him at his risk was conclusive that the transaction was a sale and not bailment. As was said in *Sturm v. Boker*, 150 U. S. 330, 14 Sup. Ct. 105 (37 L. Ed. 1093): "The complainant's common-law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract expressed or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; \* \* \* the bailment or compensation to be received therefor being a sufficient consideration for such undertaking."

2. But it is urged that the first instruction of the court was erroneous in telling the jury that the defendant, under the circumstances recited in it, "thereby becomes the bailee of such jewelry company as to all but two of the diamonds," and if the defendant,

"without the consent of the said jewelry company, appropriated to his own use the two diamonds in excess of the number ordered by him, each being then and there of the value of thirty dollars or more, then they would find him guilty." It is argued that, as all of the diamonds were shipped at one time in one package and under one bill, and with the regular wholesale price of each stated, and the defendant had the same right, privilege, and option as to each of them, it is illogical to say that the transaction was a conditional sale as to a part of them and bailment as to the others. As already said, in our opinion, the defendant was a bailee of all four of the diamonds and not a vendee. But it does not follow that the defendant was in any manner injured by the circuit court conceding that he might be a vendee as to the two diamonds which he ordered, and a bailee as to the two which he did not order. Under no interpretation of the correspondence could the defendant claim to be a vendee of more than two of the diamonds, and as to the other two he was clearly a bailee, without any right to dispose of the same until after he had selected them and notified the jewelry company that he had elected to take all four of the diamonds at the prices named, and received a bill of sale therefor. The instruction, in our opinion, was too favorable to the defendant, but of that he cannot complain in this court. It simply narrowed his liability to two of the diamonds, when in our opinion he was bailee as to all four of them. We find nothing in the oral testimony of Mr. Norton to the effect that the defendant had the option of returning the goods, or paying for them at the prices specified in the order of the jewelry company to him, which changes our opinion as to the character of the transaction between them. Unquestionably, he had the option, after an examination of these diamonds, to have elected to purchase all of them at the prices mentioned, and notified the jewelry company of said option to purchase; and had he done so, and had accompanied his notice of such selection with a remittance of the amount specified as the value thereof, he would have been fairly within his rights, but he did nothing of the kind. Without making any selection, and without notifying the jewelry company that he had made his selection, and without paying anything for either one of the four diamonds, and without receiving a bill of sale for either of them, he fraudulently disposed of all four of them and left the state.

In our opinion, there is no reversible error in the record, and the testimony was ample to sustain the charge in the indictment, and the judgment of the circuit court must be and is affirmed.

FOX, P. J., and BURGESS, J., concur.

## LYNCH v. CHICAGO & A. RY. CO.

(Supreme Court of Missouri, Division No. 2.  
Nov. 19, 1907.)

### 1. EVIDENCE—HEARSAY.

Testimony that witness had heard that certain persons were dead was hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

### 2. MASTER AND SERVANT—INJURY TO EMPLOYEE—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in an action for the death of plaintiff's son, an employé, held to warrant a finding that decedent was killed, while on his railroad velocipede, by an engine running backward; that the engineer and fireman saw decedent in his position of peril, and that he was unaware thereof, in ample time to have avoided running him down; and that no effort was made to check the engine's speed.

### 3. EVIDENCE—PLEADING—ADMISSIBILITY.

The answer of defendant railroad company, wherein it was admitted that decedent was in its employment, and that it was his duty to run a velocipede over its tracks, and which alleged that decedent, while riding, failed to keep a proper lookout for trains, was competent evidence against the railroad company as an admission that decedent was killed while operating his velocipede.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 713-725.]

### 4. MASTER AND SERVANT—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence, in an action for the death of plaintiff's son, who was run down by an engine while he was riding on a railroad velocipede, held not to show that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

### 5. SAME—PRECAUTIONS AS TO PERSONS SEEN ON TRACK.

Where an engineer and fireman saw an employé on the track riding on a railroad velocipede, and observed that he was ignorant of the approach of the engine, it was their duty to warn him, and to slow down the engine, and stop, if necessary to save his life, even though he may have been guilty of contributory negligence in running his velocipede as he did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 449-474.]

### 6. APPEAL—BILL OF EXCEPTIONS—NECESSITY—APPLICATION FOR CHANGE OF VENUE.

Jurisdiction to allow an amendment of the petition is not divested by an application for a change of venue, and hence a bill of exceptions not having been filed in the court from which the change was taken, and in which the amendment was made, to the allowance of the amendment, error, if any, therein, is not available.

### 7. TRIAL—INSTRUCTIONS—CONSTRUCTION.

A clause of an instruction, in an action for the death of plaintiff's son, who was run down by an engine while he was riding on a railroad velocipede, that the absence of ordinary care by defendant could not be inferred from the fact that defendant did not stop the engine before it struck decedent, if it did strike him, is not fairly susceptible of the construction that the court assumed as a fact that defendant did not stop the engine before it struck decedent, taken in connection with the whole instruction that, though decedent was in a perilous situation, yet, if he knew of the approaching engine, and defendant had good reason to believe, and did believe, that decedent would escape from his

perilous position without being struck, then the situation was not the perilous position referred to in another instruction, and in such case the absence of ordinary care could not be inferred from the fact that defendant did not stop the engine before it struck decedent, if it did strike him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

#### 8. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though, where a witness testified that, when a second train entered a block on which there was already another train, the second train should be kept under control, and the trainmen be ready to stop on short notice, the answer needed no explanation, and the attempt to make it clearer added nothing to it, yet it was without injury to defendant railroad company that a witness was permitted to answer the question: "What position would a train crew take when you say a train is under control?"

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

#### 9. EVIDENCE—OPINION EVIDENCE—SPEED OF ENGINE—COMPETENCY OF WITNESS.

A witness, whose duties required him to ascertain if trains were on time, and who always kept defendant railroad's time, who had worked alongside the railroad 12 years, and whose work gave him a daily opportunity of observing the speed of trains, who saw the engine which ran down decedent, and had ridden on trains of defendant railroad, was qualified to give an opinion as to the speed of the engine which struck decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2352.]

#### 10. SAME—COMPETENCY—SPEED OF ENGINE.

The speed of an engine at a point is evidence of its speed a mile or a mile and a quarter therefrom, downgrade, in the absence of any evidence that it slackened its speed.

#### 11. MASTER AND SERVANT—INJURY TO EMPLOYEE ON TRACK—EVIDENCE.

In an action for the death of plaintiff's son, who was run down by an engine running backward while he was riding on a railroad velocipede, it was not reversible error to permit a witness to testify that, when the engine reached the station beyond the place of accident, there was no person on the rear end of it.

#### 12. EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

Within what distance a train can be stopped in a given case, with safety to property and the lives of persons thereon, presents a question for expert testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2319-2323.]

#### 13. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of plaintiff's son, who was run down by an engine while he was riding on a railroad velocipede, it appeared that decedent was on a straight track on a clear morning immediately in front of the engine running backward, that the engineer and fireman had their faces turned in the direction in which they and decedent were moving, and that decedent could have been seen for a half to two-thirds of a mile before the engine ran him down; and there was no evidence that the engineer and fireman made any effort to stop the engine, or were unable to do so in time to avoid running down decedent; nor was there any evidence of the sudden appearance of decedent on the track 300 or 400 feet ahead of the engine, or any evidence of an attempt to warn him. *Held*, that conceding that a witness, who testified that, under the circumstances set out in a hypothetical question, an engine and tender could be stopped within 200 or 300 feet, was

not competent to testify as an expert, yet, under the evidence, his answer was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4186.]

#### 14. SAME—PRESENTATION AND RESERVATION OF ERROR—MOTION FOR NEW TRIAL.

A ground of motion for new trial, in an action for the death of plaintiff's son, under Rev. St. 1899, § 2864 [Ann. St. 1906, p. 1637], awarding damages for injuries resulting in death in certain cases, and declaring by whom recoverable, that "the verdict is not supported by the evidence, and, the cause being founded on a special statute, plaintiff did not prove facts sufficient to bring herself and this cause within the purview of such statute," is insufficient to notify the trial court, in compliance with section 640 (page 680), of an objection, subsequently raised on appeal, that plaintiff failed to prove her right of action, because she did not prove that her son left no minor child, him surviving, and insufficient to justify a review of the objection that she had so failed to prove her right of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1744.]

#### 15. DEATH—ACTIONS FOR CAUSING—SUFFICIENCY OF EVIDENCE OF SURVIVORSHIP.

Evidence, in an action under Rev. St. 1899, § 2864 [Ann. St. 1906, p. 1637], awarding damages for injuries resulting in death in certain cases, and declaring by whom recoverable, that decedent was unmarried at the time of his death, and was a minor, in the absence of the slightest suggestion that he had ever been married, or that he left a minor child, him surviving, justified a finding that he had left no minor child him surviving.

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Action by Catherine Lynch against the Chicago & Alton Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. O. Gray and Scarritt, Scarritt & Jones, for appellant. P. H. Cullen, Tapley & Fitzgerald, and Thad. C. Cox, for respondent.

GANTT, J. This action was instituted by the plaintiff, Mrs. Lynch, to recover damages under section 2864, Rev. St. 1899 [Ann. St. 1906, p. 1637], for the death of her son, John Lynch, which occurred on August 31, 1902. Prior to and at the time of his death John Lynch was in the employ of the defendant company as a "signal man"; that is, it was his duty to inspect and keep in proper order the automatic electric block signals and bells along a certain section of defendant's line in Lafayette county from Higginsville to Alma. The petition alleges that the said John Lynch was killed by the defendant on or about August 31, 1902, at the place and under the circumstances herein stated.

Plaintiff states that her son, John Lynch, was in the employ of the defendant railroad company, and it was his duty to run a velocipede car over the defendant railroad company's track between the stations of Higginsville and Alma; that on or about the 31st day of August, 1902, her said son, in the discharge of his duties as aforesaid, was operating his velocipede car on said tracks, and was running the same east from Higginsville

to Alma; that, while he was so upon said track operating said velocipede car, an engine owned, operated, and controlled by the defendant railway company, its agents and servants, was carelessly and negligently run east over and along said tracks; that the agents and servants of the railway company knew that deceased was upon the track, as aforesaid, and could have known it by the exercise of ordinary care, and carelessly and negligently failed to give any signals of the approach of said engine, and carelessly and negligently failed to stop said engine, but, on the contrary, carelessly and negligently ran the same with great force and speed into, against, and upon the plaintiff's said son and his car. Plaintiff says that the said defendant knew that her said son was upon the track, and knew he was in a position of peril and unaware thereof, for a long time before said engine collided with him and the said velocipede; that, after said servants discovered the situation, they could have stopped the engine and avoided striking and killing plaintiff's son, but negligently and carelessly failed to do so. There were other charges of negligence in the petition, but the cause was submitted upon the above allegation of negligence. There was a prayer for judgment for \$5,000 damages and costs. The answer denied each and every allegation in the amended petition. There was also a plea of contributory negligence and an assumption of risks. There was also a plea to the jurisdiction of the court over the subject-matter of the case. The reply was a general denial of the new matter set up in the answer. On the trial, the plaintiff introduced in evidence the original answer of the defendant, which, among other things, contained the following allegation: "That the said John Lynch was in the employ of the defendant, and that it was his duty to run a velocipede car over defendant's track at and between the stations of Higginsville and Alma and other places on the line of defendant's road. \* \* \* That said John Lynch was riding along the track of the defendant upon his track bicycle, and failed to keep a proper lookout for trains that were constantly run upon said track, and upon the approach of one of said trains failed to remove from said track, and otherwise negligently and carelessly conducted himself in the premises."

The testimony on the part of the plaintiff tended to prove that John Lynch, the deceased, was the son of Catherine Lynch, the plaintiff herein, at the time of his death, that the plaintiff is a widow, and that at the time of his death John Lynch was about 20 years of age, single, and unmarried. The evidence also established that Higginsville and Corder are stations on the defendant's line in Lafayette county, Mo., and that Corder is about five miles east of Higginsville. The usual time consumed by passenger trains from Higginsville to Corder is 9 or 10 minutes. The defendant company has in use

upon its railroad what is known as the "automatic block system." There was a block just east of Higginsville for east-bound trains between Higginsville and Corder, and another one just west of Corder to cover the track between Corder and Higginsville, and at either end of this block is an electric signal. There is also a semaphore at Higginsville, and one at Corder. It is in evidence that, when an arm of a semaphore was down, it indicated that a train could proceed with safety; but, when it was extended, it indicated danger. It was explained by the witness that after the east-bound train passes Corder, if there was no train on the block between Higginsville and Corder, the arms of the semaphore will be down; but, if there is another train between Higginsville and Corder, the arms will stand at right angles. There was also evidence tending to show: That it was the practice of the train crews, when they approached one of these automatic blocks, and found that the block was at danger, or against them, to stop and wait five minutes, and send a flag on ahead of them. After the flag had been out for a given length of time, the train would proceed on behind the flag, under control, until they went the entire limit of the block. That the train would go through the block slowly and ready to stop on short notice, and the train crew would be on the lookout and at their post of duty ready to stop the train on short notice.

The evidence tended to establish that on the morning of August 31, 1902, the deceased, John Lynch, started out from Higginsville on his tour of inspection of the electric apparatus connected with this automatic block between Higginsville and Corder. He was seen by the witness Emil Smith, who was employed at a coal mine on the defendant's road a mile and a quarter east of Higginsville, at work at a switch block a little west of this coal mine, about 5 or 10 minutes before the regular passenger train going east from Higginsville to Corder came along. This train was due at Higginsville about 9:38 a. m. The engine which afterwards killed Lynch came from the east, and went to Higginsville, along this same track about 5 or 10 minutes before the passenger train went east. As soon as the passenger train passed going to Corder, Lynch, the deceased, put his velocipede on the track, and looked back towards Higginsville, and started east towards Corder. He rode four or five telegraph poles. Before going around the curve, he looked again before he got onto that curve, and was last seen by this witness as he went around the curve, and as he went he continued to look back west. About 2½ minutes after the deceased passed around the curve, an engine running backwards came along following the deceased, going towards Corder from Higginsville. The engineer and the fireman were on the engine, and were facing east, and looking east. The engine was running about 20 miles an hour. The engine

was in sight of the witness for a quarter of a mile after it passed the coal chute, when it passed out of his sight by reason of the curve. The witness testified that the engine did not at any time give any signal in the way of a whistle. It was a clear day, still, and no wind blowing. The schedule time of the passenger train from Higginville to Corder was 10 minutes. It was due at Higginville at 9:38, and at Corder at 9:48. The testimony tended to show that the engine which followed the deceased arrived at Corder that morning not longer than 3 minutes after the passenger train. Testimony further tended to show that the deceased usually ran his velocipede from Higginville to Corder between 9:30 and 10 o'clock in the morning, and it was his custom to go either ahead of the mail train, or a little after, and he had been so traveling for about two or three weeks.

Neil Lewis, a witness for the plaintiff, testified that his business was that of an engineer. He had worked a short time at the railroad business. He was at Corder on the day that young Lynch was killed, and was at the depot when the passenger train came in. It left there about 10 o'clock. He testified, also, that, after the passenger or mail train came into Corder from Higginville, a loose engine also came in following it not longer than three minutes after the passenger. It was just an engine backing from Higginville to Corder. After the arrival of that engine, he went on another train to Higginville that same morning, and saw the body of John Lynch. It was just 45 feet east of the whistling post between Hays Crossing and Randolph Crossing, or a mile or a mile and a quarter from the Randolph Coal Chutes, about halfway between Corder and Higginville. The body was lying on the south side of the track, and was considerably mangled. He testified that, from the point where the body was found, the track was perfectly straight west for a half mile or 17 telegraph poles, and that a person could, from an elevation, see an object for 23 telegraph poles west. There was nothing to obstruct the man's view of an engine approaching for 23 telegraph poles west. He testified, further, that, after the arrival of this loose engine at Corder that morning, he examined it, and the wheels and the brake beam were covered with blood. He testified also that he had been a fireman in the railroad service some six or seven weeks, and he was asked to state from his experience within what distance an engine and tender could be stopped running at a rate of 15 or 20 miles an hour by an application of the emergency appliances, and he stated that it could be done in from three to five minutes.

The evidence tends further to show that the engine which caused the death of John Lynch had pulled a freight train into Corder from the east that morning, and had been detached there from the train, and for some unexplained reason ran west to Higginville

with no one on it but the engineer and fireman; that the conductor and brakeman on that train remained at Corder, while the engineer and fireman took the engine to Higginville and back. After the return of this engine to Corder with the wheels and brake beam stained with blood, the conductor had the engine attached to the caboose, and requested four other citizens to go with him to the place where the deceased was killed, as information that a man had been hurt had been received at Corder. One of these citizens, Mr. Cramer, testified that he was one of the four who went with the conductor and brakeman on that mission. He testified that they found the body of the deceased about 45 feet east of the whistling post, and that it was badly mangled, and they took him up and placed him on a door of the car, and put him in the caboose, and took him to Higginville. He testified that he walked back that afternoon from Higginville to Corder, and discovered nothing west of the place where the body was found, but east of that point he found the velocipede broken up. It was about 21 rails east of where they picked up the body, and on the north side of the track. This witness also testified that the passenger train arrived at Corder that morning about 9:48. There was evidence also to the effect that a railroad velocipede such as was used by the deceased on this occasion makes a good deal of noise as it is being propelled along the track, and that a man riding it must protect himself mostly by his sight.

Mr. N. Jacks, a witness for the plaintiff, testified that he had been working at and about railroads and locomotives about seven years; that he had not run an engine himself either as engineer or fireman, but had had occasion to see locomotives started and stopped, and observed the distances in which they could be stopped when running, and had ridden on trains and in engines, and had opportunities to make observations as to distances within which an engine or train could be stopped; and that a locomotive engine and tender such as is used in the ordinary freight service, equipped with air, and being run on a straight track, in dry weather, on a grade slightly down, and being operated at a rate of 15 or 20 miles an hour, with the engineer and fireman in their proper places on the engine, could be stopped in a distance of 200 or 300 feet by shutting off the steam and using the air brakes.

The defendant offered no evidence, but at the close of the plaintiff's case asked an instruction in the nature of a demurrer to the evidence, which the court overruled, and the defendant duly excepted. The court thereupon, of its own motion, instructed the jury as follows: "The court instructs the jury that, although the jury may find that John Lynch was in a perilous situation, yet if the jury find that he knew of the approaching engine, if any, and if the jury further find that the defendant's agents, if any, in charge

of said train, had good reason to believe, and did believe, that said Lynch would escape from his perilous position, if any, without being struck by said engine, then the situation of said Lynch was not the perilous position referred to in plaintiff's instruction No. 1, and in such case the absence of ordinary care cannot be inferred from the fact that defendant's agent did not in fact stop said engine before it struck said Lynch, if it did strike him."

The court then instructed the jury, at the request of the plaintiff, as follows: "If you believe from the evidence that the defendant was a corporation engaged in operating a railroad between Higginsville and Alma, Mo., and that the deceased, John Lynch, at the time of his death, was in the employ of said defendant, engaged in the work of assisting the defendant in the operation of a railroad; and if you further believe that he was, at the time of his death, unmarried, and under the age of 21 years, and that his father was dead, and that the plaintiff herein is his mother; and if you shall further believe that, at and for some time before the time John Lynch was killed, he was employed by the defendant to look after and care for appliances in use by defendant along its road, and that in pursuance of said employment it was his duty to pass over defendant's tracks on a velocipede; and if you further find and believe from the evidence that on the morning of September 1, 1902, immediately after the passing of an east-bound train, the said John Lynch put his velocipede upon the track at a point near Higginsville, and ran said velocipede east after said passenger train along defendant's tracks; and if you further believe that, when about one mile and a quarter from the point where he started, the said John Lynch was struck and killed by an engine backing east on said track; and if you further believe that the deceased had been, for a long time prior to this time, in the habit of passing east along said track between Higginsville and Corder at about this hour of the day; and if you further believe that John Lynch, while operating said velocipede upon defendant's track, became in imminent peril of being struck by defendant's engine, and defendant's employees in charge of said engine knew of his peril of being struck in time to have stopped said train, and to have averted the injury to said deceased; and if you shall further believe that they failed to exercise such care and stop said engine, and that by reason of such failure to exercise such ordinary care the said engine was not stopped, and said John Lynch was struck and killed—then the jury must find for the plaintiff, though the jury may find that the deceased, John Lynch, was guilty of negligence in running the velocipede upon the defendant's track at the time. The court instructs the jury that, if you find for plaintiff, your verdict should be for \$5,000; no more nor no less."

The court also gave the following instructions for the defendant: "The court instructs the jury that, even though you may believe that the men in charge of the engine in question could, by the exercise of ordinary care, have seen the deceased upon the track ahead of the engine in question, yet plaintiff is not entitled to recover on that account, but it is incumbent upon the plaintiff to prove to your satisfaction, by credible testimony, that the men in charge of said engine did in fact see the deceased on the track ahead of them and in a position of peril, and, further, that they had reason to believe, and had good reason to believe, that the deceased did not realize his danger and would not escape therefrom without being struck; and, further, that after so observing deceased in such position of peril, they failed to use the means at hand to avoid injury to deceased. The court instructs the jury that the fact that there was a collision between the engine in question and John Lynch, the deceased, if you find there was such collision, is not in itself any evidence of negligence on the part of the men in charge of such engine. The court instructs the jury that, in the absence of evidence to the contrary, you must presume that the men in charge of the engine in question, at and just prior to the injury of deceased, were exercising ordinary care. The court instructs the jury that a recovery by the plaintiff must be based upon substantial evidence, and not upon speculation or conjecture as to the causes of a collision between the engine mentioned in the evidence and John Lynch, if the jury shall believe from the evidence in the cause that there was such collision. The court instructs the jury that it was the duty of John Lynch, at the time in question, to look out for his own safety, and that it was his duty to keep a sharp lookout for approaching trains from both directions, and that, in the absence of evidence to the contrary, you must presume that the said John Lynch saw the engine in question approaching him before he was struck by the same."

1. The principal contention of the defendant is that the demurrer to the evidence should have been sustained by the circuit court, and the cause taken from the jury. It is conceded by the learned counsel for the defendant that on the morning of August 31, 1902, John Lynch was in the employment of the defendant, and that it was his duty to go over the line of the defendant from Higginsville to Alma to inspect and see that the electric apparatus maintained by the defendant for the control of its automatic block system between those stations was in good working order, and that for that purpose he was authorized to use a railroad velocipede on the tracks of the defendant, and that on that morning he got on his velocipede at a signal station just west of the Randolph Coal Mines, and immediately after the passenger or main train going east passed said coal



chute, and started east following said passenger train. The evidence further tends to show, without any contradiction, that, as the deceased rode east, he turned his head backward and to the west several times before he entered a cut or curve about a quarter of a mile east of the coal chute, after which he was not seen by any witness, until his dead body was found about a mile and a quarter east of the point where he was last seen by the witness Smith, who was stationed at the coal chute. The testimony also shows that from  $2\frac{1}{2}$  to 3 minutes after Lynch, the deceased, passed east around the curve, an engine of the defendant in charge of an engineer and fireman followed, going east, running about 20 miles an hour, and that the fireman and engineer on said engine had their faces turned to the east, and were looking in that direction, and that this engine reached Corder about three minutes after the passenger train arrived at that point, and that, when it reached there, the forward wheels and the brake beam were stained with blood. It also appeared that information had reached the conductor of the freight train to which this engine belonged that a man had either been killed or injured, and, accordingly, four other citizens were requested to go with the train in the direction of Higginsville, and the body of the deceased was found about halfway between Higginsville and Corder, and was taken aboard the train and conveyed to Higginsville. Counsel for the defendant concedes that, from the foregoing facts, the conclusion may be drawn that John Lynch was killed by coming in contact with that engine; but, further than that, they insist all is conjecture and guesswork. They assert that the lips of the engineer and fireman in charge of this engine and tender are sealed by death. As to this, the only evidence that the fireman and engineer in charge of that engine on that day were dead at the time of the trial appears in the cross-examination of the witness Jacks, in the following interrogatories and answers: "Q. Do you know where the engineer and fireman are of the engine that has been spoken of here? Ans. No, sir; I do not. Q. You understand, do you not, that they are dead? Ans. I have heard that; yes, sir." Nowhere in the record is it disclosed what were the names of the fireman and the engineer in charge of that engine which killed Lynch that morning. It is too obvious for discussion that the testimony of Jacks that they were dead was the merest hearsay, and, if they were dead at the date of the trial, that fact was not established by any competent evidence. That the jury were fully justified in finding that John Lynch, the signal man, was struck and killed by that engine under the facts already narrated, we think is too plain for discussion. But the learned counsel for the defendant insists that, conceding he was struck by the engine, there was no evidence that at the time of his

death, and just prior thereto, John Lynch was upon his velocipede on the railroad track. In support of the allegation in the petition that John Lynch was on his velocipede at the time he was struck and killed by said engine, the plaintiff, among other things, calls attention to the original answer filed by the defendant in this cause, wherein it admits that "John Lynch was in its employment, and that it was his duty to run a velocipede car over its tracks at and between the stations of Higginsville and Alma, and then alleges that the injuries received by the said Lynch were in part caused by his own negligence, which directly contributed thereto, in this, that the said John Lynch was riding along the track of defendant upon a track bicycle, and failed to keep proper lookout for trains that were constantly running upon said track, and, upon the approach of one of said trains, failed to remove from said track, and otherwise negligently and carelessly conducted himself in the premises." That it was competent for the jury to weigh this allegation of the defendant's original answer, as an admission that the deceased was struck and killed while he was operating his velocipede on the track, we also think is well settled. *Walser v. Wear*, 141 Mo., loc. cit. 463, 464, 42 S. W. 928, and cases cited; *Spurlock v. Ry. Co.*, 125 Mo. 404, 28 S. W. 634; *Mahan v. Brinell*, 94 Mo. App., loc. cit. 171, 67 S. W. 930.

But in addition to this admission in the answer made by the defendant when the cause was yet new, the testimony established that, when last seen, the deceased, John Lynch, was operating his velocipede on the track and traveling east about  $2\frac{1}{2}$  or 3 minutes ahead of the engine which afterwards struck and killed him when it passed the curve east of the Randolph Coal Chutes, and the evidence shows that not only was Lynch himself struck and mangled by the engine, but the velocipede was smashed and broken when it was found some 500 or 600 feet from where his body lay on the side of the track. The principle that a state of facts once shown to exist will be presumed to continue, until the contrary is shown, has been long recognized in this state. *Pope v. Cable Ry. Co.*, 99 Mo., loc. cit. 404, 405, 12 S. W. 891; *State v. Lowe*, 93 Mo., loc. cit. 571, 5 S. W. 889. And hence, when the plaintiff had established that John Lynch was riding on his velocipede on the morning of his death going east, and that the engine and tender which struck and killed him was following about  $2\frac{1}{2}$  or 3 minutes later on the same track, and moving at a rate of 20 miles an hour, and in a few minutes afterwards his body was found mangled on the side of the track, and the velocipede he was riding was also smashed and broken up a short distance east of where his body was found, we think the jury were clearly authorized to infer that, when he was struck and killed, he was yet upon the velocipede, in the ab-

sence of all evidence to the contrary. Nor do we think this inference is rebutted by the testimony that signal men would frequently stop along the section to work on matters that might need attention, nor by the conjecture of counsel for the defendant that it was possible that he had gotten off of his velocipede and was engaged in examining the electric apparatus, or that he might have left his velocipede on the track while he got off to examine or repair the apparatus. There was not the slightest testimony tending to confirm either of these conjectures. On the contrary, as already said, the admissions of the defendant in its original answer, taken in connection with the known facts in evidence as to the relative position of the deceased and the engine following him, presented an exceedingly reasonable inference that he was yet on his velocipede when the engine and the tender overtook him and killed him and broke up his velocipede.

But it is insisted that there was absolutely no evidence that the engineer and fireman of the engine actually knew that John Lynch was upon the track ahead of their engine. It is true, as already stated, the day was clear, the track for a distance of from a half to two-thirds of a mile from the west to where the deceased was struck was straight, and the velocipede and the man thereon was an object that could not escape being seen by the engineer and the fireman with their faces turned towards the east, the direction in which their engine and tender and the velocipede were traveling at the time. As was said, in *Reyburn v. Railroad*, 187 Mo., loc. cit. 575, 86 S. W. 176: "The engineer and fireman could not help but see, unless they purposely shut their eyes. And it is a fact to be considered, in this connection, that the defendant failed to call either the engineer or fireman as a witness." In *Rine v. C. & A. Ry. Co.*, 100 Mo., loc. cit. 234, 12 S. W. 641, Black, J., speaking for this court, said: "Evidence of the negligence need not be direct and positive. 'In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases open to clearer proof.' 1 *Shear. & Red. on Neg.* (4th Ed.) § 58. A demurrer to the evidence admits every fact which the jurors may infer from the evidence before them, and should be allowed only when the evidence thus considered fails to make proof of some essential averment. *Noninger v. Vogt*, 88 Mo. 592, and cases cited. All the circumstances surrounding the accident are to be considered, and, when this is done, we are of the opinion that there is evidence from which the jury could well find that the fireman at least saw Rine on the

track, and that, too, in time to have saved his life."

In *Schlereth v. Railway Co.*, 115 Mo. 87, 21 S. W. 1110, a case in which a track walker was killed, the opinion of this court in banc, in reciting the facts, says: "The deceased started west walking on the track. The road was level, and the view along the track was unobstructed. The engine and tender followed in a few minutes, and had proceeded about 1,300 feet when whistles from the engine were heard, and deceased was seen immediately lying beside the track. The evidence shows that the deceased had worked for a number of years on the track of defendant's road in the city of St. Louis, and was perfectly familiar with the running of trains thereon. The deceased started to his work walking on the track upon which trains going in the same direction were run. No witness saw the train strike the deceased, and it does not appear that he was struck while on the track, or beside it." Upon this state of facts, the court held a verdict for plaintiff was sustained by the evidence, and the summary of the holding is as follows: "The deceased, a track repairer in the company's service, while walking along its tracks to work, was killed by a locomotive going in the same direction. The track was level, and the view unobstructed. The engine and tender had followed the deceased a few moments after he started, and had only gone about 1,300 feet when the accident occurred. Held that, while the deceased may have been guilty of contributory negligence in walking upon the track and in not seeing the engine, yet the case was properly submitted to the jury on the issue whether the engineer used proper care to see the danger in which the deceased had placed himself and to avoid injuring him."

In *Payne v. Railroad*, 105 Mo. App. 155, 79 S. W. 719, the plaintiff was riding a velocipede upon the track, and the Kansas City Court of Appeals, through Judge Ellison, said: "There being evidence the tendency of which was to show that plaintiff was originally on the track, and especially that defendant's servants knew he was usually going over the track at the time of the accident, it became the duty of such servants to keep a vigilant lookout for him, and, if by such watchfulness they could have discovered him in time to have avoided the collision, the defendant is liable for their failure to do so, and even though it be considered that plaintiff was negligent in not looking back, when by so doing he might have discovered an approaching engine in time to have gotten off of the track, yet, if defendant's servants might have seen him by proper watchfulness and care, a liability arose in his behalf notwithstanding his own carelessness."

In this case it appears that the deceased had for several weeks been regularly employed in inspecting the electrical apparatus that

was used in connection with the automatic block system between Higginsville and Corder, and that he regularly rode upon the railroad bicycle between these stations in going to and from his work, and that on the morning in question the engine and tender which afterwards struck him had passed west over this section of the road going into Higginsville, and there was evidence tending to show that at the time he was engaged in inspecting the signals near Randolph Coal Chutes. It is also in evidence that, when this engine returned east following the deceased, it was running backward with the tender in front, and it was not only their duty, under such circumstances, to keep a lookout, but the evidence shows that only a very few minutes before they struck him they were actually looking ahead. From the time they turned the curve east of the coal chute, until they struck him, the track was straight and unobstructed, and the day was clear and bright, and there was absolutely nothing to keep them from seeing an object as large as a velocipede with a man upon it. Even if they had testified that, under these circumstances, they did not see Lynch, the jury were not bound to accept their statement as true. *Payne v. Railroad*, 136 Mo., loc. cit. 575, 38 S. W. 308. As said in the *Rine Case*, knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from facts and circumstances. When it is inferred from facts and circumstances, it is actually knowledge, as when proved by direct evidence an opportunity to know will under some circumstances go far to show knowledge, and under other circumstances it may be of little value. So that, given the facts that the deceased was on his velocipede on the track on a clear morning, with no obstruction, and the engine and tender following immediately behind him after an interval of not more than three minutes, with the engineer and fireman in their places, and looking east in the direction of the velocipede, there was ample evidence tending to show that the engineer and fireman saw the deceased on the track ahead of them, and that, too, that they saw him in ample time to have prevented the engine from striking him. *Eppstein v. Railway Co.*, 197 Mo. 720, 94 S. W. 967.

The next proposition urged in support of the demurrer to the evidence is necessarily closely associated with the last contention, and that is that there was no evidence that the deceased was in a position of peril and unaware thereof. If we are correct in holding that the evidence was sufficient to show that the engineer and fireman saw the deceased upon his velocipede moving east on the track in front of them, and they were propelling their engine at the rate of 20 miles an hour, and if, as the defendant's original answer states, John Lynch was keeping no proper lookout for trains in his rear, the conclusion is inevitable that he was in a position of peril from the approaching engine and

tender, and all the facts and circumstances indicated to the engineer and fireman that he was unaware of his danger, and, although he might have been guilty of negligence in not discovering that the engine and tender were following him, it was the duty of the engineer and fireman to have warned him of their approach, and, if necessary, have stopped the engine and tender in time to have avoided striking him; but the evidence tends strongly to show that they did not give him any warning whatever, not even by sounding a whistle to notify him of their approach. But the learned counsel for defendant state that there is not a scintilla of proof that the engineer and fireman did not endeavor to stop the engine and tender. The defendant did not offer any evidence in this case, and the plaintiff was unable to produce any witness who actually saw the collision; but the testimony itself shows that the engine and tender which struck and killed the deceased was following immediately behind the deceased, and that no signal whatever was given to the deceased of its approach, and the testimony tended to show that an engine and tender could easily have been stopped. That it was stopped either before or after striking deceased, we think, is too clear for serious discussion. That it was going at a rapid rate of speed when it knocked the deceased off of the velocipede is evidenced by the fact that it continued and drove the velocipede before it some 500 or 600 feet before throwing it from the track, and that it reached Corder only three minutes after the passenger arrived there. It is significant that, after striking the deceased and knocking him from his velocipede, the engine and tender were not stopped, and no effort made to go to the assistance of the unfortunate man, but that the engine proceeded, making the usual schedule time between these stations into Corder. That the engineer and fireman could not have been ignorant of the injury of the deceased is demonstrated by the fact that, although no other persons saw the disaster, information was conveyed, immediately upon the arrival of this tender and engine at Corder, to the conductor of the train, who had remained at Corder, and he at once besought the kindly offices of some of the bystanders at the station to return with him to the scene of the collision. That this information was conveyed by the engineer and fireman the jury could have had no doubt. Had they tarried long enough to have stopped their engine and gone to the assistance of the unfortunate man and taken him upon their engine to Corder, it is clear that the engine would not have reached Corder within the schedule time, and such the instincts of humanity demanded at their hands. So that the express testimony that no signal of danger was given to the unfortunate man, and the arrival of the train on schedule time at Corder, we think fully justified the jury in finding that no effort whatever was made to

check the speed of the engine and tender which killed the deceased. There was positive testimony that the velocipede made considerable noise by its running, and there was no proof that the running of a single engine and tender, without any cars attached to it, would have overcome the noise made by the velocipede, and thus apprised the deceased of its approach. Accordingly, in our opinion, the court committed no error in overruling the demurrer to the evidence and in submitting this cause to the jury as it did upon the first instruction given in behalf of the plaintiff.

2. But it is insisted that the deceased was guilty of such contributory negligence as will debar his mother from a recovery in this cause. In the consideration of this contention, it is to be noted, in the first place, that the deceased was not a trespasser upon the track of the defendant at the time he was struck and killed, but was a servant of the defendant in the line of the duty imposed upon him by the defendant. It is alleged in the answer that the deceased, under his employment, went from time to time along the defendant's track upon a velocipede car for the purpose of inspecting the electrical apparatus which the defendant had installed for the control of its trains on the block between Higginsville and Corder, and the evidence abundantly established that it had been his custom for several weeks at least prior to his death to go over this block either just before or after the passenger train which arrived at Higginsville on the regular schedule time about 9:38 each morning, and that on the morning in question, immediately after the passing of the passenger train, he put his velocipede on the track and started east in the performance of his duty. Following immediately, as he was, a regular passenger train, it cannot be said as a matter of law that he was guilty of negligence in having his velocipede upon the track on this block, because by so doing he was in no danger of meeting a west-bound train at that time; nor was he chargeable as a matter of law with notice that another train or (wild) engine would follow so closely upon the heels of a passenger train, and run at such a great rate of speed. "Ordinary care" is, of course, a relative term, and, in determining whether the deceased was in the exercise of ordinary care in running his velocipede upon this track at the time he was killed, it must be conceded that there were times, places, and occasions when the defendant and the deceased alike were of the opinion that he could operate his velocipede on the track with reasonable safety, especially where the block system was in use, as it appears it was on the defendant's road between these stations at the time. Certainly it cannot be said that the deceased was charged with knowledge that an (wild) engine would be run backwards immediately following a passenger train, and in such close proximity to it, and

the uncontradicted evidence tended to show that this engine which struck him was only 2½ minutes behind the passenger train when it passed the Randolph Coal Chutes, and arrived in Corder only 3 minutes behind it. Moreover, there was evidence which tended to show that the passenger train which preceded this engine and tender, which killed the deceased, were occupying the block between Higginsville and Corder at one and the same time, and there was evidence that it was the practice of the train crews, when they approached one of these automatic blocks and found that the semaphore indicated that another train was in the block, to stop and wait five minutes, and send a flag ahead of them, and, after the flag had been out a given length of time, the second train which had entered the block would proceed on behind the flag under control until it went the full length of the block; that the train would go through the block slowly and ready to stop on short notice. It was a fair inference for the jury to draw that, of all men, the deceased, who was in charge of electrical apparatus governing trains on this block, was fully acquainted with the rules and practice of the trainmen in handling their trains on these blocks, and that he had little reason to anticipate that the engine which killed him would proceed in disregard of the common practice governing trains under the block system. There was also testimony that, when the trainmen observed a velocipede on the track, it was their duty to signal him by sounding the whistle, and, if he gave no evidence of leaving the track, then it was their duty to stop. And the evidence in this case tended to show that no such whistle or other warning was given the deceased, and, as already said, the noise of his velocipede might well have prevented his hearing the approach of the single engine and tender running downgrade and with no cars attached to it.

We think that the court, in these circumstances, would not have been justified in instructing the jury, as a matter of law, that the deceased was guilty of such contributory negligence as would bar a recovery by the plaintiff. As said by the Supreme Court of Minnesota, in *Slette v. Railway Co.*, 53 Minn. 343, 55 N. W., loc. cit. 138: "For one not employed in railway service to risk his life by attempting to run a hand car in advance of a train known to be approaching would, of course, be negligence; but such conclusion is not a matter of course in the case of railroad sectionmen whose duty requires them to be thus upon and pass over the railway, although there may be obvious danger in so doing. From the fact that such conduct is dangerous, it does not necessarily follow that it should be characterized as negligence. The service necessarily involves exposure to danger, and the question of the propriety of the servant's conduct must be considered with regard to the nature of the service and the duties which he has to perform." The dis-

inction made by the courts between those who are trespassers upon the tracks, and those whose duty does not require them to be upon the tracks, and those who are rightfully on the track, has been announced by the courts in other jurisdictions. *St. Louis S. W. R. Co. v. Jacobson*, 28 Tex. Civ. App. 150, 66 S. W. 1111; *Railway Co. v. Selbert* (Ky.) 55 S. W. 892. Among other cases, the learned counsel for the defendant cite us to the case of *Jolly v. Railroad*, 93 Mich. 370, 53 N. W. 526, but we think the facts of that case are widely different from those presented by this record. Obviously, the same learned court did not, the very next year after its promulgation, consider it as conflicting with their views as expressed in the case of *Slette v. Railway Co.*, 53 Minn. 341, 55 N. W. 137, from which we have already quoted. Counsel have also cited us to the case of *Petty v. Railroad*, 179 Mo. 668, 78 S. W. 1008, which was a crossing case in which the injured person was not on the track, but was approaching it and drove immediately in front of the approaching car, which, according to her evidence, could have been seen for a distance of 1,200 feet before it reached the crossing. There was a light upon the car, and the gong was sounded, and yet the plaintiff drove immediately upon the track in front of the car, and the evidence showed that the motorman used every exertion to stop the car. Obviously, that case is not in point here, and the same may be said also of *Warner v. Railroad*, 178 Mo., loc. cit. 132, 77 S. W. 67, in which the court says there was absolutely no evidence whatever that the deceased was on the track when the car approached, etc. Counsel also cite us to the case of *McGrath v. Transit Co.*, 197 Mo. 97, 94 S. W. 872. In that case, McGrath was, on the day of the accident, and for some time prior thereto, employed by the defendant as a track repairer or laborer upon its tracks, and this court held, upon review of all the evidence in the case, that the particular negligence charged in the petition was not established, and cites the familiar doctrine of this court that, where the plaintiff chooses to allege specific acts of negligence, the burden of proving such specific negligence is upon him, and the recovery, if had at all, must be upon the specific negligence pleaded. And it was held in that case that there was complete failure to prove the specific acts of negligence charged. But the court went also further, and held that the demurrer to the evidence should have been sustained on the ground that the contributory negligence of the deceased barred recovery, and cited at length from the decision of this court in *Evans v. Railroad*, 178 Mo., loc. cit. 517, 77 S. W. 518, in which Judge Burgess, speaking for the court, said: "It will not do to apply the (humanitarian) doctrine in all its strictness to sectionmen whose business it is to work upon and keep in repair railroad tracks, for they are supposed to look after their own personal

safety, and to know of the time at which trains pass, to look for them, and see them, and to move out of the way. It is common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger, and let them pass by; and to require trains to stop upon all such occasions, when sectionmen are discovered on the track at work, would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel. Those in charge of trains have the right to presume, in the first place, that such persons will keep out of danger, and not until they have good reason to believe they will not do so, and then fail to use all proper means at their command to prevent injuring them, in consequence of which they are injured by reason of the willful negligence of those in charge of the train, should the defendant be held liable, and there was nothing of that kind in this case." To the same effect is *Davies v. Railroad*, 159 Mo. 1, 59 S. W. 982, and *Clancy v. Railroad*, 192 Mo. 615, 91 S. W. 509.

Recurring to the *Evans* Case, an examination of the facts upon which that opinion was predicated will show that *Evans*, for four or five years prior to his death, had been laboring in the employment of the railway company. The accident occurred at Randolph on the 15th day of October, 1898. On the day he was killed, he was engaged in cutting weeds along the railroad track at a point on or near a road crossing 125 yards east of the Wabash depot in said town. At that time the regular fast freight train, east-bound, which was not scheduled to stop at Randolph, passed that place at 2:12 in the afternoon. This train had been running on that time card for a long time prior to October 15, 1898, and was well known as a meat train. This train was exactly on time on October 15, 1898, the train whistled at the whistling post, a quarter of a mile west of Randolph Station, and the bell ringer on the engine, an automatic contrivance, was started at the time the whistle was blown, so that the bell rung from the whistling post until the train passed Randolph. It was a clear day, with the wind blowing from the southwest. As the train was not scheduled to stop at Randolph, its speed was not slackened after whistling at the post. The engineer whistled one long blast as a station signal, and then gave a short whistle as answer to a signal from the conductor not to stop. Seeing a group of men working close to the track near the crossing just west of Randolph, the engineer, when 300 or 400 feet west of the crossing, whistled again a danger or warning signal, four short quick blasts. The men, as the engineer saw them, separated then; some on one side of the track, and some on the other. After coming within 60 feet of the men, the engineer's view of them was shut off by the front part of the engine. *Evans*, the deceased, was never seen by either the engineer or

the fireman in the position of danger or peril prior to the accident; in fact, they did not know that any one had been struck by the engine until after they had reached Lexington Junction, some distance east of Randolph Station. All the eyewitnesses agreed that Evans never paid the slightest attention to the approach of the train, though it was in plain view for at least a mile west of Randolph Station. The other sectionmen both saw and heard the approaching train, and kept out of its way, and, while Evans walked east on the ends of the ties on the Hannibal track until the train was within 60 or 75 feet of him, and then started across the defendant's track directly in front of the train, the foreman and two of the other sectionmen shouted a warning to him in a loud voice. There was no rule in force as to signals to sectionmen, as each man was supposed to look out for himself. Under these facts it was said by this court: "It will not do to apply this rule (the humanitarian rule) in all its strictness to sectionmen whose business it is to work upon and keep in repair railroad tracks, for they are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for them, and see them, and to move out of the way." As applied to the facts of that case, the decision held that Evans' widow could not recover, and in our opinion was absolutely correct. There was not the slightest evidence of any negligence upon the part of the railroad, the signals were all given and heard by the bystanders, and the train was a regular train, which passed every day at that hour, and was exactly on time on the day Evans was killed. Evans was an old employé of the company, and worked on that section, and, as said by the court, it was his duty to know of the time at which the trains passed, to look for them, and move out of the way. And those in charge of the train had the right to presume that he would keep out of danger, and, until the engineer had good reason to believe that Evans would not do so, he was under no obligation to stop his train. To require engineers to stop their trains whenever sectionmen were discovered at work along the various sections of the track would not only impose an unjust burden, but would greatly interfere with traffic and travel, and with that doctrine we are entirely satisfied.

But that is not the case here. In this case Lynch was on a bicycle and in the performance of a duty imposed upon him by the company. He was as much entitled to the track as any train of the company. In the Evans Case, the engineer gave all the usual cautionary signals of the approach of his train required by the statutes and common prudence. All the operatives working with Evans moved out of danger, and the engineer saw them do so. Evans was not on the track, but stepped from a place of safety immediately in front of the rapidly moving engine.

In this case, the evidence shows that not even a signal by a whistle was given to Lynch, and he was in plain view of the engineer and fireman for at least a half a mile, with no knowledge of the approaching train or engine behind him. And, as already said, he had no reason to expect this (wild) engine to follow him so closely after the passage of the passenger train. And it cannot be said, as a matter of law, that he was guilty of such contributory negligence as would prevent a recovery by his mother. But even if he had been guilty of contributory negligence running, as he was, for a half mile or two-thirds of a mile in plain view of the engineer and fireman on this engine, and having indicated in no way to them his knowledge of their approach, it was their plain and obvious duty to exercise reasonable care for his safety, and not run over him. From the time they saw him and observed, as alleged in the defendant's answer, that he was not looking back, and was ignorant of their approach, it was their duty to warn him and to slow down the train, and stop, if necessary, in order to save his life. As was said by this court in *Sullivan v. Railroad*, 97 Mo. 118, 10 S. W. 852: It appearing that the deceased had a right to be where he was on the track, that his life could have been saved by the use of ordinary care by the defendant's servants operating the train, and that they failed to exercise such ordinary care, a demurrer to the evidence was rightfully overruled, although there was evidence tending to show that the deceased was guilty of negligence. See, also, *Kelly v. Union Transit Co.*, 95 Mo. 282, 8 S. W. 420; *Hawley v. C. & Q. R. R. Co.*, 71 Iowa, 717, 29 N. W. 787; *Eppstein v. Railway Co.*, 197 Mo. 720, 94 S. W. 967.

3. It is next insisted that the circuit court erred in overruling defendant's motion to strike out the amendment to plaintiff's petition. It appears that, when the case was commenced, the prayer in the petition was for damages to the amount of \$2,000. The action was commenced on the 10th of August, 1903. On the 21st day of January, 1904, the defendant filed an application for a change of venue, and on the same day, before the application for a change of venue was awarded, the plaintiff, by leave of the court, amended her petition by changing the amount sued for from \$2,000 to \$5,000, to which the defendant objected, but filed no term bill of exceptions. The record then recites: "And thereupon and thereafter on January 21, 1904, defendant renews and presents to the court its application for a change of venue in this cause, and the parties appearing by their attorneys, and the application being by the court seen and understood, is sustained, and the court orders that the venue of this cause be changed, and the case transferred to the circuit court of Pike county of Missouri in the Tenth judicial circuit." It also appears from the record that, prior

to the filing of this application for a change of venue, the cause had been continued; but the continuance has been set aside on the motion of the defendant. It thus appears that, after the application for a change of venue had been filed, the plaintiff by leave of the court, over the objection of defendant, amended her petition so as to make the prayer for judgment for \$5,000, instead of \$2,000, as originally asked, and the contention is that the circuit court of Audrain county was powerless to allow the amendment or to take any step whatever save to grant the change; the objection being to the judge. As said in *Colvin v. Six*, 79 Mo., loc. cit. 200: "It is a question of jurisdiction, and it has been held by this court, in construing the statute relating to change of venue from the circuit court, that it is the order of the court of a change which divests the court of jurisdiction and confirms it upon another court." *Henderson v. Henderson*, 55 Mo. 534; *State v. Daniels*, 68 Mo. 192; *State v. Hopper*, 71 Mo. 425. It has also been held that a court which orders a change of venue retains sufficient power to set it aside during the term. *State v. Webb*, 74 Mo. 333. It must follow, from the principles announced in these decisions, that the court did not lose jurisdiction of the case by the mere fact of the application for a change of venue, and that it retains jurisdiction until the order for the change has been made. These cases were afterwards approved in the *Matter of Whitson's Estate*, 89 Mo. 58, 1 S. W. 125. When the application for the change of venue was made, without doubt the circuit court of Audrain had jurisdiction to determine its sufficiency, or whether it had been timely made. If it had erroneously declined to grant it, its action would have been open to review by this court on appeal or writ of error upon proper exceptions saved. *Corpenny v. Sedalia*, 57 Mo. 88. It has been uniformly ruled by this court that the granting or refusing of an application for a change of venue is a matter of exception, and must be preserved by a bill of exceptions filed in the court which erroneously makes or refuses the order, at the term thereof when the order is made. *State v. Ware*, 69 Mo. 332; *State v. Nave*, 185 Mo. 135, 84 S. W. 1; *Keen v. Schnedler*, 92 Mo. 524, 525, 2 S. W. 312; *Wright v. Kansas City*, 187 Mo. 696, 86 S. W. 452, and cases cited. Although defendant objected and excepted when the leave was granted plaintiff to amend her petition, it filed no bill of exceptions in the circuit court of Audrain county at the term, or at any time, and hence it cannot avail itself of the error, if any, in permitting the amendment. *Keen v. Schnedler*, supra. None of the authorities cited by defendant militate in the least against the conclusion we have reached on this point.

4. Having already ruled that the circuit court properly gave the first instruction, and that there was ample testimony upon which

to predicate it, it is unnecessary to notice this point further. The other objection to it is, we think, without merit, and affords no ground for reversal.

5. The court's instruction, given of its own motion, is assailed because the last paragraph thereof reads: "In such case the absence of ordinary care cannot be inferred from the fact that defendant's agent did not in fact stop said engine before it struck said Lynch, if it did strike him." The contention is that the court assumes as a fact that "defendant's agent did not in fact stop said engine before it struck said Lynch." The clause, when read in connection with the whole instruction, is not fairly susceptible of the construction put upon it. We think, however, it was too favorable to defendant, and it has no cause to complain of it. Indeed, the instructions given in behalf of the defendant were as favorable as it could ask, and, if any error was committed in instructions, it was against the plaintiff.

6. Error is also assigned in the admission of evidence for plaintiff. The first assignment, to wit, that the court erroneously permitted the witness to answer the question, "What position would the train crew take when you say a train is under control?" is not supported by any reason whatever; but we are referred to the record. Looking to that, it appears the objection was that it was argumentative and immaterial. The witness having already testified that, when a second train entered a block on which there was already another train, the trainmen of the second train should keep their train under control and move slowly and ready to stop on short notice, the answer needed no explanation, and the attempt to make it clearer added nothing to it; but in no event could it have wrought any injury to defendant. As to the proposition that the court erred in permitting witness Smith to testify as to the speed of the engine when it passed the coal chute a mile and a quarter west of where Lynch was killed, we think that the last announcement by this court in banc, in *Stotler v. Railway Co.*, 200 Mo. 107, 98 S. W. 513, 515, justified the ruling of the circuit court. The duties of the witness required him to ascertain if trains were on time, and he always kept C. & A. time. He had resided at Higginsville 12 years, and his work on top of the mine gave him a daily opportunity of observing the speed of trains passing the chute. He saw the engine in question as it came from Higginsville, noted it as it passed, and watched it as it went east around the curve. He had ridden on trains on this road. In *Stotler v. Railway Co.*, supra, it was said: "Obviously, it would be nonsense to say that a rate of speed could only be shown by expert testimony." *Walsh v. Railroad*, 102 Mo., loc. cit. 586, 14 S. W. 873, 15 S. W. 757; *Aston v. Railway Co.*, 105 Mo. App., loc. cit. 231, 79 S. W. 999. Neither do we agree that the speed of the train

at the coal chute was no evidence of the speed it was making a mile or a mile and a quarter further east, at which point it was running downgrade. There was not a syllable of evidence that the train had slackened its speed, and it was for the jury to draw the inference that it had continued at the rate it was last seen, when the distance was only a mile further east. In the absence of all whistling and any evidence whatever to the contrary, the fact that it was maintaining a certain speed at the coal chute, with no evidence of abatement, was a fact which the jury could consider with the other evidence that it arrived in Corder only three minutes behind the regular passenger train, which reached Corder about on time. We think there was no reversible error in permitting the witness Cramer to testify that, when the engine and tender reached Corder that morning, there was no person on the rear end of it as it backed in. No objection was made to the question when it was asked. Counsel for defendant objected on the ground it was immaterial to any issue in the case. The court overruled this objection, and defendant excepted. The objections now urged for the first time were not made to the circuit court.

7. It is next objected that the court erred in permitting the witness Jacks to answer the question propounded to him by counsel for plaintiff with reference to the distance within which an engine and tender could be stopped. It is earnestly insisted that the witness was not shown to be qualified to testify as an expert on the matter. On this part of the objection, the testimony tended to show that the witness had been working at and about railroads and locomotives about seven years. He had never been an engineer or fireman, and had not operated an engine himself; but he testified that he had had occasion to see locomotive engines started and stopped, and the distance in which they could be stopped when running, and he had had these opportunities for the last seven years. He had ridden on engines and trains, had seen the engineer manipulate the appliances, and he stated from his observations in this respect he knew the distance in which a train could be stopped when it consisted of nothing but an engine and tender. That this evidence presented a question for expert testimony we think there can be no doubt. Just within what distance a train can be stopped, in a given case, with safety to property and the lives of persons thereon, must depend upon many things—the speed of the train, the grade of the track, the size of the train, the kind of brakes used, etc. As said by Biggs, J., in *Gourley v. Railway Co.*, 35 Mo. App., loc. cit. 92: "It is unreasonable to suppose that the judgment of a witness on such a subject, who has no practical knowledge in the running of trains, or who has never given the subject any study, would be worth any more than the judgment of the jurors them-

selves." In *Eckert v. Railway Co.*, 13 Mo. App. 352, the defendant introduced as a witness a builder of locomotives, and offered to prove by him the distance within which a train could have been stopped. The trial court refused to let the witness answer. Judge Thompson, in passing on this question, said: "A person long practiced in the building of locomotives and in running them on trial trips would clearly be able to give his opinion as an expert on the matter submitted to him." We are inclined to the opinion that the witness in this case did not sufficiently qualify in order to testify as an expert. But the circuit court permitted him to testify. He was then asked: "Suppose a locomotive engine and tender, not a switch engine, but an engine such as used in freight service on the road in work service—supposing it was equipped with air, and was being run down a straight track in dry weather, on a grade slightly down, and operated at a rate of 15 or 20 miles an hour, with the trainmen in their proper places on the engine, in what distance could it be stopped so as not to endanger the persons on board or injure the train?" And he answered: "He would say between 200 and 300 feet." Counsel for the defendant also objected to the hypothetical question for the reason that it was not shown in evidence what sort of an engine this particular engine was, and there was no evidence that it was not a switch engine, or how it was equipped, and also objected that the speed of the train was not shown at the time of the accident, etc. But conceding that this witness was not competent to testify as an expert, the question is: Should the cause be reversed for that reason? In *Robertson v. Railroad*, 84 Mo. 119, this court said: "That it might be error for the court to permit the witness, with no more knowledge than the jurymen, to give his opinion on the question; but, in order to be a ground for reversal, the error must have been prejudicial to the defendant. There was no evidence introduced by the defendant showing that the opinion expressed by the witness was erroneous. And it could not be perceived how the defendant could be prejudiced, except upon the assumption that the opinion was contrary to the knowledge and observation of men. No one expressed or intimated anything to the contrary, and the defendant offered no evidence to prove that it was erroneous." In this case, likewise, it is difficult to see how the testimony of this witness on this point materially affected the issue. As already said, the deceased, Lynch, on his velocipede, was on a straight track on a clear morning immediately in front of the engine and tender, and the engineer and fireman had their faces turned in the direction in which the deceased was moving, and with no obstruction whatever in the way, and the evidence shows, without contradiction, that he could have been seen for a half to two-thirds of a mile by the engineer and fireman before their engine collided with his velocipede.



pede. The answer of the defendant alleged, in substance, that the deceased did not look and observe the approach of the engine. No signal whatever was given him, and when the engineer and fireman observed, as they must have observed unless they shut their eyes, that he was making no effort whatever to leave the track with his velocipede, then it became their duty, under the decisions of this court, to give him a warning of their approach, and exercise all reasonable care to avoid injuring him. And there was absolutely no evidence whatever that the engineer and fireman made any effort to stop the train, or were unable to do so in time to avoid the injury to the deceased. So that the evidence of the witness Jacks that the train could have been stopped within 200 or 300 feet, in our opinion added no weight to the case made against the defendant. Had there been any evidence of the sudden appearance of the deceased upon the track 300 or 400 feet ahead of the engine and tender, or any evidence whatever of any attempt to warn the deceased of the coming of the engine behind him, or any effort whatever to stop the train, and the failure to do so before striking him, then the evidence of the witness Jacks would have been material, and it would have been error to have admitted it. But, in view of all the facts already narrated, we are of the opinion that the cause should not be reversed for this error.

8. Lastly, it is urged that the plaintiff failed to prove her right to maintain this action, because she did not prove, if it was a fact, that the deceased left no minor children surviving him. It was alleged in the petition that the plaintiff was a widow, and John Lynch was her son, and at the time of his death he was an unmarried minor under the age of 21 years, and left no children surviving him; that his father, the plaintiff's husband, was dead. The testimony showed that the plaintiff was the mother of John Lynch, the deceased, and that at the time of the bringing of the action she was a widow, and that John Lynch, at the time of his death, was a little over 20 years of age, and was single and unmarried. There was no proof either by the plaintiff or the defendant that John Lynch left any minor children, or that he was ever married. Section 640, Rev. St. 1899 [Ann. St. 1906, p. 660], requires that "all motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion." It is the settled law of this state that, in order to have the action of a trial court reviewed in our appellate courts, alleged errors not appearing on the face of the record proper must be called to the attention of the trial court by a motion for a new trial; otherwise they will not be considered. *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *Railroad v. Carlisle*, 94 Mo. 166, 7 S. W. 102; *Bollinger v. Carrier*, 79 Mo. 318. The fundamental principle of prac-

tice upon which these decisions are predicated is that it is the duty of an appellant, before appealing to an appellate court, to give the trial court an opportunity to correct its error, if any, and thus obviate delay and the expense of an appeal, and, when this is not done, the appellate court will not review the rulings of the trial or circuit court upon the point. *Williams v. Railway Co.*, 112 Mo., loc. cit. 485, 20 S. W. 631, 34 Am. St. Rep. 403, and cases cited. And the motion for new trial must specifically call the attention of the trial court to the alleged errors. Has defendant complied with the statutory command in this regard in its motion for new trial in this cause?

The twelfth ground in the motion is in these words: "Because the verdict is not supported by the evidence, and the cause being founded upon a special statute, the plaintiff did not prove facts sufficient to bring herself and this cause within the purview of such statute." In their brief and argument in this court, learned counsel for defendant assign as error that "plaintiff wholly failed to prove her right to maintain this action because she did not prove, if it was a fact, that deceased left no minor children surviving him." Did the motion for new trial, fairly considered, notify the circuit court of the ground above urged for a reversal of its judgment? Counsel had no difficulty to state the proposition plainly and specifically in this court in the words last above quoted. If they meant to rely upon this as a ground for new trial, they should have stated it as specifically in their motion for new trial as the statute and the practice require. Instead of stating "plaintiff did not prove facts sufficient to bring herself and this cause within the purview of the statute," they should have gone further, and added: "In this, that she did not prove that the deceased left no minor children surviving him." There was nothing in the motion for new trial to indicate to the circuit court what facts plaintiff had failed to prove, which defendant regarded as essential to bring her case within the statute. This failure of defendant to specifically direct the circuit court's attention to the claim now made is more obvious, when the record is examined, and no allusion is found to it anywhere in the oral testimony or in an instruction asked by defendant. Had the court's attention been specifically directed to the matter, and it had ruled against defendant, and an exception been saved, the defendant might with some plausibility insist it was unnecessary to repeat it in full; but to make a ground of its motion for a new trial in such general terms in regard to a matter nowhere mooted in the trial or instructions we think is contrary to the spirit of the statute, and to uphold such a practice would encourage the laying of traps for an adversary and the circuit courts. The courts and adversary parties are entitled to meet in the open adjustment of the solemn business affairs of life.

This court, in *Sweet v. Maupin*, 65 Mo. 65, construed section 640, Rev. St. 1899 [Ann. St. 1906, p. 660], then 2 Wagner's St. p. 1021, c. 110, art. 5, § 48. In that case there were several counts in the petition, and the jury returned a general verdict. The fourth clause of the motion for new trial was that "the verdict of the jury is not warranted by the issues in the case and is incorrect and informal." In the Supreme Court the verdict was assailed on the ground that it was a general one, and not a finding on each count. It was conceded by this court that, if the attention of the trial court had been called to a defect of that sort by appropriate motion, a reversal must occur, but said the court: "Our statute expressly requires that motions shall distinctly specify the ground whereon they are based. 2 Wagner's St. p. 1021, c. 110, art. 5, § 48. The object of this is to call the attention of the lower court to the point complained of, for matters of exception cannot be noticed here except when 'expressly decided' by the lower court. Id. p. 106, c. 2, art. 4, § 32; *State v. Rucker*, 59 Mo. 17, and other Missouri cases. We hardly think, in the light of these statutory provisions and decisions, the motion specified with sufficient distinctness the ground now relied on that the verdict did not contain a special finding on each count." A motion for rehearing was filed in that case in this court, and this court rendered an exhaustive opinion, reviewing all the cases and adhering to the opinion first handed down. It was ruled that errors like the one alleged in this case must be pointedly called to the attention of the trial court, or they will not be reviewed by this court.

We think the motion was insufficient to justify a review of the point raised in the brief of defendant. But if the motion for new trial had contained an appropriate specification of the ground now relied on, still we think the judgment should not be reversed. The plaintiff established affirmatively that she was the mother and only surviving parent of John Lynch at the date of his death, and that he was at that time a minor, single, and unmarried. There was not the slightest suggestion during the trial that John Lynch had ever been married, or that he had a minor child surviving him at the time of his death. Conceding there is no presumption, either that John Lynch, the deceased, was married or unmarried, still the ordinary rule is that men do not marry before reaching their majority, and when it was affirmatively shown he was single and unmarried at the time of his death, and was a minor, in the absence of the slightest suggestion that he had ever been married, and no offer to show by newly discovered evidence that he had in fact been married and left a minor child, or children, the jury were justified in finding he had no minor children or child surviving him, and to reverse this judgment to have the fact that he left no

minor child established would be, in our opinion, trifling with justice.

The judgment of the circuit court is affirmed.

FOX, P. J., and BURGESS, J., concur.

#### WOOD v. DUFFY.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1907.)

##### 1. EVIDENCE — ADMISSIONS — OFFER OF COMPROMISE.

In an action to recover the price of a ring, where it appeared that, after plaintiff placed his claim in the hands of an attorney, defendant told the attorney that he had agreed with plaintiff's assignor to purchase the ring from him, the testimony of the attorney as to defendant's admissions made on this occasion was admissible in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 745-751.]

##### 2. TRIAL — TRIAL BY COURT — DECLARATIONS OF LAW.

Where no declarations of law were asked, the action of the court in admitting testimony cannot be held error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 893.]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by John C. Wood, as assignee of William J. Berkley, against Joseph A. Duffy to recover the price of a ring. From a judgment of the circuit court, affirming a judgment of the justice's court for plaintiff, defendant appeals. Affirmed.

David Murphy, for appellant. Alex J. B. Garesche, for respondent.

GOODE, J. This action was instituted before a justice of the peace to recover \$150, the alleged price of a gold ring with a diamond and sapphire setting. William J. Berkley was the owner of the ring. He traded it to defendant Duffy for a lot. Berkley delivered the ring to Duffy, but the latter subsequently found he could not make a good title to the lot, and offered to return the ring. The testimony for plaintiff tends to show that, instead of taking the ring back, Berkley agreed that Duffy should pay \$125 for it. Subsequently Berkley assigned his interest in the supposed debt to plaintiff Wood, and the latter sued for it. After the demand had been put in the hands of Alex J. B. Garesche, an attorney, the latter wrote Duffy a letter, whereupon Duffy called on Garesche, and a conversation ensued between the two about the transaction. Garesche testified as a witness for plaintiff, and related the conversation. He said he told Duffy that both he and Berkley were his (Garesche's) friends, and he (Garesche) would like to have the matter settled; that thereupon Duffy told Garesche all about the original trade for the ring, namely, that Duffy was to give Berkley a lot for it, and also told the final arrangement made when the

title to the lot was known to have failed; that Duffy then agreed to pay Berkley \$125 in cash as soon as a certain pending deal was consummated. The action resulted in a verdict and judgment for plaintiff for \$125, and defendant appealed.

The error assigned is the admission of the testimony of Garesche, the attorney, which counsel for defendant asserts was incompetent, because whatever Duffy said to the attorney was after the latter had notified him that the account was in the attorney's hands for collection, and Duffy's statement was in the nature of an offer of compromise, proffered to avoid litigation. It should be stated that Duffy testified he simply offered to return the ring when he found he could not make a good title to the lot; that Berkley said he had bought another ring, and did not need the one traded. Duffy denies he ever promised to pay cash \$125, or any other sum. What he said in regard to the conversation with Garesche was that he went to the latter's office, and told him that he (Duffy) was very much surprised at Berkley's putting the claim in the hands of an attorney, and, further, that he offered Garesche \$100 rather than have any trouble. The tendency of Duffy's testimony is to prove the offer made to Garesche was by way of compromise; and the point against the competency of the evidence would be well taken if what Duffy swore to was all the evidence on the point. *Gorham v. Auerswald*, 59 Mo. App. 77. But Garesche's testimony put the conversation in a different light, and tends to establish that, instead of what Duffy said amounting to a compromise, it was a voluntary narrative of what had transpired between him and Berkley, including an agreement between the two to substitute for the lot a cash payment of \$125 as the price of the ring. If the court believed Garesche's version of the conversation, the latter's testimony was perfectly competent as tending to prove as admission by Duffy against interest and not an offer of compromise. No declarations of law were asked; and hence the matter is not presented in a way in which the court can be held to have erred in admitting Garesche's testimony.

The judgment is affirmed. All concur.

#### NATIONAL BANK OF COMMERCE OF ST. LOUIS v. DUFFY.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1907. Rehearing Denied Dec. 17, 1907.)

##### COSTS—ON APPEAL.

Where there was a mistake in calculating the interest on a note, and judgment for an excessive amount was rendered against defendant, who, on motion for a new trial, called the court's attention to the error which was disregarded in overruling the motion, costs cannot be taxed against defendant on his appeal, even though plaintiff remit the excess.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 913.]

Appeal from Circuit Court, City of St. Louis; Robert M. Foster, Judge.

Action by the National Bank of Commerce of St. Louis against Joseph A. Duffy. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

F. A. C. Macmanus, for appellant. Geo. L. Edwards, for respondent.

**PER CURIAM.** This action was instituted before a justice of the peace on a promissory note. It was appealed to the circuit court, where the defendant failed to appear, and judgment was entered affirming the judgment of the justice for the sum of \$308.25. That is to say, \$285, the principal note, and \$23.25, 8 per cent. interest thereon from February 19, 1906, the date of the note. Defendant filed a motion for new trial, which having been overruled, the case was appealed. An error was made in calculating the interest, which was computed from the date of the note, instead of from its maturity, May 19, 1906, as it should have been. The difference in the interest was \$5.70, and plaintiff offers to remit this amount from the judgment, the costs to be taxed against defendant, who appealed. We cannot tax the costs against defendant, because the error in computing the interest was expressly called to the attention of the court below, in the motion for new trial, but was disregarded in overruling said motion.

The judgment is reversed, and the cause remanded.

#### BROWN v. ST. LOUIS & SUBURBAN RY. CO.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1907.)

##### 1. STREET RAILROADS—OPERATION—PERSONAL INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a minor crossing in front of a street car, evidence considered, and held sufficient to take to the jury the question of the motorman's negligence in not seeing the minor and avoiding the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 253.]

##### 2. DAMAGES — INFANTS — LOSS OF EARNING POWER—EVIDENCE.

In an action by a parent for injuries to his minor son, his testimony that the son was prepared to follow him in his line of business, and would start in at so much, and be increased to what he was then getting, is too remote and speculative to be admissible to show loss of earning power of the son.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 490.]

##### 3. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by a parent for injuries to his minor son, the admission of incompetent evidence of loss of earning power of the son is harmless, where the verdict was for a sum but little in excess of the expense plaintiff was put to for medical services, and compensation for future earning barely entered into the estimation of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4175.]

#### 4. TRIAL—REQUESTS FOR INSTRUCTIONS—APPLICABILITY TO PLEADING.

Where, in an action for personal injuries, the petition alleges that a railroad company knew or should have known that at a certain defined crossing children were in the habit of crossing the tracks, and the evidence shows that the injury was caused within the limits described by the petition, an instruction that the jury could not consider the fact that children were in the habit of crossing at other places was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

#### 5. SAME.

A requested instruction covered by an instruction given is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

#### 6. STREET RAILROADS—ACTIONS FOR PERSONAL INJURIES—INSTRUCTION.

In an action by a parent for injuries to his minor son struck by a street car, a requested instruction that the jury, in determining whether or not the plaintiff's son was aware of the danger of crossing in front of a moving car, and whether or not he saw the car while in a place of safety and took his chances in crossing, the jury might consider the son's admission that he knew the danger and took chances, is erroneous in placing the boy on the equality with an adult and properly refused.

#### 7. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to a minor struck by a street car, running at an unlawful rate of speed, the minor admitted that he knew the danger and took his chances in endeavoring to cross in front of the car, a requested instruction, calling upon the jury to consider the admissions of the minor in determining whether he knew the danger and took his chances in crossing, is properly refused; there being no evidence that he knew that the car was being run at an unlawful rate of speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action for loss of services of a minor son by Joseph H. Brown against the St. Louis & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Leroy Brown, plaintiff's minor son, was run over and injured on November 10, 1903, by one of defendant's street cars traveling north on Fair avenue, in the city of St. Louis. The suit is by the father to recover damages for loss of his son's services, and for money expended and liabilities incurred for surgical and medical attendance for his son.

After stating matters of inducement, the petition alleges: "That on the said 10th day of November, 1903, the pupils of Harrison School, a public school of the city of St. Louis, used at their noon recess, and for a long time prior to said date had used at their noon recess, that part of Fair avenue, between Penrose street and Green Lea Place which extends from Green Lea Place to a point about 100 feet south of Green Lea Place, as a place of crossing back and forth between the schoolhouse on the east of Fair avenue and a vacant lot used by them as a playground on the west thereof. That the street and space between

said lot and schoolhouse was, and had long been, frequented by many small children at said time of the day to the knowledge of the defendant and its servants operating defendant's cars at that place. That during the noon recess and at about the hour of 1 o'clock in the afternoon on the said 10th day of November, 1903, plaintiff's son, a pupil of said Harrison School, together with other pupils of said school, was crossing Fair avenue at said place on his way from the said vacant lot to the said schoolhouse, and whilst so crossing a motorman of the defendant then and there in charge of a north-bound car belonging to the defendant carelessly and negligently ran said car upon and over the plaintiff's said son, crushing his skull, causing a compound comminuted fracture of his skull from the apex to the base thereof for a space three inches in length by one inch in breadth, injuring and leaving his brain permanently exposed without a bone covering thereto throughout said space, said fracture also extending laterally through the petrous portion of the left temporal bone, permanently destroying the hearing of plaintiff's said son in his left ear, and permanently leaving his left ear displaced by a distance of about three-quarters of an inch below its former and natural position, fracturing and injuring his left lower maxilla or jawbone, causing suppuration and necrosis; fracturing and crushing his clavicle; fracturing and crushing his cervical vertebrae, causing permanent wry neck; fracturing his left humerus with a compound comminuted fracture requiring permanent wiring of same, causing a permanent shortening of his left arm; and crushing and injuring his left hip and thigh—all of said injuries resulting in a permanent injury and damage to the plaintiff's son, and also resulting in a permanent nervous injury to plaintiff's said son which will result in a permanent epilepsy and other permanent nervous disorders. Plaintiff further states that the aforesaid injuries sustained by his said son were directly caused by the negligence of the defendant in this, to wit: That defendant and its servants and employees in charge of defendant's said car caused said car to run upon the place aforesaid at the noon hour aforesaid, when they knew, or by the exercise of ordinary care would have known, that said place was commonly and daily used by the pupils of Harrison School at said noon hour as a place of crossing said street and tracks, and commonly and daily at said noon hour frequented by many small children, without keeping any watch or lookout for children on or approaching the said tracks on said street at said point in danger from said car; that said failure to keep such watch or lookout directly caused said injuries to plaintiff's son; that defendant's servants in charge of said car ran said car at a rapid rate of speed on said Fair avenue between Penrose street and Green Lea Place at the place above de-

scribed at said noon hour aforesaid, when they knew, or by the exercise of ordinary care would have known, that said street at said place was commonly and daily used at said noon hour by the pupils of Harrison School in crossing from the playground to the school building of said school, and frequented at said hour by many small children. And plaintiff avers that said rate of speed at which said car was propelled at said time and place was at said time and place negligent, careless, unreasonable, and dangerous, and said rapid and excessive rate of speed directly caused said injuries to the plaintiff's said son; that the defendant and its servants and employes in charge of said car at said place negligently failed to use any care to control said car or to stop the same and avert injury to plaintiff's son, but, on the contrary, negligently caused, suffered, and permitted said car to strike and run over plaintiff's son, as aforesaid, and said failure of defendant directly caused said injuries to plaintiff's son; that defendant was further negligent, in this, that at the time of said injury to plaintiff's son there was in force within the city of St. Louis an ordinance of said city whereby it was provided that motormen and conductors of street cars should keep a vigilant watch for persons on foot, especially children, either on the street or moving toward it, and upon the first appearance of danger to such child the car should be stopped within the shortest time and space possible. And plaintiff avers that, at the time of said injuries to his said son, defendant's motorman in charge of said car failed to keep such vigilant watch and thereby directly caused said injuries to plaintiff's said son." The answer was a general denial.

The evidence shows that, at the time of his injury, Leroy Brown was eight years old, and attended Harrison School, situated at the northeast corner of Fair avenue and Green Lea Place. The latter street runs east and west and is crossed by Fair avenue, running north and south, at right angles. Three hundred feet south of Green Lea Place, Fair avenue is crossed by Penrose street running east and west, and 300 feet south of Penrose street Lee avenue runs east and west across Fair avenue. There is a vacant lot on the southwest corner of Fair avenue and Green Lea Place, fronting 105 feet on Fair avenue and running back west 150 feet. South of this open lot is a dwelling house, fronting on Fair avenue, and setting from 10 to 15 feet back from the building line. On the north side of this dwelling house is a close board fence about 5 feet high, and in front is a picket fence about 3 feet high. Defendant has a double-track railroad on Fair avenue, over which, in 1903, it operated street cars by electric power. Cars traveling north occupied the east track, and those traveling south the west one. Harrison School is a public school, and had been for about 12 years prior to 1903. Defendant had been

operating cars over Fair avenue for about six years prior to that date. Plaintiff's son was attending this school in the fall of 1903.

The janitor of the school testified the school gave a recess from 12 to 1 p. m., on each school day, and for 12 years, in the spring and fall seasons, from 50 to 100 boys went daily to the vacant lot at the southeast corner of Fair avenue and Green Lea Place, to play ball during the noon recess. The evidence tends to show that in going from the schoolhouse to the vacant lot, and in returning, the boys crossed Fair avenue south of Green Lea Place. A crowd of boys, including Leroy Brown, were on the lot playing ball during the noon recess on November 10, 1903. At 12:55 p. m. the janitor rang the school bell, and the boys ran from the lot across Fair avenue, on their way back to the schoolhouse. Leroy Brown was in the rear, and when he reached the middle of the east railroad track on Fair avenue he was struck by one of defendant's cars traveling north, knocked down on the track, and run over by the wheels of the front truck, and injured in the manner and to the extent alleged in the petition.

Arthur Duell, a witness for plaintiff, testified he turned south on Fair avenue from the next street north of Green Lea Place, and heard and saw a car coming north at a speed of from 25 to 30 miles an hour; that he walked rapidly south on Fair avenue, heard the school bell ring, saw the boys run across Fair avenue from the vacant lot, and saw Leroy Brown stoop down at the northeast corner of the dwelling house, as if in the act of picking up something, and then run east as fast as he could, and saw him when he reached the center of the east railroad track where the car struck him; that he could see the motorman plainly; that he made no effort to stop the car, "did not move his hands," until the boy was struck; and that there was no obstruction to prevent the motorman from seeing the boy running toward the track, if he had looked.

Leroy Brown's evidence, fairly interpreted, tends to show he was about three feet away from the house next the vacant lot when he heard the school bell; that when he got from behind the yard fence, and within four or five feet of Fair avenue, he looked south and saw the car that struck him at Penrose street, and ran northeast, thinking he could cross the track before the car came. He testified he had been cautioned by his father about crossing streets where there were railroad tracks, and that he took his chance after he saw the car.

Duell testified the car was from 150 to 160 feet from the boy when he first saw him start to run across the street. Plaintiff's evidence tends to show the point of collision was about 240 feet north of Lee avenue, and about 60 feet south of Green Lea Place; that the boy was knocked and rolled from 90 to 100 feet by the car before it was stopped.

Defendant's evidence tends to show the

car was running at a speed of from 7 to 8 miles per hour; that 15 miles per hour was the maximum speed to which the car was geared, but it would gain something over 15 miles on a level track by force of gravity; that, traveling at a speed of 30 miles per hour, the car could have been stopped in a space of 120 or 140 feet; at a speed of 25 miles per hour in a space of 100 feet, and at a speed of 15 miles per hour in a space of from 40 to 45 feet. The motorman in charge of the car testified he had never seen school children playing on the vacant lot or crossing the tracks until Leroy Brown was struck; that, after crossing Lee avenue, he saw a covered wagon coming south on the west track, and rang his bell and turned off the power for fear the wagon might turn across the track; that the wagon came on south, and Leroy Brown ran from behind it on the east track, within from 18 inches to 2 feet of the car, and he did not see the boy until he came from behind the wagon. The motorman's evidence in respect to the wagon, and the fact that the boy ran from behind it on the track immediately in front of the car, is corroborated by the evidence of the conductor and of R. H. Brann, a paper hanger, who testified he saw the accident through a window of a nearby house where he was working. In rebuttal, Duell testified there was no wagon on the track, or anywhere near it; that he had a clear, unobstructed view of the tracks for a distance of from 800 to 900 feet.

Verdict and judgment were for plaintiff for \$1,000, from which defendant appealed.

T. M. Pierce, for appellant. R. P. Spencer, W. C. Arline, and Collins & Chappel, for respondent.

**BLAND, P. J.** (after stating the facts as above). 1. The first error assigned is the refusal of the court to take the case from the jury, as requested by defendant. The evidence of the janitor of the Harrison School that from 50 to 100 school boys played ball daily on the vacant lot west of the railroad tracks, the evidence showing the boys crossed these tracks where Leroy Brown was struck by the car, and the evidence of Duell that the car was running at an excessive rate of speed at the very moment the school boys were crossing the track to get to the school, and that the motorman made no effort whatever to stop the car, though he could have seen Leroy Brown running across the track and in a position of peril in time to have stopped the car and avoided the collision, if he had looked, not only makes out a prima facie case, but a strong case of gross negligence.

2. Plaintiff testified he was foreman of a job press room at George D. Barnard & Co.'s establishment, and, over the objection of defendant, testified that Leroy, before he was injured, was a strong, bright, and intelligent boy and capable of preparing to follow the business he (plaintiff) was engaged in, and

that he had intended to have him follow the same business, and to put him to work at the age of 14 years; that boys were started in that business at \$4 a week, and from that advanced to journeymen, according to their ability, after serving four years, when they received from \$18 to \$20 a week. The ground of objection to this evidence was the testimony was too indefinite, and there was no presumption that the boy would follow in the footsteps of his father. In *Rosenkranz v. Lindell Ry. Co.*, 108 Mo., loc. cit. 17, 18 S. W. 892, 32 Am. St. Rep. 588, Macfarlane, J., said: "The impairment of one in his infancy is as great a damage to him, as though he had not been injured until the day he reached his majority. That he would have an equal right to compensation logically follows. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future no one can tell with any certainty. It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience, and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.'" This case is approvingly cited in *Schmitz v. Railway*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250, and in *Brunke v. Telephone Co.*, 112 Mo. App., loc. cit. 623, 87 N. W. 84. Loss of earning power is always an element of damages in a personal injury case and is ordinarily shown by the difference in the earning power of the person injured before and after the injury, but evidence of liability of promotion, or evidence to show that a plaintiff was in the line of promotion in his calling, and if promoted his earnings would have been increased, is incompetent, because remote and speculative. 8 Am. & Eng. Ency. of Law (2d Ed.) 654. It seems to us the evidence that plaintiff had intended his son Leroy should follow his occupation, and what he would likely earn as he advanced in age and experience, is entirely too speculative to furnish a basis for assessment of damages, and for that reason incompetent. But we do not think the admission of this evidence was prejudicial, for the reason the verdict was for a sum but little in excess of the expense plaintiff was put to for medical services, etc., furnished his son, and that compensation for future earnings barely entered into the estimation of damages.

3. The court refused the following instruction asked by defendant: "The court instructs the jury that in determining whether or not the plaintiff's son was aware of the danger of endeavoring to cross the defendant's track in front of the moving car, described in the evidence, and in determining whether or not he saw said car while in a place of safety, and took his chances in trying to get across, they will consider any admission on the part of the plaintiff's son himself that he did know the danger, and

that he took his chances in an endeavor to cross the track in front of said car." The following instruction was given for defendant: "The court instructs the jury that, although they may believe and find from the evidence that the plaintiff's son, Leroy Brown, at the time of his alleged injury, was a child of eight or nine years of age, still if they further find from the evidence that he had sufficient intelligence and understanding to appreciate the danger of going in front of, or in close proximity to, the car of defendant, shown by the evidence to have struck him, and if you find that he did so, and that by so doing and exposing himself to danger the plaintiff's son was guilty of such negligence as directly contributed to his injury, the jury will find for the defendant; and, further, if the jury believe and find from the evidence that the plaintiff's son saw the car described in plaintiff's evidence before he attempted to cross the tracks of defendant, and then and there comprehended the danger of such crossing, yet attempted to cross said tracks, and received the injury complained of by reason of such attempt to cross said tracks, then he was guilty of such negligence as prevents a recovery, and the jury will find for the defendant." The instruction given properly declared the law. The one refused put the boy on an equality with an adult, in respect to exercising care for his own safety, and for that reason is erroneous; and we think, also, defendant puts a strained construction on Leroy Brown's evidence to make it appear he apprehended the danger and took chances. The boy stated he saw the car at Penrose street, more than 200 feet south of him, when he was within 5 feet of the street. He was running at the time and had plenty of time to cross the track had the car been running at a lawful speed, and there is no evidence to show he discovered it was running at an unlawful or excessive speed.

4. Error is assigned in the refusal of the court to give the following instruction asked by defendant: "The jury are instructed that they cannot find for plaintiff on the theory that there were children daily playing on the vacant lot mentioned in plaintiff's evidence at the noon hour, and when school began for the afternoon said children indiscriminately scattered across defendant's tracks at other points than at said alleged crossing; but the jury, before they can render a verdict for plaintiff, must find from the preponderance of the evidence in this case that there was a definite crossing at the time and place above mentioned made by habit of such children as distinct from a miscellaneous and indefinite crossing of defendant's tracks elsewhere by children, and that said defendant's servants knew said alleged specific and definite crossing of children at said time and place as distinct from other times and places of crossing said tracks by children." The point made is: The peti-

tion alleged a different point where the boys were in the habit of crossing the tracks in going from the playground to the school, than the one where the evidence shows the collision took place, or, in other words, the evidence shows the collision took place at a point not alleged in the petition. The allegation in the petition is that the boys used as a place of crossing that part of Fair avenue which extends about 100 feet south of Green Lea Place. This would make a customary crossing of 100 feet wide. Duell testified the car struck the boy about 90 or 100 feet south of Green Lea Place, so that the evidence shows the boy was struck within the alleged space used as a crossing by the school children.

No reversible error appearing, the judgment is affirmed. All concur.

#### STARK v. LOVE et al.

(St. Louis Court of Appeals. Missouri. Nov. 19, 1907. Rehearing Denied Dec. 17, 1907.)

##### 1. MORTGAGE—FORECLOSURE—APPLICATION OF SURPLUS TO PRIOR INCUMBRANCE.

Where there are three deeds of trust on property, the trustee of the intermediate deed upon making a sale thereunder cannot apply the surplus to satisfy, or as a credit on, the prior deed of trust in the absence of an agreement with the purchaser and parties in interest that such application should be made, but it should be applied to the junior incumbrance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1125.]

##### 2. SAME.

Where the trustee of an intermediate trust deed purchases a prior incumbrance, and buys in the property at his sale under the intermediate trust deed, he being seller, purchaser, and principal party in interest cannot make an agreement with himself to apply the surplus as a credit on the prior incumbrance.

##### 3. SAME—SALE—PURCHASE BY TRUSTEE—FRAUD.

A trustee of mortgaged property cannot become a purchaser of the premises at his own sale directly or indirectly unless the purchase is authorized or consented to by the parties in interest, and such an unauthorized sale is fraudulent and may be set aside, although the trustee acted in good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1081.]

##### 4. SAME—RIGHT OF TRUSTEE TO COMMISSION FOR SALE.

Where a trustee of mortgaged property under an intermediate trust deed purchases a prior incumbrance, and buys in the property for himself at his sale under the intermediate trust deed, he is not entitled to a commission as trustee for making the sale.

##### 5. SAME—RIGHTS OF JUNIOR INCUMBRANCER.

Where a junior incumbrancer was not a party to a sale of the mortgaged premises by a trustee of a prior trust deed, which sale was illegal because the trustee purchased the property himself, he may treat the sale as valid and demand the surplus which the trustee had improperly applied as a credit on a prior incumbrance.

Appeal from St. Louis Circuit Court; Moses N. Sale and Matt Reynolds, Judges.

Action by Charles B. Stark against John

E. Love and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Chas. B. Stark and Chester H. Krum, for appellant. T. J. Rowe and C. H. Fauntleron, for respondents.

BLAND, P. J. There were three deeds of trust on a lot of ground in block No. 3,741, city of St. Louis. The senior deed was to secure a note of \$1,000 and seven interest notes. The intermediate one was to secure a note of \$3,200 and six interest notes. The junior one was to secure a note of \$1,800 and four interest notes. Defendant John E. Love was trustee in the intermediate deed of trust, and as such trustee advertised and sold the lot at public auction, at which sale one Elizabeth Raebel became the highest and best bidder for the property. Out of the proceeds Love paid the debt and interest, amounting to \$3,333.55, and applied the surplus, after paying the expenses of the sale, as a credit on the note of \$1,000 secured by the senior deed of trust. Plaintiff, by assignment, held the junior deed of trust prior to and at the time of the sale, and as such assignee demanded the surplus, which Love refused to pay. The suit is for an accounting and to recover the surplus alleged in the petition to be \$666.45.

At defendants' request, the trial court found the facts as follows:

"On October 25, 1901, by deed dated on that date, and acknowledged and recorded on November 5, 1901, in consideration of the sum of \$1,500—the receipt of which the grantor, defendant Love, acknowledges in said deed to have been paid to him—John E. Love, the defendant, conveyed to Ignatz Heet a lot of ground in block 3741, in the city of St. Louis, Mo., containing a front of 30 feet on the north line of Cook avenue, by a depth north of 160 feet, to an alley 20 feet wide, and being known as the west 30 feet of lot No. 52 of Beardslee's subdivision of the Chancellor tract in said block, per the recorded plat thereof. This property will hereafter be referred to as the 'property in controversy.' The deed expressly recites that the conveyance is subject to a deed of trust to G. F. Dudley, trustee, dated February 23, 1901, for \$1,000.

"I find that the entire consideration for this conveyance was \$1,500, and the sale, subject to the deed of trust for \$1,000 to G. F. Dudley, trustee, dated February 23, 1901, was a part of the consideration of \$1,500; in other words, that the grantee in said deed paid, or agreed to pay, only the sum of \$500 in cash. As a matter of fact Heet testified that he never had any interest in the property, and at no time was the real owner thereof. This fact, however, is utterly immaterial in my view of the law. Heet accepted and ratified the deed made to him on the 25th day of October, 1901, by deed dated on that date, and acknowledged and recorded on the 5th

day of November, 1901. Heet signed and delivered a deed of trust, conveying the property in controversy, 'together with the building now being erected thereon, and known as 4005 Cook avenue, and also other buildings now on said lot, or that may hereafter be erected on said lot,' to defendant Love, to secure one E. W. Hall the payment of one principal note, due three years after date, for \$3,200, and six interest notes, each for \$96, all of even date, with the deed of trust, to wit: October 25, 1901, the principal note being payable three years after date and maturing October 25-28, 1904, and the interest notes being payable in 6, 12, 18, 24, 30, and 36 months after date, respectively. This last-mentioned deed of trust provided that when one of said notes—whether of interest or principal—becomes due and payable and remains unpaid, then all of said notes become due and payable at once, whether due on their face or not. It is further provided in said deed, 'and said party of the first part hereby guarantees to said party of the third part that said property herein described is free and clear of mechanics' liens; said party of the first part agrees that in case any liens should hereafter be filed against said property, after the execution of this trust, and in that case, said liens so filed shall have the same force and effect as if any one of said notes, hereinbefore described, shall have become due and payable, and all the covenants and agreements herein provided shall be in full force and effect and carried out as if said notes were actually due and payable. And in the event said party of the third part, or his assigns or legal representatives, or the party of the second part, or his successors in trust, shall expend any money to protect the title or possession of said premises, or for such insurance, as aforesaid, then any such money, so expended, shall be a new and additional principal sum of money, secured by this instrument, and shall be payable on demand, and may be collected with interest thereon at the rate of 8 per cent. per annum from the time of so expending the same.'

"In the event of default in the payment of any of the notes, above mentioned, at maturity, or if default be made in the due fulfillment of any of the covenants and agreements, the trustee is authorized to sell the property at public sale at the east front door of the courthouse, in the city of St. Louis, to the highest bidder for cash, and is authorized to receive the proceeds from such sale; out of which he shall pay, first, the cost and expense of executing this trust, including lawful compensation of said trustee, and next he shall repay to any person or persons, who may or shall, under the covenants hereinbefore set forth, have advanced or paid any money for taxes, mechanics' liens, or insurance, as above provided; all sums so, by him or them advanced, and not already repaid, together with interest thereon at the rate of 8 per cent. per annum, from date of such ad-



vances till date of payment; and next, the amount unpaid on said notes, together with the interest accrued thereon, and the remainder, if any, shall be paid to the party of the first part, or his legal representatives.'

"On November 5, 1901, by deed of that date, acknowledged on the same day and recorded on May 29, 1902, Heet conveyed the property in controversy to one Boughen, by a technical quitclaim deed.

"On the 15th day of May, 1902, Boughen and wife conveyed the property in controversy to defendant, Western Realty & Investment Company, a corporation, said deed was acknowledged on May 19, 1902, and duly recorded on the 29th day of May, 1902, the deed being a technical quitclaim deed, conveying to the defendant corporation whatever right of title Boughen had to the property.

"On May 14, 1902, by deed of that date, acknowledged on May 19, 1902, and recorded on May 29, 1902, Boughen and wife conveyed the property in controversy, 'subject to incumbrances, as shown by the records,' to one Amlar as trustee, to secure to E. S. Albright the payment of five negotiable promissory notes of even date with said deed, to wit, May 14, 1902, one principal note being for the sum of \$1,800, due two years after date, and four interest notes, each for \$54, due 6, 12, 18, and 24 months after date; all notes to bear interest from maturity at the rate of 8 per cent. per annum. This deed of trust, executed by Boughen, as to covenants and agreements, is the same in form as the deed of trust from Heet to Hall, trustee. The five notes, last above mentioned, are indorsed in blank by E. S. Albright, the payee named therein, and are the same notes, together with the deed of trust, which were transferred and delivered to the plaintiff Stark, as collateral, to secure to him the payment of \$521, due him by the Western Realty & Investment Company. I find that these notes were transferred and delivered to the plaintiff some time between the 1st and 13th day of June, 1904, and before the sale under the deed of trust, hereinafter mentioned, made by John E. Love to Elizabeth Raebel on June 30, 1904. The transfer of the Boughen notes was made to plaintiff Stark after the maturity of said notes, that is, after May 17, 1904, the last day of grace upon the principal Boughen note.

"On June 30, 1904, John E. Love, the defendant, as trustee in the deed of trust, sold the property at public sale to Elizabeth Raebel for the consideration, as stated in the deed, of \$4,000. The sale under this deed of trust took place at the east front door of the courthouse on June 30, 1904, in this city, and as a matter of fact Elizabeth Raebel (a stenographer or clerk in the office of defendant Love) was not the real purchaser of the property, but the property was bought in her name by the defendant Love, and thereafter, to wit, on July 11, 1904, said Raebel by a

quitclaim deed conveyed the property in controversy to the defendant Love, for a consideration of \$1. On July 14, 1904, in consideration of the sum of \$4,200—the receipt of which is acknowledged by Love—Love conveyed the property in controversy by warranty deed to Leonard D. Putney and wife, and warrants the title, except as against the taxes for the year 1904, and thereafter. This deed to Putney and wife was acknowledged and recorded on July 14, 1904. The earnest money receipt, given by defendant Love to Putney and wife, shows that the consideration for the deed was the sum of \$4,200; out of which, however, Love agreed to pay to Putney a commission, and agreed also to prorate the taxes for the year 1904, so that the actual amount received by Love for the sale of the property to Putney and wife, was about the sum of \$4,100. The earnest money receipt is dated July 12, 1904, and Love agrees to convey a perfect title, and in default of being able to make a perfect title within a reasonable time the earnest money was to be returned and the sale declared off.

"I find as a matter of fact, that the sale to Putney and wife by the defendant Love was practically consummated before the property was sold by Love, as trustee, on June 30, 1904. The expenses of the sale incurred by Love, as trustee, under the Heet deed of trust, were as follows: For advertising, \$20.50; notary's fees, .50; and a commission claimed by Love, as trustee, of \$50.00; making a total expense of \$71.00—if the commission claimed by the trustees under the circumstances in evidence, is a valid claim. If the claim for commissions is allowed, the net proceeds collected by Love as trustee amounts to \$4,029. If his claim is disallowed, the net proceeds amount to \$4,079.

"At the time of the sale, under the Heet deed of trust, to wit, June 30, 1904, two of the notes described in the deed of trust were past due and unpaid, at least it is so stated in the advertisement published by the trustee, a copy of which is attached to the trustee's deed to Elizabeth Raebel. The testimony does not show, however, what two notes were thus unpaid. The principal note for \$3,200, in the Heet deed of trust was not due until the 25th-28th day of October, 1904. The first interest note for \$96, the second interest note for \$96, the third and fourth interest notes, and the fifth interest note were likewise past due; each of said interest notes being for the sum of \$96. It appears, however, from the testimony of Love, and from the memorandum made by him on the Heet deed of trust, introduced in evidence, that only one of these interest notes remained due and unpaid at the time of sale, and that must have been the fifth interest note for \$96; so that on the date of sale there was due under the Heet deed of trust the principal sum of \$3,200, and one interest note for \$96, making a total of \$3,296. The fifth interest note for \$96, payable 30 months after date, matured

on April 25-28, 1904, and interest is therefore to be computed upon the principal sum of \$3,200, and likewise on the interest note of \$96 from April 25, 1904, to the 30th day of June, 1904, at the rate of 6 per cent. per annum, making a total of interest due on the date of sale of \$43.95, as computed by the defendant Love, and which is substantially accurate; adding this interest to the principal sum of \$3,296, makes a total due, under the Heet deed of trust, on the day of sale, of \$3,339.95.

"Disallowing the commission of \$50 claimed by Love as trustee under the Heet deed of trust, he should have had on hand, after deducting the amount due under that deed of trust, the sum of \$739.05. If the commission of \$50 is allowed, the balance in his hands would be \$689.05.

"Defendant Love applied the sum of \$647.52, as appears from his memorandum, on the first deed of trust, known as the 'Dudley deed of trust.' This amount being practically the surplus in his hands, after satisfying the Heet deed of trust, the expenses incurred under the same and the commissions claimed by Love.

"I further find that defendant Love conveyed the property in controversy to Putney and wife, free of all liens created by deeds of trust; that he was enabled to do this at the time of the purchase of the property by him at the sale on June 30, 1904, through Raebel, because Love then owned and held the Dudley note, said note being the note of defendant Love for \$1,000, and secured by a first lien on the property in controversy (unless, as a matter of law, the fact that Love had taken up and paid the note operated as to plaintiff, as a discharge of such lien).

"I further find that the conveyance by warranty deed by love to Putney was not known to the plaintiff or to the Western Realty & Investment Company on July 13, 1904, on which date the plaintiff notified defendant Love that he was the owner of the deed of trust and notes described therein, dated May 14, 1902, executed by Boughen to Amlar, trustee. The notice thus given recites that Love sold the property to Raebel for the consideration of \$4,000. I find that this notice is a ratification by Stark of the public sale, made by the defendant Love on June 30, 1904, but is not a ratification of the subsequent conveyance from Love to Putney; that at the time of the giving of this notice, to wit, on July 13, 1904, the plaintiff was not aware of the sale to Putney; that at the time of the sale under the Heet deed of trust, on June 30, 1904, the defendant Love had taken up the notes and deed of trust, dated February 23, 1901, being the Dudley deed of trust, for \$1,000, and at the time of the sale under the Heet deed of trust Love owned and controlled said Dudley deed of trust, and the notes thereby secured.

"I further find from the evidence that at the sale made by Love, as trustee under the Heet deed of trust, on June 30, 1904, Love

sold the property under the Heet deed of trust as if it were a first deed of trust or first lien upon the property, and that, in buying the property in, in the name of his stenographer, Raebel, he did so with the purpose and intent of thereafter conveying it for the net sum of \$4,100 to Putney and wife."

The court found the issues for defendants, and rendered judgment in their favor. The appeal is from this judgment.

The finding of the facts is very full and in accordance with the evidence. The trial court's conclusions of the law were that the trustee's sale was void, but plaintiff ratified the sale by demanding the surplus and was entitled to it if nothing more appeared in the case. But that plaintiff could not recover for the reason "his right was the right to set aside the sale as being illegal. He cannot condone the offense of the trustee, in making an illegal sale, and at the same time claim the benefit of such illegal conduct." The trial judge said: "I am satisfied from the evidence in this case that when Love bid the property in under the second deed of trust that he did so with the intention of conveying the title to Putney, free from the incumbrance which he (Love) then held, as the first lien on this property, namely, the Dudley mortgage. He did not sell solely and exclusively under the second deed of trust as a matter of fact. He sold under the second deed of trust, but intended to include, and did include, in the sale, the first deed of trust, in order that he might be in a position to convey a clear title to the party to whom he had practically contracted to convey it. Love himself owned the first deed of trust, and in order to make a clear title to the purchaser from him, that is, Putney, he undoubtedly intended to pay out of the proceeds of the sale the prior incumbrance, which he himself held, out of the excess that there might be over and above the second deed of trust. While it is undoubtedly true that he had no authority to do as he did, and the sale for that reason would have been voidable at the instance of the plaintiff, yet that, in my opinion, was the extent of plaintiff's right. The plaintiff cannot, in my opinion, absorb the first deed of trust by standing by and permitting the defendant Love to carry out his contract with Putney, with knowledge of the facts which enabled him, if he had seen fit so to do, to set aside the sale and thus compel Love to account to him for the excess over the second deed of trust, which, as a matter of fact, was realized in the manner and under the circumstances indicated in this opinion. I am not influenced in the slightest degree in this conclusion I have reached as to the law by the covenants contained in the Heet deed of trust to which my attention has been called by counsel on either side. The plaintiff could have disaffirmed or set aside the purchase by Love of the property in controversy, and have reinstated all parties concerned in their rights as they existed prior to the sale. If,

with knowledge of all the facts, he elects not to do this, but to ratify or confirm the sale, he must be held to have ratified all things done by the trustee, by means of which the trustee was enabled to procure the sum of \$4,100, as the purchase price of the property in controversy."

Love testified he took up the first deed of trust in March, 1904, by paying the debt it was given to secure to the then holder, and that he took up the second deed of trust (under which he made the sale) before the date of the sale and held both deeds of trust at the time of the sale and had them at the sale. In Love's deed to Heet the latter assumed the payment of the Dudley deed of trust for \$1,000. Defendant Love was the grantor in the Dudley (the senior) deed of trust and the maker of the note it was given to secure. By his deed to Heet the latter became the principal of that note and Love his surety for its payment. Heet failed to pay the note, and Love testified he was compelled to take it up to protect the property. In making this payment he paid his own debt and thereby satisfied the deed of trust. But even if this incumbrance was not extinguished by payment, no power was given Love, as trustee in the deed of trust under which he made the sale, to apply the surplus to satisfy, or as a credit on the prior deed of trust, unless there was an agreement with the purchaser and the parties in interest that such application should be made. Love being both seller and purchaser and principal party in interest at the time of the sale could not make the agreement with himself. *Scott v. Shy*, 53 Mo. 497; *Schmidt v. Smith*, 57 Mo. 135. In *Mead v. McLaughlin et al.*, 42 Mo. 198, it was held a trustee is authorized under a deed of trust to pay off debts which constitute liens subsequent to the deed of trust. In *Helweg v. Heitcamp*, 20 Mo. 569, it was ruled that where there were three deeds of trust and the sale was made under the second, the surplus should be applied to the third; and in *McGuire v. Wilkinson*, 72 Mo. 199, it was held the surplus in the hands of a trustee after selling under a prior deed of trust was subject to garnishment by a junior judgment creditor of the mortgagor, when the judgment was a lien upon the land. On these authorities it is plain that the surplus in Love's hands should have been applied to the junior deed of trust. The learned trial judge held, however, that plaintiff's remedy was to set aside the trustee's sale on the ground of fraud in the making of the same. This holding can only be sustained on the theory that the sale by Love was absolutely void, and that he is in a position to set up his own fraud as a defense in this action. Perry says: "If a trustee or mortgagee purchases the property thus within his power to sell, and the title is conveyed to him, either directly or indirectly, through a third person, he will continue to hold the property upon the old trust, or the mortgagor may redeem.

The execution of the trust or the foreclosure of the mortgage has not been advanced." 2 Perry on Trusts, § 802v, p. 194. In *Byrne v. Carson*, 70 Mo. App., loc. cit. 131, the Kansas City Court of Appeals, speaking through Smith, P. J., said: "It is well settled that a mortgagee cannot legally become a purchaser at his own sale unless authorized or consented to by the parties in interest. And it matters not that the sale was bona fide and for a fair price. The rule is not intended to remedy the wrong, but is intended to prevent the possibility of it. *Moore v. Thompson*, 40 Mo. App. 195. Such a purchase constitutes a fraud in law, and to authorize the setting aside of a sale so made it is not required that there should be actual fraud. And where the mortgagee purchases at his own sale through the interposition of another, such interposition is a badge of fraud, and the sale may be avoided by the mortgagor."

There is no evidence tending to show Love acted in bad faith. He was honestly doing the best he could to save what he had invested in the lot; but under the proof his sale, as trustee, was fraudulent in law, and for this reason his good faith is not available as a defense in this action, for it has never yet been permitted to a party to allege his own fraudulent acts, whether in law or fact, as a defense in a court of justice. We think the trial court was justified in refusing to allow Love any commission for making the sale as trustee. Plaintiff did not participate in the trustee's sale, had nothing whatever to do with it. He was not a party in any sense to the fraudulent trustee's sale, and had the right to treat it as a valid sale and demand the surplus.

For the reasons herein stated the judgment is reversed, and the cause remanded. All concur.

#### LACLEDE GASLIGHT CO. v. GAS CONSUMERS' ASS'N.

(St. Louis Court of Appeals. Missouri. Nov. 19, 1907. Rehearing Denied Dec. 17, 1907.)

##### 1. FIXTURES—GAS PIPES.

Where no agreement was made between a gas company and house owners concerning the pipes used by the company to make meter connections with the house pipes, the pipes which were used to make the connections did not become fixtures.

##### 2. GAS—PIPES AND APPLIANCES—RIGHTS OF GAS COMPANY.

Though a gas company furnished some inside pipe, which it was under no obligation to furnish, and so connected such pipe with its meter that it could not be removed by the house owner, or cut without interfering with the meter, the gas company did not thereby acquire exclusive control over the gas after it left the meter, nor the right to prohibit the owner, or any one for him, from placing upon the pipe a governor to regulate the gas pressure.

##### 3. SAME.

Where a house owner permitted a gas company to furnish inside pipe, which it was under no obligation to furnish, neither the owner nor

any one for him, could at such pipe for the purpose of placing a governor thereon, if, in doing so, the meter would be thrown out of plumb, caused to leak, or its parts and connections or seals be broken.

**4. SAME—RIGHT TO INJUNCTION—DECREE—REQUIREMENTS OF.**

Where injuries to a gas company's meters, caused by interfering with its connections by a company installing appliances to regulate the flow of gas, were off-recurring, and no adequate compensation in damages could be had therefor, the gas company was entitled to enjoin the interference with its connections, but not to restrain the exercise of the inherent right of the owner to have the gas governors instituted, and such right should be protected by the decree awarding the injunction.

**5. SAME.**

A decree restraining a company installing appliances to regulate the flow of gas, from interfering with a gas company's meter connections, but permitting the appliances to be installed upon compliance with certain directions, should authorize the company placing the appliances to remove the same, under proper restrictions, on refusal or failure of the customers to pay the agreed rent for their use.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Bill by the Laclede Gaslight Company against the Gas Consumers' Association to restrain defendant from interfering with plaintiff's meters, pipes, etc. From a decree granting an injunction, defendant appeals. Reversed and remanded, with directions to modify decree.

O. J. Mudd, for appellant. Percy Werner, for respondent.

**BLAND, P. J.** Plaintiff and defendant are both corporations doing business in the city of St. Louis. Plaintiff manufactures and supplies gas to resident and business houses in said city for illuminating and fuel purposes. Its gas is carried to the consumer, by pressure and force of gravity, through pipes laid by the company. Plaintiff's service pipes penetrate the basement walls of the buildings where gas is consumed, and are there connected with meters furnished and installed by plaintiff at its expense. The pipes, leading from the gas mains laid in the streets to the houses, are called inlet or service pipes, and the gas flows through these pipes into the meter, and from the meter into the house pipes, which are connected with the meter. What are termed in the evidence "the house pipes" are installed by the owner of the house, and run horizontally between the floor and the ceiling of the basement, and are ordinarily brought near the place where the meter is to be located, and are connected with the meter by nipples, and, when necessary, additional pipes are furnished by the gas company. A nipple only is used when the house pipes reach within eight inches of the meter; when they do not, additional pipe must be used to make the connection. A nipple in gas fitting, according to the evidence, is a piece of gas pipe eight inches or less in length, with threads cut on either end. In installing meters the company supplies

the nipples, and, generally, additional pipe when necessary to connect the meter with the house pipe, if the distance does not exceed 12 feet; if the distance is more than 12 feet, the owner of the house is expected to furnish the extra pipe. From the oral and photographic evidence in the record, it appears that prior to 1903 plaintiff company used lead pipe to make meter connections; that during the year 1903, it took out all the old meters and lead pipe, installed new meters, and made the connections with iron pipe, and sealed these connections. The reasons given for making this change are that the iron pipes hold the meter in a rigid position, whereas the lead pipes did not do so; that the iron pipes prevent the meters from getting out of plumb, and the lead ones did not; that the iron pipes were installed for the further reason it was an easy matter to disconnect the meter from the lead pipes, and then connect the service pipe with the house pipes by means of a rubber tube, and that this practice had been indulged in by some of plaintiff's patrons, to the loss of plaintiff. Another reason for making the change was to prevent the defendant company from attaching its governor to the inside pipes furnished by plaintiff. The gas regulator is described as follows: "An automatic machine for governing and regulating the pressure of gas; it is placed on the pipes after the gas has passed the meter; our apparatus is to keep the flow of the gas even, stop all over-pressure or wasting. \* \* \* It will control the capacity—the capacity of the machine is equal to the capacity of the pipe that goes into it. The capacity of the machine, in other words, is equal to the output of the meter." The machine automatically regulates the pressure.

Defendant company is engaged in installing gas regulators in the city of St. Louis, and has about 2,000 such machines in use in said city. Defendant's evidence tends to show that the pressure of gas, as furnished by plaintiff, is at times uneven and very irregular, and that its machine remedies this irregularity; that prior to the year 1903 it installed its machines by disconnecting the lead pipe with the meter, then inserted the machine and reconnected the pipe with the meter; that, when lead pipe was used, this could be done without in the least disturbing the position of the meter, or injuring it or any of its parts; that after the iron pipe connections were made, and the connections sealed, a disconnection could not be made without breaking the seals, and plaintiff refused to remove the seals to allow defendant to install its regulator; that on account of this condition of affairs, in order to place the regulator, defendant was forced to cut the nipple, or the pipe running up from the meter to the house pipe; and plaintiff's evidence tends to show that by this method of installation, defendant cut pipes and nipples, which plaintiff had furnished to make con-

nections, and the operation disturbed the position of the meters, at times broke parts of them, caused them to leak, and broke the seals, and otherwise damaged the meters and their connections. The suit is in equity to enjoin defendant from in anywise interfering with plaintiff's meters, pipes, and nipples it has in use, or may hereafter have in use.

The decree, as modified by the trial court (omitting caption), is as follows: "Now, this 14th day of June, 1907, defendant's motion to alter and modify the decree heretofore entered in this cause, on to wit, the 6th day of March, 1907, having been duly considered by the court, the said motion is sustained, and said decree so altered and modified as to read as follows: Wherefore, it is by the court ordered, adjudged, and decreed that the defendant and its agents and servants be, and they hereby are, and each of them is perpetually enjoined from attaching gas regulators or governors to any of the pipes or nipples belonging to the plaintiff company, and by it placed in position in any of the buildings or dwellings in the city of St. Louis, for the purpose of connecting its gas meters with the house pipes in said buildings and dwellings, and through which pipes or nipples, so owned and placed by said plaintiff company, the said plaintiff company supplies gas to such buildings or dwellings, and from cutting the said pipes and nipples, or disturbing, or in any manner interfering, with the unions or connections made between the said pipes and nipples so belonging and placed in position by said plaintiff company, and its meters and the said house pipes in said buildings and dwellings, except as hereinafter decreed, or from in any manner interfering with the meters, meter connections, meter seals, and locks belonging to said plaintiff company, and installed in position by said plaintiff company in any of the buildings or dwellings in the city of St. Louis; provided, that, whenever the defendant shall have received the written direction and authority from the owner or occupant of any building or dwelling in the city of St. Louis to install its gas regulator on the house gas pipe belonging to such building or dwelling, and such owner or occupant shall, in writing, notify the plaintiff of such fact, and in such notice designate a day and hour, not less than three days in advance of the service of such notice on plaintiff, when such owner or occupant desires and intends to have installed such regulator, and request plaintiff to furnish a capable gas fitter to then and there, or prior thereto, on the day mentioned in such notice, and between eight o'clock a. m. and three o'clock p. m., shut off the gas supply from such premises, and disconnect plaintiff's pipe, nipple, or meter connection on the outlet side of its meter, from the house pipe belonging to such building or dwelling, at the union between the same, so as to enable defendant to install its regulator on the house pipe belonging to such building or

dwelling, and to thereafter reconnect such pipe, nipple, or meter connections belonging to plaintiff with such house pipe, and agree to pay or authorize the charge against him of the reasonable cost of furnishing such gas fitter for such work, and provided that, should the plaintiff fail on such notice, and on the day mentioned therein, and between the hours of eight a. m. and three p. m., to so furnish such gas fitter, and to make such disconnection and reconnection, then the defendant may shut off such gas supply, and disconnect and reconnect such union between the house pipe and meter connections heretofore mentioned, doing same in a careful and skillful manner. And the costs of this proceeding are adjudged against defendant, and unless same are paid within 10 days after the date hereof, execution shall issue in favor of plaintiff therefor." Defendant moved the court for a further modification of the decree, so as to permit it to remove any and all of its gas regulators on the refusal or failure of its customers to pay the agreed rent for the use of same. This motion does not appear to have been acted on. Defendant filed a timely motion for new trial, which the court overruled, and an appeal was taken to this court.

Defendant makes two points in its brief: First, that the pipes put in by plaintiff to connect the meters with the house pipes became fixtures, the property of the owner of the house, and therefore plaintiff had no control over them; second, if the pipes used by plaintiff to make the connection remained the property of plaintiff, yet it should not be permitted to deny the right of the owner of the house such control over them as to prevent the installation of a gas regulator. In respect to the first point, the evidence shows that no agreement whatever was made between plaintiff company and owners of houses concerning the pipes used by the company to make meter connections with the house pipes; and the evidence further shows that when lead pipes were used, and afterwards when they were taken out, and iron ones substituted, plaintiff used its own pipes to make the connection, without charge or expense to the owner of the house. The furnishing of the pipes in the manner, and for the purpose stated, is beneficial to the owner of the house, and they are furnished partly for his own accommodation and, presumably, with his knowledge and consent. The meter is undoubtedly plaintiff's property, and the connections are so made as to show conclusively that plaintiff intends to retain control, not only over the meter, but likewise over its seals, and the pipes used by it to make connections with the house pipes. In these circumstances it would be grossly inequitable to hold that the pipes, furnished by plaintiff to make the necessary connections to furnish gas to the house, became fixtures, and ceased to be the plaintiff's property. We therefore rule against defendant's first point.

In regard to the second point it is proper to state that plaintiff furnished some inside pipe, which it was under no obligation to furnish, and so connected such pipe with its meter that the pipe cannot be removed by the house owner, or cut, without interfering materially with the meter connections, and hardly without disturbing the meter itself. On account of this method of installation, plaintiff claims the right to exclusive control over the extra pipe put in by it. If it has the right to exclusive control, then the house owner, or no person for him, has any right to place a governor in such pipe to regulate the pressure of the gas. Thornton on Oil and Gas, § 553. Ordinarily, the house owner, to entitle him to meter connection, is required to bring his pipes to where the meter is to be installed, and the gas company makes the connection by a short lead pipe; but, in whatever manner the connection is made, the gas is delivered to the consumer when it passes through the company's meter into the inside pipes (Chouteau v. St. Louis Gaslight Co., 47 Mo. App. 326); and this is so, irrespective of the ownership of the inside pipes. The company is under no obligation other than to furnish a nipple or short piece of pipe to connect its meter with the house pipe. Because it furnishes additional pipe at its own option, to make such connections, it ought not and does not give it exclusive control over the gas after it leaves the meter, nor has it the right to prohibit the owner, or any one for him, from placing upon the pipe, so furnished, a governor to regulate the pressure of the gas. On the other hand, in view of the fact that the owners of houses permit the company to use its own pipes to make inside connections, the owner, nor any one by his order or permission, has any right to cut these pipes for the purpose of placing a governor upon them, if in doing so the meter is thereby thrown out of plumb, its parts broken, or it is caused to leak, or its connections and seals broken. From the evidence it appears that such injury is done by defendant, to the meter and its connections, when placing the governor on the pipes. This injury is oft-recurring, for which the law is ineffectual to afford adequate compensation in damages. For this reason plaintiff is entitled to injunctive relief, and to such relief as will prevent defendant from injuring its property, or interfering with the property rights which plaintiff has in its meters, meter connections, and seals. But the right of the owner of the house to place, or have placed, a governor on the pipes to regulate the pressure of gas, is an inherent right, the exercise of which cannot be enjoined; its exercise, however, in the circumstances of the case, must and should be regulated in such manner as to secure protection to plaintiff's property rights, and we think this will be accomplished by the terms of the decree rendered by the trial court, which we approve as far as it goes, but it should go further,

and provide that defendant may remove its regulator, under such restrictions, and on such terms, as the circuit court may deem just and proper.

The judgment is reversed, and the cause remanded, with directions to the circuit court to modify its judgment as above indicated. All concur.

### O'LEARY v. KANSAS CITY.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

#### NEGLIGENCE—INSTRUCTIONS.

The giving of a requested instruction on negligence is not error merely because it does not contain a definition of the term "negligence."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 371-377.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Mary O'Leary against Kansas City. Judgment for plaintiff. Defendant appeals. Affirmed.

Edwin C. Meservey and Francis M. Hayward, for appellant. Henry J. Latshaw and Ralph S. Latshaw, for respondent.

JOHNSON, J. Plaintiff fell into a hole in a sidewalk on one of the public streets of Kansas City and was injured. She alleges, in her petition, that the injuries were caused by the negligence of defendant in failing to exercise reasonable care to discover and repair the defect. The answer of defendant contained a general denial and a plea of contributory negligence. The trial resulted in a verdict and judgment in favor of plaintiff in the sum of \$1,225, and the cause is here on the appeal of defendant.

The only error assigned relates to the first instruction given on behalf of plaintiff, which is as follows: "The court instructs the jury that if you find and believe from the evidence that on November 29, 1904, and for a number of months continuously prior thereto, there was a hole or step-off several feet deep on the west side of Bell street and about 200 feet south of Ninth street, and that said hole or step-off, if any, made said sidewalk dangerous and not reasonably safe for the ordinary purposes of travel thereover, and if you further find and believe from the evidence that defendant knew, or by the exercise of ordinary care and caution could have known, of said condition of said sidewalk at said place on November 29, 1904, and for a reasonably sufficient length of time prior thereto to have either remedied said defects, if any, in said sidewalk, or to have placed barriers, lights, or other warning at or near said hole or step-off, if any, by the exercise of reasonable care and caution, and that defendant failed to repair said sidewalk or to put up said barriers or lights or other warnings at or near said hole or step-off, and if you further find and believe from the evi-

dence that said neglect of said defendant to either remedy said hole or step-off, or put up lights or barriers at or near said hole or step-off, was negligence on the part of defendant, and that on account of said negligence, if any, plaintiff was injured by stepping into or falling into said hole or step-off in the nighttime of said November 29, 1904, without any fault or negligence on her part contributing thereto, then the court instructs you that the fact, if it be a fact, that said whole or step-off was caused by the flood of June, 1903, is of itself no defense to plaintiff's right of recovery, if any." It is not claimed, nor does it appear, that this instruction was unsupported in any particular by the evidence introduced by plaintiff, nor that it departed from or enlarged the cause of action pleaded in the petition. But the objection is to the omission, from this and other instructions given at the instance of plaintiff, of a definition of the term "negligence." The precise question thus raised has been considered recently by us in two cases, and ruled adversely to the contention of defendant. *Willson v. Railway*, 122 Mo. App. 667, 99 S. W. 465; *Hooper v. Railway*, 125 Mo. App. 329, 102 S. W. 58. It is unnecessary to repeat or elaborate what was said in those cases, and we refer to them for a full expression of our views.

The judgment is affirmed. All concur.

#### DARR v. THOMAS et al.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

#### 1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE AND PAYMENT OF CLAIMS—STATUTORY PROVISIONS—SECURED CLAIMS.

Rev. St. 1899, § 191 [Ann. St. 1906, p. 403], providing that claims against an estate which are secured by mortgage, deed of trust, or other lien, shall not be paid until the security held by the claimant has been exhausted, when construed in connection with section 143 [page 383], empowering the probate court, where it is for the best interest of the estate, to order a mortgage debt paid out of the general assets, with sections 146 and 170 [pages 384, 393], declaring that real estate may be sold to pay debts of a decedent only when there is not sufficient personalty to pay them, with section 184, subd. 4 [page 397], providing that judgments against the estate of an intestate shall be classified and paid as provided by sections 152-155 [pages 388-389] except that if the estate be insolvent they shall be paid by the administratrix selling the lands at administration sale under order of the probate court and not by the creditor exhausting the lands by closing the lien, and with section 138 [page 382], providing that the probate court may order a vendor's lien creditor of an estate paid out of the assets, is not to be taken as prohibiting an administratrix to pay secured debts against the estate until the security has been first exhausted by the creditor; and where a husband died intestate, leaving a debt secured by deed of trust on the homestead, executed by himself and wife, and sufficient personal property to satisfy the same, his widow, as administratrix, may pay the secured debt out of the personal estate, the intention of section 191 being to protect unsecured creditors by empowering them to compel the secured creditors,

where the estate was insufficient to satisfy all, to first exhaust their security before sharing in the common fund.

#### 2. SAME.

Ordinarily a secured creditor can lay by his security and go upon the general estate of his debtor to satisfy his claim, only resorting to his security when he fails to collect his claim by the ordinary proceeding.

#### 3. SAME—DISTRIBUTION OF ESTATE—PRIORITY OF DEBTS TO LEGACIES OR DISTRIBUTIVE SHARES.

The personalty of an intestate's estate vests in the administratrix for the purpose of paying debts and costs of administration, and the heirs have no title to or interest in it until an order of distribution.

#### 4. SAME.

The primary idea of a security is that it may be used to pay the debt if the debtor fails to pay it from other sources; and a debtor should promptly pay his debt without letting it go to protest or by default, thus putting the creditor to the trouble of a resort to the security, and the same duty rests on the debtor's estate after his death, except that of necessity it must first be allowed and classified.

Appeal from Clinton County Court; A. D. Burnes, Judge.

Final accounting by Fannie Darr, administratrix of the estate of William Z. Darr, deceased. On appeal from the probate court to the circuit court certain items claimed as credits by the administratrix, but objected to by Willie C. Thomas, were disallowed, and she appealed. Reversed and remanded.

W. S. Herndon, for appellant. E. C. Hall, for respondents.

ELLISON, J. This proceeding arises on objections to the settlement of an administratrix of an estate. On appeal from the probate to the circuit court certain items claimed as credits by the administratrix were disallowed and charged back to her. She then appealed to this court.

It appears that the administratrix is the widow of William Z. Darr, who died intestate, leaving surviving him this administratrix, and two children by a former wife who had become of age and were living to themselves. At his death Darr left a homestead occupied by himself and this administratrix. It did not exceed the statutory value. He also left personal property appraised at \$3,366.49. Darr, joined by this administratrix as his wife, gave a deed of trust on the homestead to secure his note of \$1,600, payable to Charles E. Jones. He likewise, at same time, gave to Jones two building and loan warrants for \$300 each as collateral security. Jones assigned the note to the First National Bank of Plattsburg, and also delivered the collateral warrants to the bank. The bank presented the note to the probate court, and had it allowed against the estate. The collaterals were collected by the bank and credited on the demand. This administratrix thereafter paid the balance, with interest, amounting to \$1,181.04, with money arising out of the personal estate, and the deed of trust on the homestead was duly released. As before stated, the circuit court refused to

allow the administratrix credit for this payment, and had it charged up to her. The action of the trial court was based on a construction of section 191, Rev. St. 1899 [Ann. St. 1906, p. 403], prohibiting the payment of debts against an estate secured by real property until the security has been first exhausted by the creditor. That section reads as follows: " \* \* \* And when a claim is allowed against an estate which is secured by mortgage, deed of trust or other lien held by the creditor, the same may be allowed as other claims, but shall not be paid until such security held by the claimant has been exhausted; but if such security be not sufficient to pay off and discharge the debt of such creditor, then such creditor for the residue of his debt shall be entitled in common with other creditors to have the same paid out of the estate."

Though not so stated, the effect of the position taken by the objectors to the action of the administratrix in paying the mortgage is that the statute just quoted must be interpreted precisely as it reads, disassociated from other parts of the same statute, and be held to mean that in no case can a mortgage debt due from an estate be paid until after the security has been exhausted when the balance only, if any, may be paid out of the general assets. That is not the announcement, but it is the logic of objector's position. If such is the true construction, the effect upon the general policy of our administration law will be far beyond what the courts and the bar have expected since its enactment in 1889. The direct result of such construction is that there can be no redemption of real property by the estate of a decedent. The creditor must sell the land and pass the title out of the heirs however advantageous it clearly appears it would be for the heirs to retain it. It may be property that cannot, in reason, decrease in value, but will in every probability largely increase, and yet it imperatively must be sold at a forced sale under the mortgage. The statute in question cannot mean that. It must be construed with other parts of the same law in reference to the same subject, for that is a fundamental rule of construction. By the express terms of another part of the same enactment (section 143 [page 383]) the probate court is empowered, if for the best interest of the estate, to order the administrator to pay the mortgage debt out of the general assets. Must this latter statute stand as of no force and to all practical purposes be a dead letter? For if the mortgage creditor can only be paid out of the general assets after he has closed out the security, of course the probate court could not order it redeemed. The whole policy of the law of administration has always been thought to be primarily to preserve the real property holdings of estates instead of disposing of them, except where to retain it would work injury to creditors. Thus, by the terms of sections 146 and 170

[pages 384, 386] real estate may be sold to pay debts only when there is not sufficient personality to pay them. And this is the rule of procedure in all estates except in instances where, from peculiar conditions, it may be thought best to retain the personality and sell realty, which may be done under the terms of section 161 [page 390].

But there is yet more of the statute bearing on the question. The section here invoked by the objectors not only requires mortgage liens, but any "other lien held by the creditor," to be first exhausted, that is, foreclosed or executed. "Other lien held by the creditor" covers judgments and vendor's liens; and so under the literal and disassociated construction of the statute no judgment or vendor's lien could be paid, but the lands must be actually sold and only the deficit of the creditor's claim after sale could be paid out of the general personal estate. But by the terms of section 184 (subd. 4 [page 397]) judgments are classified and paid as other claims, except if the estate be insolvent they shall be paid, not by the creditor exhausting the lands by closing his lien, but by the administrator selling the land at administration sale under order of the probate court. Sections 152-155 [pages 388-389]. So as to a vendor's lien. He, too, if the statute is to receive a literal and disassociated construction, would be compelled to foreclose his lien. Yet under the terms of section 138 [page 382], in case of the estate having a vendor's lien creditor, the probate court may order the lien to be paid out of the assets of the estate. And the rulings of the courts on these statutes, on cases arising since the enactment of section 191, have been in accord with their reading, and that section has not been thought to nullify them. *Chapman v. Merritt*, 45 Mo. App. 179; *Meeker v. Straat*, 38 Mo. App. 239.

Besides the incongruities and inconveniences already stated which stand in the way of objectors' construction of the statute, there are many others which might be suggested. Thus, suppose one of several children should mortgage his own land as security for his father's debt, and the father died without paying it; is it reasonable to suppose that the other children or the administrator and probate court could force the creditor to sell the land and leave the other child to the circumlocution of presenting a claim for allowance out of the general fund of the estate on account of his land having been taken to pay the deceased father's debt? Again, suppose an estate is solvent, consisting of \$50,000 in personality and one piece of real estate—the family homestead, which is mortgaged for \$5,000, which the heirs from matters of sentiment or otherwise were anxious should be preserved and not sold out of the family—could it be thought that this statute would compel the administrator and probate court to refuse the mortgagee payment of his claim until he first sold the homestead? Why could



it not be paid out of the personalty? It would therefore seem to be apparent that section 191 should not be construed with literal preciseness, but should be considered with other portions of the statute and kept in harmony with them and be given a meaning which is reasonable and will effectuate its evident purpose. The true construction of that statute is that it is an enactment in the interest of unsecured creditors, and so we announced in *Knight v. Newkirk*, 92 Mo. App. 258. Ordinarily a secured creditor can lay by his security and go upon the general estate of his debtor. He may hold his security in reserve and only call it into service for whatever he fails to realize by the ordinary proceeding to collect his claim. *Day v. Graham*, 97 Mo. 398; *Edmonson v. Phillips*, 73 Mo. 57; *Greenwell v. Heritage*, 71 Mo. 459. This statute compels him to reverse the order of such proceeding and first utilize his security, thus not jeopardizing or hindering unsecured creditors except for what balance, if any, he may fail to get out of such security. Thus interpreted it does not run counter to other parts of the same law.

But it has been strongly insisted by the objectors that the Supreme Court in the case of *Adams v. Adams*, 183 Mo. 396, 82 S. W. 66, has construed section 191 in accord with their view. An examination of that case has disclosed that that court in no way considered the section. That case was for partition of lands, and arose in the circuit court. It was not such a case nor such a court, except on appeal from the probate court, where, ordinarily, the statute could properly arise; and all that is said of the statute in the *Adams Case* is a mere statement, at page 406 of 183 Mo., page 69 of 82 S. W., that the plaintiffs therein invoked the section, and at page 407 of 183 Mo., page 69 of 82 S. W., that defendants did likewise in their behalf. The further several claims made by the contesting parties are then stated, and then the opinion of the court follows, in which no reference is made to the statute in controversy. On the contrary, it is not again referred to, nor is any account taken of it, and the decision is made by determining the other points of contention between the parties. The case, in short, was this: A husband died leaving a homestead and other lands in which the widow had a dower interest. The husband in his lifetime, joined by his wife, mortgaged the homestead. After his death the widow sought, in a partition suit, to have the homestead relieved of the mortgage by having the other lands sold to pay it. Or, as expressed by the court, she sought to have the mortgage transferred from the mortgaged to the unmortgaged lands. The court decided that she could not do so. The decision was in no wise based upon an arbitrary demand of the statute, but is reasoned out on other grounds without reference to the statute, directly or indirectly.

We are thus left to dispose of this case

without any aid from the *Adams Case*. From the statement we made at the beginning, it will be seen that the deceased husband in his lifetime owed a note to Charles E. Jones, and that his wife, the present administratrix, joined him in giving a mortgage on the homestead to secure its payment. She did not owe the debt, and had no other connection with it than signing the mortgage. There was personal estate sufficient to pay that debt and all others. After it was duly allowed she paid it out of such personalty. In doing so she but followed the accepted idea of the administration law from an early day to the present time. The personalty vested in her as administratrix for the purpose of paying debts and costs of administration. The heirs have no title to it nor interest in it until an order of distribution. *Smith v. Denney*, 37 Mo. 20; *State ex rel. Housman v. Moore*, 18 Mo. App. 406. The personal estate, as already stated, is the primary fund out of which the debts of the estate must be paid. *Lewis v. Carson*, 93 Mo. 587, 591, 3 S. W. 483, 6 S. W. 365; *Langston v. Canterbury*, 173 Mo. 122, 180, 132, 73 S. W. 151. It is true that the homestead was mortgaged to secure the payment of the debt, but in his lifetime the husband owed the debt, and his general effects were liable to its payment, and when he died his general effects were still liable. The primary idea of a security is that it may be used to pay the debt if the debtor fails to pay it from other sources. And a debtor, primarily, should promptly pay his debt without letting it go to protest or by default, and thus putting the creditor to the trouble and annoyance of a resort to the security. The estate owes the same prompt duty except, from necessity, the debt must first be allowed by the probate court and classified.

The statute in question has interposed in behalf of creditors a duty upon the administrator and probate court which gives to them in summary manner what an unsecured creditor in equity has always been able to do, viz., where another creditor, liable to come upon the common fund, has a separate security, he could be compelled to first resort to that security, and thereby, to that extent relieve the unsecured creditor. It has been already shown that in spite of the general language of section 191, that when a secured debt was allowed it should not be paid until the security was first exhausted, yet the terms of section 143 gives the power to the probate court to order it to be paid, if, in the opinion of the court, it will promote the interest of the estate and not prejudice the creditors. The objectors recognize that section 191 could not possibly have the effect of entirely abrogating section 143, but insist that before the secured claim can be paid by the administrator there must be an order of the probate court to redeem, and that if he pays it without such order he shall not be allowed credit therefor. The cases of Lang-

ston v. Canterbury, 173 Mo. 122, 78 S. W. 151, and Springfield Gro. Co. v. Walton, 95 Mo. App. 526, 69 S. W. 477, are cited in support of such claim. We think those cases do not have bearing or influence on section 143. They construe section 224 [page 417]. Section 143 has been as it is now written since 1855, and it has been the ruling of the courts that the holder of the secured debt might have it allowed and then paid out of the assets by payment made by the administrator without an order of the probate court. Day v. Graham, 97 Mo. 898, 11 S. W. 55. The section does not read that the mortgaged property cannot be redeemed without an order. It merely reads that the probate court "shall have power" to order it redeemed "out of the personal assets of the estate." Whereas the statute (section 224) construed by the two cases cited by objectors, requires that an allowance by the court shall have been absolutely made before an administrator can obtain credit for its payment. Section 143 merely grants power to the probate court when it thinks it better for the estate, and not hurtful to creditors, to compel the administrator to redeem, although the mortgagee would prefer that it run on at interest.

The result is the conclusion that the judgment should have been for the administratrix, and it is accordingly reversed, and the cause remanded. All concur.

#### KEYSER v. HINKLE et al.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

#### 1. PRINCIPAL AND AGENT—WRONGFUL ACTS OF AGENT—LIABILITY OF PRINCIPAL.

The doctrine that a principal will not be permitted to enjoy a benefit from his agent's services and disclaim responsibility for the consequences of his wrongful act by which the benefit was conferred has no application where the agent acts for himself, and adversely to the interest of his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 599-613.]

#### 2. SAME.

The employment of an agent to lend money does not carry with it implied authority to lend the money to himself.

#### 3. SAME.

Where defendant signed a note also signed as maker by A., the alleged agent of the payee, defendant was chargeable with notice that, in becoming one of the obligors, A. could not act as agent for the payee, and consequently that any misrepresentation made by A. could not be imputed in law to the payee.

#### 4. BILLS AND NOTES—RENEWAL NOTES—EFFECT—PRESUMPTIONS.

In the absence of proof that a renewal note was accepted with the understanding that it was to operate as an absolute payment of the debt, or that the original note was to be canceled, the presumption was that the renewal note was taken as a conditional payment only, and, when default was made in its payment, the payee might treat it as collateral security, and sue on the original note.

#### 5. SAME—PLEADINGS—SCOPE—NON EST FACTUM.

Where, in an action on a note, defendant admitted its execution, the admission curtailed

the scope of a general traverse by excluding therefrom the defense of non est factum.

Appeal from Circuit Court, Vernon County; J. B. Johnson, Judge.

Action by J. W. Keyser against John Hinkle and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. B. Lovan, for appellants. W. E. Owen and R. T. Bailey, for respondent.

JOHNSON, J. This action, begun in Henry county and taken by change of venue first to Cass and then to Vernon county, is on a promissory note of which the following is a copy: "Clinton, Missouri, Dec. 14th, 1901. One year after date we promise to pay to the order of J. W. Keyser three thousand dollars, for value received, payable at the banking house of Salmon & Salmon, Clinton, Mo., with interest from date at the rate of eight per cent per annum; and if interest be not paid annually to become as principal and bear the same rate of interest. John Hinkle. G. M. Casey. Thos. M. Casey. William Adair. J. R. Barker." The verified answer of William Adair begins with a general denial, and then tenders special defenses, the nature of which appears in the following statement of its contents: "Defendant, further answering, denies that he executed or delivered the note sued on as described in plaintiff's petition, and alleges that he signed the note when there was no payee's name written in it; that he did not authorize the writing in the note of the name of the payee, except on certain conditions as herein set forth; that he so signed said note upon certain conditions and limitations and under the following circumstances, viz." He then states that Thos. M. Casey, one of the signers of the note, at the time of its execution, was the manager of the private bank of Salmon & Salmon, conducted in the city of Clinton; that defendant had kept a large account in said bank for a number of years and was interested in its welfare; that plaintiff had employed Thos. M. Casey as his agent to procure a borrower for the sum represented by the note; that Casey induced the defendant to sign the note as surety by means of the false and fraudulent representation that the money was being borrowed for the benefit of the bank, and that the bank would repay it when due; that, in fact, the money was not borrowed for said bank nor used for its benefit, but was diverted by said Casey to the use of his father; that this diversion was with the knowledge and consent of plaintiff, and was fraudulently concealed from defendant, who would not have signed said note for any other purpose than that of benefiting the bank. The answer concludes with the allegation "that the note sued on has been paid." Defendant Hinkle answered with a plea of non est factum, and the further defense that the note "was paid by the acceptance on the part of plaintiff of a new note of

\$4,000, hereinafter described." The replies were general denials. At the conclusion of the evidence, the court peremptorily instructed the jury to find for plaintiff against defendant Adair, and further instructed them to return a verdict against defendant Hinkle on the finding that he signed the note. Thus instructed, the jury found against both defendants, but Adair alone appealed from the judgment entered on the verdict.

Facts appearing from the evidence introduced by defendants which are most favorable to the defenses interposed by the appealing defendant are as follows: The banking firm of Salmon & Salmon had been engaged in business at Clinton for many years, and, until its failure in 1905, had enjoyed the fullest confidence of the public. The members of the firm were old men who, for some time, had intrusted the management of the business to Thomas M. Casey. Mr. Adair, to whom we shall hereafter refer as the defendant, was a farmer and stockman, who lived near Clinton. He had been on terms of close friendship with Messrs. Salmon & Salmon for a long time, had always carried a large account in the bank, was interested in its welfare, and, on many occasions, had become surety on notes and other obligations for its benefit. He always had followed the rule—well known to Mr. Casey—of refusing to become surety for any other persons than Messrs. Salmon & Salmon. Plaintiff also was a farmer and stockman living in that county, and was a customer of the bank. A few days before the note in controversy was executed he told Mr. Casey that he had \$4,000 he wished to lend, and asked Mr. Casey to attend to lending it for him. He deposited \$3,000 in the bank on this occasion with the assurance that the remaining \$1,000 would be furnished when needed. The facts we are stating relative to what transpired between plaintiff and Casey are taken from the testimony of defendant's son, who claims to have obtained them from a conversation he had with plaintiff a short time before the trial. The witness was asked: "Q. What was said by Mr. Keyser about who borrowed this money? A. Why, he said at the time Mr. Casey told him that all of these parties wanted to borrow the money. Q. All of what parties? A. That is all that signed the note, that John Barker, William Adair, John Hinkle, and G. M. Casey; and when he tried to collect the note later on, before the bank failed, Tom Casey told him that the money was for his father, George M. Casey." It appears from this and from other statements we do not deem it necessary to quote that, shortly after plaintiff enlisted the services of Casey, the latter presented him with the note in suit, and told him that all of the persons, including himself, whose names were signed to the note, were joint makers, and were borrowing the money for their own use. With this understanding, plaintiff accepted the note, and gave a check for the proceeds. He did not know the mon-

ey had been borrowed for the use of Mr. Casey's father, nor did he know what representations had been made to those whose names appeared as co-makers. Defendant in his testimony admitted he signed the note, and declared that he signed it at the request of Mr. Casey, who assured him at the time that it was for the accommodation of Messrs. Salmon & Salmon, and for use in their banking business, and that, without such assurance, Mr. Casey well knew he would not have signed it. A few days after the note was delivered to plaintiff, Mr. Casey delivered to him another note for \$1,000 to complete the transaction. After the maturity of the notes, Casey procured an extension of time by delivering to plaintiff a note for \$4,000 which bore the signatures of the persons who had signed the note in suit. It is conceded that the signature of Mr. Hinkle to this renewal note was forged by Casey. Plaintiff, ignorant of this fact, as well as of the fact that the signature of defendant to the first note had been fraudulently procured, surrendered the two old notes to Casey, who took them to the bank, and left them there. Shortly after the bank failed plaintiff learned, for the first time, of the forgery. He went to the bank, found and obtained possession of the two old notes (they had not been canceled), and brought the present action on the \$3,000 note and another suit on the \$1,000 note. Some of the facts we have stated are controverted by plaintiff, but in the present posture of the case we must treat them as proved. Defendant Hinkle testified in his own behalf that he did not sign either the note in suit or the renewal note. All of the evidence supports his statement as to the renewal note, but we think the great weight of the evidence establishes the fact that he did sign the first note. Counsel for defendant in their brief advance three propositions in support of their insistence that the learned trial judge erred in peremptorily directing a verdict against him: "(1) He [Adair] signed the note as a surety on certain conditions, to wit, that it was an accommodation note, and that the proceeds were to be used only for the benefit of the Salmon & Salmon Bank. The proceeds were not used for the benefit of said bank, but were fraudulently diverted to the use of George M. Casey. The respondent is bound by the false representations of Thos. M. Casey because Casey was acting as the agent of respondent in procuring the loan represented by the note sued on. (2) The note sued on was paid by the acceptance, on the part of respondent, of the \$4,000 note, in settlement of the \$3,000 and the \$1,000 notes. (3) The name of John Hinkle was forged to the note sued on, after it had been signed by William Adair." We will deal with the questions of law arising under these different heads in the order of their presentation.

1. To escape liability on the first ground, the burden was on defendant to establish by

proof the facts that he signed the note in suit as surety; that he was induced to sign it by the false representation fraudulently made by Casey that the note was for the accommodation of Salmon & Salmon; that in fact it was the intention, afterwards consummated, to procure the loan for another purpose, and that plaintiff, when he accepted the note, either had actual knowledge of the fraud practiced by Casey, or by making the latter his agent in the transaction had placed himself in a position where the fraud of his agent should be imputed to him. The evidence he introduced supports, and, indeed, leaves no room to doubt, the facts that his relation to the transaction was that of surety, that he was the victim of Casey's fraud, and that the proceeds of the note were diverted to another use than that represented. But it is not even suggested in the evidence nor in argument that plaintiff had actual knowledge of the fraud perpetrated, and we think the facts adduced negative the conclusion that the wrongful act was committed by Casey as the agent of plaintiff. We recognize the soundness of many of the principles relied on by counsel for defendant in aid of their argument that Casey was plaintiff's agent, and that his fraud practiced in the course of the employment should be imputed to plaintiff. Among them, we will mention the following: "Although there formerly seemed to be some doubt as to the liability of a principal for his agent's fraud, it is now generally well settled that, for the same reasons that a principal is liable for other torts of his agent, he is also civilly responsible for frauds committed by such agent in the course of his employment, and for the principal's benefit, although they were committed without the principal's knowledge or consent." "A principal who seeks to enforce a contract is bound by representations made by his agent in order to induce the opposite party to make it." "Agency is the legal relation which arises when one party, called the 'agent,' is authorized to represent and act for another party, called the 'principal,' in bringing or to aid in bringing such principal in contractual relation with a third person, however such authority may be conferred." "One who is intrusted with money for the purpose of changing it or having it changed is an agent. An agency may be implied \* \* \* from the fact that one is put in possession of real property, given the custody of personal property, given a note to collect, put in charge of a business, given money to invest or pay over to another." "When parol authority is relied upon and is sufficient, proof of the existence of the relation of principal and agent may be either direct or circumstantial, for the existence of the relation may be and often is inferred as a matter of fact from the relation of the parties, their conduct, and other circumstances." And, further, we will agree with defendant that, in the application of these principles to the

facts of the present case, the conclusion cannot be avoided that plaintiff did employ Casey as his agent to invest his money in a loan, and, had it been shown that Casey's connection with the transaction was as plaintiff's agent only, we would not hesitate to declare that any fraud perpetrated on defendant in the course of the employment, for the benefit of his principal, should be imputed to the principal whether or not the latter actually had knowledge of it. The doctrine that holds the principal to account for the acts of his agent is based by some writers on the fiction of the identity of principal and agent, while others place it on the ground that, as it is the duty of the agent to follow the instructions of his principal, and to render a full account of the manner in which the service has been accomplished, the presumption must be indulged that he has performed this duty, and the principal, under the plainest rules of justice and morality, will not be permitted to enjoy a benefit from the agent's service, and to disclaim responsibility for the consequences of the wrongful act by which that benefit has been conferred. But this doctrine, as was pertinently said in *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736 (quoted with approval in *Thomson-Houston Electric Co. v. Capitol Electric Co.* [C. C.] 56 Fed. 849), "has no application, however, to a case where an agent acts for himself, in his own interest, and adversely to that of his principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely in such case act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject." Obviously the doctrine cannot be applied in cases where the agent acquires an interest in the subject-matter that is opposed to the interest of his principal, nor in cases where he is acting in collusion to defraud his principal. When hostile self-interest steps in, the confidential relation is at an end, and presumptions which ordinarily attend such relationship cannot be indulged. When defendant saw Casey's name signed to the note as one of the makers, he became charged with notice of the fact that in becoming one of the obligors Casey could not act in the role of agent for the payee and consequently that any misrepresentation made by Casey could not be imputed in law to the payee, and, when plaintiff was informed by Casey that the latter and his associates whose names appeared on the note proposed to borrow the money and to obligate themselves to repay it, he learned a fact which of itself terminated the confidential relation, and required him thereafter, if he would make

that loan, to proceed on his own responsibility and at arm's length with his erstwhile agent. The employment of an agent to lend money does not carry with it the implied authority to lend the money to himself, and this rule sufficiently answers the suggestion that plaintiff should be held liable on the ground that, in selecting Casey as his agent, he placed the latter in a position to victimize defendant by means of fraudulent representations. What we have said is fully sustained by the authorities (*Mechem on Agency*, §§ 721, 723; *Story on Agency*, § 210; *Reinhard on Agency*, § 356; *Clark & Skyles on Agency*, p. 1055; *Innerliarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep., loc. cit. 191; *Gunster v. Scranton, etc., Co.*, 181 Pa. 827, 37 Atl. 550, 59 Am. St. Rep. 655; *Kenneth Investment Co. v. Bank*, 96 Mo. App. 143, 70 S. W. 173; *Smith v. Boyd*, 162 Mo. 146, 62 S. W. 439; *Merchants' Banking Co. v. Lovitt*, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; *De Steiger v. Hollington*, 17 Mo. App. 382), and disposes, adversely to the contention of defendant, of the first ground assigned for a reversal of the judgment.

2. Passing to the second proposition, we turn to 2 Daniels on Negotiable Instruments (5th Ed.) § 1272, for a clear and compact statement of the principles which control the solution of the questions presented: "There is no doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency; that is, until it is dishonored by nonacceptance or nonpayment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might, in consequence of its negotiable character, transfer it to a bona fide holder, and subject the debtor to the payment of both the original and the new debt. But, as soon as the bill or note is dishonored, the original debt revives, and the creditor may pursue his remedy for it, or sue upon the bill or note. The bill or note taken in conditional payment becomes by its dishonor, a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial." These principles have been recognized and applied repeatedly by the courts of this state. *Appleton v. Kenyon*, 19 Mo. 637; *Jackson v. Bowles*, 67 Mo. 615; *Ashbrook v. Letcher*, 41 Mo. App. 372; *Drake v. Critz*, 83 Mo. App. 650; *Higgins v. Harvester Co.*, 181 Mo. 308, 79 S. W. 959; *White v. Smith*, 174 Mo. 186, 73 S. W. 610; *Johnson v. Bank*, 173 Mo. 171, 73 S. W. 191.

The evidence shows that, when plaintiff accepted the renewal note of \$4,000, he surrendered the old notes to Mr. Casey, but it falls completely to show that the renewal note was accepted with the understanding that it was to operate as an absolute, instead of a conditional, payment of the debt, or that the note in suit was to be canceled and extinguished. In the absence of such proof, the presumption must be indulged that the renewal note was taken as a conditional payment only, and, when default was made in its payment, plaintiff could treat it as a collateral security, and found a cause of action on the original note. The only condition imposed on him by law was to account for the renewal note in order that defendant might not be compelled to pay the same debt twice, and this, the evidence shows, he has done.

3. The last point made by defendant must be rejected for the reason, if for no other, that the issue he now seeks to inject into the case was set at rest by the pleadings. We concede that, if Casey forged the name of Hinkle to the note in controversy after it had been signed by defendant, such alteration would afford defendant a complete defense; and, further, we will concede for argument, without so holding, that, had defendant's verified answer contained nothing more than a general denial, he would have been entitled to make this defense, since proof that the instrument had been altered after defendant signed it as surety would go to disprove the cause of action asserted, and not to the establishment of a fact in avoidance. *Paris National Bank v. Nickell*, 34 Mo. App. 295. But the admissions and averments of the answer are inconsistent with the plea of non est factum. Defendant, in effect, admits that he executed the note in its present form, with the single exception that the name of the payee was not inserted until after he had signed the note and returned it to Mr. Casey. The two special defenses offered are in the nature of pleas of confession and avoidance. This admission curtailed the scope of the general traverse by excluding therefrom the defense of non est factum. As this is the only reasonable construction to be placed on the pleading, it follows that the learned trial judge committed no error in refusing defendant permission to avail himself of the issue fought out by plaintiff and defendant Hinkle. We might add that, since the jury found against Hinkle on that issue, it is difficult to perceive how the error, if one were committed against defendant, could have been prejudicial, but we rule this point against defendant on the ground that the fact he would now contest was conceded by him in his answer.

The judgment is affirmed. All concur.

**NAIRN v. MISSOURI, K. & T. RY. CO.**

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907.)

**1. CARRIERS—INJURY TO GOODS—INFERENCE OF CARRIER'S NEGLIGENCE.**

Where goods, when delivered to a carrier, are in good condition, and are in a damaged condition when delivered to the consignee, it may be inferred that they became damaged while in the carrier's charge and that the damage was the result of its negligence, since with proper equipment and handling freight is ordinarily not substantially injured in shipment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 578-582.]

**2. SAME—NOTICE OF DAMAGE—WAIVER.**

Though a contract of shipment requires written notice of claim for damages to be made within 30 days, a notice is unnecessary where the carrier's agent attended the opening of the car with the consignee, listed the damaged goods and made report thereof to the carrier, who entered upon an investigation of the damages, and did not object to the form of notice.

**3. PLEADING—ALLEGATIONS—INTENDMENTS IN FAVOR OF PLEADINGS.**

Where trial is entered upon without a demurrer, every intendment will be made in favor of the pleading.

Appeal from Circuit Court, Boone County; A. H. Waller, Judge.

S. W. Nairn against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. F. G. Harris, for respondent.

ELLISON, J. Plaintiff shipped a lot of household goods from Pinckneyville, Ill., to Columbia, Mo., and, when received by him at the latter place, they were in a damaged condition. He charges that the damage was caused by the defendant, and brought this action on account thereof. He prevailed in the trial court.

It appears that the Illinois Central Railroad was the initial carrier; that it transported the car in which the goods were placed to the Mississippi river, where it was received by the Bridge Terminal Railway Company, and taken to St. Louis, where it was received by this defendant and transported to Columbia. There was evidence in plaintiff's behalf tending to show that, when the goods were shipped at Pinckneyville, they were in good order and condition; that when they were received by plaintiff at Columbia they were badly damaged. The car, judging from condition of the contents, presented an appearance as though it had been in a wreck, or off of the track. There were various estimates of the amount of damage; some of the evidence tending to show a greater amount than was allowed the plaintiff by the verdict. The contract of shipment contained the letters "O. R." and "S. L. C.," which, according to testimony, indicated that the shipment was made on the "owner's risk" and on the "shipper's load and count." Notwithstanding such provisions the defendant would be liable for negligence. But defendant claims there

was no showing of negligence. The plaintiff relied upon his showing of the delivery of the goods in good condition to the Illinois Central Railway, of their delivery to the Bridge Railway, and then, with no change in their condition appearing, their delivery to this defendant, who delivered them to plaintiff. Defendant being the last carrier, it is conceded that the presumption would ordinarily obtain that it injured the property. But it contends that, the goods being at the owner's risk, it was only liable for negligence and that there was no evidence of that. We think there was. Assuming as, in view of the verdict, we must, that the goods were in good condition when shipped at Pinckneyville, no change appearing when delivered to defendant, and then a changed and damaged condition when delivered by defendant to plaintiff, it may be inferred that they became damaged while in defendant's charge. And, being damaged while in defendant's charge, it may be inferred they became so through its negligence; for ordinarily, with proper equipment and handling, freight is not destroyed or substantially injured in a shipment. But in this case the evidence showed the goods in such condition in the car when delivered to plaintiff as to indicate an extreme disturbance of the car.

The contract of shipment required a written notice of claim for damages to be made within 30 days. No written claim was made. But the evidence tended to show that defendant's agent attended the opening of the car with plaintiff, listed the damaged goods, and made report thereof to the defendant. It further appeared that defendant entered upon an investigation of the damages, and at no time objected to the form of notice. In such circumstances a notice was not necessary. *Ward v. Railway Co.*, 158 Mo. 238, 58 S. W. 28; *Richardson v. Railway Co.*, 62 Mo. App. 1; *Bellows v. Railway Co.*, 118 Mo. App. 500, 94 S. W. 557.

Much of defendant's objection to the judgment is founded on the petition. We do not consider the objections as sound. And the motion to make it more definite and certain was properly overruled. There were also objections to any evidence, for the reason that it did not state a cause of action, and instructions were asked which were designed to prevent a recovery by reason of allegations in the petition. In the first place, while the practice of making the objection that a petition does not state a cause of action is tolerated by the courts, it is not commended. If no demurrer is interposed and the trial is entered upon, every reasonable intendment will be made in favor of the pleading. In this case we discover no substantial objection. It is sufficiently clear from the allegations that the Illinois Central, the Bridge Terminal, and the defendant form a continuous line of connecting common carriers from point of shipment to destination, and that the first undertook to deliver to the second, and

the second to the third, and the third to the defendant. The evidence disclosed a lump sum for freight paid to defendant which was divided with the other carriers. *Live Stock Co. v. Railway Co.*, 87 Mo. App. 330; *Shewalter v. Railway Co.*, 84 Mo. App. 589.

We do not consider that error was committed by the court on instructions given for the parties. Together they submit every hypothesis necessary for a proper determination of the case. Those refused for defendant were properly refused.

While we have no means of knowing whether the proper amount was allowed to plaintiff as damage and must accept the verdict in that respect, yet there is no doubt but that, so far as a right to recover is concerned, the judgment was for the proper party; and it is affirmed. All concur.

#### In re BOECKENKAMP'S ESTATE.

##### MILLER v. FINCKE.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907.)

#### 1. APPEAL—BILL OF EXCEPTIONS—FILING OF BILL.

The filing of a bill of exceptions cannot be proved by the recitals of that instrument, but must be made to appear by record entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2319-2321.]

#### 2. SAME—SUPPLEMENTAL ABSTRACTS—TIME OF FILING.

An appellant should not be permitted, as a matter of right, to correct jurisdictional defects in an original abstract by supplemental abstract filed out of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2611-2615.]

#### 3. SAME—FAILURE TO SHOW CAUSE AND OBTAIN LEAVE—EFFECT.

Where an appellant fails to show cause for omission to show in the abstract the filing and overruling of a motion for new trial and filing of the bill of exceptions, and also fails to obtain permission to cure the defects by amendment, the appellate court must consider the cause as though no motion for new trial or bill of exception had been filed.

Appeal from Circuit Court, Pettis County; Louis Hoffmann, Judge.

Action by Sophia Miller against W. C. Fincke, executor of F. W. Boeckenkamp. From a judgment for defendant, plaintiff appeals. Affirmed.

H. T. Williams, for appellant. R. M. Embury, for respondent.

JOHNSON, J. Plaintiff appealed from a judgment in the circuit court in favor of defendant, and brought the case here on a transcript of the judgment and order of appeal. It was set for hearing in this court on April 4, 1907. On the 18th day of March, defendant was served by plaintiff with an abstract of record, which, afterwards, was filed in this court. Aside from the recitals in the bill of exceptions, the abstract failed to show the filing and overruling of the motion for new trial and the filing of the bill

of exceptions. On March 28th, defendant filed a brief, in which he asked for a dismissal of the appeal, on the ground that "the abstract of record made by appellant fails to show that the bill of exceptions was filed." On April 2d, two days before the cause was set for hearing, plaintiff, without leave of court, filed with the clerk a supplemental abstract, supplying the jurisdictional facts omitted from the original.

It has been held repeatedly by this court, and by the Supreme Court, that the filing of the bill of exceptions cannot be proved by the recitals of that instrument, but must be made to appear by record entry. And, further, it has been held that an appellant should not be permitted, as a matter of right, to correct jurisdictional defects in the original abstract in a supplemental abstract filed out of time. We held, in the case of *Redd v. Mo. Pacific Ry.*, 122 Mo. App. 93, 98 S. W. 89, that leave to make such amendment might be granted under proper circumstances for good cause shown, and on reasonable terms, but would not be given in the absence of a proper showing. The same view was expressed by the Supreme Court in *Harding v. Bedell*, 202 Mo. 249, 100 S. W. 638. The failure of plaintiff to show good cause for the existence of these manifest defects, and to obtain our permission to cure them by amendment, requires us to consider the cause as though no motion for new trial and bill of exceptions had been filed therein.

Thus considered, we find no error on the face of the record proper, and, accordingly, the judgment is affirmed. All concur.

#### PITTHAN v. SCHNAITMAN.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907.)

#### EXECUTORS AND ADMINISTRATORS — CLAIM AGAINST ESTATE — MONEY LOANED — EVIDENCE.

Evidence that deceased, on his partner in the saloon business saying that they had run out of money, and that deceased better get some, about \$300, left his place of business, saying that he would go up to P.'s saloon, and get it, and that on arriving there he said he wanted \$300, and P., saying "All right," gave him that amount, nothing further, as to giving or surrendering evidences of indebtedness, being done, is sufficient evidence, as against the estate of deceased, to warrant a finding of a loan of the money to deceased.

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by W. H. Pitthan against Mary Schnaitman, administratrix of Oscar Schnaitman, deceased. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles F. Strop and Eugene Silverman, for appellant. Rusk & Stringfellow, for respondent.

BROADDUS, P. J. The action was instituted in the probate court, where the plain-

tiff filed his claim against the estate of the deceased for the sum of \$300. The claim was allowed by the probate court, and the administratrix appealed to the circuit court, where the plaintiff again obtained judgment, from which the administratrix appealed to this court. The plaintiff seeks to have allowed against the estate of Oscar Schnaitman said sum of \$300, purporting to be for money loaned to the partnership of Schnaitman & Erath, of which deceased was a member. A jury was waived, and the cause was tried by the court. The testimony introduced by the plaintiff was that on the day the loan is alleged to have been made Erath, the partner of deceased, said to him that he needed some money with which to cash checks, and that deceased replied that he would get it; that, together with the porter employed by the partnership, the deceased went to plaintiff's place of business, and plaintiff gave him the money. The plaintiff and also the deceased and Erath were engaged in the saloon business. It was not shown that any note was given for the sum, no book accounts or ledger entry, or other evidence of that description of indebtedness was produced showing the character of the transaction. In the course of the opinion more particular reference to the testimony will be made. At the close of plaintiff's testimony, the defendant offered a demurrer to the evidence, which was by the court overruled. The defendant introduced no testimony. Finding and judgment were for the plaintiff. Therefore the only question before this court is whether upon the evidence so introduced the plaintiff was entitled to recover.

It is the contention of defendant that the mere reception by the deceased of the \$300 is no evidence of a loan more than the payment of an indebtedness, and was not sufficient to authorize any finding in favor of plaintiff. In the first place, it is contended before a claim should be allowed against the estate of a deceased person "very satisfactory evidence" should be produced of its justness. We do not know that the rule of law in such cases would be different materially from that prevailing in ordinary civil cases. The rule that should prevail is that the very best evidence obtainable should be introduced by the claimant against the estate of the deceased person; for in all instances, by reason of the death of one party, the lips of the other are closed, and thus the plaintiff is deprived of the benefit of his own testimony, as well as that of deceased. It is true fraudulent claims may be, and no doubt sometimes are, allowed against the estate of deceased persons; but we do not think that, on account of such a condition, any particular rule could with safety be adopted other than that which prevails in ordinary civil cases, which is to require such evidence as will best disclose the truth. The point, however, relied upon by appellant is that there was no evidence of a loan by plaintiff to deceased, particular-

ly referring to the evidence of Erath that, on being asked what he knew about plaintiff's claim, answered: "Well, I know the money was gotten, and I know I cashed checks with the amount." And further, he says: "We run out of money, so Oscar—I says to Oscar, I says, 'You had better get some more money.'" Oscar answered: "Well, I will take the nigger with me, and I will go up to Pitthan's, and I will send you down some money. How much do you think you will need?" I said, 'I think about \$300 will be enough.' He then said, 'All right, I will send it down.'" What took place at Pitthan's saloon is stated by a witness by the name of Dowell, and is as follows: "Me and Mr. Pitthan was talking in the evening, and Mr. Schnaitman came in to the bar, and says, 'Pitt I want \$300.' Pitt says 'All right, Oscar'; and Pitt counted him out \$300, and gave it to him." The defendant to sustain his contention relies on *Dickey v. Dickey*, 8 Colo. App. 141, 45 Pac. 228, where it is held that: "Evidence of the giving of a check by a claimant to a decedent, and that the latter collected it, does not of itself prove a loan to decedent, nor establish a claim against his estate." But, where one person who has an urgent need of money for present use leaves his place of business, and goes into the place of business of another, and says to him, "I want \$300," the inference is stronger that he wants a loan than that he is demanding payment of debt; otherwise, it would have been natural for him to have said to his debtor that he would like to have his debt paid as he had use for the money. No evidence of indebtedness was seen by the witness, none surrendered, and none mentioned. If there had been such, it is reasonable to suppose something would have been said or done with reference to it. But if, on the other hand, the plaintiff had delivered a check of \$300, nothing said or further done, the most legitimate inference to be drawn from such a transaction would have been that it was a payment of existing indebtedness. It became a question under all the facts and circumstances connected with the transaction whether it was a loan or a payment of indebtedness. While the single circumstances connected with the immediate delivery of the money by plaintiff to deceased standing alone might have little probative force, but, taken in connection with all the other facts and circumstances, the whole may supply on the principle of induction the presumption of the fact that the transaction was a loan, and this was a matter within the exclusive province of the court sitting as a jury. And it is a rule of practice in this state that a demurrer to the evidence requires a reasonable inference from the fact and circumstances in evidence to be made in favor of the opposite party. *Knapp v. Hanley*, 108 Mo. App., loc. cit. 360, 83 S. W. 1005. And it is said in *Montgomery v. Railroad*, 181 Mo. 504, 79 S. W. 938, that: "It is axiomatic that



a demurrer to evidence admits the fact the evidence tends to prove, and in passing upon it the court is required to make every inference of fact in favor of the party offering the evidence which a jury might, with propriety, have inferred in his favor, and, if when viewed in this light it is sufficient to support a verdict in his favor, the demurrer should be overruled."

We cannot divest ourselves of the conclusion that there was at least some evidence upon which the court was authorized to render its finding, and, such being the case, we do not feel authorized to interfere with it. Affirmed. All concur.

### LEFFLER v. ANHEUSER-BUSCH BREWING ASS'N.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1907.)

#### 1. MASTER AND SERVANT—ACTIONS FOR INJURY TO EMPLOYÉ—SUFFICIENCY OF EVIDENCE.

In an action for injury to an employé who, while up a ladder was seized with a dizziness, and, to steady himself, rested his foot on the cogwheels of a machine which drew it in, evidence held not to show that the motion of the machine was due to an imperfection in any of the arrangements of which the employer knew, or in prudence ought to have known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

#### 2. SAME—EVIDENCE—RES IPSA LOQUITUR.

The starting of elevated cogwheels of a machine when an employé, who, while up a ladder was seized with dizziness, rested his foot on them to steady himself, ought not to be regarded as bespeaking negligence rendering the employer liable for injury to the foot, but that unusual fact should prevent the application of the doctrine of *res ipsa loquitur*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877-890.]

#### 3. SAME.

In an action for injuries sustained by an employé who, while up a ladder, was seized with a dizziness, and, to steady himself, rested his foot on the cogwheels of a machine, which drew it in, evidence by the employé, not that the wheels were moving when he stepped on them, but only that they might have been, cannot be taken as evidence from which negligence by the employer may be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877-890.]

#### 4. SAME—ADMISSIBILITY OF EVIDENCE.

In an action for injury sustained by an employé, who, while up a ladder, was seized with a dizziness, and, to steady himself, rested his foot on the cogwheels of a machine, which drew it in, it was his theory that there was a defect in the nature of a roughness on the inside of the loose pulley, which prevented it from turning smoothly on its shaft and caused it to clamp the belt, which was intended to run loosely on it, and thereby start the machinery. Evidence was offered that for seven months prior to the removal of the machine to where it was at the time of the accident there had been trouble in stopping its revolution by throwing the belt from the tight to the loose pulley, but the same was excluded. There was no offer to prove that, when the belt was over the loose pulley, the machine sometimes started, as it did when plaintiff was injured, but because motion did not always cease at once, it was argued that the evidence tended to prove a roughness on

the inside of the loose pulley, which caused it to clamp the belt, which defect caused the machine to start when plaintiff was injured, and that the employer was negligent in not correcting the defect. Held, that the occasional failure of the machine to stop revolving when the belt was thrown to the loose pulley was no basis for an inference of negligence in connection with the starting of the machinery when plaintiff stepped on it, and was properly excluded.

#### 5. SAME—DUTY TO FURNISH SAFE PLACE TO WORK.

The duty to use care to furnish an employé a reasonably safe place to work cannot be extended to cogwheels three or four feet above the floor, so as to render the employer liable to an employé who, while up a ladder, being seized with a dizziness, stepped on the cogwheels to steady himself, and was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 179-205.]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by Ira S. Leffler against the Anheuser-Busch Brewing Association. Judgment for defendant, and plaintiff appeals. Affirmed.

Walther & Muench, for appellant. Geo. S. Grover and Jones, Jones & Hocker, for respondent.

GOODE, J. Appellant received a personal injury while working in respondent's establishment in the city of St. Louis. He had been employed by respondent during the month of May, 1905, in setting up and erecting machinery in different departments of its brewery; but had been in respondent's service for three years. Appellant is a millwright of 35 years' experience. Portions of the machinery in respondent's establishment were being moved from one room to another, and installed in new quarters. One of the pieces which had been moved was a device or machine used for pressing water out of thin wood; the leaves of wood afterwards being used to wrap bottles. This machine had been kept in operation previously in another part of the brewery, but about June 1st its location was changed, and it was while plaintiff was at work installing it in its new quarters that he was injured. The machine was ponderous, and consisted of three parts—the legs or supports on which it stood, two heavy iron rollers through which the wood was passed, with cogwheels at the side which geared into each other and turned or rotated the rollers and the pulleys above on which belting ran to carry power from the main shaft overhead to the wheels and rollers. What is called by the witnesses a "shifting arrangement" was used in connection with the pulleys and belt to transmit the belt from the tight to the loose pulley, or vice versa. When it was desired to move the machinery, the belt was kept on the tight pulley, and at other times it was shifted on to the loose one. At the time of the accident the machine had been put in place and all its parts arranged except the shifting appliance, on which the appellant was at work

when he was hurt. The appliance was overhead, and to reach it appellant had ascended a ladder which leaned against a joist. He was six or seven feet up the ladder and in the act of driving a nail when a dizziness seized him, and he attempted to descend. For fear of losing his balance and falling, he rested his left foot on the cogwheels of the machine. Either the pressure of his foot started the wheels into revolution or else they were turning when appellant stepped on them. His toes were slowly drawn between the cogs before he could stop the machinery, which he did by throwing what he called the "counter belt" off the tight pulley. Said counter belt was shorter than the main belt, and ran around a lower shaft, but was occasionally used, as well as the main belt, to operate the pressing machine. Four of appellant's toes were so badly mashed they had to be amputated. He testified that the impact of his foot on the cogwheels would not have been sufficient to move the machine without the application of some force from above by a pulley. He said, further, that the machine may have been moving at the time he stepped on it, but so slightly or imperceptibly that he could not have seen it without taking special notice. Plaintiff further testified as follows: "Up to the time of the accident, we had simply tested the machine to find out whether it worked all right. I put a number of layers of wrapping through, and it squeezed the water out of them all right. I was to set the machine up and see that it was in running order; that the belt ran properly on the pulleys. I trained the belt to run fairly with the pulley in the presence of Mr. Jenny and Mr. Hardy. They were there to see that the belt tracked properly. I threw the belt from one pulley to the other, and saw that it tracked properly on both. I did this before I was hurt. I tried the belt on the pulleys either on the morning of the day I was hurt or the afternoon before, and I tried the machine on the wrappers, I believe, on the morning of the day on which I was injured. I was injured in the afternoon. The rollers of the machine are set in motion by the power communicated by the belt to the pulleys, through intermediate gearing. I had tried both the fast and the loose pulleys, and found that the belt tracked over them properly. I never observed that the loose pulley was out of order until I saw my foot in the cogwheel, and then I saw that something was wrong. When I was tracking the belt on the pulleys, both pulleys seemed to work all right. I observed nothing wrong at the time. I had been busy setting up this machine for about three days before the accident. It was my duty to finish the machine, so that it could be used. I had finished setting up the machine the day before the accident, and all the forenoon of that day I had been working on the shifting arrangement which is entirely independent of the machine, although

used to control it. The machine was moved in three parts. I helped to take it apart, and also helped to put it together again." He also testified that, in setting up the machine, the three parts of it were transferred from the room where it previously had been to its new location, and put up in the precise condition they were before. Evidence was offered by the appellant to show that, when the machine was in its former location, trouble had been experienced in stopping it when the belt was shifted from the tight to the loose pulley, and it had been necessary sometimes to insert a number of thicknesses of wrapping in the machine to keep it from moving after the belt had been shifted. This testimony was excluded by the court, and an exception saved to the ruling. The charge of negligence in the petition is as follows: "And plaintiff further avers that the defendant was then and there negligent and careless in and about the furnishing and the conduct of said machine, in this: that the said slip pulley for a long time theretofore had become and been defective and inefficient, in this: instead of freely and instantly slipping upon said shaft whenever the belt aforesaid was shifted thereto, the said pulley did frequently, as it did on said 2d day of June, 1905, fail to slip, and continued to revolve said machine and its parts to the imminent danger of persons and employees rightfully working upon or near the same, and that such defect in said pulley was fully and for a long time theretofore known to the defendant, and was entirely unknown to the plaintiff prior to the happening of said injury; and that, notwithstanding such knowledge, defendant failed to remedy such defects, but continued to use said machine in its defective condition, as aforesaid." At the conclusion of the evidence offered by the appellant, the court, at respondent's request, instructed the jury to return a verdict for it; whereupon appellant took a nonsuit with leave to set it aside, and afterwards appealed.

1. It is the theory of appellant that there was a defect in the nature of a roughness on the inside of the loose pulley, which now and then prevented it from turning smoothly on its shaft, and caused it to clamp the belt which was intended to run loosely on it, and thereby start the machinery and cause appellant's injury. On this theory, evidence was offered to prove that for seven months prior to the removal of the machine there had been trouble in stopping its revolution by throwing the belt on the loose pulley. It is true appellant swore that he and his fellow workman had tested the operation of the pulleys and the machine in general, after they had been set up in their new location, and that they worked well. But, inasmuch as the machinery had been freshly oiled, it is contended that it may have worked smoothly, temporarily, and appellant have been prevented from detecting any imperfection in the loose pulley which would cause it to start

the machinery at times. Appellant's own testimony shows that it was his duty and task to set the machinery up and see that it was in good working order, both the pulleys and the other parts of it; that he did this, and made tests of how it worked and had found nothing wrong, either with the cogwheels, belts, or shafting. Just what caused the machinery to start when appellant stepped on the cogs does not positively appear. It may have been that the pressure of his foot started it, and that the edge of the belt, which was then on the loose pulley, by rubbing against the side of the tight pulley, kept up the revolution. Appellant swore that he realized while his foot was caught that, if the edge of the belt was in contact with the tight pulley, sufficient force would be communicated to the belt to continue the revolution. If we leave out of view the excluded evidence regarding the difficulty of stopping the machinery in its former location, by shifting the belt from the tight to the loose pulley, it is manifest that appellant's evidence had no tendency to prove negligence on the part of respondent in any respect. As the case appears without said proof, and if appellant's statement is accepted that his weight could not start the machine to revolving, it started to revolve for some unaccountable reason when appellant stepped on it. There is nothing to show that this motion was due to an imperfection in any of the arrangements of which respondent knew, or in prudence ought to have known; for, with the offered testimony excluded, there is none to prove the machinery had worked improperly.

2. The starting of the wheels when appellant stepped on them ought not to be regarded as bespeaking negligence; but that unusual fact should prevent the application of the doctrine of *res ipsa loquitur*, even if applicable under proper circumstances in actions by a servant against a master. Said doctrine rests on the theory that an accident had happened which according to common experience would not happen without negligence. *Dougherty v. Railroad*, 9 Mo. App. 478; *Scott v. London Dock Co.*, 3 Hurlst. & Col. \*596. But a man stepping his weight on elevated cogwheels is not shown to be within the range of common experience, and hence no presumption can be indulged that the wheels would not turn under him if they were in good order.

3. Regarding the possibility that the wheels were moving when appellant stepped on them, suffice to say that he did not testify that they were, but only that they might have been; and such a bare conjecture cannot be taken as evidence from which negligence might be inferred.

4. But it is insisted that the court erred in excluding testimony of the previous action of the machine when the belt was thrown from the tight to the loose pulley. It is not denied that it was appellant's duty to install the different parts of the machine

properly, see that they were in good working order in their new location, and test their working. But it is argued that if there was some defect in the loose pulley which occasionally prevented it from working properly, and if appellant had no knowledge of its failure to work well previously, and the defect was concealed or latent, blame is not to be imputed to him for failure to discover the defect; and this may be conceded. As to respondent's blame for such a defect, if any there was, appellant contends that some one ought to have known the defect existed, because, in the former location, the loose pulley was occasionally inefficient. All that was sought to be proved in order to fasten negligence on the respondent in connection with the movement of the machinery when appellant got hurt was that occasionally, in its old location, the machine did not stop revolving promptly when the belt was thrown on the loose pulley. There was no offer to prove that, when it was over the loose pulley, the machinery sometimes started, as it did when appellant got hurt. But, because motion did not always cease at once when the belt was thrown on the loose pulley, it is argued that this fact tends, firstly to prove a certain roughness in the interior of the loose pulley, which caused said pulley not to revolve with uniform smoothness on the shaft, but to tighten sometimes under the belt, presumably in consequence of a protruding part of the inner surface rubbing against the shaft; secondly, to prove the same defect caused the machine to start when appellant was hurt; and, thirdly, that respondent was guilty of negligence in not correcting the supposed fault in the loose pulley. It is evident that this argumentation is of a fanciful and speculative character, and does not present just inferences from the facts. No witness swore that in its former location the machinery would sometimes not stop running when the belt was on the loose pulley because of a roughness inside the pulley, or that there was a roughness. The failure to stop may have been, as suggested by appellant, caused by the edge of the belt when on the loose pulley rubbing against the side of the tight pulley, or from some other cause. Neither did any witness testify that the machinery had ever started before from a motionless state because of a defect in the loose pulley, or other defect. Hence we think the fact of an occasional failure of the machinery to stop revolving when the belting was shifted on the loose pulley during the time the machinery was in its previous location was no basis for an inference of negligence on the part of respondent in connection with the starting of the machinery in its new location when appellant stepped on the cogwheels. Such a finding would consist of a chain of conjectures, instead of being a valid inference from established facts. Not only are bare conjectures no basis for a verdict, but inferences cannot be multiplied to the extent nec-

essary to support appellant's position; one inference being based on another, instead of on facts in proof. *Bigelow v. Railroad*, 48 Mo. App. 367, 372; *State v. Lackland*, 136 Mo. 26, 32, 37 S. W. 812; *Glick v. Railroad*, 57 Mo. App. 97; *Chemical Co. v. Lackawanna Co.*, 78 Mo. App. 312.

5. Appellant's case may be regarded from another point of view. Let it be granted for argument's sake that there was an imperfection in the machinery which caused it to start, and that respondent was remiss in the matter so as to be liable to a servant injured while operating the machine or performing some other task which naturally would bring him in contact with it. The question occurs whether such negligence can be treated as failure to furnish appellant a safe place to do the work he was about. As appellant stepped on the wheels to save himself from falling, the act was not a negligent one, but we think it throws the casualty into the class of pure accidents for which no one is to blame. It was not, of course, expected or to be anticipated that an employé would have occasion to put his foot on cogs which were three or four feet above the floor, and hence that was not properly speaking any portion of the place furnished him to work in, but a place in which he stepped in consequence of an incident not to be anticipated—his sudden seizure with dizziness. The duty to use care to furnish employés a reasonably safe place to work cannot be extended so as to require the entire environment to be safeguarded against unforeseeable accidents due to a workman going where none was expected to go. We think the duty of a master to protect a servant from injuries in consequence of defects in the master's premises rests on the same principle as does the rule requiring owners of premises generally to protect persons from injury by keeping the premises in order. The duty does not obtain, except in the case of premises and the parts thereof where servants in reason may be expected to be. *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459. If a servant goes where no one could think he would go, even if some singular exigency compels him to go there, the obligation of the master to furnish a safe place to work would not embrace such a locality. We are not now speaking of the statutory duty incumbent on employers to guard cogwheels and other machinery; for, though negligence in that respect was charged in the petition, it was abandoned at the trial, because the proof showed appellant and his co-workman were preparing to put guards over the cogwheels, but had not done so when the casualty occurred. The cause of action relied on is a defect in the loose pulley, in consequence of which the machinery would continue to revolve after it ought to have stopped. In our opinion no negligence was proved, or offered to be, against the respondent.

The judgment is affirmed. All concur.

- SMITH v. ST. LOUIS & S. F. R. CO.  
(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

1. CARRIERS—PERFORMANCE OF CONTRACT OF TRANSPORTATION—ACTIONS—DAMAGES.

In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, and thus compelling her to ride to the next station, the measure of damages is such amount as will reasonably compensate her for actual inconvenience, loss of time, and labor of returning from the next station to her original destination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1082.]

2. SAME—EVIDENCE.

In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, evidence held insufficient to sustain a charge of incivility on the part of the conductor.

3. SAME—JUDGMENT.

In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train at the station, the evidence showed that she left the train from the rear end, being some distance from the depot, and then re-entered in order to ride to the depot, and intending to require the conductor to let her off on the station platform, in consequence of which act she was carried to a station three miles distant, and compelled either to wait four hours for a train back, to walk back, or take a carriage. It was about midnight, the station was lighted, the weather was pleasant, and the roads good. Held, that a judgment for \$100 was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1084.]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Mrs. Rice Smith against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition that plaintiff remit part of recovery.

L. F. Parker and Woodruff & Mann, for appellant. H. L. Shannon, for respondent.

JOHNSON, J. The cause of action alleged in the petition is founded on the negligent failure of defendant, a common carrier, to afford plaintiff, a passenger on one of its trains, a reasonable opportunity to leave the train at her destination, in consequence of which she was carried beyond her station and compelled to walk home. The wrongful act is claimed to have been aggravated by insulting conduct on the part of the conductor, and the prayer of the petition is for the recovery of exemplary as well as compensatory damages; but the learned trial judge ruled, in the instructions, that none of the facts disclosed presented a case for the assessment of punitive damages.

Defendant, in effect, conceded it had been guilty of a technical breach of its contract with plaintiff in carrying her beyond her station, and first took the position that, under the facts most favorable to her contention, she was entitled to nominal damages only. An instruction to this effect was asked, but was refused, whereupon the defendant asked, and the court gave, the following instruction

on the measure of damages: "If the jury find the issues for the plaintiff, in assessing her damages they will allow her only such sum as will reasonably compensate her for the actual inconvenience, loss of time, and labor of returning from Webb City to Orinogo, not exceeding the sum of \$500, and you should not allow her any sum for anxiety or for mental suffering or exposure." Thus instructed, the jury returned a verdict for plaintiff in the sum of \$100. Defendant, after ineffectually moving for a new trial, brought the case here by appeal, and presents but one question for our determination, viz., that the verdict is so clearly excessive we should pronounce it to be the result of passion or prejudice on the part of the jury. Plaintiff answers this contention by saying, in effect, that, since the facts and circumstances in evidence justify the conclusion that the wrongful act of defendant in failing to perform its contract with plaintiff was accompanied by insult, the jury rightly included smart money in its verdict, though in so doing it disobeyed the court's instructions.

The pertinent facts which afford grounds for these diverse positions are as follows: On August 20, 1905, plaintiff, who lived in Orinogo, became a passenger on a Sunday excursion train run by defendant, which consisted of an engine and seven coaches. Her ticket entitled her to ride on this train from Orinogo to Eureka Springs, Ark., and return. On the return trip, the train arrived at Orinogo at about 11:45 p. m. and was stopped at the station at a point where the forward coach stood immediately south of the south end of the platform (the track passes through the town from north to south), the next three coaches at the platform, and the three remaining coaches to the north of it. Plaintiff, in company with three other women and two children, rode in the rear coach. The train remained stationary a sufficient time for, perhaps, 75 passengers to leave it. Plaintiff and her companions knew they had reached their destination, and, observing the cars were too crowded for them to go forward to a coach adjacent to the platform, proceeded to the rear end of the last coach for the purpose of alighting. The station and platform were on the west side of the track, and the only reason given by plaintiff, who appears to have directed the movements of her party, for not alighting on that side of the train, was that the ground was lower there than on the other side, and they would be inconvenienced in making the long step required to reach it. It is not shown that the step could not have been made in safety, or without much inconvenience, nor that they would not have had an open and safe pathway over which to travel in reaching the platform. They chose, however, to alight on the east side, where it was quite dark, and the gravel was wet and soft and sloped downward in a way to make their footing precarious. Becoming confused and fearful that they were

not in a place of safety, plaintiff proposed to her companions to reboard the car and to require the conductor to let them off at the platform. They acted on this suggestion, and after the train started forward, and as they were passing the station, they encountered the conductor. The conversation which ensued thus is stated by plaintiff: "The conductor, just as I put my hand on the knob of the opposite coach to see if I could get the door open and see some one, he came in, and I says: 'This is where we stop, please let us off.' And he spoke very rough, and says: 'Why didn't you get off when the train stopped?' And he says: 'You will just have to go on to Webb City. I will not stop the train.'" When they arrived at Webb City, plaintiff, so she states, "said to the conductor: 'How are we to get back from here?' And he says: 'Go to the depot and wait for the next train back.' And I says: 'Will we have to pay our fare back?' And he says: 'No, just tell the conductor you were carried past your station.'" Webb City is three miles from Orinogo. A station is maintained there, and on that night it was open and lighted. Plaintiff and her party might have waited there for the first train bound for Orinogo, which was due in about four hours. They might have stayed at a hotel all night, or might have hired a conveyance at a livery stable to take them home. Two of the women followed the latter course, and were driven home in a hack. It is not shown that plaintiff was without money to pay hotel bills or livery hire, but rather than wait four hours in the station at night, or incur any expense, she and her remaining companions walked back. A good road, pleasant weather, and moonlight enabled them to reach home in about an hour and a half without physical injury, and obviously, without great inconvenience. No other witness supports plaintiff in her assertion that the conductor spoke rudely when he asked why she did not get off when the train stopped. One of the women testified, without contradiction, that, after they had alighted from the coach at Orinogo, plaintiff, in explanation of her proposal that they re-enter the car, remarked: "We have paid for our tickets, and we will ride to the depot."

We could answer the point made by plaintiff that the trial court erred in refusing permission to the jury to assess punitive damages by saying that, since plaintiff did not appeal, she is in no position to complain of any error committed against her. Further, we might say that, had the evidence disclosed that the conductor had aggravated his wrong by insulting conduct, nevertheless the jury had no right, in plain disregard of the instructions given by the court, to wield the rod of correction. But we prefer to dispose of plaintiff's argument on the ground that no facts and circumstances appear in evidence to sustain the charge of improper conduct of a character to warrant the assessment of oth-

er than actual damages. In *Trigg v. Railway*, 74 Mo. 147, 41 Am. Rep. 305, the plaintiff testified, when the conductor told her he could not take her back, she thought he "spoke very sharp." The Supreme Court held this to be no evidence of malice, insult, or violence. What was there said applies very pertinently to the facts of the case in hand: "But, taking this statement in connection with the subject of conversation and what he actually said, and viewing it also in the light of his subsequent language and conduct, we take it to mean only that the conductor was very positive; and as the action which the plaintiff proposed was such as involved, perhaps, not only her own safety, but the safety of all the passengers on the train, it was a matter about which he probably expressed himself with emphasis. Every passenger, and especially ladies unattended by an escort, has a right to expect and receive ordinary civility from all the servants of a railroad company with whom they are necessarily brought in contact, and, if there is any deviation from this standard, it should be on the side of courtesy; and if we were of opinion in this case that the language or manner of the conductor, connected with the negligence complained of, bordered upon indignity or insult, we would not hesitate to let the verdict stand." What was said in the present case, taken in conjunction with all the circumstances, shows that the conductor acted with civility and consideration in a trying situation. Plaintiff and her companions were the only passengers, of all who desired to leave the train at Orinogo, who acted on what she conceived to be the technical right of a passenger to have the coach in which he was riding stopped at the station platform. Their purpose to insist on the satisfaction of this supposed right remained undisclosed until after the train had started and gained some headway. It would have been natural for the conductor to feel irritated, and to speak somewhat brusquely; but that he did this, or exhibited any intention of insulting plaintiff or of treating her with incivility, is clearly an afterthought, manifestly born of a desire to enhance the recoverable damages. Moreover, it appears that plaintiff was the only person really guilty of rudeness, either at the time of the occurrence in question, or subsequently thereto. She admits that, when the conductor asked her why she did not get off when the train stopped, she told him: "We didn't have legs as long as bean poles, so as to step off on the west side, and on the east side we could not stand." And while on the witness stand she gratuitously and intemperately berated the conductor in this wise: "Q. Do you know the conductor that was on that train? A. I don't know his name. I know he was one of the most contemptible men I ever saw. Q. Do you know Frank Hart? Mr. Hart, stand up. (Mr. Hart stands up.) This is the young man that was on that train, the conductor? A. Yes, I never have

liked him. I know his face." Such outbursts were evidently designed to bolster up a weak position with a semblance of outraged feminine sensibilities. The learned trial judge rightly held the evidence to be insufficient to support the charge of insult added to injury.

Adopting, as we should, the theory on which the case was tried by the parties, that defendant was at fault in not stopping its train at a place where plaintiff could depart therefrom in safety, the remaining questions for our consideration relate to the elements of the compensatory damages a plaintiff is entitled to recover in such cases. The instruction given by the court at the instance of defendant correctly declared the law. In the absence of physical injury as one of the results of the wrongful act, or of evidence that the injury was accompanied by circumstances of malice, insult, or inhumanity, the only damages plaintiff should recover were those resulting from the actual inconvenience, loss of time, and labor she experienced in returning from Webb City to her home. Again, we refer to the case of *Trigg v. Railway*, for a statement of the principles applicable: "Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, as no personal injury was received by the plaintiff, and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger. The general rule is that pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity. \* \* \* If anxiety and suspense of mind are not a ground of recovery here, of course the effects are not." *Marshall v. Railroad*, 78 Mo. 610; *Rawlings v. Railroad*, 97 Mo. App. 515, 71 S. W. 534; *Snyder v. Railroad*, 85 Mo. App. 495; *Strange v. Railway*, 61 Mo. App. 587; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Mississippi, etc., Railroad v. Gill*, 66 Miss. 39, 5 South. 893; *Judice v. Railroad*, 47 La. Ann. 255, 16 South. 816; *Railroad v. Cleveland* (Tex. Civ. App.) 33 S. W. 687; *Blackburn v. Railway*, 143 Ala. 346, 39 South. 345; *Railroad v. Peacock*, 48 Ill. 254; *Railroad v. Parks*, 18 Ill. 460, 68 Am. Dec. 562.

And, further, within the limits defined in the instruction, if plaintiff's actual damages were increased by the course she selected in returning home, she should not be compensated for inconvenience, loss of time, and labor beyond that which would have been suf-

ferred had she pursued a more reasonable method. She was under no compulsion to travel afoot, but could and should have followed the example of her more sensible comrades, and hired a conveyance to take her home. Had she done this, her actual damages could not have exceeded the sum expended in livery hire. Here again she appears, without excuse, to have adopted the course best suited to aggravate her damages and to appeal to the sympathy of the jury. It goes without saying it was her plain duty to do all she reasonably could do to minimize her damages, and, if she voluntarily and unnecessarily selected the most arduous course, it is but just that she should have her added labor for her pains. Ten dollars will fully compensate her, and the verdict, in so far as it exceeds that amount, is clearly excessive and wholly unsupported by any evidence.

We shall give her an opportunity, by entering a remittitur, to avoid another trial of the cause, and, accordingly, we affirm the judgment on condition that within 10 days from the filing of this opinion, a remittitur of \$90 be entered.

It is so ordered. All concur.

#### STATE v. GALLAGHER.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

##### 1. INTOXICATING LIQUORS—SALE TO MINOR—CIVIL LIABILITY—STATUTES.

No one but a dramshop keeper defined to be a licensed retailer of liquors by Rev. St. 1899, § 2990 [Ann. St. 1906, p. 1714], is liable under section 3009, as amended by Laws 1905, p. 141 [Ann. St. 1906, p. 1724], providing that a dramshop keeper shall be civilly liable for a penalty for selling to a minor, and making such dramshop keeper also liable to prosecution for a misdemeanor therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 187-192, 201.]

##### 2. SAME—LIABILITY OF CLERKS.

In a prosecution for selling liquor to a minor without the consent of his parents, in violation of Rev. St. 1899, § 2179 [Ann. St. 1906, p. 1397], providing that "any person" who sells intoxicating liquor to a minor without the consent of the parents shall be guilty of a misdemeanor, etc., it was no defense that the seller was a mere bartender or clerk for a licensed dramshop keeper in whose shop the liquor was sold, and that the sale was made for the proprietor, and not for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 187-192, 201.]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Dan Gallagher was convicted of selling intoxicating liquor to a minor without the consent of his parents, and he appeals. Affirmed.

J. C. Growney, for appellant. John M. Dawson, for the State.

ELLISON, J. The defendant was indicted, tried, and convicted for selling intoxicating liquors to a minor without the consent of

his parents. It is not disputed that the sale was made by defendant; but he claims that he was bartender or clerk for the dramshop keeper in whose shop the liquor was sold, and that he made the sale for the proprietor, and was not himself liable. In this view he offered to show that the proprietor of the dramshop for whom he clerked was a regularly licensed dramshop keeper. The court refused such evidence.

Since defendant's offer of proof was declined, we will, for the purpose of the appeal, assume it to be true. By section 3009 of the General Statutes of 1899, as amended in 1905 (page 141 [Ann. St. 1906, p. 1724]), a "dramshop keeper"—that is, a licensed retailer of liquors (section 2990, Rev. St. 1899 [Ann. St. 1906, p. 1714])—is made civilly liable to a penalty for selling to a minor, and is also made liable to a prosecution for a misdemeanor, to be fined not less than \$50 nor more than \$200. Under that section, it has been held that no one but a dramshop keeper is liable. *Bachman v. Brown*, 57 Mo. App. 68. Whether that decision would meet the case of a clerk for a dramshop keeper and excuse him from a prosecution based on that section we need not say; for the prosecution of this defendant is not under that section. He is not prosecuted as a dramshop keeper, but is charged generally under section 2179 [Ann. St. 1906, p. 1397], which declares that "any person" who sells intoxicating liquor to a minor without consent of the parent shall be guilty of a misdemeanor, and fined not less than \$50 nor more than \$200. Being prosecuted under the latter statute, the evidence offered was irrelevant. Any one who sells intoxicating liquor to a minor without the written consent of the parent, master, or guardian is guilty under that section. In prosecutions of this character every one will be presumed to know the law. *Hays v. State*, 13 Mo. 246.

The judgment is affirmed. All concur.

#### ATTERBURY et al. v. HENDRICKS.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907.)

##### 1. PLEADING—INCONSISTENT DEFENSES.

Traverses and defenses in avoidance may go together where they are not inconsistent, that is, where the proof of one defense will not necessarily disprove the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 189.]

##### 2. SAME.

A general denial, in an action by brokers for commissions for procuring a purchaser of real estate, raises an issue of every fact essential to the cause of action, and there is no incongruity between a general denial and the facts that a contract of sale was actually made between the owner and a purchaser procured by the brokers, and that the brokers accepted employment from each party without the consent of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 189.]

## 3. SAME.

In an action by brokers for commissions, answers by way of a general denial and in avoidance alleging that the brokers were employed to procure a purchaser, that a contract between the owner and a purchaser procured by the brokers was entered into, and that the brokers, without the consent of the owner, acted in the employ of both parties, are in part inconsistent, and the admissions are equivalent to a specific admission that the purchaser procured was ready, able, and willing to purchase, eliminating every issue save the question whether the brokers acted in the employ of both parties without the consent of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 189.]

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Action by H. C. Atterbury and another against I. F. Hendricks. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. A. Collet, for appellant. Crawley & West, for respondents.

JOHNSON, J. Plaintiffs, who were partners engaged in the business of real estate agents, sued to recover a commission alleged to have been earned under contract of employment with defendant. They prevailed in the trial court, where the cause was tried before a jury, and defendant appealed.

It is conceded that defendant employed plaintiffs to procure a purchaser of certain lands owned by him in Douglass county, Kan., at the price of \$29,112.50, that he agreed to accept either cash or other property of satisfactory character and price in payment of the consideration, and that he agreed to pay plaintiffs a commission of \$400 for the procurement of a purchaser on the terms proposed. Further, it is conceded that plaintiffs did find purchasers, who entered into a written contract with defendant, by the terms of which the latter was to receive a consideration of \$29,112.50 for his land, to be paid as follows: The purchasers assumed the payment of a mortgage on the property of \$8,000, and agreed to convey to plaintiff certain real estate in Brunswick, Mo., at the price of \$11,000, and a stock of hardware, the value of which was to be ascertained in a manner prescribed by the contract. Further, it was stipulated in the contract of sale "that in case the real estate in Brunswick at \$11,000, plus the stock of merchandise invoiced as above provided, does not amount to an aggregate of \$21,112.50, the equity in the Douglass county farm, then the parties of the second part [the purchasers] shall pay the party of the first part in cash whatever difference remains, and if the Brunswick store, building, and stock when invoiced exceed \$21,112.50, the difference shall be paid by the party of the first party to party of the second part within 30 days." For some reason not disclosed and of no importance to the present inquiry, the trade thus agreed on was not consummated. Defendant refused to pay the commission, and this action followed.

The petition contains a statement of facts sufficient to constitute a cause of action. The answer is as follows: "Comes now defendant, and for answer to plaintiff's petition herein admits that at all the dates and times mentioned in said petition plaintiffs were, and are now, partners engaged in the business of buying and selling real estate for hire, and denies each and every other allegation in said petition contained. Further answering, defendant says that on or about the 20th day of August, 1904, he did list with plaintiffs for sale or exchange the lands in Douglass county, Kan., mentioned and described in said petition, and agreed to pay them a commission for the sale or exchange of said lands upon certain terms and conditions. Defendant further says that thereafter plaintiffs did procure a contract to be made by and between this defendant and William M. Hopkins and Jacob Schrenk, who were then and there partners engaged in the retail hardware business at the town of Brunswick, Chariton county, Mo.; that by said contract defendant contracted and agreed to convey to said William M. Hopkins and Jacob Schrenk the lands aforesaid, and said William M. Hopkins and Jacob Schrenk agreed to convey to defendant certain real estate situated in Chariton county, Mo., belonging to them as tenants in common, and a certain stock of hardware and plumber's and tinner's tools, belonging to them as such partnership firm. Defendant further says that since the making of said contract he has been informed and now believes, and therefore states the fact to be, that in the bringing about and procuring of said contract to be made, the plaintiffs were acting not only as the agents of the defendant, but were also acting in the employ and as the agents of said William M. Hopkins and Jacob Schrenk; that neither defendant, nor said William M. Hopkins, nor Jacob Schrenk, was informed or had any knowledge whatever at the time of the making of said contract or prior thereto; that the plaintiffs were acting in the dual capacity of agents for all the parties to said contract; that by reason of their dual agency, and by reason of the fact that they failed to communicate information of such dual agency to the defendant and to said William M. Hopkins and Jacob Schrenk, plaintiffs should not be permitted to recover herein. Wherefore, having fully answered," etc.

The cause was subsequently tried as though a reply in the nature of a general denial had been filed to this answer, and we will regard the pleadings as containing a reply of that character. At the trial defendant offered evidence tending to prove that "Hopkins and Schrenk did not own a perfect title of record to their real estate; that such real estate was incumbered for \$5,000, and that they did not furnish him an abstract of title to said real estate, but that said abstract showed that Hopkins and



Schrenk did not have a perfect title of record; \* \* \* that it was not because of any fault on his (defendant's) part that the contract was not carried out; and that at the time said contract was entered into Hopkins and Schrenk were insolvent." The learned trial judge refused to admit this evidence, on the ground that the new matter pleaded in the answer restricted the controversy to a single issue of fact, viz., whether or not plaintiffs accepted a dual employment without the knowledge and consent of each principal. Following this ruling, no other issue was submitted to the jury, and defendant's instructions, by which he attempted to obtain a submission of the question of whether Hopkins and Schrenk were ready, able, and willing to close the trade on the terms agreed in the contract, were refused. Defendant argues that the existence of the fact that the purchasers procured by plaintiffs possessed the requisite ability and willingness to consummate the trade was elemental to the cause of action pleaded in the petition, and was not removed from the field of debatable issues by the admissions to be found in the answer. His position is that the general denial put in issue all of the constitutive facts except those afterward admitted in the special defense pleaded, and that the only facts thus admitted are that plaintiffs employed by defendants for hire, procured purchasers with whom defendant contracted for an exchange of his property, and that these admissions are not inconsistent with the fact asserted by defendant, and which he sought to support by competent evidence, that Hopkins and Schrenk were not able to perform their part of the contract.

We agree with defendant that it is a rule of pleading well settled in this state that traverses and defenses in avoidance may go together where they are not inconsistent, and that the true test to be applied in solving the question of whether defenses are inconsistent is this, will the proof of one defense necessarily disprove the other? If the question must be answered in the affirmative, the defenses are inconsistent; but, should it require a negative answer, there is no inconsistency, and both defenses properly may be included in the answer. *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Rhine v. Montgomery*, 50 Mo. 566; *State ex rel. v. Rogers*, 79 Mo. 283; *Springer v. Kleinsorge*, 83 Mo. 152; *Ledbetter v. Ledbetter*, 88 Mo. 60; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462; *Moore v. Macon Savings Bank*, 22 Mo. App. 684; *Wood v. Hilbish*, 23 Mo. App. 389; *State, to Use, v. Samuels*, 28 Mo. App. 649; *Cavitt v. Tharp*, 30 Mo. App. 131; *State ex rel. v. Moss*, 35 Mo. App. 441; *McCormick v. Kaye*, 41 Mo. App. 263; *Nelson v. Wallace*, 48 Mo. App. 193; *Bay v. Trusdell*, 92 Mo. App. 377; *Ruff v. Milner*, 92 Mo. App. 620. The general denial in the present answer was unequivocal in

terms, and, standing alone, would have raised an issue as to every fact constitutive of the cause of action pleaded in the petition. And if defendant's construction of the new matter pleaded in the answer is the correct one, there is no incongruity between the denial of the fact that the purchasers were able, ready, and willing to take the property on the terms agreed and the fact that a contract of sale was actually made between the parties to the transaction. These facts could exist together, and also could exist with the further fact alleged in the special defense that plaintiffs accepted employment from each party to the trade without the knowledge or consent of his principals.

But the trouble with defendant's position is that the admissions found in his special plea are more comprehensive in their scope than he concedes them to be. He admitted, not only that a contract was made between him and Hopkins and Schrenk for an exchange of properties, but also that they were the owners of the real estate and merchandise they bound themselves to convey to him. These unqualified admissions were equivalent to the specific admission that they were ready, able, and willing to purchase his property on the terms proposed, and their effect was to emasculate completely the general traverse and to remove from the case all other issues except that raised by the plea in avoidance.

It follows that the judgment must be affirmed. All concur.

# TOWER GROVE PLANING MILL CO. v. McCORMACK.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1907.)

## FRAUDS, STATUTE OF—SALE OF GOODS.

An order for sashes and doors for a special purpose to be manufactured by the seller at a stated price of \$250, to be paid on completion of the work, is a contract for the sale of goods and not for labor, within statute of frauds, Rev. St. 1899, § 3419 [Ann. St. 1903, p. 1963], providing that no contract for the sale of goods of the price of \$30 and upwards shall be good unless in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds, Statute of*, § 148.]

Appeal from Circuit Court, St. Louis County; Daniel G. Taylor, Judge.

Action for breach of contract of sale by the Tower Grove Planing Mill Company against Charles B. McCormack. From an order in favor of defendant granting a new trial, plaintiff appeals. Affirmed.

Walther & Muench, for appellant. Stern & Haberman, for respondent.

GOODE, J. This action was instituted originally on a statement containing two counts. We are not concerned with the first one, and will say nothing about it. The second count is as follows: "And for its second cause of action, plaintiff states: That on or

about the 19th day of April, 1904, defendant gave plaintiff an order for the following described goods, to be manufactured by plaintiff for him, to wit: 3 pairs of doors, 12'0"x15'0", 2- $\frac{1}{4}$ ", 12 lbs.; 2 sash 8-9"x4'6" 8 Lt., 1- $\frac{1}{4}$ " diamond sticking for windows, etc. (setting out other like articles)—all to be in yellow pine, and agreed to pay therefor the sum of \$250, which order plaintiff on said day accepted. That thereafter defendant notified plaintiff that he would not accept said goods, nor perform said contract upon his part. That defendant has failed to pay the cost of said work, and has refused and still refuses to accept the said material. That by reason of defendant's said breach of said contract plaintiff has been damaged in the sum of \$250, for which amount, together with interest and costs, it prays judgment." The case was originally instituted in a justice's court, whence it was appealed to the circuit court and retried. The evidence showed defendant was engaged in erecting an automobile garage at the World's Fair, and ordered from the plaintiff company the goods in question for use in that building. After the stuff was about manufactured the defendant notified plaintiff that he had placed the order with another company or mill, because plaintiff had been declared "unfair" by labor unions, and defendant would have trouble with employees if he used goods turned out by plaintiff's factory. There was evidence tending to show plaintiff did not carry in stock windows and doors, either completed, or partly completed, but manufactured them for particular buildings according to plans and specifications, and that the doors and windows manufactured for defendant were peculiar in size and character and could not be used in other buildings. The case was tried without a jury and there was a judgment for plaintiff on the second count, which was afterwards set aside by the court, and a new trial granted, on the ground that the court had erred in refusing certain declarations of law asked by the defendant.

The substance of these declarations was that if the court found from the evidence that the contract on which plaintiff based its second count was one for the sale of merchandise or things of the price of more than \$30, and that the buyer did not accept any part of the goods sold, or actually receive the same, and gave nothing in earnest to bind the bargain, or anything in part payment, and no note or memorandum was made of the bargain and signed by the buyer or his agent, then, under section 3419 of the Revised Statutes of 1899 [Ann. St. 1903, p. 1963], the finding must be for the defendant.

These declarations invoked that clause of the statute of frauds which provides that no contract for the sale of goods, wares, and merchandise of the price of \$30 and upwards shall be good unless the buyer accepts part of the goods and actually receives the same or gives something in earnest or part payment, or unless there is a note or memorandum in writing made of the bargain and signed by the party to be charged, or his authorized agent. Plaintiff's counsel say the contract does not fall within the statute of frauds, because it was not one for the sale of goods, wares, or merchandise, but for work and labor. In the opinion of the writer this clause of the statute of frauds is unsuited to modern business conditions, and productive of more fraud than it prevents. Nevertheless the contract in question falls within its terms, according to the decisions in this state, and the statute must be enforced. The contract, as pleaded in plaintiff's statement, explicitly states that it was an order for goods to be manufactured for plaintiff. The substance of the contract was a purchase by defendant from plaintiff of certain doors, windows, etc.; that is to say, chattels. It is true the chattels were to be manufactured; but the contract was not to pay plaintiff for the work of manufacturing them, but for the chattels themselves when they were put in a condition suitable for defendant's use. Whether it is right or wrong, the rule in *Lee v. Griffin*, 1 Best & Smith, 272, has been adopted as the rule of decision in this state. It is that "when the subject-matter of the contract is a chattel to be afterwards delivered, then, though work and labor are to be done on such chattel before delivery, the cause of action is goods sold and delivered and the contract is within the statute of frauds." *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656. In *Burrell v. Highleyman*, 33 Mo. App. 183, the property was household furniture which was to be covered and trimmed according to the order of the purchaser, who selected the covering and trimming, which were worth about half the agreed price of the furniture. Notwithstanding this fact, it was held that the contract was one, not for labor, but for goods sold and delivered, and hence was in the statute of frauds. In the case of *Lee v. Griffin*, the articles sold were two sets of artificial teeth manufactured for the defendant. In *Schmidt v. Rozier*, 121 Mo. App. 306, 98 S. W. 701, the same doctrine was applied to a suit of clothes manufactured by a tailor for a customer.

The judgment granting a new trial is affirmed, and the cause remanded. All concur.

**CITY OF MOBERLY ex rel. MOBERLY  
BRICK, TILE & EARTHEN WARE  
CO. v. HASSETT et al.**

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

**1. LIMITATION OF ACTIONS—MUNICIPAL COR-  
PORATIONS—PUBLIC IMPROVEMENTS—SPE-  
CIAL TAXES—ENFORCEMENT.**

Where the relator under contract with plaintiff city became entitled to have special tax bills issued against the defendants to pay for the paving of a street, his right thereto was a liability or obligation created by statute within the statute; Rev. St. 1899, § 4273 [Ann. St. 1906, p. 2349], limiting the time to sue on such claims to five years, so that, where the tax bills were not issued for more than five years from the time his right to them accrued, he cannot maintain an action thereon, since he might at any time have compelled the city to issue them, or have taken measures to levy the taxes against the property liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 157.]

**2. SAME—PERSON ENTITLED TO PLEAD STAT-  
UTE.**

Though tax bills issued by a city to a contractor to pay for a street improvement are the city's obligation, the party against whom they are issued is the real party in interest, and when sued upon the tax bills may interpose a plea of the statute of limitations, in that the tax bills were not issued within the time prescribed after the contractor's right to them accrued.

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by the city of Moberly, on the relation of the Moberly Brick, Tile & Earthen Ware Company against George L. Hassett and others. From a judgment for plaintiff, defendants appeal. Reversed.

W. P. Cave, for appellants. Martin & Ter-  
rill, for respondent.

ELLISON, J. This is an action on a special tax bill issued for paving Williams street, in the city of Moberly, with vitrified brick. The judgment in the trial court was for the plaintiff. The principal point against the judgment is the statute of limitations. It appears that on the 16th of May, 1892, the city council of Moberly adopted a resolution declaring it to be the sense of the council that Williams street be paved. The resolution was duly published. Afterwards, on the 9th day of July, 1892, an ordinance was passed for the paving. The relator's bid was accepted, and the city entered into a written contract with him to issue tax bills for the paving, and the paving was completed and accepted on the 15th day of December, 1892, when special tax bills were ordered to be issued according to law. In pursuance of said order, the city engineer on the 15th day of December, 1892, issued and delivered to relator what purported to be special tax bills for doing said paving, purporting to be issued by virtue of an ordinance assessing and levying a special tax for said work, when, in truth and in fact, no such ordinance had been passed. When said tax bills on their

face purported to fall due, viz., one-third after one year, one-third after two years, and one-third in three years from date, and when the last of said bills fell due, the relator undertook by process of law to collect them, when it first developed that there had been no levy made to collect the tax, and on September 24, 1897, relator took a nonsuit, and afterwards, on the 21st day of December, 1898, the city passed an ordinance assessing and levying said special assessment against the property for the payment of said pavement, and issued the tax bills here sued on. The statute (Rev. St. 1899, § 4273 [Ann. St. 1906, p. 2349]) reads that "all actions upon contracts, obligations or liabilities," and "an action upon a liability created by statute," shall be begun within five years after the cause of action shall have accrued. The right of the relator that tax bills be issued to him was a "liability created by the statute," or was, at least, a contract or obligation against the city. It was therefore subject to the five-year period of limitation. *Connoyer v. LeBeaume's Heirs*, 45 Mo. 139; *Turner v. Burns*, 42 Mo. App. 94; *Brady v. St. Joseph*, 84 Mo. App. 399. In the case of *Bank v. Ridge*, 79 Mo. App. 34, five years had not elapsed. His right to the tax bills accrued the 15th of December, 1892, and the bills upon which this action is brought were not issued to him until the 21st of December, 1898. This was more than five years from the time his right to them accrued; and hence his right was barred. He might at any time have compelled the city to issue the tax bills, or have taken measures to levy the tax against the property liable. *Brady v. St. Joseph*, supra. It is no answer to say that relator could not sue for the reason that the city did not issue proper bills until December, 1898, and that he began this action within five years of that date; for he might at any time have taken measures to compel the city to issue proper bills. *Kirwin v. Nevin*, 111 Ky. 682, 687, 64 S. W. 647; *Innes v. Drexel*, 78 Iowa, 253, 43 N. W. 201. See, also, *Bauserman v. Blunt*, 147 U. S. 647, 658, 13 Sup. Ct. 406, 37 L. Ed. 316, and *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051. It may be suggested that the obligation to issue the tax bills was the city's obligation; and hence this defendant has no right to interpose the statute of limitations when sued on the bills. It is true that a plea of the statute is personal to the party owing the obligation, and no other can plead it for such party. But, where the party interposing the plea is the real party in interest, he may do so. *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; *Moody v. Fleming*, 4 Ga. 118, 48 Am. Dec. 210. In such case he should not be regarded as a third person to the controversy.

Considering the bills to be barred, it follows that we should reverse the judgment and it is so ordered. All concur.

## In re HOWARD'S ESTATE.

## HOWARD v. STRODE.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1907. Rehearing Denied Dec. 17, 1907.)

1. EXCEPTIONS, BILL OF—TIME FOR ALLOWANCE—EXTENSION—MOTION IN ARREST—CARRYING OVER TERM.

Where a motion for arrest of judgment was continued over to the next term, the carrying over of the motion did not extend the time for signing and allowing a bill of exceptions to the next term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 49-51.]

2. SAME—MOTION FOR NEW TRIAL.

Rev. St. 1899, §§ 727, 728 [Ann. St. 1906, pp. 716, 720], provide for the signing and allowing of bills of exceptions at any time within the term at which the exceptions were taken, and that all exceptions taken during the progress of a trial before the same jury shall be embraced in the same bill of exceptions. *Held*, that where, at the term at which alleged erroneous orders were made refusing motions for voluntary nonsuit and dismissal and final judgment given against petitioner, a motion for a new trial was made, in which the orders complained of were mentioned, and was continued to a subsequent term at which it was overruled, a bill of exceptions filed thereupon duly preserved the exceptions to the rulings complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 49-51.]

3. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW BY PROBATE COURT—PROCEEDINGS—APPEAL—VOLUNTARY DISMISSAL.

On appeal to the circuit court by a widow from a judgment against her by the probate court on her petition for a money allowance in lieu of provisions for a year's support, under Rev. St. 1899, § 105 [Ann. St. 1906, p. 372], the petitioner was entitled to dismiss where she was not prepared for trial, and it was not an objection thereto that the administration of the estate might be indefinitely postponed by successive presentations of her claim and dismissals, since the allowance must be applied for before the personal property of the estate was distributed or sold.

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Petition by Mary Howard, widow of Laclede J. Howard, deceased, for a money allowance for a year's support. From a judgment of the circuit court affirming a judgment of the probate court against petitioner, she appeals. Reversed and remanded.

John J. O'Connor, for appellant. Johnson, Houts, Marlatt & Hawes, for respondent.

GOODE, J. This appellant, Mary Howard, claiming to be the widow of Laclede J. Howard, deceased, filed on May 12, 1905, in the probate court of the city of St. Louis, her petition under section 106 of the Revised Statutes of 1899 [Ann. St. 1906, p. 373] for an appropriation out of the assets of the estate in lieu of the grain, meat, and other provisions allowed a widow and family of a deceased husband for a year's support by section 105 of the statutes [Ann. St. 1906, p. 372]. This petition was heard on January 13,

1906, and judgment rendered against the petitioner, who took an appeal to the circuit court. The cause came on to be heard in the latter court on October 31, 1906, and among other motions and pleas the petitioner filed an application for a continuance, on the ground of surprise and the absence of material witnesses, setting out what she believed said witnesses would testify. This application having been overruled, appellant asked leave to take a nonsuit. This request was refused by the circuit court and an exception saved, and then appellant moved said court for leave voluntarily to dismiss her cause of action; but the motion to dismiss was likewise overruled on November 3, 1906, and an exception saved. Thereupon, on the same day, the circuit court entered a judgment affirming the judgment of the probate court for failure of appellant to prosecute her appeal from the latter court. The judgment of the circuit court recites that the petitioner refused to proceed in the case after her motions for a voluntary nonsuit and to dismiss had been overruled. All these proceedings were had at the October term, 1906, of the circuit court of the city of St. Louis, and at the same term, and within four days from the rendition of the judgment against the petitioner, she filed a motion for a new trial, in which, among other things, she complained of the refusal of the court to permit her voluntarily to dismiss her cause of action, and also of the action of the court in rendering judgment affirming the judgment of the probate court. A motion in arrest was likewise filed on the same day (November 5, 1906) that the motion for new trial was filed. Those motions were continued until the ensuing or December term, 1906, and during said term, to wit, on January 7, 1907, both were overruled; the appellant excepting to the orders. On the same day an appeal was allowed to this court, and time given for the filing of a bill of exceptions until February 10, 1907. The bill of exceptions was filed February 2, 1907, which was a day of the regular December term, 1906.

1. It is contended in behalf of respondent that we are precluded from reviewing appellant's exceptions because no term bill of exceptions was signed and filed at the October term, 1906, when the original exceptions were taken. On the contrary, it is insisted for appellant that if she filed motions for new trial and in arrest at said October term, and those motions were continued over to the next term and then disposed of, and a bill of exceptions filed at said later term, the carrying over of the two motions for new trial and in arrest carried over the exceptions from the October term. It is certain that the motion in arrest did not have this effect; because such a motion does not reach those exceptions which must be preserved in a bill of exceptions, but goes only to errors, imperfections, and deficiencies which appear on

the face of the record without being made part of the record by a bill. Therefore we shall inquire concerning the effect on appellant's exceptions of the continuance of the motion for new trial. The statutes (Rev. St. 1899, §§ 727, 728 [Ann. St. 1906, pp. 716, 720]) say that whenever in the progress of the trial of a civil suit either party shall except to the opinion of the court and write his exception, if the same is true, the court shall sign and allow it; and that such exception may be written and filed at any time within the term of court at which it was taken; further, that all exceptions taken during the progress of a trial before the same jury shall be embraced in the same bill of exceptions. Those statutes, if enforced literally, would require all exceptions taken during the progress of a cause to be saved by the filing of a bill of exceptions at the term when they were taken, without regard to whether a motion for new trial was filed and disposed of during said term, or continued to the succeeding one. But many exceptions cannot be reviewed on appeal, unless the trial court's attention is called to them in a motion for new trial, and an opportunity afforded for their correction before the appeal is allowed. *Cowen v. Railroad*, 48 Mo. 556; *Vineyard v. Matney*, 68 Mo. 105; *Ray v. Thompson*, 26 Mo. App. 431. In *Walter v. Scofield*, 167 Mo. 537, 547, 67 S. W. 276, 278, it was said that no errors except those apparent in the record proper will be reviewed, unless they are called to the attention of the court of first resort in a motion for new trial. For this reason, and also in view of the provision in section 728 (Rev. St. 1899 [Ann. St. 1906, p. 720]) that all exceptions taken during the progress of a trial of a cause, or taken before the same jury shall be embraced in the same bill of exceptions, the statutes have been construed to mean that if a motion for new trial is carried over to a term subsequent to the trial, and then overruled, the losing party may preserve for review, by bill of exceptions filed at said subsequent term, certain species of exceptions taken at the trial term, and particularly those taken during the trial. *Riddlesbarger v. McDaniel*, 38 Mo. 138; *Henze v. Railroad*, 71 Mo. 636, 644. Respondent concedes this much, but contends that, if a motion for new trial is carried over, a bill of exceptions filed at a subsequent term can save only such exceptions as were taken during the actual trial of the cause before a court or jury, and not exceptions taken to rulings on motions and other orders and rulings which did not occur in the course of the trial. Hence the argument is, with reference to the present cause, that as the only exceptions appellant took, or rather the only ones insisted on now, were the orders overruling her motions for nonsuit and dismissal, and as these exceptions did not occur on the trial of the cause (for in fact there was no trial), they could not be preserved by a bill filed at

the December term. This point is one of difficulty, and we have been unable to find a case in which it was directly decided. In *Hurt v. King*, 24 Mo. App. 593, the point in decision was that if the motion for new trial was overruled at the trial term, but a motion in arrest continued over, a bill of exceptions filed during the term when the motion in arrest was overruled would not preserve exceptions taken at the trial term. As already said, this is the law, for the reason that the purpose of a motion in arrest is not to call attention to exceptions which become part of the record by filing a bill of them, but to direct attention to errors and imperfections apparent in the record proper. *State v. Larew*, 191 Mo. 192, 196, 89 S. W. 1031. But in the opinion in *Hurt v. King*, 24 Mo. App. 593, remarks were made indicating that, even if a motion for new trial is carried over to another term and a bill filed when the motion is overruled, this bill will preserve only those exceptions taken on the trial of the issues before the court or jury. But, on the other hand, the further remark was made that a motion for new trial is necessary to save exceptions taken during the trial, and that it would be unreasonable to require the filing of a bill of exceptions until the determination of such motion, meaning that the trial court might sustain the motion for new trial, in which event no appeal would need to be taken or bill of exceptions filed by the party against whom judgment had been given. This was the ground on which the opinion that first dealt with this question put the right to save, in a bill filed at a subsequent term, exceptions taken at a prior term if a motion for new trial had been carried over. The language of the opinion is: "The statute intends that the exceptions shall be written out and filed during the term, while the cause rests in the breast of the court. But, where a motion for new trial is made at the close of the term, there may be good reasons for continuing it until the next succeeding term for final hearing. And, until a final hearing and disposition of the motion, the whole matter would unquestionably rest in the breast of the court, and it would be competent for it, in its discretion for good cause, to sustain the motion and award a new trial. Until this result is reached, it cannot be said that the cause is finally determined. And, as the statute requires all exceptions to be embraced in the same bill, it will be correct if filed at the term when the matter is disposed of." The opinion in *Henze v. Railroad*, 71 Mo. 636, 644, in adopting the rule declared in *Riddlesbarger v. McDaniel*, adverts to the clause of the statute requiring all exceptions taken during the trial to be preserved in one bill. The two reasons given in *Hurt v. King*, above, have a bearing on the decision of the point in the present case. If the bill of exceptions is allowed to be good if filed at the term when the motion for new trial was overruled, on

the principle that it is necessary to call the trial court's attention to alleged errors by a motion for new trial, and hence the necessity of a bill cannot be known until said motion is passed on, then, in order to ascertain whether the present case falls within or without the principle, we would have to inquire only whether the rulings of which appellant complains were of a kind that must be mentioned in a motion for new trial as a condition precedent to having them reviewed on appeal. On the other hand, if the rule has been prescribed because the statute says all exceptions taken during the trial of a cause or issue before the same jury shall be embraced in the same bill of exceptions, and the word "trial," as here used, is given a strict technical meaning, the present instance would not fall within the reason of the rule, since there was no trial of the cause. The point was again discussed in *Walter v. Scofield*, 167 Mo. 537, 548, 67 S. W. 276, 278, and the reasoning in the *Riddlesbarger Case* adopted. It was held that there is no final judgment until a motion for new trial is overruled, and no proper case for an appeal or bill of exceptions. We shall accept this case as establishing the rule in question on the ground taken in *Riddlesbarger v. McDaniel*.

The matter is further embarrassed by loose remarks about the function of the motion for new trial, which, in some opinions, is said to be merely to direct the trial court's attention to errors alleged to have occurred during the actual trial of the issues. *Rigdon v. Ferguson*, 172 Mo. 49, 52, 72 S. W. 504; *Aultman v. Daggs*, 50 Mo. App. 280, 288. If this is the only purpose of a motion for new trial, such motion would not properly embrace alleged errors in rulings on motions which were not made during the actual trial. There are various motions, the rulings on which may be reviewed without being mentioned in a motion for new trial, for instance (a) those made after judgment in a cause (*Parker v. Waugh*, 34 Mo. 340; *Bruce v. Vogel*, 38 Mo. 100; *Parker v. Railroad*, 44 Mo. 415; *Slagel v. Murdock*, 65 Mo. 522); or (b) to strike out an entire pleading, which motion is equivalent to a demurrer (*O'Connor v. Koch*, 56 Mo. 253); or (c) such as go to the whole cause and aim to dispose of it without trial (*Aultman v. Daggs*, 50 Mo. App. 280, 288). But rulings on another class of motions cannot be reviewed, unless exceptions are saved when the rulings are made, and afterwards the court's attention called to the alleged error in its rulings in a motion for new trial. Such are (a) motions for an allowance of alimony pendente lite (*Curtis v. Curtis*, 54 Mo. 351; *Steele v. Steele*, 85 Mo. App. 224); or (b) striking out parts of pleadings (*Palmer v. Shenkel*, 50 Mo. App. 571; *Crow v. Mitchell*, 44 Mo. App. 137, 139; *Acock v. Acock*, 57 Mo. 154); or (c) for a continuance (*State v. Mann*, 83 Mo. 589); or (d) motions to affirm

the judgment of a justice of the peace for want of notice of appeal (*Lewis v. Moxey*, 9 Mo. App. 597); or (e) motions for change of venue (*Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161); or (f) motions for the award of a jury to assess damages in a condemnation suit (*Kansas City, etc., R. R. v. Carlisle*, 94 Mo. 166, 7 S. W. 102). Motions of the latter class do not necessarily occur in the actual course of a trial of the cause. Hence, when the Supreme Court says the only function of a motion for new trial is to call attention to errors happening at the trial, it does not mean this literally. If it did, the statement would be irreconcilable with the rule that errors in rulings on preliminary motions must be embraced in a motion for new trial. In *St. Louis v. Brooks*, 107 Mo. 380, 383, 18 S. W. 22, the distinction between the two classes of motions was noticed, and it was said that for purposes of review in an appellate court the rulings of the trial court on motions made after final judgment stand on a different footing from those made during the progress of a cause, and that the action of the lower court on motions of the first class would be examined, though no motion for rehearing or new trial was filed. In *Aultman v. Daggs*, 50 Mo. App. 280, the same matter was discussed, and the same distinction drawn. In *Crow v. Stevens*, 44 Mo. App. 137, which was an action of attachment and garnishment, plaintiffs had filed motions to have portions of the garnishee's answers stricken out, and those motions were overruled, and an exception saved. But the matter was not mentioned in the motion for new trial; and, in disposing of the errors assigned, this court said that, in order to have the error reviewed, it was not only necessary to preserve the exception to the ruling by a bill, but also requisite that the attention of the trial court be called to the alleged error in the motion for new trial. The question is whether the overruling of plaintiff's motions for nonsuit and to dismiss would be reviewable without the filing of a motion for new trial or rehearing. It was, of course, necessary for an exception to be saved by bill in order to have this matter reviewed. *Aultman v. Daggs*, *supra*. But, if no motion for new trial or rehearing was necessary, then unquestionably the bill must have been filed at the time when the rulings were made; for no one will contend that a motion for new trial, when continued to a subsequent term, could carry over to such term exceptions which need not be mentioned in the motion. Appellant's motions for nonsuit and to dismiss appear to have been oral. They do not fall within either of the classes of motions above specified, the rulings on which may be reviewed on appeal, though the lower court's attention was not called to them in a motion for new trial. Appellant's said motions were filed prior to judgment. They did not go to an entire pleading or become part of the record proper,

nor did the rulings on them dispose of the cause. After they were overruled, it appears from the record that appellant refused to proceed further, and then a judgment was entered which disposed of the cause by affirming the judgment of the probate court on the ground that appellant had failed to prosecute her appeal. It is our opinion that, by motion for new trial or rehearing, the trial court ought to be afforded an opportunity to revise its rulings on motions like those the appellant preferred, just as it should its rulings on a motion for a continuance or change of venue, or to strike out parts of a pleading, or award a jury trial. If it is essential to the review of these rulings that they be mentioned in the motion for new trial, then logically the bill of exceptions might wait until the motion for new trial was overruled; because, as said before, it would not be known until then that the lower court would not change its rulings. We think the dicta scattered through opinions that the only purpose of the motion for new trial is to call attention to errors which occurred during the progress of the trial cannot be appealed to as prescribing a rule of decision in cases like the present, in which, though there was no actual trial, the case was ended by a final judgment, and previous rulings had been made which the losing party was entitled to have reviewed, but could not have reviewed without filing a motion for new trial or rehearing.

Our attention is called to *Smith v. Baer*, 166 Mo. 392, 68 S. W. 166, as supporting the respondent's contention that appellant lost the benefit of her exceptions by filing her bill out of time. But in that case the exceptions which the Supreme Court refused to examine were taken at the October term, 1895; whereas, the bill of exceptions was not filed until July 7, 1898, and the motion for new trial was not filed until the April term, 1897. Hence there was no motion for new trial carried over from the October term, 1895, to the term when the bill of exceptions was filed. It is clear in such a case, in the absence of a term bill of exceptions, the rulings are not subject to review. It may be that, in passing on the error assigned in the refusal of the lower court to grant a jury trial of certain issues, the opinion in *Baer v. Smith* gives countenance to the contention in the present case. The court remarked, in passing on said point, that what had been said regarding the previous exception was applicable, but said, too, the motion for a jury was made too late, as the case had already been referred. It is apparent the assignment of error was held devoid of merit; and, after careful thought on the subject, we are of the opinion that in what was said about the necessity of a term bill of exceptions to preserve it the court did not mean to hold the continuance to a later term of a motion for new trial would not carry over such an exception. Indeed, this point was not discussed. So, in *State v. Ware*, 69

Mo. 332, no motion for new trial was filed at the term when the exception was taken to the action of the lower court on a motion for change of venue. Hence said action could not be reviewed on a bill of exceptions filed at a subsequent term. The same was true in *State v. Taylor*, 134 Mo. 109, 136, 35 S. W. 92. The defendants had been denied a certain motion at a term prior to the trial term, but no bill of exceptions was filed at the term when the ruling was made, nor was a motion for new trial filed at said term and carried over. In fact, such motion could not then have been filed, for the case was not terminated by verdict or final judgment, as was done in the present case. Similar facts will be found to exist in the other cases in which a party, who had filed no term bill of exceptions, was denied a review of rulings made at a term prior to the trial term. But in the case at bar a motion for new trial was filed at the term the alleged erroneous orders were made and final judgment given, and those orders, as we hold, ought to be mentioned in a motion for new trial, and actually were mentioned in such motion, which was continued to a subsequent term and overruled, whereupon a bill was filed to preserve the exceptions to the rulings. Under these circumstances the exceptions were duly preserved, and may be examined.

2. The second contention of respondent is that appellant had no right to dismiss in the circuit court the appeal she had taken from the judgment of the probate court. The argument is that a proceeding in the probate court is of the nature of an action in rem in which the judgment is conclusive against every one; wherefore everybody interested in the estate, as creditor, heir, or legatee, is so much concerned in the speedy determination of the matter that it is against public policy to allow a dismissal. It is not denied that ordinarily in other courts, a plaintiff may dismiss his cause at any time before its submission to court or jury, which, indeed, is the statute law of the state. Rev. St. 1899, § 639 [Ann. St. 1906, p. 658]. But it is argued that probate procedure, having come down from the ecclesiastical courts, knows nothing of nonsuits or dismissals. It is true that the administration of estates was originally vested in the spiritual courts, but it is not true that the procedure of our probate court is identical with, or even similar to, the ancient procedure of the spiritual courts. The practice of the probate court in this state is of a simple character, and largely regulated by statute. 1 Woerner, Ad. L. § 149. We know of no peculiarity of probate practice which necessarily, in every instance, precludes a suing party from dismissing his action when he chooses. As to some actions, for instance, demands against the estate of a deceased person, a claimant had his choice to proceed in the first instance either in the circuit or the probate court. Rev. St. 1899, §§ 188, 191

[Ann. St. 1906, pp. 402, 403]. Surely there can be no reason for saying that such claimant might dismiss his action if he proceeded in the circuit court, but could not dismiss it if he proceeded in the probate court. *Houston's Adm'r v. Thompson's Adm'r*, 87 Mo. App. 63. In an action to contest a will which must be instituted in the circuit court, but is regarded as practically an appeal from the judgment of the probate court probating the will, the contestants are not allowed to dismiss, because the proceeding is in rem, and the estate cannot be administered until the will is established or rejected. *Benoist v. Murrin*, 48 Mo. 48. But this proceeding is a very different one, and no such embarrassment to the estate would follow from the appellant's claim being left in abeyance, as will be shown. If we are governed by decisions relating to appeals from justices of the peace, it does not alter the matter that there had been a trial in the probate court and a judgment there. On appeal from the probate court a case is heard in the circuit court de novo the same as on an appeal from a justice of the peace. *Rev. St. 1899, § 285* [Ann. St. 1906, p. 438]. But, on appeal from the judgment of a justice to the circuit court, a plaintiff may dismiss his action in the latter court, thereby vacating and annulling the judgment of the justice. See *Lee v. Kaiser*, 80 Mo. 431, and cases cited in the opinion. It seems to be the law that the practice on appeal from a probate court is, *mutatis mutandis*, like that on appeal from a justice. *Westpheling v. Euright*, 60 Mo. 279. This is not a demand by a creditor, but one of a peculiar character allowed by the statute in favor of the widow of a decedent. But we do not see why that fact should be ground for denying the appellant the privilege of dismissing her action if she was not prepared to go to trial. The principle on which a suing party is permitted to dismiss his cause is

that his adversary will be in no worse plight after the dismissal than he was before; whereas, if the case is forced to trial, there may be a miscarriage of justice from the plaintiff not being prepared to try. *Houston v. Thompson*, *supra*. Apart from a statute, the right is, to some extent, limited by a consideration of the harm which may result to the defendant from a dismissal. 14 Cyc. 406. Appellant may not have been ready for trial when her case was called. She asserts she was not, and, indeed, she asked for a continuance. Instances of dismissals of suits against administrators and executors, without prejudice to the right to sue again, can be found. *Haydon v. Kale's Adm'r*, 7 Ky. Law Rep. 375; *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612. The only reason assigned why the appellant should have been refused the privilege of dismissal is that the administration of the estate might be postponed indefinitely by successive presentations of appellant's claim and dismissals of it. The answer to this argument is that the appellant does not have unlimited time in which to demand her allowance as widow. What she is asking for is a money allowance in lieu of grain, meat, and other provisions granted by the statute out of the estate of a decedent for the support of his widow and children for 12 months. We think the allowance must be applied for within the 12 months; but, if not, undoubtedly it would have to be applied for, like the other allowances to the widow, before the personal property is distributed or sold. It was decided in *Dowry v. Bauer*, 68 Mo. 155, that the right of the widow in such cases is statutory, and that, if she fails to demand what the statutes give her before the property has been disposed of by distribution among the heirs or legatees or by sale for the payment of debts, she will be denied her portion.

The judgment is reversed, and the cause remanded. All concur.



## KRAUSE et al. v. CITY OF EL PASO.

(Supreme Court of Texas. Dec. 18, 1907.)

## 1. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS.

To justify a reversal of the judgments of the Court of Civil Appeals and the district court, refusing to enjoin a city from removing a part of plaintiff's house situated upon a street of the city, it must appear that the city was estopped to claim the ground as a part of the public highway, or the facts must show that the city had abandoned the use of that part of the street upon which the house is situated.

## 2. SAME—ESTOPPEL AGAINST PUBLIC.

Where plaintiff, after compliance with an ordinance requiring persons intending to build to get permission from the mayor, and to have their property lines designated by the city engineer, erected a permanent brick building upon her property in conformity with such designation, and thereafter constructed a sidewalk in front of such property, according to orders from the city, which recognized her property lines as established by the engineer, and has since been compelled by the city authorities to keep such sidewalk in good condition, the city, after plaintiff's occupancy for more than 20 years, is estopped to claim a part of such property as public highway, and to remove plaintiff's building therefrom.

## 3. SAME.

In an action to enjoin a city from destroying plaintiff's house, claimed to be situated upon a public highway, the city contended that plaintiff never complied with the ordinance requiring permission from the mayor for the erection of the house. *Held*, that no prosecution having been had for violation of the ordinance, nor any objection made to the house for more than 20 years, it will be assumed that plaintiff acted lawfully and duly applied for a building permit.

## 4. APPEAL—REVERSAL—RENDERING FINAL JUDGMENT.

Where it appears that the cause has been fully developed in the lower court, there being no fact necessary to the determination of the rights of the parties which needs to be ascertained, it is the duty of the Supreme Court on appeal, if it reverse the judgment of the trial court, to enter such judgment as should have been entered by that court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4573-4587.]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Annie P. Krause and others against the city of El Paso to enjoin the removal of a part of plaintiffs' house. From a judgment of the Court of Civil Appeals (101 S. W. 828), affirming a judgment for defendant, plaintiffs bring error. Reversed, and injunction granted.

T. A. Falvey, Waters Davis, and Wm. Aubrey, for plaintiffs in error. M. W. Stanton, Richard F. Burges, and W. M. Coldwell, for defendant in error.

BROWN, J. Annie P. Krause, John P. Pryor, and Thos. D. Pryor, heirs and legatees of Mrs. Fannie D. Porter, deceased, instituted this suit in the district court of El Paso county to enjoin the city of El Paso from removing a portion of a brick house on a small piece of land situated at the intersection of San Antonio and Stanton streets, which land is alleged to be the property of plaintiffs.

The land in controversy is a triangular piece 24 feet on Stanton street, and its north line running to an intersection with San Antonio street, about 28 feet. The controversy arose over a conflict in maps of the city, which had been made previously and subsequently to the acquisition of the property. On some of the maps Myrtle avenue, which approached Stanton street from the opposite side to San Antonio street, if its north line be extended, would cut off the southeast corner of lot 63, in block 12, in triangular form, as above stated. The city filed a plea in reconvention, claiming the right to the street, setting up the fact of its dedication to public use, and the acceptance of it by the city, to which plaintiffs answered by general denial and not guilty.

There is a very elaborate statement of the case made by the honorable Court of Civil Appeals embracing the findings of fact of the trial court, which findings we condense, as follows: In the year 1858, Gillette Bros., J. F. Crosby, and Morton & Kelley owned the land on which the city of El Paso is located, and in that year they employed Anson Mills, a surveyor, to lay the land out in lots, blocks, streets, and alleys and make a plat of it, which he did; but the said owners were not satisfied with the plat, which we will call the "First Mills Map." The streets and the lot and block which is here claimed were shown and platted as is claimed by the plaintiffs. In May or June, 1859, at the instance of the owners of the said land, Mills made a map which was signed by him and accepted and signed by the owners of the land. Copies of this map were kept in the office of the company and were used by them in the sale and transfer of the lots in the city. The map was lithographed and was used by the public generally, and became known as the "Mills Map of the City of El Paso," and we shall so designate it in this opinion. The last-named map showed lot 63, in block 12, San Antonio street, Stanton street, and Myrtle avenue as they are now claimed by the city. The first Mills map was never used by the owners of the property, nor by others in the transfer of property within the city. El Paso seems to have been unincorporated until 1873, when it was chartered under the laws of the state, whether by special act or by general law is not stated. In 1874 the city council of the city of El Paso adopted an ordinance by which all obstructions on any street, alley, etc., were declared to be an offense and punishable by fine. In 1881 the city engineer made a map of the city in accordance with the Mills map, which was adopted by the council on May 26, 1881, but it was provided that it should not be binding upon those whose land had not been dedicated to the use of the city. This last map was in use when Mrs. Porter purchased the land. At a subsequent date not given in the statement, one Campbell and others made an addition to the city of El Paso, and made a map of the

city, as well as of the addition, which showed lot 63, in block 12, and the streets to be laid out as in the first Mills map. In 1885, J. G. Hilzinger, who was assessor of taxes for El Paso, prepared for himself a map according to the first Mills map, and the Hilzinger map was adopted by the city council. Thereafter, at a date not given, Wimberly, city engineer, prepared a map of the city in conformity to the Mills map, which was adopted by the city and has continued to be the official map since that time.

July 24, 1882, Rector & Campbell, being the owners of lot 63, in block 12, conveyed it to Mrs. Porter; the deed describing the land conveyed as shown by the first Mills map. At that time there was an ordinance of the city of El Paso which required persons who desired to erect improvements upon their property to have their lines designated by the engineer, and Mrs. Porter, being desirous to erect a house upon her property, called upon the city engineer to show her the lines of the streets surrounding her property. The city engineer, in accordance with her request, surveyed the lot and designated the lines and corners according to the first Mills map. Mrs. Porter built upon the property a brick house and went into possession of it, and the possession has been continuous since that time until this suit was brought. At a date not given, the city of El Paso required Mrs. Porter to make a sidewalk along her property at the place where the controversy arose, which recognized her right as she claimed it and the location of the streets as it was shown upon the first Mills map. In subsequent years, Mrs. Porter was at different times required to repair this sidewalk and keep it in good condition. There does not appear to have been any claim set up by the city to this piece of ground until the institution of this suit, or a short time prior thereto. The brick house upon the property is simply said by the court to be valuable, but its value is not given. To enforce the right of the city would practically destroy this house.

In the charter of the city of El Paso are these provisions:

"Sec. 36. To have the exclusive power and control over the streets, alleys, sidewalks, lanes, avenues, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, re-grade, clean, pave, macadamize, or otherwise improve the same."

"Sec. 103. The duties of the engineer and surveyor shall be fixed by the city council, and also his compensation, and the fees he shall be allowed for all work done for the city or private individuals as city engineer and surveyor, as well as the amount of bond he shall give for the faithful performance of his duties."

The city adopted an ordinance that was in force in 1882, from which this extract is made: "It shall be the duty of the city en-

gineer to make all surveys of such streets, blocks, lots or other grounds within or without the city as the city council shall direct; \* \* \* to make all surveys of lots, blocks or other grounds within the city for private individuals when called upon by them to do so, of which surveys, when so completed, he shall give certificates to such individuals as may require them and shall keep in his office a record book wherein a plat of every survey made by him within the city shall be placed and indexed."

The case was tried in the district court before the judge, a jury being waived, and judgment was entered against the plaintiffs, which judgment was by the Court of Civil Appeals affirmed. The findings of fact made by the Court of Civil Appeals establish that the land in controversy was embraced in Myrtle avenue according to the plat of the city by which the proprietors dedicated the streets to the use of the public, and that the streets so platted were accepted by the city of El Paso.

To justify a reversal of the judgments of the Court of Civil Appeals and district court, it must appear that the city was estopped to claim the ground as a part of the public highway, or that the facts show that the city had abandoned the use of that part of the street. The defendants in error submit the proposition that a municipal corporation cannot convey the public streets of a city to private individuals for private use. Therefore the title to the streets cannot pass from the corporation to the citizen by estoppel. In support of this proposition, they cite the following cases, with others: *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Snyder v. Pulaski*, 178 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; *Mobile v. Sullivan Lumber Co.*, 129 Fed. 293, 63 C. C. A. 412; *Philadelphia Mtg. & Tr. Co. v. Omaha*, 63 Neb. 280, 88 N. W. 523, 98 Am. St. Rep. 442; *Simplot v. Chicago, M. & S. Ry. Co.* (C. C.) 16 Fed. 350; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834. In *Webb v. Demopolis* the Supreme Court of Alabama expressed a doubt as to the applicability of the doctrine of estoppel to a municipal corporation in any case, but the facts did not call for a decision of the question. The court said: "If it were necessary to pass on the point in the present case, we should be much inclined to hold that no act or omission to act on the part of the municipality with reference to obstructions in public streets could in any case raise up an estoppel against it to proceed in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street." In *Snyder v. Pulaski* the Supreme Court of Illinois used language which is broad enough to embrace this case, but the facts of that case were: That by contract a citizen was permitted to use water from a well in a public street for a given time, and the court held that the city had

no authority to bind the public by such a contract, and that the doctrine of estoppel would not apply. The use of the well was not in opposition to the right of the city, but under and by authority of the city, and the doctrine of estoppel could not arise. It was simply a question of the validity of the contract. The conclusion in that case is sound, but the reasoning of the judge is in conflict with a number of cases decided by the Supreme Court of that state. In *City of Mobile v. Sullivan Lumber Co.*, the persons who claimed the estoppel knew that they had no right in the land beneath the navigable waters of that bay. They did not act under any authority of the city, nor under a representation of an officer, but simply used the property by the construction of a wharf, without objection or interference on the part of the city. No act of the city misled them. In the case of *Philadelphia Mortgage & Trust Co. v. City of Omaha*, decided by the Supreme Court of Nebraska, taxes had been levied by the city upon the property in question, and, through a mistake, the tax collector marked on the rolls that the taxes were paid. The trust company loaned money, and took a mortgage on the property, and claimed that the city was estopped, by the act of the tax collector, from enforcing its lien for taxes upon the property. There is nothing in the facts of that case to bring it within the rule under which the authorities apply the doctrine to municipal corporations.

Counsel for the city invites special attention to *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834. The writer has read the opinion with much interest. That opinion thoroughly sustains the contention of counsel, but we think that the opinion is not sound. The court states that his conclusion is sustained by a number of states; Texas being among them. No case in this state holds the doctrine laid down in the case cited. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288, was a controversy between two property owners, which involved the power of the city to close an alley. The doctrine of estoppel could not apply to the facts and was not mentioned in the opinion.

Ordinarily, a municipal corporation is not subject to estoppel by reason of the negligent or unauthorized acts of its officers, but it is generally recognized that there are exceptions to that rule. The decided weight of authority places this case within one of the exceptions which is clearly and tersely stated by Judge Campbell, in *Gregory v. Knight*, 50 Mich. 63, 14 N. W. 700, in this language: "It also appears that plaintiff claims to have occupied on his lines for more than 20 years, and it seems quite likely that the fences were put where the authorities and parties supposed the lines to be. Such a practical construction, if long acquiesced in, would necessarily bind the public. *Ellsworth v. Grand Rapids*, 27 Mich. 250. It would be wrong and illegal to put a highway, as against long pos-

session, on any better footing than other property. Highways may be wholly, and there is no reason to hold they may not be partially, discontinued by nonuser. It is the business of the authorities, when roads are laid out, to take some pains to designate the boundaries on the ground, and to have the lines visibly defined. If this is not done, the mischief of unsettling what is generally accepted will be very great, and the rights of parties, whether depending on surveys or possession, will be protected by the ordinary courts of justice." The doctrine here stated is well supported by many well-considered cases, from which we cite the following: *City of Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811; *Peoria v. Johnston*, 56 Ill. 45; *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759; *Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212; *Jordon v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *Simplot v. Dubuque*, 49 Iowa, 630; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

Why should a municipal corporation, which has led a citizen into error and caused him to expend large sums of money in the erection of permanent improvements upon a portion of the highway, after 20 years' occupancy, be permitted to destroy the improvements without compensation, simply to assert a legal right? A sense of justice common to all civilized people revolts at such a rule of legalized wrong. The facts in this case show without dispute that when Mrs. Porter bought lot 63, in block 12, in the then little town of El Paso, there was nothing on the ground to indicate that the north line of Myrtle avenue extended across Stanton street, so as to make a wedge shape between San Antonio street and lot 63. At that time the streets were not much used, and Myrtle avenue at the point opposite to this place was not designated in any way upon the ground. These conditions of uncertainty made it necessary that Mrs. Porter should secure reliable information as to the lines of these streets and their relation to her lot before she erected the brick house which was in contemplation. To whom could she apply for such information? There was an ordinance of the city which required that before she built her house Mrs. Porter should make application to the mayor for a permit to build, giving a description of the lot on which the house was to be erected, and another ordinance made it the duty of the city engineer, upon request by Mrs. Porter, to survey her lot, giving a certificate and keeping a record of the survey. Mrs. Porter's application to the engineer and his survey under the circumstances fully justified her good faith in acting upon the lines thus established as being the boundaries of her right, and indicating the public highway to which the city was entitled, and the fact that she erected a permanent building of brick upon the ground shows that she acted in good faith upon the permit to build and

the engineer's survey. Her occupancy was not only adverse to all claim of the city to the ground as a public highway, but absolutely excluded the public from any use of it as such for the full period of time named. It is claimed that there is no proof that an application was made; but building without it would have been unlawful, and it would have been the duty of the officers to punish her. No prosecution having been inaugurated, nor any objection to the erection or continuance of the house upon the lot for more than 20 years, it will be assumed that she acted lawfully, and the making of the application will be presumed. The requirement of the city that Mrs. Porter should construct a sidewalk along the front of her property for the use of the public in passing to and fro, and the demand of the city that she keep the sidewalk in repair, were affirmative acts recognizing the rightfulness of her possession. Argument would not add to the force of such facts, for they embody the logic of common right and fair dealing, which compels the conclusion that the city of El Paso, by the acts of its officers, with the absolute possession by Mrs. Porter during the great length of time, is estopped now to claim that the piece of land occupied by the brick house shall be yielded up to public use at great loss to the owner by the destruction of that building. The inconvenience to the public, if indeed there be any would be so small in comparison with the damage to the owner that nothing but an inflexible rule of law would justify the enforcement of the city's claim. It would, in fact, be the appropriation of private property to public use without compensation. *Ralston v. Weston*, above cited. In that case the court said: "Whenever private property is taken or damaged for public use, it must be done through the public officers, acting as the agents of the people. And for these same officers to mislead, either by acts of omission or commission, a private person into building a costly structure over the line of a public highway, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, would be taking and damaging private property for public use without just compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, in so far as the intrusive structure is concerned."

We have not rested our conclusion upon the constitutional guaranty against taking private property for public use without compensation, but it embodies a sound principle of justice and right that courts may well, and do, consider, in determining such cases. Counsel for the city of El Paso insist that, in case the judgment in this cause be reversed, the case shall be remanded to the district court for another trial. It appears that the case has been fully developed; there being no fact necessary to the determination of

the rights of the parties which needs to be ascertained.

It is therefore the duty of this court to enter such judgment as the trial court should have entered, and it is ordered that the judgments of the district court and Court of Civil Appeals be reversed; and, now, here proceeding to enter the judgment that the district court should have rendered, it is further ordered that the city of El Paso take nothing by its suit against Annie P. Krause, John P. Pryor, and Thos. D. Pryor; and it is further ordered that the temporary injunction granted by the judge of the district court against the city of El Paso be perpetuated, and that the said city be enjoined and forever restrained from removing the house or any part of it from the ground in question in this suit.

#### MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 6, 1907. Rehearing Denied Dec. 13, 1907.)

#### 1. CRIMINAL LAW — CONTINUANCE — SUFFICIENCY OF APPLICATION.

Where an application for continuance of a criminal case, on the ground of an absent witness, alleges that defendant will prove by said witness that he purchased the goods alleged to have been stolen from a party in B., etc., but it does not show whether the application was the first or a subsequent one, and does not name the party from whom the alleged purchase was made, whether he was a stranger or not, and the attending circumstances, it is too indefinite to form the basis of perjury, and a refusal to grant the application is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1349-1361.]

#### 2. SAME—ADMISSION OF EVIDENCE — RESISTING ARREST.

In a criminal prosecution, it is proper to show that accused resisted arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 780.]

#### 3. SAME.

It is not reversible error to permit a committing magistrate to testify, on the final trial of a criminal case, that, on the hearing before him, he warned accused that any statement he made would be used against and not for him, where it is not shown that accused made any statement whatever.

#### 4. SAME—APPEAL—OBJECTIONS TO EVIDENCE — SUFFICIENCY—FACTS INJECTED INTO OBJECTION WITHOUT PROOF THEREOF.

Where matters of fact are injected into grounds of objection, to be considered, they must be verified in some way so as to show they are facts, and not merely grounds of objection. Hence, where testimony that a record showed a judgment against accused in February, 1902, was objected to on the ground that the judgment was not dated and identified as of the February term, 1902, as alleged in the indictment, and the record as to the sentence was objected to on the ground that the minutes did not show at what term accused was convicted, the objections are not available in the absence of proof of the matters injected into the objection.

#### 5. SAME — HARMLESS ERROR — FAILURE TO SHOW INTRODUCTION.

Objections urged to laying the predicate for the introduction of a record in a criminal prosecution cannot avail the criminal, when there

is no showing that the record went before the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 8137-8143.]

**6. SAME—ADMISSION OF EVIDENCE—RECORD OF PRIOR CONVICTION.**

Where an indictment alleges a prior conviction to enhance punishment, the record of such prior conviction is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 8261.]

**7. SAME—APPEAL—HARMLESS ERROR—REJECTION OF EVIDENCE.**

In a prosecution for burglary, rejection of testimony that accused had joined the army will not be considered prejudicial, when there is no showing as to the materiality of the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 8145-8153.]

**8. SAME—INSTRUCTION AS TO INSANITY—NECESSITY—EVIDENCE.**

In a prosecution for burglary, where the only witness as to defendant's insanity testified that he had examined and treated defendant after he had been brought back from the penitentiary, that he was acquainted with defendant's mother and family, that he would not say defendant was insane, but that he was never mentally very bright, that he was a degenerate mentally and morally, that many criminals were known as degenerates who were held accountable and able to distinguish right from wrong, that he did not think defendant so mentally incapacitated or of such unsound mind that he would be able to plan and accomplish the burglarizing of a store and think it was not wrong, and that he thought defendant could distinguish right from wrong, refusal to give a special charge submitting the issue of insanity was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1821-1828, 1980, 1981.]

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

Henry Mitchell was convicted of burglary, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of burglary; the indictment being framed so as to secure the accumulated punishment under article 1015, Pen. Code 1896. The jury assessed, in accordance with the terms of said article, the highest punishment for the offense charged in the indictment.

The evidence discloses, as the indictment charges, a burglary of a storehouse belonging to a corporation known as Higginbotham Bros. & Co. The burglary occurred at night.

Error is assigned on the refusal of a continuance. George Barton was the alleged absent witness, and the statement is made that it "is material, in that defendant will prove by said Barton that he purchased the goods alleged to have been stolen from a party in Brownwood, and paid in return therefor a pistol and some money." This application does not show that it was the first or subsequent one, does not name the party from whom he should have made the purchase, whether he was a stranger or not, and the attending and surrounding circum-

stances, and in fact the same is so indefinite that it could not form the basis of perjury. The court did not err in refusing this application.

The witness Cox was asked: "What occurred when you made the arrest?" He replied, speaking of appellant: "He drew his gun and hit me on the head, and we had quite a scuffle." The objection was that "the question was prejudicial." The court qualifies this by stating "that the evidence was offered and admitted to show that defendant resisted arrest in this case." This testimony was legitimate. Where a party is arrested, or sought to be arrested, for an offense, and he resists the arrest, it is a legitimate fact to be proved.

The witness Williamson was asked the question: "State whether or not, on the examining trial before you, you warned the defendant that any statement he made would be used in evidence against him and not for him. A. Yes, sir." Appellant objected because the "statements made before the examining trial, the 28th of March, 1907, in the town of Comanche, could not be used against him only for the purpose of impeachment of said witness who has not testified in the main trial." There was no statement of appellant proved under this bill. The predicate was laid to show that he had been warned. This was the duty of the justice of the peace under our statute. So that, if the accused desires to make a statement, he may do so after being so warned, and it is usually termed a voluntary statement. This must be reduced to writing, signed, etc., by the accused. However, no statement made by appellant was introduced, so far as this bill is concerned, of the fact that warning alone was proved. The defendant may not, in fact, have made any statement, and, so far as this bill is concerned, it is not shown either way.

The witness Reese was asked the question: "What record is that you have? A. Criminal Minutes of the District Court of Comanche County, Tex. Q. Do you find any record against Henry Mitchell there? A. I find a judgment against him in February, 1902." Objection was urged for the reason that the judgment was not dated and identified as of the February term of said court for 1902. In approving the bill, the court said: "I approve this bill, but do not certify to the fact that the judgment was not dated and identified as entered at the February term, 1902, of the district court of Comanche county, Tex." The trouble with this bill is that the objections all are urged to laying the predicate for the introduction of the record, and do not show that the record itself went before the jury, nor can the statement of facts, not certified to by the court to be true, constitute grounds of objection. Where matters of fact are injected into the grounds of exceptions, they must be verified in some way so as to show they are facts and not merely grounds of objection.

The record of the previous conviction would be admissible in support of the allegation in the indictment that at the February term, 1902, appellant had been convicted for a similar offense of burglary. The prosecution charged a previous conviction in order to get the enhanced punishment under article 1015, Pen. Code 1895, and it was necessary to prove that allegation in order to secure the highest punishment.

The next bill of exceptions recites that the state asked the witness Reese to read from the Criminal Minutes of the District Court of Comanche County the sentence passed upon Henry Mitchell in February, 1902. Objection was urged because the minutes did not show at which term the defendant was convicted. The ground of objection states the fact, which, if supported by the record, should be made to appear as a fact, to wit, that the minutes did not show at which term the defendant was convicted. This would not constitute a ground of objection unless it should be made to appear as a fact. If, as a matter of fact, Mitchell had been convicted at a previous term of the court, and the sentence for some reason was not pronounced until the February, 1902, term, this bill of exception should have made those matters appear; but even in that event, if the sentence had not been pronounced at the term at which conviction occurred, it could be, under our statute, pronounced at any subsequent term.

While the witness Mitchell was testifying, he was asked the following question by defendant: "Q. I will ask you if the defendant ever joined the army? A. Yes, sir." To this question the state objected because the question and answer were immaterial, and the court sustained the exception and excluded the testimony. It is contended that this evidence is material, and the reason the court erred in rejecting it is that the father signed a contract with the officers of the United States, whereby Henry Mitchell was to and did become a soldier in the actual service; that said defendant shortly after said enlistment deserted said army, and returned home, and stayed at home, and never offered to secrete himself, showing that defendant was not aware of the enormity of the crime of desertion. Here is the same trouble. These matters are not made to appear as facts in this bill of exception. There is no contract here made by appellant's father with the officers of enlistment; no evidence here that he deserted the army, except as stated here in the bill. But even if those matters were made to appear, the only fact offered to be proven in this bill was merely that the defendant joined the army. There is nothing in the bill to show that he offered to prove that his father had contracted with the officers of the government to make a soldier out of him, or that he deserted, or anything of that character. The bill, as far as the ruling of the court is concerned, stands up-

on the rejection of the evidence that merely appellant joined the army.

It is contended that the evidence is not sufficient, to which we disagree, and that the court erred in not charging on the issue of insanity. The court declined to submit this issue when presented in a special charge because the testimony, in his judgment, did not suggest it. We think the court was correct. There was a witness offered, Dr. McCarty, by whose evidence the defendant sought to put this issue before the jury; but Dr. McCarty would not and did not swear he was insane. He says that he had occasion to examine and treat appellant after he had been brought back from the penitentiary; did not recollect the time without referring to his books; that he was acquainted with appellant's mother and family, and, further, he states: "I don't say that he is insane, but he was never mentally very bright. He seemed to be both physically and mentally run down at that time. From my own personal observation at that time I would term this defendant to be degenerate. I don't mean by that that he is insane, unless you would consider an inherited mental incapacity. He is a degenerate. At the time I treated him he was not insane. He has never been insane further than congenital mental incapacity. I mean by being a degenerate that he has not as strong a mind as other people. I mean that he is a degenerate mentally and morally. It is a fact that a great many criminals are known as degenerate. At the same time they are held accountable and are able to distinguish right from wrong. I don't think that this defendant is so mentally incapacitated or of such unsound mind that he would be able to plan to burglarize and burglarize a store, and then think it wasn't wrong. I think that a man of that kind would be able to tell right from wrong. I presume that this man can distinguish right from wrong." We are of opinion this does not raise the issue of insanity sufficiently strong to require the issue to be submitted to the jury. This is the only evidence in the case in regard to insanity. All the other testimony indicates that appellant's plans to burglarize were conceived and executed with a considerable amount of ingenuity and ability.

Finding no reversible error in the record, the judgment is affirmed.

HENDERSON, J., absent.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

1. CRIMINAL LAW — APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.

On a trial for theft, a witness for the state was asked whether defendant told him that he did get or found \$10, but that he did not intend to give it up, to which defendant objected that

no predicate had been laid. The county attorney stated that he expected to impeach defendant by the witness, defendant having denied having made such statement whereupon the court overruled the objection. The witness answered that defendant did so state; that witness had a warrant for defendant's arrest, and, on asking him at his home why he got the \$10, defendant answered him as before stated; and that he immediately arrested him. *Held*, that the objection that no time and place was fixed for the impeachment was obviated by the witness' answer who stated the time and place when the statement was made.

**2. SAME—EVIDENCE—CONFESSION—ADMISSIBILITY.**

Where a peace officer having a warrant for defendant's arrest on a charge of theft went to his room, and found defendant asleep, and, on waking him, asked him why he got the \$10, to which defendant answered that he had got or found the \$10, but did not intend to give it up, and the peace officer immediately arrested him, and did not warn defendant, defendant was under arrest when his confession was made, and hence it was error to admit the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1167-1171.]

**3. WITNESSES—CREDIBILITY—EVIDENCE OF GOOD CHARACTER OF PROSECUTING WITNESS.**

It was error to admit evidence as to good character of prosecuting witness, where defendant had not introduced any testimony impeaching it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1066.]

Appeal from Jefferson County Court; Jas. A. Harrison, Judge.

Dave Jones was convicted of theft, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted for theft, and his punishment assessed at confinement in the jail for three months and a fine of \$50.

Bill of exceptions No. 1 shows that the state's witness H. M. Wooley was asked the following question: "State whether or not the defendant, Dave Jones, ever told you that he did get or found \$10, but he did not intend to give it up." To this question appellant objected on the ground that no predicate had been laid. The county attorney stated to the court that he expected to impeach the defendant by the witness Wooley; the defendant having denied having made such statement to said witness. The court overruled defendant's objection, and stated to the jury that "the testimony will be admitted only on the ground of impeaching the defendant, and the court instructs the jury to consider it for no other purpose." The defendant then urged the additional objection that no predicate had been laid for the testimony, even for impeaching, as no time and place had been fixed. The court overruled the objection, and said witness was permitted to answer as follows: "Yes; the defendant told me before he was arrested that he did get \$10, or found \$10, but he did not intend to give it up. Yes; I had a warrant for his arrest on this charge, and went to his home and in his room. He

was asleep. I opened the door of his room, went in, woke him up, and asked him why he got the \$10, and he told me as before stated. Yes; I immediately arrested him. I think he knew I was a peace officer. I did not warn him at all." The above is almost a literal copy of the bill of exceptions. The ground insisted upon is that there is no time and place fixed for the impeachment. The bill does not certify that the grounds urged were true, nor does the bill so state. While technically correct, the objection is entirely obviated by the answer of the witness, who does state the time and place when the statement was made. We accordingly hold that there is no reversible error in the ruling of the court.

Bill of exceptions No. 2 shows that when the same witness, Wooley, was on the stand, the state asked said witness if the defendant told him he got the \$10, and after the court had overruled the appellant's objection, and no predicate had been laid either for the admission of the defendant's statements or confessions or impeachment, as shown in bill of exceptions No. 1, said witness testified as follows: "Yes; defendant told me before I arrested him that he did get or found the \$10, but he did not intend to give it up. I had a warrant for his arrest on this charge. This conversation was in defendant's house. When he made the statement, I had not arrested him. I woke him up. I immediately arrested him on this charge. I think he knew I was a peace officer. I did not warn him." Defendant moved the court to strike out all the testimony of said witness Wooley, because it had clearly been shown that no predicate had been laid for same, and had been conclusively shown that, while in fact the warrant had not actually been read to defendant at the time of said statements, it clearly showed he was under duress and virtually arrested upon said charge and clearly inadmissible and prejudicial to defendant. We think this testimony shows that he was under arrest at the time this confession was made. It follows, therefore, that the court erred in admitting same.

Bill No. 3 was that Mrs. Kline was permitted, over appellant's objection, to testify that the prosecuting witness, Jim Phoenix, had been working for her, Mrs. Kline, about 11 months, and had been a collector and collected for her, and always returned the money. This testimony was inadmissible, since there was no evidence to impeach the testimony of the witness, except by contradictory evidence. Unless appellant had introduced testimony impeaching the character of the prosecuting witness, it is never permissible to bolster testimony up with testimony of the character indicated above.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

**REINHARD v. STATE.**

(Court of Criminal Appeals of Texas. Nov. 6, 1907. Rehearing Denied Dec. 18, 1907.)

**1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—NECESSITY FOR TAKING.**

On appeal in a criminal case, the trial court's action in overruling a motion to quash a special venire will not be reviewed, where no bill of exception has been reserved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2661.]

**2. SAME—EVIDENCE—CONFESSIONS—CAUTION.**

In a murder trial, evidence was not inadmissible on the ground that at the time of the occurrence referred to in the testimony defendant was under arrest, for a prior offense.

**3. SAME—INSANITY.**

Where a murder charge was defended on the ground of insanity, the state could show that a justice of the peace wrote to defendant's father before the killing stating that decedent was pregnant through defendant, trying to induce defendant to marry her; that the justice went to defendant's home, and defendant and his father stated they thought the matter was settled; that the justice insisted defendant go with him to decedent's father and make satisfactory settlement; that defendant's father told defendant he had better go with the justice and marry decedent; that the justice knew that defendant had read his letter; that the justice and defendant went to decedent's residence, where, after discussing the matter, the justice sent for a marriage license, it not appearing that defendant consented, though he did not disagree; that shortly thereafter defendant went to decedent's room, and, after talking with her, shot her and tried to kill himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 760.]

**4. SAME—DECLARATIONS BY ACCUSED.**

Declarations made by defendant to another in the nature of a confession while he was not under arrest are admissible against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 894-936.]

**5. SAME—CHARACTER OF FAMILY.**

Where insanity was the principal defense, defendant could not show that none of his kinsman had committed or been charged with crime.

**6. SAME—DECLARATIONS.**

The state could show that upon defendant's mother's arrival at the place where he had killed decedent and shot himself she cried out, "Oh, Joe! I begged you not to do this, and you have gone and done it anyhow," and that, looking at decedent, he said, "The wretch, she thought she could do with me as she wished, and, if it was to do over, I would do it again"; the mother's statement being not improper as the remark of a bystander.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 968-972.]

**7. SAME—APPEAL—BILL OF EXCEPTION—NECESSITY FOR VERIFICATION.**

A bill of exceptions case need not be considered, where it was refused by the court and was not otherwise verified.

**8. SAME—BURDEN TO SHOW ERROR.**

On appeal defendant complained that the prosecuting attorney's reference to the fact that testimony of a declaration made by defendant before the homicide was not disputed was a reference to his failure to testify. The bill of exceptions showed that witness, decedent's mother, testified that the declaration was made when only she and defendant were present, but the trial court explained the bill by stating that the witness testified the declaration was made to her and her daughter. The evidence shows she had daughters other than decedent. *Held*, under

the rule, that a bill of exceptions must be specific and certain enough to show error without resort to inference or the ruling complained of will be presumed to be correct.

**9. SAME—MOTION FOR NEW TRIAL—EVIDENCE—TIME FOR FILING.**

Evidence under a motion for a new trial must be filed during the trial term in order to be reviewable.

Appeal from District Court, Kerr County; R. H. Burney, Judge.

Joe Reinhard was convicted of murder in the first degree, and he appeals. *Affirmed*.

W. O. Linden, Lee Wallace, and Jno. R. Storms, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of murder in the first degree; life sentence being awarded.

When the case was called for trial, motion was made to quash the special venire. This is found in the record, and the assignment of error based upon it being overruled. Bill of exception was not reserved, and, as presented, it cannot therefore be considered.

Challenge for cause was interposed to some of the jurors, which being overruled they were peremptorily excused. Error is assigned because appellant was forced to exhaust some of his peremptory challenges upon said jurors, and thereafter jurors were forced upon him which were objectionable. The bill of exceptions does not show any real objection to the jurors who sat in the case, but that phase of the question is unnecessary to be discussed, because the bill of exceptions, as explained by the court, justified the court in overruling causes for challenge.

The state introduced Herman Schultze, justice of the peace, who testified that he wrote a letter to the father of appellant in regard to a proposed settlement between defendant and his family and the family of the deceased, Earnestine Kutzer, which was then pending in regard to a report that said Earnestine Kutzer was pregnant by defendant, the substance of which letter was that the witness would not permit the settlement to be made, and, if the matter was not settled at once, the witness would have to report the same to the courts, and that he also said to appellant's father that he was as deep in the trouble as was the defendant, and that on the 26th, or the following day, he reached the home of defendant and his father, and discussed the matter with them, and that he then told defendant that he could not, as an officer, permit the proposed settlement to be made, and he referred to what had been told him by Mr. Kutzer, father of the girl, to the effect that an abortion was to be committed upon the girl; that appellant and his father stated they thought the matter had been settled that morning and the girl was to go away; that witness insisted that defendant should go with him to Kutzer and arrange to marry the girl, or make some settlement of



the matter satisfactory to Kutzer; that appellant's father told appellant that perhaps he had better go with the witness, and had better marry the girl; that appellant consented to go, and that witness knew from the conversation that appellant had read the letter written by him to appellant's father the previous day; that he thought he had signed the letter officially. The substance of this letter, without going farther into it, was to the effect that Earnestine Kutzer, the deceased, was pregnant, and that appellant was the author of her disgrace, and the justice of the peace was trying to induce him to marry the girl, and would not permit his procuring an abortion. Appellant went with the justice of the peace to the residence of Kutzer, where, after talking the matter over, the justice of the peace 'phoned to Kerrville to secure a license to marry them. The bill does not show that appellant agreed to this, though he did not disagree. A short time afterward, and while at the residence of Kutzer, appellant went in the room where the girl was, and after talking with her awhile shot her to death, and then tried to kill himself by shooting. It is contended that appellant was under duress at the time, and all of this testimony was inadmissible. It will be noted that at the time of the occurrence, if under arrest at all, he was held for a different offense, to wit, seduction; there having been no charges preferred however. Under this state of case, we are of opinion that appellant was not under arrest, and, as before stated, if so, it was for seduction, and not this homicide. This testimony was therefore inadmissible, even though he was under arrest. See *Mathis v. State*, 39 Tex. Cr. R. 549, 47 S. W. 464. We believe this was admissible upon another ground; that is, touching his insanity, as that was the real defense upon which appellant relied in the case. See *Burt v. State*, 38 Tex. Cr. R. 439, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 306, 330, and *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351.

Error is assigned in regard to the introduction of the testimony of Dr. Jones, on the ground that the statements of appellant were not voluntary. It was in the nature of a confession; and, the party not being under arrest, it was clearly admissible. However, appellant does not brief this assignment. There is also an assignment upon the ruling of the court admitting the evidence of appellant's father, John Reinhard, and in refusing to permit him to prove by his father, John Reinhard, and his uncle, Jacob, that they had known the family of defendant on the paternal and maternal sides in the ascending line, as well as collateral kin, and that no member of said families had been charged with crime, nor had committed any offense up to the time of the trial of this defendant. No authorities are cited in support of this proposition, nor any tangible reason given, it occurs to us, why this testimony was admis-

sible. We do not understand exactly what bearing or how this would relate to the question of insanity, nor do we think it necessary to discuss it.

While Mrs. Reinhard, mother of defendant, was being cross-examined, she was asked if it was not a fact that immediately upon her arrival at the side of her son, appellant, at the home of the deceased, where he was lying on the floor in the room where he had shot himself, she cried out, "Oh, Joe! I begged you not to do this, and you have gone and done it anyhow." Objection was urged to this because it was the remark of a bystander, not a part of the *res gestæ*, and would not be the subject of legitimate impeachment, because it would be immaterial and collateral. Before being overruled, she answered in the negative. Then the state was permitted to introduce Mrs. Mertz, and offered to prove by her: That Mrs. Reinhard, immediately upon her arrival at the side of the defendant, where he was lying at said place, cried out, "Oh, Joe! I begged you not to do this, and you have gone and done it anyhow." That appellant then looked at deceased, Earnestine Kutzer, lying on the sofa, and said in German, "The wretch, she thought she could do with me as she wished; and, if it was to do over, I would do it again." Appellant objected on the ground that it was a remark of a bystander, no part of the *res gestæ*, and answer was not in response to the alleged statement. That Dr. Schnell had testified that he arrived at the place of the shooting before Mrs. Reinhard, and was there at the time Mrs. Reinhard arrived, and that the defendant was in a state of collapse and practically unconscious at that time, and it is urged from this it appeared that defendant was irrational and irresponsible, and not in a condition to be held responsible for his utterances. We are of opinion this was admissible. It was not the remark of a bystander, as that matter is legally understood. This does not come within the authority of *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777, or *Sauls v. State*, 30 Tex. App. 496, 17 S. W. 1066, or in that line of authorities. Here the remark was pointedly directed to appellant and his answer, pointing to his deceased victim lying on the sofa, indicated that he understood the whole matter, and it was inadmissible as original evidence, and in our opinion had a further bearing upon the question of insanity, but it was clearly inadmissible as original evidence independent of any question of insanity.

The following bill, with reference to the introduction of the testimony of Pancratz, need not be considered, as the bill was refused by the court, and it was not otherwise verified.

Mrs. Kutzer testified for the state that she was the mother of the deceased, and that at a time when she and the deceased and no other persons were present the defendant

said to them, referring to a matter between himself and the deceased: "If this thing gets into the court, there will be some dead people lying around here." Mr. Morris, counsel for the state, in his argument, referred to this evidence as bearing upon the question of express malice and murder in the first degree, and said: "Gentlemen of the jury, there is abundant evidence of express malice found in the threat that, 'if this matter gets into the court, there will be some dead bodies here,' made by the defendant. You know that old woman testified to the threat, and it is not denied or controverted by any suspicious circumstance." Appellant's counsel here stopped said attorney, and excepted to the argument. A controversy arose as to the language used by state's counsel. He said to the court, "I know what I said because I was very guarded in saying it." Exception was reserved, alleging that the remark was a reference and allusion to defendant's failure to testify. This is practically as the bill was made and presented to the court. The court, however, explains, as follows: "That the witness Mrs. Kutzer did not say that no other persons were present, but said that the statement by defendant was made to her and her daughter, but it appears that they were the only parties present, considering her entire testimony." This leaves the bill in such a confused and uncertain state that we hardly know just what it does mean. An examination of the testimony of Mrs. Kutzer leaves it somewhat doubtful, and in about as uncertain condition as does the bill of exceptions. There are decisions which go to the extent of holding that, where the defendant and witness alone are together, and the witness details a conversation of material character, and the accused does not take the witness stand, an argument which, in effect, would refer to the failure of defendant to testify by stating that no witness denied the said statement, etc., the cases have been reversed, but here an examination of the facts in aid of the bill of exceptions is permissible, as the court refers to the evidence to show that Mrs. Kutzer had other daughters besides the deceased. As the bill is presented in its uncertain condition, we do not believe it calls for a reversal of the judgment. An examination of Mrs. Kutzer's testimony bears out the statement of the court that Mrs. Kutzer did not say there were no other persons present, but she did state that the statement was made to her and her daughter, and then draws a conclusion, in a general way, that these were the only parties present. Wherever a bill of exceptions brings to the attention of this court a matter for review, it must be specific and certain enough to point out the error, and not leave it to inference. The ruling of the trial court will be presumed to be correct, and, in order to overcome this presumption the record, in a legal way and with legal

sufficiency, must manifest the error requiring a reversal of the ruling of the trial court. We do not believe this bill is in such condition as it requires us to reverse this judgment.

Misconduct of the jury is relied upon in that they discussed the failure of appellant to testify in his own behalf during the trial. The statement of facts in regard to this matter was not filed until some days, 18 or 20, perhaps, after the adjournment of court. This could not be done. Evidence in regard to motion for a new trial must be filed during the term in order to warrant its revision. See *Mikel v. State*, 43 Tex. Cr. R. 617, 68 S. W. 512, and *Black v. State*, 41 Tex. Cr. R. 185, 53 S. W. 116. We are of opinion that the court's charge is sufficient, and that there is nothing in the contentions of sufficient importance to require a reversal from this standpoint.

As the record is presented, we do not believe there are any errors of sufficient importance to require a reversal of the judgment; and it is therefore affirmed.

HENDERSON, J., absent.

#### CAMPBELL v. STATE

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### FALSE PRETENSES—SWINDLING—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to support a conviction for swindling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 62.]

Appeal from Smith County Court; J. A. Bulloch, Judge.

Audry Campbell was convicted of swindling, and appeals. Reversed.

B. B. Beaird, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for swindling.

The state's contention is that the party alleged to be swindled was the owner of a little brown mare mule, and that on the 16th of February, 1906, he brought the mule to the city of Tyler, and sold it to appellant for \$22.50, a cash transaction. The alleged owner of the mule, Freeman, among other things during the conversation that led up to the trade with the accused, said he asked the accused \$25 for the mule; that the accused then told him he had a horse out at his house (and this is shown to be a mile and a half east of Tyler) that a man in town, Will Hartsfield, had bought for \$22.50, and that he would give him that amount for the mule. The witness told appellant that he would take that for the mule. They got in the wagon, drove out to appellant's house, leading the little mule behind the wagon to that point, and, upon arriving there, the witness

untied the little mule from the wagon, and appellant took the mule and turned it in his lot, placing the rope taken from the mule on the horse, brought him out and tied him behind the wagon, requesting the witness to drive on back to town, stating that he would go to town another way, as he had a little business that required his attention, and that he would be in town in a little while, and pay the witness for the mule. The witness returned to town, leading the horse behind the wagon. He further states that appellant told him the horse was to be delivered to Hartsfield, and did not say anything about trading the horse for the mule. On arriving at the rack in the city of Tyler from which they had started horse traders there began to tell him how trifling the horse was, and how badly he (witness) had been cheated by appellant in the trade. He (witness) informed them that he did not trade the mule for the horse. After remaining around there for some time, appellant not appearing, he took one of his mules from his wagon and rode back to Campbell's residence to see him and get his money. When he reached Campbell's residence, he was gone. He returned to town without Campbell or his mule, and, after doing so, he met Hartsfield and obtained from him the information that Hartsfield had not bought a horse from appellant. After remaining around the rack a while appellant rode up, got down, and hitched his horse; the horse that witness brought in from Campbell's house being hitched there about the rack. The witness demanded pay of appellant for his mule, which was refused. Appellant denied having bought the mule, and asserted that he traded the horse to him for the mule. The evening passed, and the mule was not paid for, and the witness left the mule in Campbell's possession, thinking he was going to pay cash for it. The witness turned the horse over to Henry Keel to take care of, or do with him as he saw proper, and gave him a writing to show that he did not sell Keel the horse nor give him a bill of sale of the horse. This is practically the state's case. There are other facts and circumstances; but, as we view the testimony of this witness, it adds nothing of any moment to what has been stated.

Bynum testified that he was present when Freeman and defendant traded. In regard to the transaction here under discussion, and on the day the trade was made, Freeman was in his wagon on the public square near the horse rack in Tyler, and had with him a little brown mare mule tied behind his wagon that the witness had previously traded to Freeman. He asked Freeman if he would trade the mule, and Freeman replied that he was waiting for Audry Campbell; that he and Campbell were on a trade; that they were going out to Campbell's house to look at a horse of Campbell's; that he saw them drive out towards Campbell's house,

leading the little mule behind the wagon; that within about an hour Freeman returned to the public square with Campbell's horse tied behind his wagon, but without the little mule. This witness had owned this horse previously. He figured the value of the mule from \$12.50 to \$17.50, and had seen this particular mule sold for \$10.

Jim Jackson testified that he saw Freeman the day he drove up on the east side of the public square in Tyler, and where horse traders gathered themselves together for trading purposes. Freeman came up in his wagon, driving two mules, with a little, old, poor, brown-colored mare mule tied behind the wagon, driving up where these people were congregated Freeman stopped. Witness stepped out, and asked him if he would trade his mule. He said, "Yes," but he had rather sell it, and would take \$22.50 for it. Witness declined to give that, and told him he had nothing to trade, but "some of the boys might give him a trade." Appellant walked up at that time, and witness remarked to Freeman that Campbell would like to trade with him, and Freeman asked appellant what he had to trade, and was informed that he had a horse out at his house that he would trade. This witness left them talking about trading, and in a few minutes afterwards he saw Campbell and Freeman in Freeman's wagon, going east, toward Campbell's residence, with the little mule still tied behind Freeman's wagon and being led. In about two hours Freeman came to him at the rack where they had first met, and wanted him to sell the horse for him. It was the same horse appellant had owned. This witness then placed his halter on the horse and tied him to the rack, went away, was gone a few minutes, and returned, and when he returned Freeman was then delivering the horse to a young man whose name was Keel, and Freeman informed this witness that he had sold the horse to Keel for \$15 and Freeman asked this witness to write a bill of sale of the horse to the man, and Freeman delivered the horse and bill of sale he wrote to Henry Keel, and that Wade Sanders at the instance of Freeman signed the bill of sale as a witness.

Wade Sanders testified that he saw Freeman and appellant talking about something that day; did not hear the conversation; saw them go away towards defendant's house, leading the mule. Afterwards he saw Freeman return to the square with Campbell's horse tied behind the wagon. Freeman requested this witness to sell the horse for \$15, and directly afterwards this witness saw Freeman sell and deliver the horse to Henry Keel for \$15. That Freeman had Jackson, a witness, to write a bill of sale of the horse from him to Keel, and asked this witness to sign the bill of sale as a witness, which he did, and Freeman delivered the horse and bill of sale to Keel then. He further stated he did not see any money paid by Keel, but understood the sale was on a credit, and did

not remember the wording of the bill of sale.

The witness Estes testified that he lives in Tyler, and did live there at the time of the transaction between Freeman and appellant, and was in the market business, and bought the horse Freeman got from defendant from Henry Keel that same evening he had got him from Freeman.

Edwards testified that he subsequently bought the little mule; does not recollect exactly how long it was after Campbell got it from Freeman, but it was very poor and small and worth very little; that he fed it and got it in very good condition, and traded it to a negro and Mr. Mims.

The defendant testified in his own behalf that along about the middle of the day Freeman drove into town and to a point where he and others were with the little mule tied behind his wagon and stopped his wagon. The boys began talking to him about trading, and that he (appellant) went up and asked him if he wanted to trade the mule, and he said, "Yes"; that he wanted to sell it, as he did not need it. Appellant then told Freeman that he had a horse at his house a mile and a half from town that he would trade for the mule. They got in the wagon and drove to appellant's house, leading the little mule. When they reached the place, Freeman got out and looked at the horse that was in the lot, and examined him, and told appellant he would give him the mule for the horse, and they traded. The mule was untied from the wagon and put in the lot; the rope taken from the mule and put on the horse by Freeman, who led the horse out and tied him behind his wagon, and drove back to town with the horse. After Freeman left, appellant ate his dinner, saddled his horse, and rode to town, going to the same racks where the parties had previously met, and got down, and hitched his horse. He saw Freeman there and his wagon, and the horse that he (appellant) had traded him for the mule was hitched to the rack; a good many persons and traders being immediately around the rack. After he had been there a little while, Freeman stepped up to him and said to him: "I want you to pay me for my mule." The accused then told him that he had his pay for the mule, and Freeman asked, "What have I got?" and appellant pointed to the horse, "You see what you have got." Freeman then denied giving him the mule for the horse, and wanted appellant to pay him \$22.50 for the mule. Appellant states that he told Freeman before they traded that he had been offered \$22.50 for the horse, but did not tell him who offered it, nor that he stated that he had sold the horse for that amount, nor that he would sell or deliver the horse to the party and get money and pay him for the mule. He further testifies a little later in the evening he saw that Freeman had sold the horse to Keel and given him a bill of sale. This is practically and substantially the case, except some tes-

timony introduced by the state as to the standing of Freeman as a truthful man.

As we understand the record, there are two propositions, or two deductions to be arrived at from the facts: First, that Freeman was to let appellant have the mule for which appellant was to pay him that day \$22.50, and that appellant did not do so, but got Freeman to go to his house, leave the mule, and bring his (appellant's) horse to town, and, instead, that it was a trade of the mule for the horse. Appellant's theory of the case is that there was a trade in which he gave the horse for the mule. Freeman corroborates appellant's theory substantially, in that he drove out to appellant's house, carried the mule, left it, and got the horse that he brought to town in exchange for the mule. He is further corroborated by the fact that Freeman turned the mule over to another party for the purpose of being sold, and was sold to Keel and bill of sale given. Appellant's version of it is proved by several witnesses who are named in the above statement, to the effect that they heard the transaction and the trade, or, rather, they saw the parties get in the wagon and drive out to appellant's house to look at the horse, and that Freeman left the mule and returned to town with the horse. The state's theory must be supported by the testimony of Freeman, to the effect that he sold the mule and was to be paid the money that day. Freeman's testimony excludes the idea that it was to be paid at the time it was turned over, but shows that it was to be paid after they returned to town. We are of opinion that this does not constitute the offense of swindling. It was a sale under Freeman's view of it of the mule to appellant to be paid for during the day after their return to town. The money was not paid. Of course, if the testimony of appellant's witnesses who testified to hearing the trade made between appellant and Freeman is true, there could not possibly be any swindling. So under either view of it, as we understand the testimony, it was not swindling.

Therefore, believing the testimony not sufficient to support the conviction, the judgment is reversed and the cause is remanded.

HENDERSON, J., absent.

#### WARREN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### CRIMINAL LAW — EVIDENCE — FOOTPRINTS — CIRCUMSTANTIAL EVIDENCE — REASONABLE DOUBT.

The fact that certain footprints corresponded with defendant's shoes, which were half soled, had several prominent tacks, and were run down at the heel, is not as circumstantial evidence sufficient within the rule to exclude every other reasonable hypothesis than that the tracks were made by the shoes of accused, who was

seen within a day of the crime a few miles from the town where it was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1287.]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

A. J. Warren was convicted of burglary, and appeals. Reversed and remanded.

Preston Martin, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at nine years' confinement in the state penitentiary.

The only question necessary to be reviewed in this record is the sufficiency of the evidence. On the 6th day of February, 1907, in the little inland town of Brock, in Parker county, the storehouse of John White was burglarized. The safe was blown open, and something over \$80 in money secured. Upon hearing the explosion, the owner of the store, who lived near by, started to the store, and was in the act of meeting a party coming out thereof, when said party turned away and disappeared. Witness White was then in some 25 or 30 yards of the fleeing party, and said, in size, he appeared to be about the size of the defendant in this case. The next day after the burglary the tracks leading from the store, which were made by the party that White saw fleeing, were critically examined by White and others, who testified in this case, giving all the peculiarities of same. The defendant was seen by several parties within a mile of the town of Brock on Wednesday morning; the burglary occurring that night. One witness testified that she gave him his breakfast, and another witness, who lived at a home near by the first one, testified that she gave him a breakfast. The defendant was seen in different directions from Brock and within a distance of a mile or so of the town. Several witnesses testified that they met a man going in the direction of Brock about 10 o'clock at night, about the size of appellant. On February 9th, two or three days after the burglary, appellant was arrested in the city of Ft. Worth, a distance of about 30 miles from the scene of the burglary. At the time of his arrest he was very much intoxicated and asleep. A boy testified that a short while before the arrest of appellant that he drew a pistol on him, made the boy accompany him, and stated to the boy that he had \$80 at the factory or foundry, and if he, the boy, would go with him, they would have a good time. The constable of the city of Ft. Worth took charge of defendant, placed him in jail, and for some reason undisclosed by this record the sheriff carried one of the ladies who had given appellant a breakfast on the morning before the burglary in Parker county to Ft. Worth, and she there identified appellant as the party to whom she had given the breakfast. The shoes found upon appellant when arrested in Ft. Worth

corresponded in all their peculiarities with the tracks found going from the burglarized store. When appellant was arrested in Ft. Worth, he was found with about 80 cents in his pocket. This in substance, as we understand this record, is all of the criminative facts contained therein that go to show appellant's guilty participation in the burglary alleged in this case. We hold that same is not sufficient to comply with the rules of law laid down by this court in cases of circumstantial evidence. The law of circumstantial evidence requires that the evidence should be of that degree of cogency and probative force that would justify a jury and this court in believing that the evidence excludes every other reasonable hypothesis than that of the guilt of the appellant. Conceding all these facts to be uncontradicted, and we take it from this record that they are uncontradicted, they do not exclude in our mind every other reasonable hypothesis than that of the guilt of appellant. It would be a dangerous precedent, however, guilty this appellant may be, for this court to lay down a rule holding that tracks alone, plus a presence within two miles of the scene of a crime, would justify a court in affirming a case. The tracks show that the party making same had on a pair of shoes that had been half soled. The heels of one of the shoes making the tracks was run down and worn off, several tacks were prominent, or several indentations in the tracks appeared to have been made by prominent tacks. These peculiarities are shown to have existed in appellant's shoes. But does this exclude every other reasonable hypothesis than that the shoes worn by appellant made the tracks? We say it does not. It is too well known that shoes are frequently half soled, and it is equally well known that tacks are often prominent therein. It is further a commonly known fact that heels of shoes are often run down or worn off.

These being matters of common notoriety and knowledge, they force us to the irresistible conclusion that this evidence does not exclude every other reasonable hypothesis than that of appellant's guilt. So believing, we reverse this case because the evidence is insufficient to support the verdict.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

#### WARREN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

Appeal from District Court, Parker County; J. W. Patterson, Judge.

A. J. Warren was convicted of larceny, and appeals. Reversed and remanded.

Preston Martin, for appellant. F. J. McCord, Asst. Atty. Gen., and J. C. Wilson, County Atty., for the State.

DAVIDSON, P. J. This is a companion case to *A. J. Warren v. State* (No. 3,769, this day decided) 106 S. W. 133. The facts are the same. The companion case was for burglary and this case is for the alleged theft of property taken at the time of the alleged burglary. We held in the other case that the facts were not sufficient. That disposes of this case.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

#### ROSEBORO v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### INDICTMENT AND INFORMATION—JOINDER OF COUNTS—MISDEMEANORS.

Separate counts for different misdemeanors may be joined in the same information or indictment, and a conviction had for each.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 423.]

Appeal from Smith County Court; J. A. Bulloch, Judge.

Ellis Roseboro was convicted of aggravated assault, and appeals. Affirmed.

B. B. Beard, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The motion for a new trial suggests error in regard to the court's charge, as well as the want of sufficient evidence to support the conviction. In regard to the last contention, it is sufficient to reply that the state's evidence authorized a verdict of assault by appellant upon a woman, the conviction being for aggravated assault. The information contains three counts, two of which charge assault on a woman, of different dates. The third count charges the use of abusive language to and concerning the assaulted woman in a manner and under circumstances calculated to provoke a breach of the peace. The jury convicted under one of the counts for aggravated assault, acquitting for using the abusive language. The real contention in reference to the charges of the court is based on the fact that the court charged the jury that they might convict of all three offenses, specifying in their verdict the amount of punishment assessed under each count. As before stated, the jury only convicted for aggravated assault under one of the counts. Appellant was therefore not convicted of the other two under the verdict rendered. It is well settled in Texas that misdemeanors may be joined for different offenses in separate counts in the same information or indictment, and a conviction had for each. *Hall v. State*, 32 Tex. Cr. R. 474, 24 S. W. 407; *Stebbins v. State*, 31 Tex. Cr. R. 294, 20 S. W. 552; *Day v. State*, 14 Tex. App. 30; *Street v. State*, 7 Tex. App. 5; *Gage v. State*, 9 Tex. App. 259; *Alexander v. State*, 27 Tex. App. 536, 11 S. W. 628. For a more complete col-

lation of authorities see Judge Hurt's concurring opinion in *Hall v. State*, supra. Following this line of authorities, we believe that the court's charge was correct.

The judgment is affirmed.

HENDERSON, J., absent.

#### BUCHANAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907. Rehearing Denied Dec. 18, 1907.)

#### 1. CRIMINAL LAW—TRIAL—CONDUCT OF COURT AND COUNSEL—READING LAW TO JURY.

The reading of law to a jury is a matter largely within the discretion of the trial court, and is not reversible error, unless clear abuse and probable prejudice appear; and where a prosecuting attorney, while arguing to the jury, read extracts from two cases, and contended that the law was applicable to the case, and upon objection the court handed a charge he had prepared to the prosecuting attorney who read an extract therefrom, which was subsequently given to the jury, and was practically in line with the authority previously quoted, the conduct of court and counsel was not reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1682-1687.]

#### 2. HOMICIDE—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE—POLICEMAN IN CHARGE OF PRISONER.

In a prosecution of a policeman for killing one under arrest, evidence held to sustain a conviction of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 516.]

Appeal from District Court, McLennan County; Sam. R. Scott, Judge.

A. P. Buchanan was convicted of manslaughter, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was a policeman in the town of West, and arrested the deceased without warrant, and had him under arrest and a prisoner at the time of the killing.

The contention of appellant is that he arrested the deceased for being intoxicated and for cursing on the street. The evidence is slight as to any profanity by the deceased; in fact, the great preponderance of the evidence shows that not to be a correct statement. Under appellant's theory, the deceased was not sufficiently drunk to have been arrested; for his idea of being drunk in order to justify an arrest was that the party must be down. Appellant summoned a bystander to assist him in carrying the deceased to the calaboose. En route the deceased objected to being placed in jail, and jerked loose. Some commotion followed this, and appellant's theory is that the deceased struck him in the face with a rock that he had picked up near the railroad track where the killing occurred. There is some testimony to the effect that deceased picked up some pebbles

and dirt, and threw at appellant. There was an abrasion on appellant's face—on his cheek or jaw. This bruise is supposed to have been made by the deceased. The testimony is sharply conflicting; but perhaps a preponderance of the evidence is in favor of the prosecution, to the effect that appellant struck the deceased over the head with his pistol, and that whatever rock or pebble was thrown was subsequent to this lick by appellant with his pistol on the deceased. Be that as it may, the cause of appellant shooting him was the striking of appellant with a rock or the pebbles, as we understand from the testimony. Appellant states, however, that he thought the deceased was coming on him at the time he fired the first shot for the purpose of inflicting other injuries upon him, or perhaps to take his life. There were three shots fired, all taking effect. Witnesses differ as to the position of the deceased during the shots. They all agree that, when the first shot was fired, they were facing each other. Some of the witnesses say that the deceased was falling at the time the second shot was fired, and was on the ground when the third shot was fired. Some of the witnesses put the deceased on the ground when the last two shots were fired. The deceased lived a few hours, and died. The jury gave appellant manslaughter, with two years in the penitentiary as punishment.

While the state's attorney was arguing to the jury, he read some extracts from *Glebel's Case*, 28 Tex. App. 172, 12 S. W. 591; and *Caldwell's Case*, 41 Tex. 97, and contended that the law as enunciated in these two cases was applicable to this case. Objection was urged to the reading of the law from these books, and the court then gave the charge he had written in the case to the attorney, which attorney read an extract from the charge of the court and which was subsequently given to the jury, which was in line, practically, with the authorities he had read. Three bills of exceptions were reserved to this action of the prosecuting attorney and of the court. There were no facts, it seems, read, but simply the law applicable to a state of case where an officer killed his prisoner. We deem it unnecessary to go into a discussion of the law in regard to this matter, as the bills of exceptions only refer to the fact that the authorities and the charge of the court was read to the jury. The reading of law to a jury is a matter largely within the sound legal discretion of the trial court, and will not constitute cause for reversal, except where the matter shows clear abuse, and has brought about at least probable injury. This has been a matter of revision by this court in many cases. The law, we think, has been well settled to the effect there is no error shown in these bills of exceptions. *Forbes' Case*, 35 Tex. Cr. R. 24, 29 S. W. 784; *Jacob's Case*, 37 Tex. Cr. R. 428, 35 S. W. 978; *Willis v. State* (Tex. Cr. App.) 55 S. W. 496; *Williams v. State* (Tex. Cr. App.) 53 S. W. 859.

There are many other cases, but these are deemed sufficient.

There are some exceptions, in the motion for a new trial, to the court's charge in reference to the law applicable to a state of case where an officer kills the party he has under arrest and in his control at the time of the killing. The court charged the law, as we understand it has been laid down in this state in the various decisions, among others *Glebel's Case*, 28 Tex. App. 172, 12 S. W. 591, *Caldwell's Case*, 41 Tex. 97, *supra*, and other cases, but these are sufficient we think. There are some criticisms to the court's charge on manslaughter and self-defense. These criticisms, as we understand them, have no merit, and are rather hypercritical. It is a very serious question whether self-defense was in the case at all. There were two men in charge of a drunken prisoner, one upon either side, carrying him to the calaboose. The officer armed with a six shooter and the party summoned to his assistance, a stout vigorous young man six feet in height, weighing about 170 pounds, ought to have been able to control a small drunken man weighing only about 135 pounds without taking his life by shooting him. The young man summoned by appellant to assist him makes it appear that at the time of the difficulty the deceased was so drunk that when he turned him loose he fell, and in getting up picked up a lot of sand, pebbles, and rocks with his hand, and threw at the officer, who stood a few feet away with his pistol out, and when the rocks were thrown shot the deceased. It may be a question of a little surprise that the jury gave appellant the minimum punishment for manslaughter, and that the punishment was not for a higher grade of homicide. A careful review of this case has impressed us with the fact that appellant has not only had a fair trial, but has been fortunate in receiving such a moderate verdict.

The judgment is affirmed.

HENDERSON, J., absent.

#### MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. CRIMINAL LAW—REVIEW—BILL OF EXCEPTIONS.

The admission in evidence of the voluntary statement of accused, made at the examining trial, cannot be reviewed where there is no bill of exceptions reserved to the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2880, 2918, 2931-2935.]

#### 2. SAME—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

The overruling of a motion for a new trial on the ground of newly discovered evidence is proper where there is no affidavit attached, and no legal showing in the motion complying with the statute in reference to newly discovered evidence.

### 8. HOMICIDE—MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to support a verdict of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 518-538.]

Appeal from District Court, Burleson County; E. R. Sinks, Judge.

Frank Mitchell was convicted of murder in the first degree, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted upon a plea of guilty of murder in the first degree, and his punishment assessed at death.

We find no bills of exceptions in the record. The court properly charged on both degrees of murder. The record shows that appellant was properly warned before entering his plea.

Appellant's second assignment of error complains that the court erred in permitting the introduction of the voluntary statement made by appellant at the examining trial. There is no bill reserved to the statement; hence the ruling of the court, if erroneous, cannot be reviewed. If we were, under the rules of this court, permitted to look at the testimony, it would disclose the fact that the proper predicate was laid.

Appellant's third ground complains that the court erred in not granting the same, on the ground of newly discovered evidence, to the effect that appellant was of unsound mind, and that he could prove same by two witnesses who live in Burleson county. There is no affidavit attached, and no legal showing in the motion complying with the rules of the statute in reference to newly discovered evidence. These alone are the grounds urged by appellant for a new trial, in addition to the fact that the verdict is contrary to the law and the evidence. The evidence shows a cruel and unprovoked murder on the part of appellant. Appellant slipped into the house where deceased was sleeping, and with an axe crushed her head, and the record shows that this was done because he was mad at her. The act was done with premeditated design and with a deliberation that amply warranted the jury in assessing the death penalty.

The judgment is in all things affirmed.

**HENDERSON, J.,** absent.

### NORRIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

#### 1. WITNESSES—IMPEACHMENT—EVIDENCE.

Where accused introduced witnesses B. and L. to impeach prosecutor, a deputy sheriff, for truth and veracity, and their testimony covered some six or eight months prior to the alleged offense, the state could introduce a petition addressed to the sheriff requesting prosecutor's appointment as a deputy, which had been signed by such witnesses some seven or eight months

prior to the trial of the case, in which they stated that prosecutor was a safe, reliable, truthful, and honest man.

#### 2. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

An order denying a motion to quash the venire cannot be reviewed on appeal where it is not presented by a bill of exceptions.

#### 3. SAME—TRIAL—REQUESTED CHARGES.

Request to charge covered by the main charge may be properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

Appeal from Smith County Court; J. A. Bulloch, Judge.

E. A. Norris was convicted of violating the local option law, and he appeals. Affirmed.

Hanson & Robertson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is a conviction for violating the local option law; the punishment assessed being a fine of \$100 and 20 days' imprisonment in the county jail.

Appellant's first bill of exceptions complains of the following: The prosecuting attorney offered in evidence a petition signed by a large number of the neighbors and friends of the witness J. S. O'Neal, including the names of defendant's witnesses T. H. C. Butler and Bud Lawrence, petitioning the sheriff of Smith county, Tex., to appoint the prosecuting witness Jas. S. O'Neal deputy sheriff. The petition was signed some time in November or December, 1906. Defendant objected to the introduction of same, for the reason that same was signed some seven or eight months prior to the trial of this cause, and the question at issue was the general reputation of the said O'Neal for truth and veracity in the community in which he lived at the time of the trial of said cause, and not some seven or eight months prior to said time; furthermore, said petition was only the individual opinions of the signers of said petition, and not the opinion and reputation as expressed by the community at large, and was therefore inadmissible. The court overruled the objections, and permitted the introduction of the petition, at least that part of it showing that the above witnesses signed same. The bill, however, is approved with this explanation: "That defendant introduced T. H. C. Butler and Bud Lawrence as witnesses to impeach state's witness O'Neal for truth and veracity, and covers some six or eight months of time prior to the alleged sale. And the county attorney then introduced a petition addressed to the sheriff of Smith county, with witnesses Butler and Lawrence's names, and said petition stated that O'Neal was well known to each of them, and he was a safe, reliable, truthful, and honest man, and only Butler's and Lawrence's names were allowed to be shown to the jury as impeaching them, or show their attitude; it being also shown that recently Butler had fallen out with O'Neal and Lawrence was on defendant's liquor dealer's bond." Clearly, un-



der the explanation of the court, the testimony was entirely admissible. These witnesses were brought in by appellant to impeach the prosecuting witness. In substance, that shows a lack of verity in their statement against appellant. All that contradicts their statements is entirely admissible.

Appellant complained of the failure of the court to quash the venire. There is no bill presenting the matter, and therefore same cannot be reviewed.

We have carefully read the court's charge, and in our opinion it is a proper presentation of the law of this case. As far as applicable, the special charges were covered by the main charge.

Finding no error in the record, the judgment is affirmed.

HENDERSON, J., absent.

### NORRIS v. STATE

(Court of Criminal Appeals of Texas. Nov. 20, 1907. On Rehearing, Dec. 18, 1907.)

#### 1. CRIMINAL LAW—APPEAL—CONTINUANCE—DENIAL—REVIEW—BILL OF EXCEPTIONS.

An order denying accused's application for a continuance cannot be reviewed, where it is not presented by a bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2926.]

#### 2. INTOXICATING LIQUORS—WRONGFUL SALE—EVIDENCE—VERDICT.

Evidence held to sustain a conviction for violating the local option law:

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300-322.]

On Rehearing.

#### 3. CRIMINAL LAW—APPEAL—EXCEPTIONS—BILL OF EXCEPTIONS.

A recital in a judgment overruling accused's application for a continuance that he excepted was insufficient to justify a review of the ruling on appeal, in the absence of a bill of exceptions reserved during the term.

#### 4. SAME—VENIRE—MOTION TO QUASH—MATTERS OF FACT—BILL OF EXCEPTIONS.

Where a verified motion to quash the venire alleged matters of fact, an order denying the motion could not be reviewed on appeal, in the absence of a proper bill of exceptions preserving the evidence introduced to substantiate the facts alleged.

#### 5. SAME—STATEMENTS IN MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR.

Statements in a motion for a new trial or assignments of error concerning matters of fact on which rulings were based are insufficient to justify a review of the rulings, in the absence of a bill of exceptions preserving the evidence introduced to establish the facts alleged.

#### 6. SAME—PRESUMPTIONS.

In the absence of evidence of matters of fact on which a ruling was based, the Court of Criminal Appeals will presume that the ruling was correct; the party alleging error being required to overcome such presumption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3015.]

Appeal from Smith County Court; J. A. Bulloch, Judge.

E. A. Norris was convicted of violating the

local option law, and he appeals. Affirmed. Motion for rehearing overruled.

Hanson & Robertson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law.

Appellant's insistence that the court erred in refusing his application for a continuance cannot be considered. A bill of exceptions was not reserved to the ruling of the court. A bill of exceptions was reserved to some comments and argument of the county attorney. As explained by the court in qualifying the bill, the language used is not of sufficient importance to require a reversal. The court indicates in the qualification that the remarks of the county attorney were in reply to those used by appellant's counsel. There is a direct conflict in the testimony; the state's evidence showing that some of the whisky bought by the state's witness was in violation of the law and not under prescription, as claimed by appellant. Appellant introduced two prescriptions, each one for two pints of whisky, signed by different physicians. These prescriptions purported to have been made in favor of the prosecuting witness. Witness admits getting one, but denies receiving the other prescription, and states that he did not know the physician who is supposed to have given the second prescription. There being a conflict in the testimony, the physician who should have given the second prescription does not testify, and, as the evidence is presented, we do not feel justified in reversing the judgment.

It is therefore affirmed.

HENDERSON, J., absent.

On Motion for Rehearing.

DAVIDSON, P. J. Motion for rehearing is filed asking a revision of a former affirmance and alleging grounds of error.

Appellant's first reason is that the trial court erred in refusing to continue the case, and that this court erred in not reversing on account of such ruling of the court, contending that exception was duly reserved. In the judgment overruling the application for continuance, it is recited that appellant excepted. This is not sufficient. Unless a bill of exceptions is reserved during the term, to the overruling of an application for a continuance the matter will not be revised on appeal. For collation of numerous authorities, see White's Ann. Code Cr. Proc. § 645. It has been expressly held in numerous cases that a recital in the judgment that a continuance was refused, and that the defendant excepted, does not supply the place of a specific bill of exceptions to the overruling of the continuance. Gaston v. State, 11 Tex. App. 148; Prator v. State, 15 Tex. App. 363; Hollis v. State, 9 Tex. App. 643; Nelson v. State, 1 Tex. App. 41; Harris v. State, 40 Tex. Cr. R. 8, 48 S.

W. 502; *Griffith v. State*, 89 S. W. 832, 14 Tex. Ct. Rep. 9.

Appellant made a motion to quash the venire, but this was not noticed in the former opinion, because not presented by a bill of exceptions. The motion alleges matters of fact. If any evidence was introduced to sustain the grounds of the motion, it is not in the record, nor was any bill of exceptions reserved. Wherever matters of fact are involved in the rulings of the trial court, such rulings will not be revised on appeal, unless the facts are substantiated by proper bills of exceptions. Statements in a motion for a new trial, or assignments of error, will not be sufficient. In the absence of evidence of matters of fact, this court on appeal will indulge the presumption that the rulings of the trial court were correct, and this presumption must be overcome by the party alleging the error. In regard to this motion to quash the venire, matters of fact are stated why the motion should have been sustained. This is sworn to by appellant. This does not sufficiently present the question to this court to require a revision of the court's ruling. We have nothing before us, except the statements of the motion and the action of the court overruling it. We are of opinion that this matter is not sufficiently presented to call for a revision. We do not believe there is any error in regard to the remarks of the county attorney sufficient to require a reversal, as was said in the former opinion.

The motion for rehearing is therefore overruled.

HENDERSON, J., absent.

### EARLES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

#### 1. HOMICIDE—EVIDENCE—ADMISSIBILITY.

On a trial for the killing of an officer by accused while resisting arrest, the testimony of a witness that after decedent had arrested accused they went off peaceably, without any trouble, was competent, the appearance of accused as to being angry or otherwise being a legitimate inquiry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 341.]

#### 2. CRIMINAL LAW — EVIDENCE — OPINION OF WITNESS.

The statement of a witness that after an officer had arrested accused they went off peaceably, without any trouble, was not objectionable as the opinion of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1040, 1041, 1042, 1044.]

#### 3. HOMICIDE — EVIDENCE — ADMISSIBILITY — PREJUDICE.

On a trial for homicide committed by accused while temporarily in a town, questions asked accused on cross-examination as to why he stopped in the town, followed by answers that he wanted to stop there to see friends, were not prejudicial.

#### 4. CRIMINAL LAW — REVIEW — ADMISSION OF EVIDENCE—BILL OF EXCEPTIONS.

A bill of exceptions complaining of the overruling of objections to questions asked accused while testifying, which does not show the answers, is defective, and the appellate court will not look at the statement of facts to see what the answers were.

#### 5. SAME—EVIDENCE—ADMISSIBILITY.

Where the state had not attempted to show that a third person had not had a talk with defendant's witness, to which he had testified, the sustaining of objections to questions showing how accused learned of the person's testimony was proper.

#### 6. SAME.

Where a witness for the state testified that he had been a deputy sheriff for a number of years, and that the pistol used by accused was a 38 caliber, long barrel, it was not error to permit him to state that the pistol was a deadly weapon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1053-1055.]

#### 7. SAME — EVIDENCE — STATEMENTS OF THIRD PERSONS.

On a trial for the murder of a police officer by accused while resisting arrest, evidence that the police officer had received instructions to arrest accused, either for the offense of disturbing the peace or for carrying a pistol, was admissible, though the instructions were given to the officer in the absence of accused.

#### 8. HOMICIDE—EVIDENCE—ADMISSIBILITY.

On a trial for the murder of a police officer by accused while resisting arrest, it was proper for the state to show a basis for a legal arrest.

#### 9. CRIMINAL LAW — EVIDENCE — ORDER OF PROOF.

The fact that evidence received in rebuttal was not rebuttal did not make it inadmissible, where it was introduced before the trial terminated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 1609, 1610.]

#### 10. HOMICIDE — HARMLESS ERROR—ADMISSION OF EVIDENCE.

On a trial for the murder of a police officer by accused while resisting arrest, the admission of evidence of a conversation between decedent and another officer with respect to the latter's desire to arrest accused was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 709-713.]

#### 11. WITNESSES—COMPETENCY—KNOWLEDGE OF FACTS.

Where the state claimed that decedent was shot from the back, and defendant claimed the contrary, the court properly excluded the testimony of a witness as to the location of the fatal bullet wound, based on knowledge obtained by observing the undertaker probing the wound, the witness being unable to state that the probe followed the wound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80-87.]

#### 12. HOMICIDE—CHARACTER OF DECEDENT—ADMISSIBILITY.

Where there was no evidence that decedent made any threats of violence toward accused, who was ignorant of decedent's reputation for violence, the exclusion of evidence of such reputation was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 312-316.]

#### 13. SAME—EXCLUSION OF EVIDENCE.

On a trial for the murder of a police officer by accused while resisting arrest, the refusal to strike out the state's testimony that decedent arrested accused for unlawfully carrying a pistol, on the ground that there was no testimony that decedent informed accused at the

time of the arrest that he was arrested for carrying a pistol, was not erroneous, since the circumstances might warrant the jury in believing that decedent so informed accused.

14. SAME—EVIDENCE—ADMISSIBILITY.

On a trial for the murder of a police officer by accused while resisting arrest, made without warrant, ordinances showing the authority of a police officer to arrest without warrant were properly received in evidence.

15. SAME—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, on a trial for the murder of a police officer by accused while resisting arrest without warrant, the jury found that the arrest was illegal by rendering a verdict of manslaughter, any error in receiving in evidence ordinances showing the authority of police officers to arrest without warrant was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 709-713.]

16. SAME—EVIDENCE—INSTRUCTIONS.

Where, on a trial for the murder of a police officer by accused while resisting arrest, the evidence was conflicting on the issue whether the arrest was legal, the court properly defined a legal arrest and submitted the question to the jury.

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Walter Earles was convicted of manslaughter, and he appeals. Affirmed.

J. T. Williams, for appellant. F. J. McCord, Asst. Atty. Gen., and Richard Mays, for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary.

This case has been appealed to this court twice before this appeal. The former opinions in the case will be found in 85 S. W. 1, 12 Tex. Ct. Rep. 267, and 94 S. W. 464, 16 Tex. Ct. Rep. 223, respectively. For a statement of the evidence, see the former opinions.

Bill of exceptions No. 1 shows that the state was permitted to prove, on cross-examination of Roy Canady, that after deceased Maddux arrested appellant they went off peacefully without any trouble. Appellant objected to this testimony on the ground that it was immaterial, and a conclusion of the witness. The appearance of appellant as to whether he was angry or not is legitimate matter for inquiry, and it is not an opinion of the witness to testify to same. Bill of exceptions No. 2 complains, in substance, of the same character of testimony. Bill of exceptions No. 3 complains of the following: On cross-examination of appellant he was asked the following questions: "Q. You say that you were on your way from Wortham to Dallas? A. Yes, sir. Q. What did you stop at Corsicana for? A. Just simply because I had decided I would stop off there until Monday morning. (Appellant's counsel: I urge this objection to that: I don't believe it is material to state why he stopped off in Corsicana. The Court: Witness has answered the question. Appellant's counsel: Well,

I object to any further examination on that question.) Q. Well, what did you stop there for? (Mr. Williams: I make the objection. The Court: I overrule the objection. Appellant's counsel: I except to the ruling of the court.) Witness: Well I told you while ago I stopped because I decided I wanted to stop off there and decided to stay until Monday morning. I struck up with some parties I had been very good friends with and had not seen them for some time, and stopped over there until Monday." We can see no possible objection to this testimony under any phase of the law of this state. If appellant stopped off for an innocent purpose, which he testifies he did, it could not possibly hurt him. If he stopped off for an illegal purpose, it might have been legitimate testimony in the trial of this case; not necessarily so, however, but clearly in the light of this bill there could have been no injury to appellant.

Bill of exceptions No. 4 shows that while appellant was on the stand counsel for the state, on cross-examination, asked him the following questions: "Q. How many times had you been to the oilmill to see Batson? A. Why I was down there two or three times that day. Q. You had your pistol down there with you? A. Down there at the mill." Appellant's counsel objected on the ground that it is immaterial whether defendant had a pistol and was carrying it at the oilmill, which objection the court overruled. This bill is wholly defective in that no answer of the witness is shown by the bill. We will not look at the statement of facts to see what his answer was. The bill must be complete.

Bill of exceptions No. 5 shows the following: Appellant's witness T. W. Hoskins was placed upon the stand, and the following questions propounded to him: "Q. Do you remember having a conversation with Mr. Grantham, right after the jury had received the instruction of the court and they had retired, a short while after that?" The state objected on the ground that it was immaterial. Appellant's counsel: "They asked him (Grantham) that question and drew it out, and wanted to know how it got to me. The Court: The question is now, you propose to prove by this witness what Grantham told him? Mr. Williams: Yes; and how we got on to Grantham's testimony." The objection was sustained. The bill is approved with this statement: "There was and had been no attempt by the state to show that Grantham did not have a talk with Hoskins, to which he had testified." There certainly could have been no error in the ruling of the court.

Bill of exceptions No. 6 shows that the state's witness Bradley was asked if the pistol used by Earles was a deadly weapon, and witness answered that it was a very deadly and dangerous weapon. The court approved the bill with the statement that the witness had testified that he was a deputy sheriff and had been for a long number of years; that the pistol in question was a 38

caliber, long barrel, and then answered as shown in the foregoing bill. There was no error in the admission of this testimony.

Bill of exceptions No. 7 complains of the following testimony of the witness Ricker: "I observed the arrest of Earles by deceased. He went straight on with him. Never made any halt. The morning of the arrest deceased was on duty with me. The chief of police saw deceased and I together that morning, and made a statement to us in reference to making an arrest of appellant. He instructed us, if we found Earles that day, to arrest him for disturbing the peace. I don't remember that he said anything about him carrying a pistol. I had no conversation with deceased before the chief of police instructed us to arrest Earles. I had a conversation with deceased after that, about 9 o'clock. We had left the city hall, going up town. After our conversation with the chief of police deceased did not say what he wanted Earles for. He was just talking about the description of Earles. Neither one knew him, and he remarked then that he had been told that appellant had a pistol; that John Nutt had told him that morning. He did not say whether he wanted to arrest him for carrying a pistol or what. He did say that he had been told that he had a pistol."

John Stewart, a witness for the state, testified that he was city marshal of Corsicana. "On the morning of the day that Maddux was killed, in response to a request, I went out to Dean's house. When I returned to the city hall I gave instructions to Ricker and Maddux, policemen, on day duty at that time, to arrest appellant if they met up with him. I told them they could get him for two offenses, one for disturbing the peace, and one for carrying a pistol. I told them he had a pistol on. There was no warrant for the arrest of appellant, nor any complaint filed in the city court." This testimony was clearly admissible. It does not come within the rule of third parties talking out of the presence of appellant, invoked by appellant for its exclusion in this case. It is proper and incumbent upon the state to show a basis for the legal arrest, and if the deceased had been informed, as this witness testifies, that appellant had a pistol, or had been carrying a pistol, he had a right to arrest without a warrant.

Appellant objects to the testimony of W. M. Ellis and J. W. Gillisple on the ground that same was not in rebuttal. The bill does not state what they testified to, and hence is defective. The sheer fact it was not in rebuttal would not make it inadmissible if it was introduced before the trial terminated. The court says that the testimony was in contradiction of testimony offered by appellant. We find no error in the ruling of the court.

Bill of exceptions No. 9 shows the state's witness Bradley testified as follows: "I met deceased at Kiber & Cobbs' corner, and had

a conversation with deceased about defendant. Q. Did he (deceased) tell you in that conversation on said corner that he wanted to arrest Earles? A. Yes; said he was hunting him. Q. Did you tell deceased that you wanted Earles also? A. Yes. Q. Did you tell deceased in that conversation what you wanted Earles for? A. I did not." Appellant objects to this testimony on the ground that it was a conversation between two officers in the absence of appellant, and was hearsay, and not a part of the *res gestae*. We do not think there was any error in the ruling of the court. At least it was harmless.

Bill of exceptions No. 10 shows that the state's witness C. W. Taylor testified that he saw Mr. Sutherland, the undertaker, insert a probe into the wound in the body of deceased after he was dead. The wound was on the left side of the body. He could not swear whether he followed the course of the bullet or not. "I was not watching him when he found the direction he afterwards told me about. The undertaker entered a metal probe a little thicker than a pencil, about 8 or 10 inches long, sharp at one end. He worked in the wound with that probe for three or four minutes. I was watching him. He was trying to find the direction of the bullet. After he had worked two or three minutes, he did not find the direction the bullet had taken. I stepped around on the other side of the body, and presently he called to me, and I went around to the other side of the table, and he was then pushing the probe clear into the body perfectly easy." The defendant then offered to prove by said witness what angle said probe was working, whether straight in or to the side; the state's contention being that Maddux was shot from the back, and the defendant the contrary. The state objected to this witness stating at what angle the probe was working, unless he could state that it was following the wound. The witness stated he could not state this, and that he had told appellant's counsel he thought his testimony would not be admitted, but that he ought to have the undertaker. It further appeared the undertaker lived in Corsicana, and no process had been issued for him. Objection of the state was sustained. This bill was prepared by the court in lieu of one prepared by appellant. We do not think there was any error in the refusal of the court to permit the witness to testify to something he evidently knew nothing about.

Bill of exceptions No. 11 shows that appellant offered various witnesses who knew the general reputation of deceased in Corsicana, and that his general reputation in said city was that of a man of violent temper and overbearing disposition, and was a determined man. Defendant offered this testimony to show the jury that appellant was in the custody of a man who not only had the power and means, but was the kind of a man that likely would have killed or crushed de-

defendant if such force became necessary to compel defendant to submit to the arrest. The state objected to this testimony on the ground that appellant neither knew deceased or had ever heard of him, and that deceased did not know appellant. It was not contended that deceased made any threat of any character, or statements threatening violence of any kind to defendant. The court asked counsel for appellant if he would undertake to show that appellant knew of such reputation of deceased. Counsel for appellant stated that he could not show that appellant knew it. This bill is also prepared by the court in lieu of appellant's bill. We do not think there was any error in the ruling of the court, since appellant could only prove deceased was a violent and dangerous character.

Bill of exceptions No. 12 shows that defendant, after the state had closed its evidence, filed a motion in writing asking the court to strike out and exclude all the testimony in support of the theory of the state that Maddux, the deceased, arrested the appellant for unlawfully carrying a pistol, because, under the first and second grounds, there is no evidence that deceased arrested appellant for carrying a pistol. The court overruled said grounds of the motion and approved the bill, stating that the motion was not before him at the time, but that the motion itself would be in the record and would show the grounds. The above grounds appear to be in the motion. We do not think the court erred in failing to exclude the testimony. The fact that there is no testimony that he informed appellant at the time of the arrest that he did so for carrying a pistol would not preclude the arrest being legal, if the circumstances warranted the jury in believing that he did so inform him. The verdict in this case clearly shows the jury did not believe the arrest was legal, since they found appellant guilty of manslaughter.

Bill of exceptions No. 13 shows the state offered in evidence article 363 of the Revised Ordinances of the city of Corsicana, and being the same as article 407 of the Revised Statutes of 1895, also article 290 of said Revised Ordinances, and article 11 of said ordinances, and also in connection with said ordinances the state offered in evidence section 48 of the Special Charter of the city of Corsicana, adopted and incorporated as a part of the ordinances of said city in 1905, also sections 91 and 276 of said charter. The same were offered for the purpose of showing that a policeman of Corsicana had authority to make an arrest for disturbance of the peace without warrant, whether the offense was committed in his presence or view or not. We do not deem it necessary to copy said ordinances, but suffice it to say that same were admissible to show, which they did, that a policeman had a right to arrest appellant for violations against the peace,

and for carrying a pistol. But be this as it may, in view of the verdict in this case, it could not have injured appellant, since the jury found in favor of appellant on the issue of arrest when they decided that appellant was guilty of manslaughter.

Appellant filed a motion for continuance, but we do not find any bill of exceptions reserved to the overruling thereof, hence same cannot be considered.

The tenth ground of the motion for a new trial complains that the court erred in paragraphs 24, 25, 26, and 27 in this: The court used the following language: "If you find that the arrest of defendant by Maddux was illegal," etc. "The vice in the charge in said paragraphs is in the court submitting the question as to the legality of the arrest to the jury to be determined by the jury, as a question of fact. The court should have excluded all testimony as to the arrest for carrying a pistol, and instructed the jury that the arrest was illegal, and leave nothing in this respect for the jury to pass on. Whether the arrest was legal or illegal is a question of law, and a matter for the court to decide, and so instruct the jury." The charge of the court was an apt presentation of all the law applicable to the facts of this case. It was controverted by appellant as to whether the arrest was legal. The evidence is conflicting on this question. The court told the jury that deceased would have a right to arrest appellant for carrying a pistol without warrant, but he would not have a right to arrest him for seduction or disturbing the peace without a warrant, and the court told the jury, after finding what would be a legal arrest, that if he was legally arrested appellant would not have a right to resist. In other words, the evidence being conflicting as to whether the arrest was legal or not, it was the duty of the court to define a legal arrest, which he did, and then submit the issue to the jury to pass upon. Instead of the charge being erroneous, it was a proper way of presenting the question to the jury. If the evidence had been undisputed either way, then it would have been proper for the court to have said the evidence showed the arrest was legal or illegal, as the case might have been, but in this record the evidence is conflicting. We have carefully read and reread the charge of the court, in the light of the former opinions in this case, and must say that it covers every possible phase of the evidence and every possible right of appellant thereunder. The jury have seen fit to find appellant guilty of manslaughter, and this court does not feel called upon to disturb their finding.

In the view of the writer, the previous opinion of this court was erroneous in holding that appellant would have a right to resist an illegal arrest when the facts showed that he did not know whether the arrest was legal or not. I understand the law of this state to be that if an officer arrests a party illegally, and that party does not know whether

the arrest is legal or not, but draws a pistol and kills the officer, that the question of legality or illegality of the arrest would not be in the case at all. In other words, appellant's guilt or innocence depends upon his knowledge and intent. To say that a defendant can kill a man, and because the subsequent developments showed that the man killed had illegally arrested him, which fact was not known to appellant at the time of the killing, is a proposition that I cannot assent to. Appellant's guilt is dependent upon upon his own animus and intent. How can one insist that a killing is nothing but manslaughter on a theory not known to the party at the time of the killing? Of course, if one is arrested and believes the arrest is illegal, and so believing acts on that belief, then the issue of legality or illegality of the arrest is a pertinent issue in the trial; but where one submits to an arrest, not knowing whether the arrest is legal or not, and subsequently jerks loose from the officer and kills him because of the arrest, would not, in my opinion, make it any the less murder because the facts should subsequently show that the arrest was illegal. To illustrate: Suppose A. kills B., and on the trial of A. he should get on the stand and swear that he killed B. because he had seduced his daughter, but in that connection he stated that the fact that he had seduced his daughter was made known to him subsequent to the killing; the killing having taken place on the first meeting after the seduction would not render the fact of the seduction admissible to mitigate the punishment of A., since A.'s guilt is dependent upon the knowledge and the intent that he had at the time of the killing. However, the court has twice differed with me on this question, and the above views are simply presented by reason of the fact that I did not state them before.

Finding no error in this record, and believing from the previous opinions that the verdict is warranted by the evidence, the judgment is in all things affirmed.

HENDERSON, J., absent.

#### TRAYLER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### CRIMINAL LAW—APPEAL—APPEALABLE JUDGMENT.

Code Cr. Proc. 1895, art. 845, provides that, when a fine only is assessed, the judgment shall be that the state recover of defendant the amount of the fine and the costs, and that defendant, if present, be committed to jail until the fine and costs are paid, or, if he be not present, that a capias forthwith issue, etc.; also that execution may issue against his property. Article 846 provides that, when the punishment is other than a fine, the judgment shall specify it, and order its enforcement, and shall also adjudge the costs against defendant. A judgment was to the effect that defendant appeared and was tried by the court, which was of the opinion that he was guilty, and it was

"ordered, adjudged, and decreed by the court that defendant be fined \$100 and 90 days in the county jail, and costs." *Held*, that it was not a final judgment, from which an appeal can be prosecuted.

Appeal from Jefferson County Court; D. P. Wheat, Judge.

Alex Traylor was convicted of crime, and appeals. On motion to dismiss appeal. Motion granted.

B. E. Moore, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The state and the defendant concur in moving to dismiss the appeal for the want of a final judgment. The judgment is as follows: "On this day this cause came on to be heard, and defendant appeared in person, waived a jury, and was tried by the court; and the court, after hearing the evidence and argument of counsel, is of the opinion that defendant is guilty. Wherefore it is ordered, adjudged, and decreed by the court that defendant be fined \$100 and 90 days in the county jail, and costs."

Article 845 of the Code of Criminal Procedure of 1895 provides: "When the punishment assessed against a defendant is a pecuniary fine only, the judgment shall be that the state of Texas recover of the defendant the amount of such fine and all the costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid, or if the defendant be not present, that a capias forthwith issue commanding the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs." Article 846, Code Cr. Proc. 1895, is as follows: "When the punishment assessed is other than a pecuniary fine the judgment shall specify it and order its enforcement by the proper process. It shall also adjudge the costs against the defendant and order the collection thereof, as in other cases." The judgment, as copied above, shows that it does not comply with the provisions of the statute in several respects. It is only from a final judgment that an appeal can be prosecuted.

We are of opinion that the motion to dismiss should be sustained, and it is accordingly so ordered.

HENDERSON, J., absent.

#### PATTERSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907. Rehearing Denied Dec. 18, 1907.)

#### 1. HOMICIDE—ASSAULT WITH INTENT TO MURDER—THREATS.

Evidence that prosecutor merely suggested to defendant, prior to the assault, that if defendant did not "quit making such big talks and threats" he would get his head knocked off, such

evidence did not require the court to charge on threats.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 622.]

## 2. SAME—SELF-DEFENSE.

Where the court properly charged that if defendant was assaulted by prosecutor, or prosecutor made any demonstration showing his intent to do so, defendant could act on such assault, or apparent assault, and defend himself against either death or anticipated bodily injury, the court did not err in limiting defendant's right of self-defense to the right to defend himself against the attack which prosecutor was making against him at the time defendant attacked him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 622.]

## 3. SAME—SIZE OF WEAPON.

Where the knife with which defendant attacked deceased was a deadly weapon, the court was not required to charge on the size of the weapon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 595.]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Mack Patterson was convicted of assault with intent to murder, and he appeals. Affirmed.

McGrady & McMahon, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for two years.

The first ground of appellant's motion for a new trial complains that the court erred in failing to charge on threats, on the ground that appellant insisted that Jim Platt, the injured party, a few minutes before the assault, threatened defendant to knock his head off, and that Platt, before the assault, was making preparations to carry such threats into execution. The evidence does not suggest this issue. The testimony shows that Platt merely suggested to appellant that, if he did not quit making such big talks and threats, he would get his head knocked off. This statement occurred just a few moments before appellant made the assault upon Platt with the knife.

Appellant's second ground complains that the court erred in failing to charge the jury that, if Platt had previously made an assault upon defendant with a deadly weapon, then defendant would have a right to cut and strike in self-defense, if by reason of such previous assault, coupled with the acts and words of said Platt, the defendant had reasonable grounds for fearing, and did fear, at the hands of said Platt, death or serious bodily injury; and that the court also erred, in paragraph 18 of the charge, in limiting defendant's right of self-defense to the right to defend against an attack which Platt was making against defendant at the very time defendant struck. The court did not err in charging as suggested. The court properly charged on the law of self-defense to the effect that if appellant was assaulted by Platt,

or made any demonstration showing an intention to do so, appellant could act upon said assault, or apparent assault, and defend himself against either death or anticipated serious bodily injury. The court charged upon assault with intent to murder, aggravated assault, simple assault, and presented every phase of appellant's defense. There is no error in the refusal of the court to charge on the size of the weapon in this case, as the evidence shows, although a knife, it was a deadly weapon.

Appellant complains of the argument of the district attorney and of employed counsel; but the explanation of the court attached to each bill of exceptions reserved thereto shows there was no such error as requires a reversal of this case.

The judgment is affirmed.

HENDERSON, J., absent.

## ROSE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

### 1. LARCENY—TAKING FROM ACTUAL POSSESSION—NECESSITY.

A taking, to constitute theft, need not be a taking from the actual possession of the owner; but a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof and to appropriate it to the use of the person taking, constitutes theft.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 20.]

### 2. SAME—INSTRUCTIONS—TAKING.

Where, on a trial for theft, there was testimony that a person left his pocketbook, containing money and a drink check, in his trousers, which he had left at the place where defendant was at work to be repaired, and that on receiving his trousers he missed his pocketbook, and that he went back and made inquiry, and defendant denied any knowledge thereof, and the drink check was traced into defendant's possession, a charge that a fraudulent taking, to constitute theft, need not be the taking from the owner's actual possession, but that a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof, constitutes theft, was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 196.]

### 3. SAME—SUFFICIENCY OF EVIDENCE.

On a trial for theft there was testimony that a person left his pocketbook, containing money and a drink check, in his trousers at the place where defendant worked to be repaired, that on receiving his trousers he missed his pocketbook, that defendant denied any knowledge thereof, and the drink check was traced into his possession. *Held*, that it was not error to deny a motion in arrest, on the ground that at most the drink check alone was traced into defendant's possession and that it was insufficiently described in the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 162.]

Appeal from Anderson County Court; R. E. Erwin, Judge.

Will Rose was convicted of theft, and he appeals. Affirmed.

Weeks & Whitley, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This prosecution and conviction was for a misdemeanor theft; punishment being assessed at \$25 fine and two days in the county jail.

The court gave the following charge: "You are further instructed the fraudulent taking, in order to constitute theft, need not be the taking from the actual possession of the owner; but if taken without his consent, when not in his actual custody, with the intent to deprive him of the value thereof and to appropriate it to the use and benefit of the person taking it would constitute theft." This is an enunciation of a correct rule of law. The testimony shows that the alleged owner left his pocketbook in his pants pocket in that part of the house where appellant was at work, going off forgetting it; or rather, perhaps, to be more correct about the statement, it was left in the pocket of a pair of pants which he had left at the place where appellant was at work to be repaired, or for some work to be done on them. The owner subsequently put on his pants, and went out in town, and missed his pocketbook, which contained about \$5 in money and a drink check on the Buckhorn saloon. He went back to the place and made inquiry for his property. Appellant denied any knowledge of it, and a policeman was informed of the circumstances and a description of the property given; among other things a description of the drink check that was in the pocketbook when missed. The policeman went to the Buckhorn saloon and inquired if any one had recently paid in at that place a drink check. Being informed in the affirmative, the bartender placed before him the drink ticket that appellant had paid him, with several other drink tickets that he had on hand. This drink check was secured and identified by the owner as his property. The pocketbook and money were not recovered. Under these circumstances we think this charge was correct. The court may have even gone further and informed the jury that if the owner had left his pants at the place in question, containing the pocketbook with \$5 in money and the drink check, and if appellant had found and taken from the pants pocket said pocketbook with its contents, without the consent of the owner, the taking would be fraudulent and would authorize a conviction. It is not necessary always that the property shall be in the actual personal possession of the owner. A familiar illustration of this proposition is that cattle and horses running on their accustomed range are in the possession of the owner, as is lost property. We are not discussing a case where the title to the property is in possession of one party and the property held or controlled by another. Appellant moved in arrest of judgment; the contention being that at most the drink check alone was found and traced into his

possession, and this, being insufficiently described in the indictment, would not authorize the conviction of appellant for the theft of the money, or his conviction at all. For the purposes of this case, if it be conceded that the drink check was insufficiently described (see *Patrick v. State* [Tex. Cr. App.] 98 S. W. 840, and *Wade v. State*, 35 Tex. Cr. R. 170, 32 S. W. 772, 60 Am. St. Rep. 31), yet if appellant was found in possession of the check, and this was shown, without its even being alleged in the indictment, it might be sufficient to establish, under the circumstances in this record, that appellant had taken the pocketbook and all of its contents, and there is no question that the money was sufficiently described. If the drink check was traced to appellant's possession immediately after its loss, it would be very clear and cogent evidence of the fact that he took the pocketbook and all of its contents; for the check was in the pocketbook. There can be no question here that, if appellant stole the drink check, he stole the pocketbook and all of its contents.

As the case is presented, we fail to find any such error as would require a reversal of the judgment, and it is therefore affirmed.

HENDERSON, J., absent.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

##### 1. CRIMINAL LAW—TRIAL—MISSTATEMENT BY ATTORNEY—VERDICT—IMPEACHMENT.

The court having charged that the jury must receive the law from the court, that the district attorney misstated the law, was not ground for reversal, though a juror made an affidavit that he was influenced thereby to consent to a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

##### 2. SAME—ARGUMENT.

A remark of the district attorney that a witness was a "henchman" of the defendant was not objectionable, the word "henchman" being used in the sense of "friend."

##### 3. HOMICIDE—ASSAULT TO MURDER—INSTRUCTIONS.

Where the court charged that the jury must review all the facts from defendant's standpoint, and that he had a right to act on reasonable apprehension of danger from his standpoint, whether the danger was real or apparent, a portion of the charge that apprehension of death or serious bodily injury would excuse a person for using all "necessary" force to protect his life and person was not objectionable as too restrictive.

##### 4. CRIMINAL LAW—NEW TRIAL—DILIGENCE.

A new trial will not be granted for newly discovered evidence, unless accused showed diligence in attempting to procure it, and also that if it had been introduced a more favorable verdict than that returned would probably have been reached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2318-2323.]

##### 5. SAME—MATERIALITY.

Where the person injured had not attempted to use any weapon just prior to or during



the difficulty, the accused would not be granted a new trial because of newly discovered evidence that the injured party had a pistol at the time, such evidence being immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2324-2327.]

#### 6. HOMICIDE—INSTRUCTIONS.

Where there were no threats made prior to the difficulty, the court did not err in failing to charge on threats.

Appeal from District Court, Leon County; Gordon Boone, Judge.

Haywood Davis was convicted of assault with intent to murder, and he appeals. Affirmed.

S. W. Dean, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of assault with intent to murder, and his punishment assessed at two years' confinement in the penitentiary.

Appellant's first bill of exceptions complains of the remarks of the district attorney, which were substantially to this effect: That under the law, unless the alleged injured party, Wade Boozier, was advancing on the defendant, and unless the said Boozier was trying to shoot the defendant, the defendant could not claim the right of self-defense." Appellant insists that said remarks were a wrong statement of the law, and deprived appellant of the right to act upon a reasonable appearance of danger, and he supports this by an affidavit of a juror who was influenced thereby. The charge of the court told the jury they must receive the law from the court. Certainly we would not be warranted in reversing a case because a juror took the misstatement of the law by the district attorney as a predicate for his verdict, when, in the face of the fact, he is sworn to try the case according to law and testimony and the charge of the court. The court properly charged the law in reference to the matter, and no juror will be heard to contravene the accuracy of his verdict by any such stupid insistence.

Appellant's second bill of exceptions complains of the following remark of the district attorney: "That one Ed Overall, a witness in the case, was a henchman of the defendant." We presume the district attorney meant by this that he was a warm friend of appellant. This was a conclusion that might be drawn from the testimony of the witness, and we could not reverse the case because he used the word "henchman" instead of "friend."

Appellant's third bill of exceptions complains of that portion of the court's charge wherein he tells the jury that reasonable apprehension of death or serious bodily injury will excuse a person from using all necessary force to protect his life and person. Appellant insists that the word "necessary" is too restrictive. However, by reading the whole paragraph, from which this is an excerpt, it shows that the criticism is without merit,

because the subsequent portions of the same paragraph tell the jury that they must review all the facts from defendant's standpoint; that he had a right to act on reasonable apprehension of danger from said standpoint, whether the danger was real or apparent.

Appellant insists that the court should have granted a new trial on the ground of newly discovered evidence. It appears that there was some controversy as to whether the injured party had a pistol on the occasion in question. The newly discovered evidence was sought in order to prove by two witnesses that they saw the injured party at the time of the difficulty with a pistol. In the first place, there was no semblance of diligence used to secure this testimony, in the second place, if it had been secured, a verdict more favorable to appellant would not probably have been reached, and, in the third place, it was not material testimony, as far as this appellant was concerned, since there is no evidence in this record showing that the injured party attempted to use any weapon just prior to or during the progress of the difficulty.

Appellant complains that the court erred in failing to charge on threats. There were no threats made as evidenced by this record prior to the difficulty, and hence there is no error in the court failing to so charge.

Finding no error in the record, the judgment is affirmed.

HENDERSON, J., absent.

#### HILL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. HOMICIDE — MANSLAUGHTER — INSULT TO FEMALE RELATIVE.

Where accused had been informed of slanderous statements as to the chastity of his daughter, alleged to have been made by deceased, and, believing that such statements had been made, he sought out and killed deceased at the first meeting, the offense was manslaughter, and not murder, though the information received by accused was remote hearsay; the grade of the offense being determined by the fact that accused believed his daughter had been slandered, and acted pursuant thereto, independent of whether it was true or false in fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 74.]

#### 2. SAME—INSTRUCTIONS.

Where defendant claimed that he killed deceased because of alleged slanderous statements made by deceased concerning defendant's daughter, which defendant claimed had been communicated to him by the G. boys and others, and the G. boys denied making the statements to defendant, the court erred in charging that the jury should consider the statements defendant claimed to have made to him by the other parties only to determine the credibility of the G. boys, and this, though defendant testified that he acted alone on their statements.

#### 3. SAME—EVIDENCE.

Where defendant claimed that he killed deceased because of slanderous statements made

by him concerning the chastity of defendant's daughter, which had been communicated to defendant by the G. boys, and the state denied that defendant had received such information, evidence of a conversation between decedent and D., in which decedent told D. that he had many times had intercourse with defendant's daughter, was admissible, as warranting an inference that, if decedent so talked with D., he probably had also so informed the G. boys and the others whom defendant claimed had communicated the statements to him.

#### 4. WITNESSES—CREDIBILITY—ISSUE.

The fact that witnesses testified in a case, and that their testimony was controverted by other testimony, did not put the credibility and general reputation of the witnesses in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1087-1093.]

#### 5. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—CERTIFICATE OF COURT.

Where a bill of exceptions to the exclusion of evidence to support the credibility of certain witnesses on the ground that they were strangers in the county did not state that the witnesses were strangers in such county, but only that defendant objected to the exclusion of the testimony because the witnesses were strangers, such bill was not, in effect, a certificate by the court that the witnesses were strangers.

#### 6. HOMICIDE—INSTRUCTIONS.

Where defendant had been acquitted of murder in the first degree on a former trial, an instruction that he was charged by indictment for murder, and was "on trial" for murder in the second degree, and that the court would also submit the issue of manslaughter, was not objectionable for failure to state that defendant was also on trial for manslaughter.

Appeal from District Court, Hamilton County; N. R. Lindsey, Judge.

W. W. Hill was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Goodson & Goodson, J. C. George, H. E. Chesley, and A. R. Eldson, for appellant. F. J. McCord, Asst. Atty. Gen., J. L. Lewis, Sadler & Arnold, J. H. McMillan, Dist. Atty., and R. Q. Murphree, for the State.

**BROOKS, J.** Appellant was convicted of murder in the second degree, and his punishment assessed at 30 years' confinement in the penitentiary.

Appellant in his motion for a new trial objected to the following charge of the court: "Now, if you believe from the evidence that the defendant, prior to the time he killed Charley House (if he did so), had been informed by Clarence Griffin or by Chester Griffin that the said Charley House had used insulting language towards the daughter of the defendant, in substance that the said Charley House had stated that he had had sexual intercourse with the said daughter of the defendant, and if you further believe from the evidence that the defendant believed that the deceased had stated that he had had sexual intercourse with defendant's daughter (if you find either Clarence or Chester Griffin had so informed him), and if you find from all the facts and circumstances in evidence that said information aroused in the mind of defendant sudden passion such as

anger, rage, sudden resentment, or terror, rendering his mind incapable of cool reflection, and that the defendant, on first meeting with the deceased, after he, the defendant had been informed (if he had been so informed) that the deceased had made such statements about his, defendant's, daughter, and, acting under the immediate influence of such sudden passion (if any) in Hamilton county, Tex., and on or about the 18th day of May, 1906, with intent to kill, shot with a gun and thereby unlawfully killed the said Charley House as alleged in the indictment, you will find the defendant guilty of manslaughter, and so say in your verdict, and assess his punishment at confinement in the penitentiary for any period of time not less than two nor more than five years, and in this connection you are instructed that it makes no difference whether the said Charley House had in fact ever used the insulting language about the daughter of the defendant, in substance that he had had sexual intercourse with the said daughter of the defendant, provided you believe from the evidence that Clarence or Chester Griffin informed the defendant, prior to the killing of the said Charley House, that he, the said House, had used such insulting language about defendant's daughter, and that the defendant believed from the said statements of the Griffins, or either of them, to him, that the said Charley House had, in fact, used such insulting language about the defendant's said daughter and that the information, in fact, aroused in the mind of the defendant such sudden passion as to render him incapable of cool reflection, and that such state of mind continued up to the time of the killing. You are instructed that the testimony of Joe Collier, 'that Chester Griffin told him, in Mr. Griffin's field, that House said to him that when he [House] and the girl came from Dublin around by way of Hico that they acted as man and wife, and that House claimed he had been keeping the girl,' and the testimony of Charlie Collier 'that Chester Griffin, at the ball game at Bear creek, told him that House had told him (Chester Griffin) that he had taken the girl from Dublin around by way of Hico and had stayed all night with her, and that he had been keeping her for some time,' and the testimony of old man Britton 'that Chester Griffin stated, at the ball game on Bear creek, that House told him that he had taken Hill's girl around from Dublin by way of Hico, and that he had stayed all night with her, and that he had been keeping her a year or two,' was not admitted before you to prove or as tending to prove that House had, in fact, made such statements, and you will not consider said testimony at all for that purpose. Said testimony was admitted before you, and you are permitted, to consider the same in passing upon the credibility of said witness Chester Griffin as a witness in this case, and in passing upon the weight to be given to his

testimony and in determining the issue whether the said witness Chester Griffin made the statements to the defendant in regard to House that the defendant claimed he did make." The evidence in substance shows, from defendant's standpoint, that Charley House had been talking about his daughter in a manner that solely reflected upon her chastity. Being armed with information from various witnesses that Clarence and Chester Griffin had told said witnesses that said Griffin had informed them that deceased had been talking about his daughter, he armed himself with a gun, went to the field where the Griffin boys were plowing, and being informed, in substance, that the deceased had told them that appellant's daughter was unchaste, he proceeded to the field where deceased was plowing, and there shot deceased to death. The state's case makes out a cold-blooded murder. The defense's testimony makes out a case of manslaughter. The learned trial court seems to have proceeded upon the theory that appellant could not act upon hearsay testimony, and thereby reduce the homicide to manslaughter. In other words, the trial court seems to have acted on the theory that, before appellant could reduce the homicide to manslaughter on the ground that deceased had made insulting remarks about his daughter, some witness would have to inform appellant that he, the witness, had been told by the deceased that appellant's daughter was unchaste, or that the deceased would have to make a statement to the witness, and the witness communicate said statement to appellant, substantially showing that deceased had made remarks that reflected upon the chastity of his daughter. This is not the law. If the deceased told the Griffin boys that appellant's daughter was unchaste, this, in a technical sense, would be hearsay testimony, even if said Griffin boys should testify to same themselves. The record before us shows that the Griffin boys denied in substance making the statement to appellant that he swore they did make just prior to the difficulty. Now, this being the shape of the testimony on the matter, it was clearly prejudicial and harmful error for the court to tell the jury that the testimony of other witnesses, who had been told by the Collier boys, in substance, that appellant's daughter was unchaste, was not admitted to prove or as tending to prove that deceased had in fact made such statement, but that "said testimony was admitted before you for you to consider the same in passing upon the credibility of said witness Chester Griffin," and in passing upon the weight to be given to his testimony, and in determining the issue whether the said witness Chester Griffin made the statements to the defendant in regard to deceased that defendant claimed he did make. In other words, if the Collier boys or any other witness, should make a statement to appellant to the effect that appellant's daughter was

unchaste, and appellant, relying upon said statement, seeks out and slays deceased upon first meeting, these facts would force the court to charge upon manslaughter, and would authorize the jury to so find the appellant guilty if they believed said facts, regardless of whether the witnesses who informed appellant of deceased's statement heard the deceased in person make it, or having talked with some other witness who had heard deceased make the statement. A killing for using insulting language about a female relative is not predicated upon whether the information that causes said killing is remote hearsay or not; but is predicated upon the proposition that appellant believed said statement. It is the intent of appellant that the court attempts to get at. His animus and his motive alone controls the decision of the question. The fact that the testimony may be remote hearsay might be a circumstance to be considered by the jury in passing upon whether appellant believed the statement had been made by the deceased; in other words, would merely go to the probative force of the statement and to its credibility, but it is not a matter that could be limited by the court, but is left to the decision of the jury. If appellant receives a wild and floating rumor from the mouth of the fifth or sixth witness, this would have a strong tendency to make the jury believe that appellant did not act on said rumor, but it would not preclude the fact that he did so act, and, if the jury believed that he did so act, then it would be immaterial how remote the hearsay testimony might be. This charge was clearly calculated to injure the rights of appellant. The Griffin boys had denied in substance making any statement to appellant. Now, then, to have the court tell the jury that they could not consider the statement made by other parties to appellant, except for the purposes above stated, was an unwarranted limitation of said testimony; nor would the fact that appellant himself swore that he acted alone upon the statement of the Griffin boys militate against the above proposition. The defendant may have believed implicitly the statement of the other witnesses, and the manner of the Griffin boys or their statement may have thoroughly convinced appellant that deceased had made the statement that he says the Griffin boys made to him, and in that sense the statement of the Griffin boys may have been to his mind the sole predicate for the killing; but certainly the fact that various other witnesses had told appellant that the Griffin boys had stated that the deceased had slandered his daughter is very convincing corroborative proof of the fact that the Griffin boys had made said statement, but the fact that it does corroborate the fact that the Griffin boys made the statement would not warrant the court in limiting the statement of other witnesses to the question of credibility of the Griffin boys. It is original testi-

mony, in other words. Appellant's testimony must be treated like that of any other witness. The jury may have believed that appellant was mistaken when he said he relied alone upon the testimony and statement of the Griffin boys; and it was erroneous and reversible error for the court to limit said testimony for said purposes.

Bill of exceptions No. 2 complains of the following: Appellant offered to prove by the witness Dansby that he had a conversation with the deceased at a literary society the latter part of April, as follows: "Deceased and I had our horses tied to the wire fence. The horses began to cut up, and we went out there. Deceased told me to wait until he got through smoking. In the meantime Maud Hill, appellant's daughter, passed, and deceased said, 'That is a pretty damned fast girl.' I replied, 'Is that so?' and deceased reached in his vestpocket, and pulled out a 'cundrum,' and said, 'I have worn out a hat full of them on her.' I replied, 'You are a liar, ain't you?' And he said 'No.' I replied, 'You are a fool for telling it.' Once before the occasion of this conversation, we were going out of town, and he asked me if I was acquainted with the Hill family, and he said he had been going with the girl a long time, and said that he had been having a hell of a good time with the girl for quite awhile. I never told Mr. Hill about that before the killing. I never told any one about it. I never breathed it to any one." The state objected to said testimony, on the ground that said statement had not been communicated to the defendant prior to the homicide, and that it did not appear that the defendant knew of this statement prior to the homicide. The court sustained the objection. In a criminal case where appellant relies upon any character of defense, and said defense is disputed by the testimony of the state, that which renders probably true appellant's defense is always admissible testimony. Evidence that is corroborative or renders probably true appellant's testimony is always admissible. Of course, if appellant killed deceased for insulting language concerning his daughter, his defense must depend upon the information upon which he acted, but this record shows the state solely controverted the fact that he received such information. Now, then, the testimony of this witness Dansby, if true, shows that the deceased talked to the witness Dansby, and renders highly probable that he talked to the Griffin boys. It would appear the court should limit this testimony, however, to the only purpose for which it could be introduced; that is, to show the credibility of the statement of appellant, and to indicate the probable truth of appellant's statement wherein he says the Griffin boys informed him, and that other people informed him, that deceased had been talking about his daughter, and that he could not predicate a defense of manslaughter upon uncommunicated insults, but said uncommunicated insults could

only be introduced to show the probable truth of insults that had been communicated. It follows, therefore, that the court erred in rejecting this testimony.

Bill of exceptions No. 3 shows that the defendant's witnesses Hicks and Story testified that they were acquainted with the witnesses Britton, Collier, and Cootes, and were acquainted with the general reputation of said witnesses in the community in which they live for truth and veracity, and, upon counsel for the state objecting to said witnesses being permitted to state what the general reputation of these witnesses in the community in which they live was, because the state had not put in issue the reputation of said witnesses, the court sustained the objection, and refused to permit said witnesses to testify that the general reputation of said witnesses in the community in which they lived for truth and veracity was good. Defendant then and there excepted because it was shown that the witnesses were strangers in Hamilton county; that the witness Britton had never lived in Hamilton county, but had only been in the county a short time; that his home was in Dallas county, where he had lived for a long time and was well known; and as to the witness Collier, who had only lived in the county a short time, less than a year, and was not acquainted in Hamilton county, knew only a few persons, and, as to the witness Cootes, he had lived in Hamilton county less than a year and was not known, but well acquainted in Dallas county where he lives now and has lived for a number of years. The mere fact that witnesses testify in a case and their testimony is controverted by other testimony does not bring in issue the credibility and general reputation of said witnesses. Furthermore, the bill does not state that the witnesses were strangers in Hamilton county, but that appellant objects to the court refusing the testimony on the ground that they were strangers in Hamilton county. This is not a certificate of the court that they were strangers.

Appellant objected to the following paragraph of the court's charge, to wit: "Defendant stands charged by indictment for murder. He is now on trial for murder in the second degree, and I will also submit to you the issue of manslaughter." To this charge in the indictment the defendant has pleaded not guilty. Appellant insists in view of the fact that he had been acquitted of murder in the first degree on a former trial that defendant was on trial at this time for manslaughter, as well as murder in the second degree. We do not think there is anything amiss in the charge of the court.

Appellant also complains in this record by proper bill of exception of the misconduct of the jury; but, in view of the fact that the case will be reversed upon the matters above pointed out, we do not deem it necessary to review same.

But, for the errors of the court above indi-

cated, the judgment is reversed and the cause is remanded.

HENDERSON, J., absent.

### BOY v. STATE

(Court of Criminal Appeals of Texas. Dec. 4, 1907. Rehearing Denied Dec. 18, 1907.)

#### 1. CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS.

In the absence of any bills of exceptions, there is nothing for the court on appeal to review, save the sufficiency of the indictment and of the evidence.

#### 2. SAME.

Accused cannot for the first time on appeal complain of the court's failure to charge on the law of circumstantial evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2846.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Frank Boy was convicted of crime, and he appeals. Affirmed.

F. J. McCORD, Asst. Atty. Gen., for the State.

BROOKS, J. In the absence of any bills of exceptions, there is nothing requiring at our hands any review, save and except appellant's insistence that the indictment and the evidence are insufficient. The indictment is in proper form. The evidence amply supports the verdict of the jury. There is nothing in the motion complained of that authorizes or requires a review at our hands.

Appellant complains for the first time in this court of the failure of the lower court to charge on the law of circumstantial evidence. This cannot be done under the statute of this state. The motion must contain all of the errors complained of in the charge, or a bill of exceptions must be reserved there to, before this court can review same.

Finding no error in this record, the judgment is affirmed.

HENDERSON, J., absent.

### HALL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. FISH—WRONGFUL SALE—STATUTORY PROVISIONS—REPEAL.

Acts of 30th Leg. p. 154, c. 75, prohibits the taking of fish by means of poison, dynamite, or any other explosive in any fresh water lake or stream; section 2, the taking of fish in any other manner than by hook and line, and declares that it shall be unlawful to sell game fish taken from any fresh water lake or stream in counties named, among which is H. county. Subsequent to the passage of the act found on page 154, the same Legislature passed another act, found on page 161, which is practically a reproduction of the first act, and was approved April 6th, the first act having been approved April 5th. The first act became a law at once under the emergency clause, and the second did not

take effect until 90 days after adjournment, which put it in effect July 12th. The second act does not prohibit the selling of fish caught in certain portions of H. county. Held, that Acts 30th Leg. p. 161, c. 78, repealed the prohibition of Acts 30th Leg. p. 154, to sell fish caught in the portions of H. county specified in Acts 30th Leg. p. 161, c. 78.

#### 2. CRIMINAL LAW—PUNISHMENT—EFFECT OF REPEAL OF ACT DEFINING OFFENSE PENDING APPEAL.

Pen. Code 1895, art. 16, providing that the repeal of a law, where the repealing statute substitutes no other penalty, exempts from punishment all persons who may have offended against the repealed law, unless it be otherwise declared in the repealing statute, exempts a defendant from punishment convicted under Acts 30th Leg. p. 154, c. 75, declaring that it shall be unlawful to sell game fish taken from any lake or stream, in counties named, where, pending his appeal the provision of the act, relating to the place where the fish were taken, was repealed by the taking effect of Acts 30th Leg. p. 161, c. 78.

Appeal from Harrison County Court, H. T. Lyttleton, Judge.

Henry Hall was convicted of selling game fish which had been taken from fresh water lakes and streams in Harrison county, and he appeals. Reversed, and prosecution dismissed.

Harrison, Davidson & Burkhart and S. P. Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the state.

DAVIDSON, P. J. Appellant was charged with selling, and offering for sale, two certain game fish, on or about the 17th of April, 1907, which had been taken from fresh water lakes and streams in Harrison county. A motion was made to quash the complaint and information, because it charged no offense against the law. The judgment was rendered at the May term of the county court, 1907.

This prosecution was brought under the acts of the 30th Legislature, under what is known as House Bill 144, and is found on page 154, c. 75, of said acts, which prohibits the taking, catching, killing, etc., of fish by means of poison, dynamite, or any other explosive, in any of the fresh water lakes and streams in this state. Section 2 prohibits parties from taking, catching, and ensnaring or entrapping fish, except minnows for bait, by means of nets, or in any other manner than hook and line, or trot line. This section exempts quite a number of counties from the operation of the law. In regard to Harrison county, this proviso is found in the bill: That Gregg, Harrison, and Rusk counties shall be exempt from the provisions of this section as to the waters of Sabine river and no further. The evidence is that appellant caught the fish by means of the ordinary hook and line, but the charge against him is that he sold the fish after catching them. Another proviso of section 2 of the act in question is that it shall be unlawful for any person to sell or offer for sale, ship or offer to ship, any game fish, including white perch, trout, or bass, taken from any of the fresh

water lakes and streams in Marion, Harrison, and Cass counties, prescribing a punishment of not less than \$25, nor more than \$100.

We deem it hardly necessary, in the attitude of the case, to decide the question of the authority of the Legislature to authorize a party to catch fish and reduce them to his possession, and acquire ownership and property in them, and then punish the party for the sale of such fish. In the opinion of the writer, the Legislature would hardly have such authority. After it became his property, and it was acquired as authorized by the Legislature, it would occur to the writer that the party would have a right to dispose of his property. That the Legislature is clothed with authority to protect game and fish in order to prevent their destruction is a sound proposition. That they may limit the manner of taking the fish to the ordinary hook and line, or by means of the trot line, is in line with the same thought, but how it could be a protection to fish or game to prohibit their sale after they are taken from the water and reduced to possession and ownership, the writer does not understand. There may be a proper exercise of police power in limiting the manner of catching, and the Legislature might even go farther, and limit the amount to be caught, and this would be a protection equally with the manner and means as to how they should be caught; but a different question is involved, as the writer understands it, in regard to the prohibiting of a sale, where the party has legitimately taken the fish. These, however, are but the views of the writer. There is a question that necessarily disposes of this case adversely to the state. Subsequent to the passage of the act under which this prosecution was instituted, the same Legislature, on page 161, c. 78, passed another law, which is House Bill No. 500, which exempts Gregg, Harrison, and Rusk counties from certain provisions of that bill in certain respects and as to certain territory. The latter bill or act is practically a reproduction of the former in the main and was approved on April 6th, the other bill having been approved on April 5th. The first bill became a law at once under the emergency clause, and by a proper two-thirds vote. The latter bill did not take effect until 90 days after adjournment of the Legislature, which put it in effect on the 12th of July. The prosecution was begun and ended in the trial court, under the provisions of the first bill. By virtue of the terms of the latter bill, a party is not prohibited from selling fish caught in certain portions of Harrison county, which are set out. And this bill includes all the territory lying north of the Texas & Pacific Railway, from the state line to Marshall, and all that portion lying east of the Texas & Pacific Railway from Marshall to Marion county line. The fish were taken from Caddo Lake, which is a very large lake extending from Texas for some distance into Louisiana, the state line crossing the lake.

The facts show that the fish were taken by means of the hook and line from the water of Caddo Lake, and sold at Marshall, Harrison county. When the latter act went into effect, it was practically a substitute for the former law, passed by the same Legislature, relating to the same subject-matter, and in regard to Harrison county, the terms of the latter law, in regard to selling fish, were omitted. The latter act, therefore, repealed the terms of the former law, which prohibited such sale. The latter act does not perpetuate offenses committed against the prior act. Therefore, all pending prosecutions should pass from the dockets, and under our law, in this condition of matters, the parties would be exempt from prosecution. Article 16 of the Penal Code of 1895 reads thus: "The repeal of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute." As before stated, the first act of the last Legislature, in regard to selling fish, was repealed by the latter act, and all prosecutions pending at the time the latter act went into effect, the parties being prosecuted, will be exempt; and this statute applies to this case, pending its appeal to this court. This statute has been so often construed that it would seem hardly necessary to refer to the authorities, but the proposition is sustained by the following: "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered; and, if the law has been repealed, no further proceedings will be taken under the repealed law to enforce the punishment." *Wall v. State*, 18 Tex. 583, 70 Am. Dec. 302; *Sheppard v. State*, 1 Tex. App. 522; *Hubbard v. State*, 2 Tex. App. 506; *Montgomery v. State*, 2 Tex. App. 618; *Tuton v. State*, 4 Tex. App. 472; *Halfin v. State*, 5 Tex. App. 212; *Chaplin v. State*, 7 Tex. App. 87; *Monroe v. State*, 8 Tex. App. 343; *Boone v. State*, 12 Tex. App. 184; *Fitze v. State*, 13 Tex. App. 372; *Pinkard v. State*, 13 Tex. App. 373; *Freese v. State*, 14 Tex. App. 31; *Prather v. State*, 14 Tex. App. 453; *Mulkey v. State*, 16 Tex. App. 53; *Whisenhunt v. State*, 18 Tex. App. 491; *Woodlief v. State*, 21 Tex. App. 412, 2 S. W. 312; *Wells v. State*, 24 Tex. App. 230, 5 S. W. 830; *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820; *Robinson v. State*, 26 Tex. App. 82, 9 S. W. 61; *Lawhon v. State*, 26 Tex. App. 101, 9 S. W. 355; *Ex parte Cox*, 28 Tex. App. 537, 13 S. W. 862; *Kenyon v. State*, 31 Tex. Cr. R. 13, 23 S. W. 191. This has even been held in regard to the repeal of a civil statute, where that statute repeals the penalties imposed with regard to its enforcement. There can be no penalty or criminality in violating a repealed statute.

The substitution of the latter act for the former, omitting the penalty with regard to

selling fish, repealed the former law so far as this case is concerned, and, under the authorities cited he will be exempt from punishment, even on appeal. There are many interesting questions presented for revision which we deem, under the views taken, unnecessary to discuss.

For the reason indicated, the judgment is reversed, and the prosecution is dismissed.

HENDERSON, J., absent.

### JAGGERS v. STRINGER.

(Court of Civil Appeals of Texas. Nov. 21, 1907. On Rehearing, Dec. 12, 1907.)

#### 1. TRESPASS TO TRY TITLE—TITLE TO SUPPORT ACTION.

In trespass to try title, plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of that of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, §§ 16, 53.]

#### 2. BOUNDARIES—DESCRIPTION—ELEMENTS—RELATIVE IMPORTANCE.

The general rule that monuments and natural objects will prevail over calls for course and distance, in cases of conflict, does not apply where the surrounding circumstances show that the superior marks were placed by inadvertence, or that there was a verbal mistake in the description of the monument or natural object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 12.]

#### 3. SAME.

The courts, in grading the dignity of the different classes of calls found in deeds descriptive of land, intended only to establish a rule for arriving at the location of the boundaries actually established, and the rule that monuments and natural objects are superior to course and distance does not impeach the sufficiency of course and distance to locate a boundary, but course and distance must yield to the superior grade in cases of conflict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 3, 12.]

#### 4. SAME—EVIDENCE—SUFFICIENCY.

Where plaintiff in trespass to try title seeks to overcome the proof that the calls for course and distance and the description of his tract, as shown by his deed, are definite, and sufficient to locate a corner with precision, and the location so made is in accord both with the configuration of the tract and with the quantum of land specified, and establish the corner at another place, he can do so only by showing with reasonable certainty, not only the existence of the monument or natural object mentioned in his field notes, but that the object is in conflict with the calls for course and distance contained in it.

#### 5. APPEAL—RENDITION OF JUDGMENT.

Where there was nothing to indicate that plaintiff would be able to strengthen his case on another trial, and no testimony offered by him was excluded, and there was no complaint by him as to any of the rulings of the trial court, and the evidence was insufficient to sustain a judgment in his favor, the appellate court will render judgment for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4579.]

On Motion for Rehearing.

#### 6. TRESPASS TO TRY TITLE—PROOF OF TITLE—BURDEN OF PROOF.

Where plaintiff sought to recover a specified tract of land described by metes and bounds,

and defendant pleaded a general denial, and not guilty, plaintiff had the burden of showing title to the land, otherwise he could not recover, and, until he showed at least a prima facie title, the strength of defendant's claim of title need not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, § 53.]

#### 7. SAME—EVIDENCE—SUFFICIENCY.

In trespass to try title, evidence examined, and held insufficient to show title in plaintiff essential to a recovery.

Appeal from District Court, Franklin County; P. A. Turner, Judge.

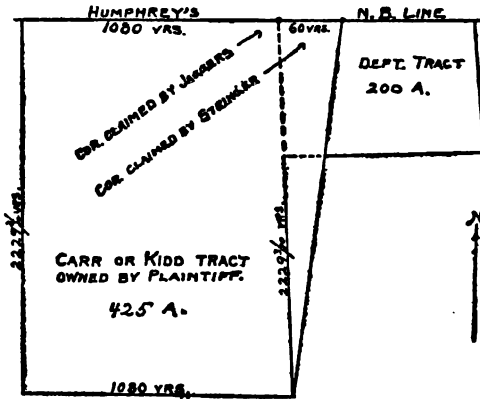
Action by C. W. Stringer against J. M. Jaggars. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

R. E. Davenport, for appellant. W. L. Title and R. T. Wilkinson, for appellee.

HODGES, J. This suit was instituted in the district court of Franklin county, by the appellee, Stringer, to recover of the appellant, Jaggars, the following described tract of of land: "Being a part of the John Humphries survey. Beginning at the original N. E. corner of a 425-acre tract known as the 'H. B. Carr place,' the same being at a point on the N. B. line of the said Humphries survey 60 vrs. east of the N. E. corner of a tract recently surveyed for Dr. W. C. Crutcher. Thence south — vrs. with an old marked line, the same being the E. B. line of the said Carr tract, pass two marked hickories about one foot in diameter, in all south 635 vrs. a stake on said old line for corner. \* \* \* Thence west 60 vrs. to W. C. Crutcher's S. E. corner from which a red oak brs. W. mkd. X. \* \* \* Thence north with Crutcher's E. B. line 635 vrs. to his N. E. corner on the N. B. line of said Humphries survey from which a red oak brs. S. 25 E. mkd. X. \* \* \* Thence east with said Humphries N. B. line to the place of beginning." A trial before a jury resulted in a verdict in favor of the appellee, from which appellant appeals.

The controversy arose over a disputed boundary line between two tracts of land lying adjacent to each other and owned by the parties to this suit. Both tracts are a part of a large survey of about 4,000 acres in the name of John Humphries, located many years ago, and which had subsequently been subdivided into smaller tracts and sold to various purchasers. The land owned by the appellee, and of which he contends the strip recovered in this suit is a part, consists of a rectangular block of about 425 acres, and in the field notes is described as follows: "Beginning at the Bickerstaff N. W. corner. Thence north 2229-3/10 vrs. John Humphries' N. B. line a stake from which a post oak brs. S. 85 E. 14 vrs., marked H. B. C.; a post oak brs. S. 81 W. 10 vrs. marked X. Thence east 1080 vrs. a stake from which a post oak brs. S. 60 W. 9 vrs., marked X. Thence south 2229-3/10 vrs. said Bickerstaff's N. E. corner. Thence west 1080 vrs. to the beginning. This tract is known as the Carr or Kidd land." The ap-

pellant's tract, of which he claims that recovered from him in this suit as a part, lies immediately east of the above-described land, and is a smaller body, consisting of about 200 acres, and runs south only about one-third of the length of the appellee's tract. His west boundary line coincides with the east boundary line of the appellee's tract, and his northwest corner is the northeast corner of appellee's land. The diagram given below shows more fully the location of the different tracts of land, and the lines and corners in dispute:



The land owned by the appellee is an older subdivision of the Humphries survey than that of the appellant, and appellant's deed calls for the east boundary line of the Carr land as its west boundary. A few years ago, while Kidd owned the Carr land, he sold 120 acres off his east side to Crutcher, which is designated on the diagram as the "Crutcher land;" but appellee now owns all of the Carr, or Kidd, tract. The strip of land contained between the dotted lines in the diagram is the land in dispute, and the two places where the respective parties contend the true corner should be are also indicated. Appellee's southwest, southeast, and northwest corners are well established and marked. At the last-named corner stands a post oak tree marked "H. B. C." on the north boundary line of the Humphries survey. Appellee contends that, notwithstanding his deed in giving the distance from his northwest to his northeast corner calls for only 1,080 varas, he is entitled to go 60 varas farther east in order to reach the original and true corner established and marked by the surveyor in the original subdivision of the land; that on account of the call in his deed being for and including a natural object, to wit, "a stake from which a post oak south 60 west 9 varas marked 'X.'" he has the right to go to that point, even though it exceeds the distance of his north line as shown in his deed. In other words, he claims that the natural object called for as his northeast corner overcomes the calls for distance. On the other hand, the appellant contends that there is no natural object at the point where the ap-

pellee claims his northeast corner is; but that the true corner should be and is exactly 1,080 varas east of the appellee's northwest corner, as shown by the calls in his deed. It will therefore be observed that the only dispute between the parties to this suit is as to the exact location of this corner on the north boundary line of the Humphries survey.

In view of the disposition that we make of this case, it is unnecessary to notice any of appellant's assignments of error, except that wherein he challenges the sufficiency of the evidence to sustain the verdict of the jury. This is an action of trespass to try title, and the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant. Appellee's right to recover in this instance depends wholly upon his ability to produce satisfactory evidence of the existence of the monument, or natural object, called for in his deed, conflicting with the calls for course and distance, designating the northeast corner of his tract of land at the point where he claims it to be. While it is a general rule that monuments and natural objects will prevail over calls for course and distance in cases of conflict, still that is not always the case. There may be instances where the surrounding and connecting circumstances adduced in proof will show that the superior marks were placed by inadvertence, or mistake, or that there was a verbal mistake in the description of the natural object, or monument, mentioned in the deed. *Sanborn v. Gunter*, 84 Tex. 273, 17 S. W. 121, 20 S. W. 72. In grading the dignity of the different classes of calls usually found in deeds descriptive of tracts of land, courts have intended only to establish a rule for arriving at the location of the boundaries actually established at the time the original survey was made, to be resorted to only in cases where there is in the field notes a real conflict in such calls. While it is said that as a rule monuments and natural objects will be considered superior to course and distance, it is not thereby intended to impeach the sufficiency of course and distance to locate a boundary; but only that it must yield to the superior grade in cases of conflict. If the calls for course and distance are to govern in this suit in locating the appellee's true northeast corner, then it will unquestionably be located where the appellant claims it to be as shown in the diagram, and the judgment cannot be sustained; but, if the appellee has adduced evidence sufficient to show that the post oak tree standing south, 60 degrees west, 9 varas distant from the corner, marked with an "X" called for in his field notes, is at the point where he claims it to be, then he is entitled to judgment in his favor upon that issue. The only direct evidence tending to establish this fact shown in the record is the testimony of Messrs. Pyron and Kidd, both witnesses for the appellee. It seems that Kidd had once owned the en-



tire tract of 425 acres now owned by the appellee, Stringer, having purchased it from Morris & Carr about the year 1884. Pyron was Kidd's son-in-law, and had some interest in the tract, beginning about 11 years before this case was tried in the court below. Pyron testified substantially that near where they (Pyron, Kidd, and appellee) claimed the disputed corner to be located he noticed, about 11 years before, a fallen post oak tree and the stump upon which it stood; that at the time he noticed the tree the body was old and rotten, and most of the bark had fallen off; that he was unable to tell whether the tree had fallen from some cause, or had been cut down; that he did not see any surveyors' marks on the tree; that where the tree had stood was in a post oak glade. Mr. Kidd testified that he first observed this post oak tree about the time he bought the land, in 1884; that at that time the bark had slipped off, and the stump was there. He also was unable to, or did not, observe any surveyors' marks on this tree. He says it stood about 15 or 20 feet from where they claimed the corner should be, meaning the point where the appellee locates it; but he does not give the direction. Both of these witnesses testify to an old marked line running from this old tree toward the appellee's southeast corner, and say that it could be easily traced entirely through. No witness was able to say when, or by whom, this old line was marked; nor was any further testimony adduced to show that the post oak tree had any surveyor's marks on it. The record indicates that the first survey of this Carr, or Kidd, tract was made about the year 1851, more than 30 years before any witness who testifies had ever seen any of the trees or corners. At the point where Jaggars claims the corner to be, at a point 10 varas distant, stands a red oak marked with an "X." The testimony is conflicting as to whether this mark is a very old one or not. Jaggars testified that several years ago he discovered traces of an old marked line running south from the corner claimed by him in the direction of the southeast corner of the appellee's land. Other witnesses deny having seen any such marked line.

If this were merely a contest to establish a corner, and there were no other evidence in the deed by which to determine its true location, then it may be conceded that the testimony offered by the appellee preponderates, and upon a submission to a jury would justify a finding in his favor upon the issue; but no such case is here presented. It is not one in which the jury is authorized to decide upon the mere preponderance of the testimony offered by the opposing parties upon the trial; but one where the plaintiff, relying upon the existence of a conflict in the description contained in the field notes of his land, is seeking to show the actual location of a superior evidence of the establishment of his corner at a point farther east than his calls

for distance would place it. The calls for course and distance in the description of the appellee's tract of land, as shown by his deed, are definite and explicit, sufficiently so to locate the corner with precision. The location made by resort to this means is in accord both with the configuration of the tract and with the quantum of land specified as having been conveyed. If the appellee would overcome this proof and establish the corner farther east, he must do so by showing with reasonable certainty, not only the existence of the monument, or natural object, mentioned in his field notes, but that this object is in conflict with the calls for course and distance also contained in it. In our opinion he has utterly failed to do either. To sustain the verdict in this case, we must assume from the mere circumstance that a fallen post oak lay near where the appellee claims the corner to be that this tree had the surveyor's marks on it, and was the identical tree called for in the deed. Such an assumption would be a dangerous indulgence of the power of conjecture. The fact that there was an old marked line running from this supposed corner, in the direction of the appellee's southeast corner, adds but little, if any, probative force to the existence of the fallen tree. It is not a line, but a corner, that is sought for in this controversy. Given the corner, then, with the undisputed calls for course as shown in this deed, the line follows as a mathematical result. The apparent age of the line is the only feature about it which should elicit any consideration. To find that it was the one made and marked in the original survey of this tract of land would again require us to conjecture a fact too remote from any positive testimony. We have been unable to find anything in the record that would justify us in concluding that the plain and unambiguous description of the appellee's land, contained in his deed, should be ignored. Certainly, before this should be done in any instance, the evidence should be clear and convincing.

There are other errors pointed out which would justify the reversal of this judgment; but we have refrained from discussing them, for the reasons above mentioned.

There is nothing in the record to indicate that the appellee would probably be able to strengthen his case upon another trial. There was no testimony offered by him and excluded by the court, and there is an absence of any complaint from him as to any of the rulings of the trial court. According to his own showing, it is clear that he is not entitled to recover in this suit.

The judgment will therefore be reversed and here rendered for the appellant, defendant in the court below.

#### Motion for Rehearing.

Appellee contends in his motion for a rehearing that we erred in holding the testimony was insufficient to support the verdict

of the jury and in rendering judgment here against him. He asserts that this is a boundary suit, and that the case was tried in the court below upon "the hypothesis that the true location" of the division line between the two tracts of land was the only question for the jury. This may be true, but the pleadings in the record clearly show that the appellee, plaintiff below, sued to recover a specific tract of land, described by metes and bounds. His right to recover this tract was the issue. The appellant, defendant in the court below, did not meet this issue with a disclaimer, which would have made it strictly and technically a boundary suit, but pleaded a general denial and not guilty. This pleading had the effect of imposing upon the appellee the burden of showing title to the land sued for, otherwise he could not recover. Until he had shown at least a prima facie title, the strength of the appellant's claim of title need not be considered. The effect of the disposition we made of the case was to hold that appellee had failed to establish even a prima facie right to the tract sued for. Appellee claims that the testimony of the witness Cowan was to the effect that if a line was run on a correct variation of the compass from the northeast corner of the Bickerstaff tract, which is the southeast corner of the Carr tract, it would coincide with the line claimed by him to be the true line; and, if one should be run from the southwest corner of the Carr tract north on a correct variation, it would intersect with the Humphreys' north boundary line, one degree east of the west boundary line of the Carr tract. We are not told what is meant by the term "correct variation." Evidently it was a variation different from that upon which the original lines of the Carr tract were run, as it does not coincide with the west line of that tract, but diverges from it one degree, or about 60 varas, in the length of the line. The record shows that Cowan testified as follows: "The west boundary line of the 425 acres of the Kidd land [known as the Carr land, and that claimed by the appellee] is a well-defined and well-marked line and can be easily traced on the ground. The trees with hacks are still there. The southwest corner of this tract is well established, and can be easily found. The south end of the tract measures 1,080 varas across, and the southeast corner can be located. The stump of this corner was standing there when I first surveyed the land. When a surveyor runs one line of a survey on a certain variation, he should run all the others on the same variation. To run the east line of the 425 acres of the Kidd land [Carr land] on the same variation as the west line of this tract would throw the line where the defendant [appellant, Jaggers] claims it is. When you commence at the H. B. C. tree and run east 1,080 varas, you are within 10 varas of a red oak tree marked with a cross. This 425 acres calls for a

tract ——— varas long and 1,080 varas wide. The call on the north line is 1,080 varas, and on the south line 1,080 varas. The line as claimed by Jaggers runs down and strikes the Seaborn Bickerstaff northeast corner, and runs with Bickerstaff's east boundary line, which is also a part of the John Humphrey's survey." In the light of this testimony and the plain calls in the appellee's deed for course and distance, the northeast corner of the appellee's land is bound to be exactly 1,080 varas east of his northwest corner, just where appellant claims it to be, unless the post oak called for as a bearing tree be shown to be at a different place from where the calls for course and distance in his deed locate it. In no other way has he attempted to show title to the land sued for. This is not a situation in which a mere preponderance of testimony will determine the appellee's right of recovery, but one where the existence of a fact is relied upon to establish an asserted right, and where the sufficiency of the evidence is one of first importance.

The issue is not whether Stringer or Jaggers owns the land based upon the assumption that one or the other does own it; but whether Stringer owns it. Jaggers can defeat the latter's claim by the mere failure of Stringer to prove title. It is not essential that he show a superior title in himself until Stringer has shown at least a prima facie title. Has appellee done this? This original survey of the Carr tract appears to have been made about 55 years ago, more than 30 years before any living witness observed the place; and the bearing tree, the post oak marked "X," may have fallen and rotted away. There is nothing to indicate what was its size or condition at the time marked. The fact that none is standing there now, nor was there 20 years ago, cannot be considered as conclusive evidence that none was ever there. The testimony of Pyron and Kidd to the existence of the old marked line running from appellee's southeast corner in the direction of where the latter asserts the true corner to be may furnish grounds to infer that there might have been a corner at that place. But this inference is seriously weakened, if not practically destroyed, when we consider that this line would not be parallel with the well-established west boundary line of the same tract, and would thus contradict the plain calls for course in the deed, the distance from the northwest corner, and would have the effect of giving more land than the deed undertakes to convey. We have very carefully reconsidered the testimony in the record, and fail to find anything to cause us to change our former view of this case. We still think the testimony is insufficient to warrant a verdict in favor of the appellee.

The motion for rehearing is therefore overruled.

## TEXAS &amp; N. O. R. CO. v. CLIPPENGER et al.\*

(Court of Civil Appeals of Texas. Nov. 19, 1907. Rehearing Denied Dec. 12, 1907.)

## 1. LIMITATION OF ACTIONS—AMENDMENT OF PETITION—INJURY TO PASSENGER.

If a cause of action set out in an amended petition is different from that in the original petition, the original petition will not prevent the running of the statute of limitations as to the amended petition; but, if the amended petition retain even a part of the cause of action in the original petition, the original petition will prevent the running of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-546.]

## 2. SAME.

Where it is alleged that the plaintiff's wife, a passenger for hire on one of defendant's trains, received injuries at a certain time and place by the wrecking of the train in which she was riding, caused by a defective switch and by the negligence of the defendant's servants, an amended petition, which made no change in the allegations, except that when the train ran on the switch it was wrecked by being derailed, instead of colliding with another train, as alleged in the original petition, did not state a new cause of action so as to admit the bar of the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-546.]

## 3. APPEAL—ASSIGNMENTS OF ERROR—PROPOSITIONS AND STATEMENTS.

Where a defendant, in an action for injuries to a passenger, assigns as error the refusal to instruct that there was "no testimony tending to show" that the wreck of the train on which plaintiffs were passengers was caused by any of the things alleged in the petition, and the statement following this assignment is that there was "no affirmative proof" showing how the wreck was caused, the court will not consider the assignment, since the statement does not purport to show that there was no testimony tending to show that the wreck was caused by any of the things alleged in plaintiffs' petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3000.]

## 4. SAME.

An assignment of error will not be considered which does not conform to the rules of the court requiring the statement following a proposition to embrace in substance such proceedings, or part thereof in the record as will be sufficient to explain and support the proposition with reference to the pages of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3000.]

## 5. SAME.

Where defendant, in an action for injuries to a passenger, assigned as error the overruling of its ground for new trial, that the evidence wholly failed to show that the derailment and wrecking of defendant's train on which plaintiffs were riding was caused by any of the negligent acts or omissions alleged in plaintiffs' petition, and the statement following the assignment only refers to the ground of the motion as stated, and to the statement under the third assignment, which is that there was no affirmative proof showing how the wreck was caused, the court will not consider the assignment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3000.]

## 6. CARRIERS—INJURIES TO PASSENGERS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a passenger, where plaintiffs in their petition charged as one of the elements of defendant's negligence, which resulted in the wreck of the train and the in-

juries sustained, the excessive and dangerous speed across a switch and in and upon a side track, it was proper to allow testimony as to the speed of the train at the time of its derailment and wreck.

## 7. EVIDENCE—OPINIONS—PHYSICAL CONDITION.

In an action for injuries to plaintiff's wife, it was proper to allow plaintiff, a nonexpert witness, to testify as to the pain and physical suffering of the wife after the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2238-2240.]

## 8. DAMAGES—MEASURE OF DAMAGES—INJURIES TO PERSON—EXPENSES INCURRED.

Where, in an action for personal injuries, it was shown that \$150 had been expended for medicines and medical supplies, and two physicians testified that this charge was reasonable, it was proper to instruct that the reasonable value of medicine and medical supplies furnished by plaintiff might be considered in estimating the measure of damages, though the treatment was in Ohio, and the physicians testifying lived in Texas.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 243.]

## 9. CARRIERS—INJURIES TO PASSENGERS—ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to a passenger by the wreck of a train, alleged to have been caused by an open and defective switch and the excessive speed of the train, *held*, that under the evidence the questions of the negligence of the defendant in failing to use due care as to the condition of the switch, and of its employees in operating the train and allowing the switch to remain open, were for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1315-1325.]

## 10. SAME—INSTRUCTIONS.

In an action for injuries to a passenger, the instruction that, if defendant was negligent in running its train over an open switch at an excessive speed, he failed to exercise due care and foresight in regard to the condition of a switch, and such conduct constituted negligence, then defendant was liable, was not erroneous as submitting to the jury defendant's negligence in permitting the switch to be and remain in bad condition and defective in construction.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by W. W. Clippenger and another against the Texas & New Orleans Railroad Company to recover for personal injuries. From an order overruling defendant's motion for a new trial, it appeals. Affirmed.

Baker, Batts, Parker & Garwood and Chester & Da Ponte, for appellant. Teagle & Conley, for appellees.

McMEANS, J. This was a suit by appellee W. W. Clippenger against the appellant, Texas & New Orleans Railroad Company, to recover damages for personal injuries sustained by his wife, Helen Clippenger, on the 18th day of November, 1902, while a passenger on one of its trains. The suit was commenced by the filing of the original petition November 16, 1904, and was tried on the second amended original petition, filed November 14, 1906. The case was tried before a jury, and resulted in a verdict for appellee. From an order overruling a motion for new trial, the cause is brought before us on appeal.

\*Writ of error denied by Supreme Court Jan. 15, 1908.

The petition of the plaintiff, after the necessary formal allegations, contained the following: "That heretofore, to wit, on the 18th day of November, A. D. 1902, plaintiffs were on board one of defendant's regular passenger trains, having paid for two first-class, full-fare tickets, and while en route between the town of Liberty, in Liberty county, Tex., and the town of Houston, in Harris county, Tex., and, as plaintiffs are informed and believe, near the town of Devers, in Liberty county, Tex., a collision occurred between the train upon which plaintiffs were riding and another train of defendant's coming in the opposite direction; that said two trains in so colliding crashed into each other with great force, wrecking and damaging a large part of each train, destroying a number of cars, and wrecking a number of cars in each train. That said collision of said trains and the injuries inflicted on the said plaintiff was caused by the negligence of the defendant company in negligently causing, permitting, or allowing its said trains to collide in the manner and at the time hereinbefore stated. That plaintiffs are informed and believe that said collision was caused by the negligence of the servants, agents, and employees in charge of the said trains, in carelessly, recklessly, and negligently handling said trains, and in propelling the same at a high rate of speed while attempting to pass each other, and was further caused by the said railroad company negligently and carelessly maintaining a defective and improperly constructed switch at the point where the said wreck occurred; the said switch being so improperly constructed as to allow one of said trains, which was attempting to pass the other on the main line or track, to enter the said switch on which the other train was standing, and thus collide therewith, as before alleged."

The amended petition contained the following averments: "That heretofore, to wit, on or about the 18th day of November, A. D. 1902, plaintiff, with his wife, Helen L. Clippenger, were lawful passengers for hire on defendant's railroad, having theretofore purchased two tickets entitling them to passage on one of defendant's trains; said tickets being two first-class tickets reading from Houston, Tex., to Beaumont, Tex., and plaintiff paying therefor the full price demanded by the agent for said company, and being the usual and proper charge made by defendant company for transporting passengers from the city of Houston to the city of Beaumont, whereby the defendant company undertook and bound themselves to safely transport the plaintiff and his said wife to their destination. That plaintiff and his said wife, on said date, boarded one of the regular passenger trains of the said company, leaving the city of Houston, Tex., about 8:30 o'clock a. m. for the purpose of being transported to the city of Beaumont, and while so en route between said points, and, as plaintiffs are in-

formed and believe, at a point at or near the town of Devers on the line of said road, the train upon which plaintiffs were riding, and while running at a high and dangerous rate of speed, suddenly left the track or rails of said road and ran in and upon a side track or switch, and the engine attached to the said train then and there turned over, the mail car on said train was wrecked, and other cars on the said train were then and there wrecked and damaged. That the car in which plaintiff and his wife were riding was thrown from the rails and bounded over the ties for some distance, and the said car was thrown from its trucks and tipped to one side at an angle of about 45 degrees. That at the time of the said wreck the said train was going at a high and dangerous rate of speed, and did not slow up in its speed at said station, or before reaching the same. That the derailment of said train and the wrecking thereof was caused by the negligence of defendant, its servants, agents, and employees, in then and there running its said train at a high and dangerous rate of speed through the town of Devers and across the switch at said point, and in then and there allowing and permitting said tracks at said point to be and remain in a defective condition, and in negligently operating its said train at a dangerous rate of speed, and in then and there permitting the switch at the point of said accident to be and remain in a bad condition and defective in construction. And plaintiff further alleges that, in addition to all of the aforesaid defects and causes contributing to the wrecking of said train, the defendant, its servants, agents, and employees, negligently and carelessly allowed said switch to remain open at the time of the passing of the said train, so as to allow the said train to enter the said switch and side track with unusual force and speed, resulting in the wrecking of said train, as aforesaid. Plaintiff further alleges that one or more or all of said causes were the proximate cause of the said injuries, and the said injuries were so inflicted by defendant's negligence in one or more or all of said acts, without fault or negligence on the part of plaintiff or his said wife, and while said track and train were under the exclusive control and management and operation of the said defendant, its servants, agents, and employees."

Defendant excepted to the amended petition on the ground that it appeared that the cause of action sought to be set up therein was barred by the two years' statute of limitations; and by a special charge, seasonably requested, sought to have the jury instructed to find for defendant because the undisputed proof showed that the plaintiff's cause of action was barred; and the refusal of the court to sustain the exception and to give the special charge is made the basis of appellant's first and second assignments of error. If the cause of action set out in the amended petition was a new or different cause of action from that asserted in the original petition,

It was barred at the time of the filing of the former. But if the amendment in any way retained, even as a part of the cause of action asserted by the original petition, and afterwards reasserted by the amended petition, it is sufficient, to prevent the running of the statute after the original petition was filed. *Mexican, etc., Ry. Co. v. Mitten*, 13 Tex. Civ. App. 653, 38 S. W. 282. By reference to the extracts from the original and amended petitions, above quoted, the following similarity will be observed: In both the accident is alleged to have occurred to one of defendant's passenger trains on the 18th day of November, 1902; in both petitions the accident is alleged to have occurred at the same point, viz., at or near the town of Devers, in Liberty county, Tex.; in both it was alleged that the wreck was caused by said railroad company negligently and carelessly maintaining a defective and improperly constructed switch at a point where the wreck occurred, the said switch being so improperly constructed as to allow the train to enter the switch, resulting in the wreck; in both it is alleged that the defendant carelessly, negligently, and recklessly operated the said train and propelled the same at a high and dangerous rate of speed; in both the injuries complained of are the same; and in both the alleged contract of carriage is the same. The only material change made in the amended pleading is that in it the pleader's misconception of the facts were corrected, and the allegation that, when the train ran in upon the switch, it collided with another train on the switch, was eliminated. In both, however, it was charged that the wrecking of the train and the injury to plaintiff's wife were the result of the negligence of the defendant in the manner of the operation of the train and in maintaining a defective and improperly constructed switch. We are of opinion that the amended petition set up no new or different cause of action from that alleged in the original petition, and the assignments are overruled. *Railway Co. v. Mitten*, supra; *Railway Co. v. Perry*, 85 S. W. 62, 12 Tex. Ct. Rep. 216; *Railway Co. v. Veale*, 87 S. W. 202, 12 Tex. Ct. Rep. 890; *Railway Co. v. Wellington* (Tex. Civ. App.) 86 S. W. 1114.

By its third assignment, appellant complains that the court erred in overruling the third ground of its motion for a new trial, in that the court committed error in refusing to give in charge to the jury its second special instruction, which is as follows: "You are instructed that there is no testimony tending to show that the derailment and wrecking of the train on which plaintiffs were passengers on or about November 18, 1902, was caused or occasioned by any of the things alleged in plaintiffs' petition, and you will therefore return a verdict for defendant." The statement following this assignment is, simply, that "there was no affirmative proof showing how the wreck was caused." This statement does not purport to show that

there was no testimony tending to show that the wreck was caused by any of the things alleged in plaintiffs' petition, and we therefore decline to consider the assignment; but, should we waive this objection, we would still decline to consider the assignment, because it is not in conformity to the rules of this court, which require the statement, following a proposition, to embrace, in substance, such proceedings, or a part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with reference to the pages of the record. There may have been testimony other than affirmative testimony tending to sustain the allegations of the plaintiffs' petition, which would have justified the court in submitting the issues to the jury and in refusing to give the requested charge. It was clearly the duty of appellant, in framing its brief, to refer to the evidence relating to the proposition under discussion so that this court could determine whether the refusal of the trial judge to give the charge was error.

For a like reason, we refuse to consider appellant's fourth assignment, which complains of the action of the court in overruling the tenth ground of its motion for new trial. The tenth ground, as set out in the assignment, is as follows: "Because the evidence wholly failed to show that the derailment and wrecking of defendant's passenger train on which plaintiffs were riding was caused or occasioned by any of the negligent acts or omissions alleged in plaintiffs' petition." The statement following the assignment simply refers us to the tenth ground of the motion, which is in the language above quoted, and to the statement under the third assignment, which we have shown above to be insufficient and not in compliance with the rules.

The fifth, sixth, and seventh assignments are predicated upon the refusal of the court to grant a new trial because of alleged errors in permitting the witnesses Clippenger, Babcock, and Whitlock to testify as to the speed of the train at the time of its derailment and wreck; the grounds urged for its rejection being that such testimony was irrelevant and immaterial. The plaintiff, in his amended petition, charged, as one of the elements of negligence of appellant, which resulted in the wrecking of the train and the injuries sustained by the appellee's wife, the running of the train at a high, excessive, and dangerous rate of speed in and upon a side track or switch at or near Devers, without slowing up or slackening its speed at said point, and the running of its said train at a high and dangerous rate of speed across the switch at said point, so as to permit the train to enter said switch and side track with unusual force and speed. In view of these allegations, the inquiry as to the rate of speed of the train, as bearing upon the appellant's negligence in that regard, was both pertinent

and material. The assignments are not sustained.

Appellant's eighth assignment is as follows: "The court erred in permitting the witness Clippenger to testify, over the objection of the defendant, as follows: Q. Did she suffer any physical pains after that, or appear to suffer any? (Defendant objects as leading, and nothing but the opinion of the witness, also that this would be hearsay and self-serving. Court states witness can tell how she appeared. Defendant excepts.) A. Yes, sir; it seemed to be intermittent. Some days she would feel very well and apparently free from pain, and maybe the next day, or within a few days, it would return, the pain would, and it seemed that when she would keep off her feet and lie down the pain would diminish and subside, so that she would feel very comfortable, and go that way for several days at a time, and then it would return again. Q. What would she have to do when those pains came on her? A. She would have to lie down and keep very quiet. She would generally sit in the room and lie down on the bed—not necessarily going to bed, but she would lie down and remain off her feet. Q. How long did that continue? A. That continued from the time of the wreck up to the time she returned to Cincinnati." The proposition based on the above assignment is that "the testimony complained of was hearsay, an opinion by a nonexpert, based upon self-serving declarations made by the injured party, and was inadmissible." We are of the opinion that there was no reversible error in admitting the testimony. "The rule laid down by text-writers, and which seems to have been followed in this state, is that nonexpert witnesses may give their opinions on question of identity, resemblance, age, apparent condition of the body or mind, intoxication, insanity, sickness, health, etc. Such testimony is received in the particular cases or instances mentioned because a mere description, without the witness' opinion, would convey an imperfect idea of the force, meaning, and inherent character of the things described." 1 Greenleaf on Ev. (13th Ed.) § 439; *Railway Co. v. Smith*, 90 S. W. 926, 14 Tex. Ct. Rep. 379. In the case cited, a witness was permitted to testify that "plaintiff does not appear to be 50 per cent. as good a man now as he was before the injury." This testimony was objected to on the grounds that it was immaterial and irrelevant, the opinion of the witness not shown to be an expert on a matter given in expert form, and was too vague to form the basis of evidence. In passing upon this objection, the court says: "The minute appearances indicating appellee's physical condition before and after he was injured, observed by the witness and upon which his opinion, as expressed, was formed, could not be so described by him as to enable the jury, without such opinion, to draw a just or correct con-

clusion with respect to the issue to which the testimony related. In such case the inference or opinion of the witness may be stated." The assignment is overruled.

In charging upon the measure of damages, the court instructed the jury that they might take into consideration the reasonable value of medicine and medical supplies furnished by appellee, if any was rendered necessary by reason of the injuries sustained by his wife. This charge is made the basis of appellant's ninth assignment; the objection to it being that there was no proof that the sums so expended were reasonable or necessary. The testimony showed that the expenditures for medicine and medical supplies covered a period from January 4, 1903, to the time of trial, and amounted to \$150, including \$25 for a brace. Dr. Price testified: "I guess it was a pretty reasonable bill." And Dr. Cunningham testified that it was very reasonable. It is urged that inasmuch as Mrs. Clippenger was being treated in Ohio, and that the expenditures were made there, while the physicians, who testified as to the reasonableness of the bill, lived in Beaumont, their testimony was in the nature of things only a guess, and did not meet the requirement that the charges must be proved to have been reasonable. This argument addresses itself to the weight of the evidence, and not to the action of the court in giving the charge. The evidence justified the court in giving the instruction objected to. The assignment is overruled.

By the tenth, eleventh, and twelfth assignments, appellant complains of the charge of the court in submitting, as ground of negligence, the rate of speed of the train at the time of the derailment, in permitting the switch at said point to be and remain in bad condition and defective in its construction, and in allowing the switch to remain open at the time of the passing of the train. The objection is that there was no such proof of negligence in the particulars stated as to justify the charge. The portion of the charge complained of is copied in appellant's brief, and is as follows: "This is a suit by the plaintiff W. W. Clippenger against the Texas & New Orleans Railroad Company for damages alleged to have been sustained by plaintiff by reason of the infliction of injuries to plaintiff's wife, Helen Clippenger, while plaintiff and his said wife were traveling on one of defendant company's passenger trains between the city of Houston, Tex., and the city of Beaumont, Tex., on or about the 18th day of November, 1902; plaintiff alleging that he and his said wife had purchased tickets reading over the line of railroad of defendant company, between said points, by which they were entitled to a first-class passage to the city of Beaumont, and that in consideration of the purchase of said tickets the defendant company undertook to safely transport them to their said destination. Plaintiff further alleges that while on

said train, at a point at or near the town of Devers, the said train was wrecked; that at the time of said wreck the said train was negligently operated, in that it was run at a high and dangerous rate of speed; that defendant company, its servants, agents, and employes, were negligent in running said train across a switch at said point at a high and dangerous rate of speed, and were negligent in then and there permitting and allowing their road and track to become and remain in bad repair, and in then and there permitting the switch at said point to be and remain in bad condition and defective in its construction; and that, in addition to all of said defects and causes contributing to the wrecking of said train, the defendant, its servants, agents, and employes, negligently and carelessly allowed said switch to remain open at the time of the passing of said train, so as to allow the said train to enter said switch and side track with unusual force and speed, resulting in the wrecking of said train. Plaintiff further alleges that his said wife sustained serious and permanent injuries in said wreck, which injuries are fully set out in plaintiff's second amended original petition herein; that his said wife suffered great physical and mental pain, and was compelled to engage the services of physicians, surgeons, and nurses, and purchase medicines and medical supplies in order to properly care for said injuries, to plaintiff's further damage, as alleged in his said petition; and that all of said damages are the proximate result of the negligence of the defendant company, its servants, agents, and employes, in the manner and things alleged in said petition. In answer to these allegations, the defendant company has pleaded a general denial, and the effect of this plea is to cast upon the plaintiff the burden of proof to establish the material allegations in his petition, and, amongst other things, that his said wife was injured as alleged, and that such injuries, if any, were the proximate result of the negligence of the defendant company, its servants, agents, and employes, in one or more of the things charged against it. Now, gentlemen of the jury, bearing in mind the foregoing instructions and definitions, if you find, from a preponderance of the evidence before you, that the plaintiff and his said wife were passengers for hire, as alleged by them, and at the time and place alleged, and that plaintiff's wife was then and there injured, as alleged, that the defendant company, acting by and through its servants, agents, and employes, were then and there in charge and control of said train, and that said train was then and there run into and across an open switch upon a siding, at an unusual rate of speed, and you further find from a preponderance of the evidence before you that in so doing the said defendant, its servants, agents, and employes, were guilty of negligence, as that term has been herein defined to you, and that such

negligence was the proximate cause of plaintiff's wife's injuries, then, if you so find, you will find for the plaintiff, etc. Or, if you should find, from a preponderance of the evidence, that, at the time and place alleged, the defendant company, its servants, agents, and employes, failed to exercise due care and foresight, as has been herein explained, in regard to the condition of the switch, and that such act, if any, constituted negligence, as the term has been defined, and that such negligence, if any, was the proximate cause of said injuries, then you will find for the plaintiff."

The evidence shows that, when the train reached Devers, it was going at an unusually high and dangerous rate of speed; that when the switch was reached, for some cause unexplained, the engine left the main track and started on the switch track, and then almost immediately left the rails and plunged into the mud. The tender followed the engine, and in turn was followed by the mail car and baggage car in the order named, and each of these left the track about the time the switch was reached. The first passenger coach also started into the switch, and then in some way went back toward the main line. The coach in which appellee and his wife were riding followed the other, but did not go quite the same distance after it left the rails. The witness Whitlock testified that, about the time the engine struck the switch, he saw it turn to the left and go into the mud, and the mail or baggage car, following it, changed ends, and the trucks were knocked off. As to the speed of the train the witness Babcock testified: That, when he first observed the train it was two or three miles away, and going toward him at a high rate of speed. That the speed was so great that he feared something would happen. "I think it went the fastest of any train I ever saw. It was coming right towards me, and the train was humming, and it hummed like a threshing machine, and the boiler on the trucks was going from side to side." That when it passed over a little bridge about 200 feet away it seemed to gain momentum, and when it struck the switch "it was going at a fearful rate of speed—at a terrible rate of speed." The testimony further shows that the ground was very soft; that there was a great deal of water alongside the track there, water stood generally over the country, and the drain ditches were full of water, and everything was overflowing; but that the roadbed at the switch was above the water that day. The appellee testified that the train was two hours behind time, and that just before the accident the train was going very fast, and the impression made on him was that it was going at a terrific rate; that as he looked out of the window everything was flying by very rapidly; that there was a rocking motion to the coach; that he did not remember ever riding on a train that traveled so rapid-

ly; that in the last four or five years he had traveled 50,000 or 60,000 miles and had frequently timed trains between stations; that his attention was attracted to the speed of this train "on account of the terrific speed we were going."

While the law does not prescribe the rate of speed at which a train should be run through a switch, still it is pertinent to the general issue of negligence to inquire whether or not appellant's train was being run at a greater rate of speed than was prudent, considering all the circumstances; and, in view of the evidence above given, we do not think it was error for the court to submit the issue of appellant's negligence, in that regard, to the jury. *Railway Co. v. Eaton*, (Tex. Civ. App.) 44 S. W. 562; *McDonald v. Railway Co.*, 86 Tex. 9, 22 S. W. 942, 40 Am. St. Rep. 803. Nor do we think there was any error in submitting the question of the negligence of the servants of appellant operating the train in running the same into an open switch or siding at an unusual rate of speed, or the negligence of appellant in failing to use due care in regard to the condition of the switch. That the train was run into the switch at an unusual rate of speed was shown by the undisputed evidence. That the switch was open is logically inferable from the fact that the engine left the track there and went onto the siding. That the appellant did not exercise ordinary care in regard to the condition of the switch may be inferred from the fact that such condition was not corrected before the train, laden with human lives, reached the switch and was wrecked. It seems to us that the facts of this case bearing upon the condition of the switch call for the application of the rule *res ipsa loquitur*.

But it is urged that the charge was erroneous, because it submitted to the jury the negligence of the appellant in allowing its road and track at the point of accident to become in bad repair, and in permitting the switch at said point to be and remain in bad condition and defective in construction. These objections are not sustained because, from an inspection of the charge, we find that no such issues were submitted. It is true that the trial court, in stating the plaintiff's case in his charge, enumerated all the grounds of negligence alleged by appellee, among which were those next above referred to; but in submitting the issue the court confined the jury to the question of negligence of appellant in running its train into an open switch at a siding at an unusual rate of speed, and in failing to exercise due care in regard to the condition of the switch.

We have considered the other assignments of error presented by appellant, and conclude that none of them point out any reversible error. The judgment of the district court is affirmed.

**Affirmed.**

## FOLEY v. HOUSTON CO-OP. & MFG. CO.

(Court of Civil Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

### 1. BILLS AND NOTES—ORDERS—SUFFICIENCY OF EVIDENCE—FUNDS IN HANDS OF DRAWEE.

In an action on an order drawn by a contractor for the construction of a building on the owner in favor of a materialman, evidence considered and held sufficient to show that at the time the order was presented to the owner he had sufficient funds due the contractor to pay the order.

### 2. WRIT OF ERROR—ASSIGNMENTS OF ERROR—PROPOSITIONS—APPLICABILITY TO EVIDENCE.

Where an action is based on an order drawn by a contractor for the construction of a building on the owner in favor of a materialman, a proposition that, in a suit upon a contract which is not proved, there being no declaration for the value of the work done, the case of plaintiff fails, and no recovery can be had on a quantum meruit or *valebat* on an implied contract not declared on, cannot be considered on writ of error, the record containing no evidence of any implied contract.

### 3. BILLS AND NOTES—ORDERS—ACCEPTANCE ON CONDITION—SUBSTANTIAL PERFORMANCE—INSTRUCTIONS.

In an action on an order drawn by a contractor for the construction of a house in favor of a materialman on the owner, and accepted on condition that certain finishing work be done, a requested instruction, that there was no evidence that such work had been done or that the house had been completed and accepted was properly refused; the evidence showing that the condition was substantially performed, and the work approved and accepted by the architect, the sole arbiter of questions of performance and acceptance under the contract.

### 4. ASSIGNMENTS—EQUITABLE ASSIGNMENTS—ORDERS.

An order drawn by a contractor on the owner of a building in favor of a materialman is an equitable assignment of so much of the fund on hand due the contractor on the contract as it was given for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 95, 96.]

### 5. BILLS AND NOTES—ORDERS—CONDITIONAL ACCEPTANCE—PERFORMANCE—INSTRUCTIONS.

In an action on an order drawn by a contractor for the construction of a building on the owner in favor of a materialman, and accepted by the owner on condition that certain finishing work be done, in which the contractor was brought in as a party by the defendant, requested instructions as to liquidated damages under the contract against the contractor for delay in completing the work were properly refused, the evidence showing that the condition of acceptance was fulfilled.

### 6. WRIT OF ERROR—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action on an order drawn on funds in the hands of the owner of a building and due a contractor, and accepted on conditions, which conditions were fulfilled, an instruction that the jury should determine the amount of damages sustained by the owner during the fulfillment of the conditions was, as against the defendant, harmless error, since it was immaterial whether defendant suffered any damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4219-4224.]

### 7. TRIAL—SUBTRACTION VERDICT.

Where, in an action on an order drawn on funds due a contractor, a verdict is rendered for the only amount for which it could be rightfully rendered, a contention that it is a sub-



traction verdict, which is based merely on the coincidence of the amount with the remainder after certain credits are deducted from the contract price, is unavailing.

### 8. INTEREST—ORDERS FOR PAYMENT OF MONEY.

An order for the payment of money, drawn for immediate payment out of funds due the drawer, is payable on demand, and interest is rightfully allowed from the date of demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interest, §§ 95, 96.]

### 9. ACTION — PREMATURE COMMENCEMENT — PLEADING—AMENDMENT.

Where a suit is brought on an order for the payment of money, accepted on condition before the conditions are fulfilled, the filing of an amended petition after the conditions are performed cures any defect as to the prematurity of the action.

Error from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Houston Co-operative & Manufacturing Company against W. L. Foley on an order for the payment of money. From a judgment for plaintiff, defendant brings error. Affirmed.

Wilson & Dabney and John L. Meany, for plaintiff in error. W. G. Love and R. J. Channell, for defendant in error.

NEILL, J. The defendant in error, plaintiff below, sued plaintiff in error, defendant below, on the following written order: "Mr. W. L. Foley, Houston, Texas—Dear Sir: Please pay to the Houston Co-operative Company the sum of \$837.25 for labor and material furnished by them for mill work furnished for your residence on Texas avenue and Jackson street, Lots Nos. 1 and 2, Block No. 102, S. S. B. B., Houston, Texas, and charge the above amount to amount due me on contract for constructing said building, this sum being the amount due them from me as subcontract for millwork. January 19th, 1905, Thomas McHenry"—to recover the sum of money for which the order was given. It was alleged that plaintiff duly presented the order to defendant for payment and that the latter promised to pay the same as soon as certain finishing work was done on the building, and that he would withhold the amount of money for which it was given from McHenry in settlement of the contract price due him for constructing the building; that at the time the order was executed and presented to defendant he was indebted to McHenry, on account of the contract price for constructing the building, in a sum largely in excess of the amount stated in it; that the building has long since been completed and accepted by defendant and that there remains in his hands a sufficient amount due on his contract with McHenry to pay the amount for which the order was given. In addition to the amount covered by the order, the plaintiff sued defendant for the sum of \$110.90 alleged to be due for work done by him at the latter's instance and request. The defendant answered by a general denial, and specially denied that he ever ac-

cepted or promised to pay the order sued on, or that he was indebted to McHenry in any amount on account of the building contract when the order was given or at any time afterwards, but, on the contrary, that McHenry was, on such account, indebted to him thereon in amounts largely exceeding plaintiff's demand. By a cross-bill McHenry was made a party to the suit by the defendant, and judgment prayed for against him. The case was tried before a jury, who were instructed by the court to deduct from the contract price (\$8,375) of the building such amount as it should find defendant had paid for the work provided for in the contract, so as to ascertain what the balance was in defendant's hands, and debit him with that balance; then to determine from all the facts and circumstances in evidence what damage, if any, defendant had suffered by reason of not being able to get in the house for 45 days after the 15th of November, 1904, and credit the defendant with that amount; to then determine what it cost defendant to drain the cellar and put it in the condition required by the contract, and credit the defendant with the amount of such cost. That if the jury believed that the floors as put down were in substantial compliance with the contract, or if it believed they were afterwards put in that condition by the plaintiff, then to allow defendant nothing on that account, but if it believed the floors were not in substantial compliance with the contract, and that they were not put in that condition by the plaintiff, to find what the reasonable cost to defendant would be to put them in the condition required by the contract, and credit him with that amount; then to determine whether the doors and windows or any other part of the building were or were not in compliance with the contract, and, if not, to determine what the reasonable cost to the defendant would be to put such part or parts in the condition required by the contract and credit him with that amount; and then, to ascertain the aggregate of all the sums which it found defendant entitled to be credited with, under the instructions given, and deduct the same from the balance found in his hands, and for the remainder, if any, to return a verdict in favor of plaintiff in accordance with the next succeeding paragraph, which simply prescribed the form of the verdict in event it should be for plaintiff. In response to the charge the jury returned the following verdict: "We, the jury, find the balance in defendant's hands to be \$1,092.80, and we find him entitled to credits as follows: \$255.55 for cellar, and find the balance to be \$837.25, and find for plaintiff for that amount, with interest at the rate of 6 per cent. per annum from January 20, 1905." In accordance with this verdict, judgment was entered in favor of the plaintiff against the defendant. Judgment was also entered in favor of McHenry against defendant on the latter's cross-bill, which recites that it

was entered because the defendant failed to offer any proof in support thereof.

#### Conclusions of Fact.

It is undisputed that Thomas McHenry had a contract with defendant to furnish the material, construct and finish a dwelling house, in accordance with certain plans and specifications, for defendant, Foley, for the price of \$8,375; that the order sued on was given by McHenry to plaintiff on the defendant for labor and material furnished by plaintiff for the construction of the building as recited in said order. The undisputed evidence shows that the defendant was indebted to McHenry on account of the contract at the time the order was given in an amount far in excess of the sum for which the order was executed, and that defendant had notice when the order was given that it was for material furnished and work done by the plaintiff as a subcontractor in the construction of the building, and that, after the order was drawn and he had notice of what it was for, he paid out of the funds in his hands over \$1,100 to other subcontractors and materialmen; that the architect, employed by defendant to superintend the construction of the building was, by the terms of the contract, made the judge of the quality of material and character of the work used and done in its construction, and the evidence fails to show that such architect disapproved any of the material furnished or work done by the plaintiff on the building. The acceptance of the order sued upon was upon the condition that the cellar and floors were to be fixed according to the contract. The defendant himself testified that the cellar was made all right without additional cost to him. And the undisputed evidence shows that the floors were fixed all right. And the evidence was sufficient to warrant the jury, under the charge of the court, in finding that, after allowing defendant all credits he was entitled to, he had a balance on hand of the money contracted to pay McHenry, the sum of \$837.25.

#### Conclusions of Law.

1. Under the first, second, third, and fourth assignments of error, which are grouped in plaintiff in error's brief, this proposition is asserted: "In a suit upon a contract which is not proved, there being no declaration for the value of the work done, the case of the plaintiff fails, and no recovery can be had upon a quantum meruit or valebat on an implied contract not declared on." While the proposition is an enunciation of an elementary principle of law, we are unable to perceive its applicability to this case, for the record refutes the contention that the judgment was had on a quantum meruit or valebat. There was no evidence of an implied promise on the part of defendant to pay plaintiff as much as he reasonably deserved to have for his labor, or of an implied promise on his part to pay him as much as his work was

reasonably worth. In other words, if plaintiff's petition had been so framed as to admit of a recovery upon a quantum meruit or valebat, there was no evidence which would tend to admit of a recovery on either such ground. Nor was either ground submitted by the charge of the court to the jury as a basis for plaintiff's recovery. The proposition is a mere abstraction in no way akin to the law arising from the facts upon which the judgment in this case rests.

2. The defendant requested the court to give the following special charge: "The jury are charged that the plaintiff in this case has alleged that the defendant accepted an order made by McHenry on him, and also that the defendant's house had been completed and accepted. The evidence is that defendant accepted said order provided certain additional work should be done or made good, and there is no evidence that such work was done so as to make such acceptance binding. The plaintiff must therefore recover on his other claim that the house had been completed, it appearing that Foley had not paid the whole of the contract price. You are instructed that there is no evidence that the house had been completed, but the evidence is that the house was not completed and accepted. Your verdict will therefore be for the defendant." Its refusal is the subject of the fifth assignment of error. The evidence was not such as to authorize the charge. As shown by our conclusions of fact, the conditions attached to defendant's acceptance of the order were substantially performed, and that the architect, who by the contract was the sole arbiter of questions regarding its performance and acceptance of the building, approved the work and accepted the building. Besides, the evidence indisputably shows that the defendant was indebted to McHenry on account of the contract at the time the order was given in an amount much greater than the sum of money called for thereby, and that defendant had notice that the order was given for material furnished and labor done upon the building by the plaintiff while he (defendant) had such excess on hand. The order was an equitable assignment of so much of the fund on hand due McHenry on the building contract as it was given for. *Texas Builder's Supply Company v. Nat. Loan & Investment Company*, 22 Tex. Civ. App. 349, 54 S. W. 1059; *County of Harris v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *Campbell v. Grant*, 36 Tex. Civ. App. 641, 82 S. W. 794.

3. Under the sixth and seventh assignments of error, which complain of the court's refusing certain special instructions requested by the defendant, is inserted this proposition: "When a contract, and particularly a builder's contract, states that damages are liquidated at so much per day, and when it appears from the evidence that, in the nature of things, the damages are difficult of estimation, and that there is not, or cannot

be proved to be, a serious divergence or lack of analogy between the actual damages and the liquidated damages, then it is the duty of the court to charge the jury that they must give liquidated damages according to the terms of the contract." The special instructions requested embody the principle of law enunciated by the proposition, and should have been given, had the case involved a question of liquidated damages. But as the defendant had accepted the order upon certain conditions which were afterwards complied with, and was, besides, liable on account of the equitable assignment of funds in his hands due McHenry under the contract referred to in the order, no such question was involved. Therefore there was no error in refusing instructions submitting such question. This also disposes of the eighth assignment of error.

4. While the court may have erred in instructing the jury to determine what amount of damages the defendant may have suffered by reason of not being able to obtain possession of the house for 45 days after November 15, 1904, as is complained by the ninth assignment, such error was not prejudicial to the defendant. As has been seen, the conditions were performed which made the acceptance of the order final and its payment obligatory, it was immaterial, so far as it concerned plaintiff's right of recovery, whether defendant suffered any damages by reason of not obtaining possession of the building until after November 15th or not. If defendant suffered by reason of the contractor's default, his remedy was against him on his bond given to secure the performance of the contract, and not by withholding money due on a fund which had been equitably assigned to plaintiff by an order which he had accepted and promised to pay upon conditions which had been performed.

5. It is complained by the tenth assignment that the court erred in not granting defendant a new trial upon the ground that the verdict falls in the class of "Chance Quotient and Subtraction Verdicts," not based upon a consideration of the evidence. It is subject to remark that by subtracting certain sums, found by the jury, the defendant was entitled to as credits, from the contract price he was to pay for the construction of the building, that the verdict thereby found is in the exact sum, to a cent, for which the order sued upon was given. If, however, the findings of the jury of the various credits defendant was entitled to were authorized by the evidence, the coincidence that their aggregate sum subtracted from such contract price would leave a remainder in the exact amount called for by the order would not vitiate the verdict. And we have found that the evidence was reasonably sufficient to authorize the verdict under the court's charge. But under the undisputed evidence, despite the erroneous directions given in the charge to the jury as to what should be considered in reaching a

verdict, no other verdict could have been found than that the plaintiff was entitled to recover the amount sued for. As is said in plaintiff's brief: "Since plaintiff in error had in his hands at the time the order was presented to him more than sufficient funds due McHenry to pay the order in full, he is liable for the full amount of the order, whether sufficient funds out of the original contract price now remain in his hands or not; and the fact that the court required the jury to find as a prerequisite to Foley's liability on said order that an amount sufficient to pay the same remained in his hands out of the original contract price, thereby imposing upon defendant in error a heavier burden than the law places upon him, gives plaintiff in error no ground for complaint on appeal, and affords him no escape from a debt which the jury unquestionably found that he owed."

6. The eleventh assignment of error which complains of the verdict allowing plaintiff interest from January 20, 1905, is, we think, answered by plaintiff's counter proposition, which is: "The order upon which recovery was had in this cause having been drawn for immediate payment out of a fund then in Foley's hands subject to said demand, the full amount of said order became payable by Foley upon demand, and the jury properly allowed interest from the date such demand was made."

7. The errors in the court's charge indicated by the twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments of error, if errors, were rather in favor of than prejudicial to the defendant. The defendant having in his possession funds subject to the demands of McHenry under the contract to pay the order in full, such order being an equitable assignment of the fund, he was bound to pay the same when presented for payment, regardless of the matters submitted in the portion of the charge complained of by these assignments. If the suit should be regarded as prematurely brought, plaintiff's amended petition, having been filed subsequent to the performance of the conditions attached to defendant's acceptance of the order alleging compliance with such conditions, cured such defect.

8. Our conclusions of fact dispose of the seventeenth assignment of error adversely to defendant.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

SAN ANTONIO & A. P. RY. CO. v. KEIRSEY et al.\*

(Court of Civil Appeals of Texas. Nov. 13, 1907. Rehearing Denied Dec. 13, 1907.)

1. APPEAL — REVIEW — VERDICT — CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

\*Writ of error denied by Supreme Court Jan. 22, 1908.

## 2. SAME—HARMLESS ERROR—ARGUMENT OF COUNSEL.

If counsel's argument was improper, the error was cured by the withdrawal of the remarks and an instruction to the jury not to consider them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4135.]

## 3. TRIAL—FINDINGS—SUFFICIENCY.

A finding of a specific sum for each plaintiff as damages to land, without any mention in the verdict of a claim for damages to crops, was equivalent to a finding against plaintiffs on the latter issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 853.]

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Action by L. D. Keirsey and another against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. W. Houston and W. S. Baker, for appellant. J. A. Martin, E. M. Eddins, and Rice & Bartlett, for appellees.

**KEY, J.** This is the second appeal in this case. The nature of the case is stated in the opinion of this court, reported in 81 S. W. 1045. The case went to the Supreme Court and was reversed on a question of the admissibility of certain testimony. *Railway v. Keirsey*, 98 Tex. 596, 86 S. W. 744. That question is not now in the case. In other respects the case is quite similar, and we see no reason for changing the rulings made on other questions presented in the former appeal.

Upon the last trial, under instructions quite similar to those given formerly and approved on appeal, the jury returned a verdict for the plaintiffs. There was conflict in the testimony, but there is testimony in the record which supports the verdict which finds for the plaintiffs on the issues of fact submitted to the jury, and this court finds accordingly. The court's charge, together with instructions given at appellant's request, leaves appellant without just grounds of complaint upon that subject. The assignments relating to the admissibility of testimony are overruled. We think the testimony complained of was pertinent and not subject to the objections urged against it. The assignment which complains of certain remarks made by the plaintiff's counsel in argument is without merit. If they were improper, which we do not hold, they were withdrawn when objected to, and the court instructed the jury not to consider them. We do not regard as meritorious the objection to the form of the verdict. The finding of a specific sum for each plaintiff as damages to land, without any mention in the verdict of the claim for damages to crops, was equivalent to a finding against the plaintiffs upon the latter issue.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

**RICE, J.**, did not sit in this case.

## WALKER v. ERWIN.

(Court of Civil Appeals of Texas. Nov. 28, 1907.)

## 1. TRIAL—DIRECTION OF VERDICT—QUESTIONS FOR JURY.

In an action to try title to land, where plaintiff's title depends upon the character of an alleged deed to him and whether it was delivered and accepted, a directed verdict for defendant is proper only if ordinary minds could reasonably reach no other conclusion than that the instrument never became effective because not a deed, or, if a deed, because never delivered and accepted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 838, 883.]

## 2. DEEDS—DELIVERY AND ACCEPTANCE—QUESTIONS FOR JURY.

Whether a deed was delivered to and accepted by the grantees therein *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 127.]

## 3. SAME—NECESSITY.

A deed to operate as a conveyance must be delivered to and accepted by the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 116, 142, 143.]

## 4. SAME—PROOF—INTENTION.

Actual manual delivery of a deed need not be shown, but its delivery and acceptance may be established by circumstances showing an intention to deliver and to receive title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 118.]

## 5. SAME—DELIVERY TO THIRD PERSON.

It is not necessary that a deed should be delivered by the grantor to the grantee in person, since a delivery to a third person for the use and benefit of the grantee is effective if accepted by the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 130-135.]

## 6. TRIAL—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE.

The credibility of witnesses and the weight to be given their testimony are questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332-335.]

## 7. SAME—DIRECTED VERDICT.

A directed verdict for defendant is not erroneous, although there may be sufficient evidence to take the case to the jury on certain issues, if evidence on the issue of plaintiff's estoppel to assert his claim is so conclusively in favor of defendant's contention that ordinary minds could not differ as to its effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338-341, 381-383.]

## 8. ESTOPPEL—ESTOPPEL IN PARI.

The truth should not be permitted to control in determining the rights of parties where it would enable one who has misrepresented it to perpetrate a fraud upon another and innocent person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 218.]

## 9. SAME.

Where a person with knowledge of the truth makes a false representation of a material fact to a person ignorant of the truth, under circumstances such that it may be reasonably calculated to induce the other, acting in good faith and with due care, to act thereon, and he does so act, the party making the representations is estopped to assert the truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 218, 219.]

# 10. TRIAL — TAKING ISSUE FROM JURY — GROUNDS.

That a judge or appellate court on the same evidence might reach a conclusion contrary to the one contended for is not a reason for withdrawing the issue from the jury.

# 11. ESTOPPEL—EVIDENCE—DIRECTION OF VERDICT.

Evidence as to plaintiff's estoppel examined, and held not so conclusive as to warrant a directed verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 308, 309.]

# 12. EVIDENCE — HEARSAY — STATEMENTS BY PERSONS OTHER THAN PARTIES OR WITNESSES.

Where plaintiff claimed land under an alleged deed from his mother, testimony of a witness that certain persons had told him that plaintiff had testified in an action by plaintiff's sister involving the same deed that he (plaintiff) did not claim anything under the deed is hearsay, and inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

# 13. SAME—EVIDENCE ADMISSIBLE BECAUSE OF SIMILAR EVIDENCE FOR OTHER SIDE.

In an action where plaintiff claimed an interest in land through an alleged deed executed by his mother and subsequently destroyed by her, testimony of the officiating notary on cross-examination that after plaintiff's mother had executed the deed she declared that she wished the title to the land to go to plaintiff and his sister at her death was properly admitted over plaintiff's objection that it was the details of a conversation after the deed was written tending to modify the intention expressed in it, where it did not appear whether the statement was made after or before execution of the deed, especially where the notary also testified on direct examination by plaintiff that she made the same statement to him when she executed the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 445-458.]

# 14. SAME — DOCUMENTARY EVIDENCE — JUDGMENT IN FORMER TRIAL.

In an action involving the validity of a deed, a judgment in a former suit involving the same deed is inadmissible to prove notice to a subsequent grantee from the same grantor that the deed to plaintiff had been sustained in the former suit, where the judgment was the result of a compromise, and it did not appear that the validity or invalidity of the deed had been determined.

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Trespass to try title by H. E. Walker against L. R. Erwin. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

B. B. Sturgeon and W. F. Moore, for appellant. Hale, Allen & Dohoney, for appellee.

**WILLSON, C. J.** The suit was brought by appellant against appellee to try the title to 86½ acres of land, part of the M. Click survey in Lamar county. Appellant's petition contained the allegations usually made in the statutory suit of trespass to try title. Appellee's answer was a general demurrer, a plea of not guilty, and a general denial of the truth of the allegations in the petition. On a trial had in the district court of Lamar county, at appellee's instance the jury was peremptorily instructed to return a verdict

in his favor. In accordance with such a verdict, on January 2, 1907, a judgment was rendered against appellant.

By an instrument in writing dated November 1, 1897, Mrs. E. A. Walker, a widow, divided into two parts a tract of land then owned by her, and conveyed to her daughter Effie, who afterwards, in 1899 or 1900, married E. T. Nix, one of the parts; and to her son (appellant) the other part, which included the land in controversy. By the terms of the instrument, the estate thereby passed to her children in the land was not to commence until Mrs. Walker's death, she reserving to herself the use of the land during her life. The execution of the document was duly acknowledged by Mrs. Walker; and, after executing it, she wrapped it in a cloth and placed it in a trunk kept at her home. About 1900, because of some difference between her and her son-in-law Nix, she took the instrument from the trunk, carried it to the home of one of her neighbors and there, by burning, destroyed it. Afterwards, but when does not appear from the record, she conveyed the land to J. W. Walker, another son, whom, on February 16, 1904, she joined in a deed conveying same to R. E. Wood, who, by a deed dated February 27, 1904, conveyed same to appellee. Mrs. Walker died May 27, 1904, being then 72 years of age. This suit was instituted June 8, 1904.

By his fifth assignment of error appellant complains of the action of the court in peremptorily instructing the jury to return a verdict for appellee. This assignment should be overruled if it appears from the evidence in the record that ordinary minds reasonably could have reached no other conclusion than that the instrument, executed by Mrs. Walker in 1897, never became effective as a conveyance, because not a deed; or, if a deed, because never delivered to, and accepted by appellee. Lord v. Ins. Co., 95 Tex. 216, 66 S. W. 290. At the time the trial was had the instrument referred to had been destroyed. The evidence in the record as to its form and contents is meager, but sufficient, we think, *prima facie*, to establish it as in form, and, if delivered, in its effect, a deed. We therefore shall so treat and designate it. Martin v. Farles, 22 Tex. Civ. App. 539, 55 S. W. 602; Jenkins v. Adcock, 5 Tex. Civ. App. 468, 27 S. W. 21; Griffiths v. Payne, 92 Tex. 293, 47 S. W. 973; Griffiths v. Payne 55 S. W. 757; Matthews v. Moses, 21 Tex. Civ. App. 494, 52 S. W. 113; Bombarger v. Morrow, 61 Tex. 417; Chrisman v. Wyatt, 7 Tex. Civ. App. 40, 26 S. W. 759; Lockridge v. McCommon, 90 Tex. 234, 38 S. W. 33. The question then follows: Did the evidence present an issue as to the delivery of the deed, which it was the duty of the court to submit to the jury?

Briefly stated, the evidence in the record, bearing on the issue as to whether the deed was delivered to and accepted by appellant, was as follows: Prior to the time Mrs. Walker executed the deed she had frequently

talked with appellant about conveying the land to him and to his sister Effie. In 1894, when appellant, after an absence of several weeks, visited his mother at her home, she stated to him that she would make him a deed to the land, if he would remain with her long enough. Appellant, in reply to this offer, stated that he could not stay—that he had to leave the next morning—and then suggested to her that, if she wished to do so, she could make the deed after he left, and turn it over to his sister Effie, as such an arrangement would be all right with him. Her reply was that she would do so. Appellant left his mother's home the morning following this conversation with her, and did not know until about 1900 that his mother had made the deed. He learned of it then in connection with information conveyed to him to the effect that his mother, after executing the deed, had destroyed it, and in connection with an invitation from his sister, Mrs. Nix, to join her in a suit she contemplated bringing to establish the deed. On November 1, 1897, at the time she executed the deed, Mrs. Walker stated to the notary engaged by her to prepare it that she wanted appellant and her daughter Effie to have the land, and wished the deed to be executed by her so written as at her death to vest title in them to the respective parts of the tract to be conveyed to them by her. The notary prepared the deed accordingly. After executing it, she asked the notary "what was the best thing to do with it?" and he suggested to her to take it and lock it up in her trunk, and let it remain there until her death, when the parties interested would find it. She told him that she would do so. In accordance with the advice given her by the notary, Mrs. Walker did place the deed in a trunk, which during her lifetime had belonged to a deceased daughter, and which was equally accessible to Mrs. Walker and to her daughter Effie. In a conversation had with Mrs. Holcomb in 1898, Mrs. Walker declared that she had given the land to appellant and to her daughter Effie, and that the latter had the deed upstairs in a trunk and could have it recorded when she wished to. In this conversation she explained to Mrs. Holcomb that she had made a deed instead of a will, because a will "could be destroyed, and that a deed could not be." On an occasion when Mrs. Walker and her daughter Effie were starting to town, the latter asked her if she would take the deed and have it recorded. Mrs. Walker replied that she would take it some other time for that purpose. At the time she destroyed the deed, Mrs. Walker stated to her neighbor that no one had ever seen it except herself and the notary who wrote it. Mrs. Nix testified that she had read it and seen it frequently in the trunk. After Mrs. Walker destroyed the deed, her daughter, Mrs. Nix, brought suit to establish it, or to recover the title to and possession of the land—which does not clearly appear from the record. ▲

trial of the daughter's suit was had in October, 1900. Appellant was not a party to that suit—having declined to join his sister in its institution—but was present at the trial and testified as a witness for his mother. On this trial Mrs. Walker testified that she had never delivered the deed to any one, that she had never given any person the right to take it out of her trunk, and that she had a right to burn it as she had done. On the same trial appellant testified that he knew his mother had burned the deed; that he did not, and had not questioned her right to do so; that he had not repudiated her action in burning it; that he did not know whether he had recognized her right to burn it or not, etc. He also testified at the trial of that suit, according to the testimony of witnesses in this one, that he did not claim the land under the deed; and, according to the testimony of R. E. Wood, to whom the land was conveyed by J. W. Walker, as before stated, made a similar statement to him. In his testimony on the trial of the pending suit, appellant explained that he understood, and thought his mother at the time understood, that her daughter's suit was to recover the immediate possession of the land; that the rights claimed by him in the land he understood accrued at his mother's death, etc. On the trial of the pending suit, he further testified that his mother never said anything to him about taking the land away from him; that, on the contrary, during the trial of her daughter's suit, she assured him she was not trying to dispossess him of the land or to affect his right to it, but intended him to have it. At that time, appellant testified, his mother was old and feeble. It further appeared from appellant's testimony on the trial of the pending suit that, at the time the daughter's suit was tried, he knew that his mother had endeavored to sell the land to Bob Wood. He learned this, he thought, from the letter Mrs. Nix wrote him, suggesting that he join her in her suit.

We think the testimony recited made it the duty of the court to submit to the jury the issue as to whether the deed made by Mrs. Walker in 1897 had been delivered to and accepted by the grantees therein; and that the court erred in peremptorily instructing a verdict for appellee, unless it was proper to do so, notwithstanding the evidence bearing on the question of delivery and acceptance, on the issue as to an estoppel, hereafter to be discussed.

To operate as a conveyance it is as necessary that a deed be delivered to the grantee as it is that it be executed by the grantor. *Steffian v. Bank*, 69 Tex. 518, 6 S. W. 823. It is also essential to its operation as a conveyance that the deed be accepted by the grantee. *Tuttle v. Turner*, 28 Tex. 759. But both delivery and acceptance may be established by circumstances. Actual manual delivery need not be shown (*Hubbard v. Cox*, 76 Tex. 239, 13 S. W. 170; *Bunnell v. Bunnell*,

111 Ky. 586, 64 S. W. 424, 65 S. W. 607), and any words or acts showing an intention to receive the title will be sufficient to prove an acceptance. *Gould v. Day*, 94 U. S. 405, 24 L. Ed. 232. It is not necessary that the delivery should be made by the grantor to the grantee in person. A delivery to a third person for the use and benefit of the grantee is effective, if accepted by the grantee. *Elliott v. Morris* (Tex. Civ. App.) 98 S. W. 221. Whether in a given case the deed was delivered or not is to be determined by looking to the intent of the grantor as evidenced by his acts or words, or both. Did he intend to divest himself of the title? If so, the deed should be held to have been delivered. In the case of *Bunnell v. Bunnell*, cited above, the Supreme Court of Kentucky says: "No particular form of procedure is required to effect a delivery. It is not essential that the paper be actually transferred. If the grantor, when executing it, intends it as a delivery, and this is known to and understood by the grantee, and they treat the estate as having actually passed thereby, it will have that effect, though the instrument be left in the possession of the bargainer." In *Elliott v. Morris* (Tex. Civ. App.) 98 S. W. 221, the delivery of the deed was held to have been sufficiently shown, although the creditor to whom it was made had not been notified of its execution, where the grantor, on receiving a letter from his creditor offering a certain price for the land, and telling him to go to his attorneys and fix it up, accepted the offer, and went to the attorneys and executed a deed which they placed among the creditor's papers. In *Lord v. Ins. Co.*, 95 Tex. 216, 66 S. W. 290, an insurance policy had been issued to Lord, payable to his executors, administrators, or assigns. His sister Kate claimed the policy had been given to her. Repeated declarations of Lord's that the policy belonged to her was the only evidence produced in her behalf. The policy had never been manually delivered to her, so far as the testimony showed, but had been kept among Lord's papers. The Court of Civil Appeals having affirmed a judgment of the trial court in favor of the sister, the question as to the sufficiency of the evidence to support the judgment was certified to the Supreme Court, and it was there held to be sufficient, to require its submission to a jury. In passing on the question certified, the Supreme Court said: "It cannot be true that it belonged to his sister Kate, or in the language used—that it was hers, or Kate's, as stated by one witness—unless Lord had given it to her and had actually delivered it, because the right of property could not have been passed without such act of delivery."

Keeping in view the principles of law announced, and the illustrative cases cited, we think it is clear that the court should have submitted to the jury the question as to whether the deed made by Mrs. Walker had been delivered or not. According to this tes-

timony recited, before executing the deed she had repeatedly declared her intention to give the land in controversy to appellant; in 1894 had proposed to make the deed if he would stay with her long enough to enable her to do so; had assured him in response to his suggestion that if she wished to do so she could make it in his absence and deliver it when made to his sister for him, that she would do so; in 1897 actually made it as she had declared she would; and according to the testimony of Mrs. Nix and Mrs. Holcomb, after having made it, declared that she had given the land to her daughter Effie and appellant, and that her daughter Effie then had the deed upstairs in a trunk, and could have it recorded if she wished to. The credibility of the witnesses who furnished the testimony recounted, and the weight to be given their testimony, were for the jury alone to determine. If the issue had been submitted to them, and they had found in favor of appellant's contention that the deed had been delivered, could it be said that their verdict was without evidence to support it? Would it not then be pertinent to inquire in support of such a finding by the jury: If the daughter had the deed and the right to have it recorded, as the jury might have believed, how did she acquire such possession and right? If it was in any other way than by a delivery of the deed to her by Mrs. Walker, with the intent and for the purpose of passing the title to the land, it would have to be answered from the record before us that it does not show it. In the absence of an explanation showing such possession and right in the daughter to be consistent with Mrs. Walker's continued ownership of the title to the land, could it, then, be said that such possession and right in the daughter, in connection with other evidence in the record which the jury might have believed, was not sufficient to support their finding? Without undertaking to answer these questions, it is sufficient to say that the testimony presented a question about which ordinary minds might, with reason, have differed; and for this reason the issue made by it should have been submitted to the jury, unless on the issue of an estoppel the peremptory instruction properly was given. As intimated above, while what we have said may be true, yet the action of the court in instructing a verdict cannot be complained of, if the evidence on the issue of an estoppel was so conclusively in favor of the contention of appellee as to forbid the conclusion that ordinary minds might have differed as to its effect in establishing the estoppel claimed. It therefore becomes necessary, in connection with the testimony in the record, to look to the principles of law controlling when an estoppel is relied upon to cut off rights being asserted by a litigant. The truth should, and when known always will, control in determining the rights of the parties, in the absence of conduct on the part of one of them operating to mislead the other and innocent

party to his injury. If permitting the truth to control would enable one who has misrepresented it to perpetrate a fraud upon another and innocent person, then the truth should not be permitted to control in determining their rights. And within rules established for its proper administration, this is the doctrine of the law. Where a false representation made by one person is relied upon as an estoppel against him in favor of another person, the rules governing in an inquiry to determine the existence or nonexistence of the estoppel, in *Nichols-Stewart v. Crosby*, 87 Tex. 453, 29 S. W. 380, are stated to be as follows: The false representation must be (1) of a material fact; (2) it must have been made with a knowledge of the truth of the matter; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with intent that it should have been acted upon; and (5) it must have been acted upon. A qualification of the rule that the false representation must have been made with the intent that it should be acted upon by the party invoking the estoppel is insisted upon in *Westbrook v. Guderman*, 3 Tex. Civ. App. 406, 22 S. W. 59, where the court says: "We do not believe that it is absolutely essential to the existence of any equitable estoppel that the representation or concealment should have been intended to influence the conduct of the party asserting the estoppel. If, under the circumstances of the particular case, the representation or concealment be reasonably calculated to induce the other party, while acting in good faith, and exercising ordinary care and diligence, to act thereon—if the other elements of estoppel exist—the party who misrepresents or conceals the truth will be estopped, whether there exists an intent to influence the conduct of the other party or not." We think the qualification a proper one.

The application of the rules of law stated must determine the question now being considered. That the statement, claimed to have been made to Wood by appellant, that he did not claim any interest in the land by virtue of the deed made to him by his mother in 1897, was of a material fact cannot be doubted. But appellant testified that he did not make the statement in the unqualified way in which Wood testified that he made it. He (appellant) testified that he stated to Wood that he was not a party to the Nix suit, and was not claiming anything in that suit. He further testified that he understood the deed to him was not to become effective until his mother's death, and that he was not claiming anything under it as due to him at the time he made the statement to Wood, relied upon to estop him. Whether credence should be given to his testimony or not was for the jury to determine. If they had believed that he did not, as he contended he did not, represent to Wood that he claimed no right to the land under his mother's deed, but, instead, should have believed that his

representations to Wood were that he claimed nothing in the Nix suit then pending, nor any interest in the land under his mother's deed during her life, they might have reached the conclusion, under proper instructions from the court, that he was not estopped from maintaining his suit against appellee. If properly they might have reached such a conclusion, we think it cannot be said that the evidence did not present an issue about which ordinary minds could not differ. That a judge or an appellate court on the same evidence might reach a conclusion contrary to the one contended for does not furnish a reason for withdrawing from the jury a consideration of such issue. Without stopping to inquire whether or not all the other elements of an estoppel were so conclusively shown by the evidence as to relieve the court from the duty of submitting the issue to the jury, we hold that the element first discussed was not so conclusively established, and that, therefore, the court erred in peremptorily instructing a verdict. As the judgment must be reversed and the cause be remanded for a new trial, it is proper we should indicate our views as to matters complained of in other assignments of error.

Over appellant's objection, the court permitted the witness Wood to testify that A. P. Dohoney and Col. Hodges had stated to him that, on the trial of the Nix suit, appellant had testified that he did not claim anything under his mother's deed to him. This was not an effort to establish as against appellant an estoppel by evidence of a false statement made by him to the party claiming the estoppel; but it was an effort to establish it by evidence that Dohoney and Hodges had stated to the party claiming it that they had heard appellant make the statement claimed to operate as an estoppel. The testimony was hearsay, and should have been excluded. And so should the testimony of the witness A. P. Dohoney, in so far as it detailed testimony given by Col. Hodges on a former trial of this case, as to matters testified by appellant and his mother on the trial of the Nix case. This testimony clearly was hearsay, and inadmissible.

Over appellant's objection appellee was permitted on a cross-examination of the notary Skidmore to prove, as is claimed by appellant, that after she had executed the deed destroyed by her she declared to him that she wished the title to the land at her death to vest in appellant and his sister. The ground of the objection urged was that "it was the details of a conversation that occurred after the deed was written, and tended to modify the intention clearly expressed in the deed and the plain purport of a written instrument." It does not appear from the record whether the statement complained of was made by Mrs. Walker after or before she had executed the deed. Moreover, it appears that on his direct examination by appellant the witness Skidmore had testified



that Mrs. Walker made an exactly similar statement to him on the occasion when she executed the deed. The court properly overruled appellant's objection to this testimony.

By his fourth assignment of error, appellant complains of the action of the court in excluding, as evidence, the judgment of the court in the Nix case when the same was offered by him. The judgment was an agreed one; it vested the title to the land there in controversy, and claimed by Mrs. Nix under the deed appellant here relies upon, in Mrs. Nix, and decreed a recovery against her by Mrs. Walker in the sum of \$560, to secure the payment of which it declared and foreclosed in Mrs. Walker's favor a vendor's lien on the land adjudged to Mrs. Nix. Wood, in whose favor an estoppel as against appellant was claimed, had testified that he knew the result of the Nix suit. The judgment was offered to show this result, and so fix on Wood notice that the validity of the deed under which appellant claims had been sustained. We do not think the judgment was competent evidence to fix such notice on Wood, and are of the opinion that the court did not err in refusing to admit it in evidence. On its face, the most the judgment would have been evidence of in such a connection, was that the parties to that suit had gotten together and adjusted their differences in a way satisfactory to them. It was not evidence that the deed had been determined to be either valid or invalid as a result of the suit.

For the errors indicated, the cause is reversed and remanded.

### MATTOX v. DAVIS et al.

(Court of Civil Appeals of Texas. Dec. 12, 1907.)

#### REFORMATION OF INSTRUMENTS—MISTAKE IN DEED—RELIEF AGAINST THIRD PERSONS.

The grantor in a deed from which by mutual mistake a reservation of merchantable pine timber was omitted will be granted relief in equity as against the grantee, and also as against a third person, who purchased the timber with notice of the mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 111.]

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by A. A. Mattox against Miles Davis and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

S. C. Hart and Warren & Briggs, for appellant. Barnwell & Eberhart, for appellees.

WILLSON, C. J. There is no statement of facts in the record, but from the trial court's findings of fact it appears: That, owning 166 acres of land in the W. P. Landrum survey in Upshur county, on November 19, 1902, Mattox, reserving to himself the merchantable pine timber standing and growing thereon, agreed to sell same to appellee Davis for

the sum of \$830. In accordance with his agreement, on the date mentioned Mattox executed and delivered to Davis a bond to make title to the land, and Davis executed and delivered to him three promissory notes for \$267.66 each, due, respectively, on November 1, 1903, 1904, and 1905. Afterwards, to wit, on January 20, 1905, when there was a balance of \$619.50 due on the notes referred to, Mattox executed and delivered to Davis, in lieu of the bond, a general warranty deed conveying the land without any reservation of the timber thereon, which deed was on January 30, 1905, duly placed of record; and Davis executed and delivered to Mattox, in lieu of the notes mentioned, another note for the sum of \$619.50. From the deed so executed, by mutual mistake of the parties, a reservation of the merchantable pine timber on the land, in favor of Mattox, was omitted. For the consideration agreed upon Mattox did not intend to sell and convey such timber, and Davis did not understand that he was buying the same. About April 1, 1906, Davis proposed to sell to appellee Brown the timber on 75 or 80 acres of the land at \$4 per acre, if Brown would "take up" and hold, crediting on same the purchase price of the timber, the \$619.50 note held by Mattox against the land. Brown, after examining as recorded Mattox's deed to Davis, agreed to do this; and on April 20, 1906, he, Davis, and Mattox met in the bank at Gilmer for the purpose of concluding the transaction. Before it was concluded, and before Brown had paid anything on account of his undertaking to buy the timber from Davis, he was notified by Mattox that he had not sold Davis any timber, and that Davis did not own any timber. At this time Mattox did not know of the mistake in his deed to Davis, whereby the land was conveyed without a reservation of the timber, and did not learn of the existence of the mistake until several days after the transaction whereby the timber was sold by Davis to Brown was concluded. He then demanded of Davis that he correct the mistake, which Davis refused to do. The court's finding that Brown had actual notice of the fact that Mattox owned and that Davis did not own the timber in question seems to be based upon a conversation had between the parties in the bank when they met there to "take up" the note held by Mattox against the land. What occurred on that occasion in his findings of fact is stated by the court as follows: "Before the said Brown had paid either to the said Davis or the said Mattox anything whatever, the following conversation occurred in the presence and hearing of Brown: Davis said something to Mattox about the timber and Mattox replied, 'Why, Miles [referring to defendant Miles Davis], you haven't got any timber. I never sold you a foot of timber, and you know the timber is mine.' Thereupon the said Brown and Davis stepped out upon the sidewalk and had a few minutes conversation, and they returned, and the cashier

of the bank by direction of Brown paid to A. A. Mattox the amount of said note, to wit, \$700, and the plaintiff, A. A. Mattox, wrote his name on the back of said note and gave it to either the defendant Davis or Brown." Appellant's suit was against both Davis and Brown to reform the deed made by him to Davis so as to exclude from its operation the merchantable timber on the land, and so conform it to the intention of the parties.

On the facts found by him the trial judge as matter of law concluded "that, the deed from Mattox to the defendant Davis being absolute upon its face and containing no reservation of the title to the timber, being upon record at the time the defendant Brown bought and paid for said timber and took up said note, the title to said timber passed to the said Brown relieved of any equities of the said Mattox in same. In other words," the trial court adds, "I hold that the notice given by the record of the deed from A. A. Mattox to Miles Davis, which was examined by Brown before he bought the timber from Davis and paid money to Mattox therefor, is of greater effect than the actual notice given by A. A. Mattox, as stated in my findings of fact, and judgment is therefore rendered for the defendants." The actual notice mentioned by the court has reference to the conversation between Mattox and Brown, included in his findings of fact and hereinbefore set out.

It is well settled that as between the parties equity will grant relief at the suit of either against a mistake of both, whereby the writing intended to evidence their agreement falls truly to state the terms of the contract between them. *Kelley v. Ward*, 94 Tex. 296, 60 S. W. 311; *Yarzombek v. Grier* (Tex. Civ. App.) 32 S. W. 236. So, also, will relief be granted as against third persons whose claim of right in or to the subject-matter of the contract was acquired with notice of the mistake against which the relief is sought. 24 A. & E. Ency. Law, 655, and authorities there cited. It is as well settled that in such a case relief will be denied where to grant it would injuriously affect the rights of innocent third persons, acquired for a valuable consideration paid by them and without notice of the mistake. *Canal & Banking Co. v. Montgomery*, 95 U. S. 19, 24 L. Ed. 346; *Byrne v. Bank*, 1 Ind. T. 680, 43 S. W. 957; *Story's Eq. Jur.* §§ 165, 166. If the trial court in his findings of fact meant to be understood as finding that the appellee Brown had notice of the fact that appellant had not sold to Davis the timber in question, his conclusion of law clearly would be erroneous, and it would be the duty of this court to reverse the judgment based on such erroneous conclusion and here render the proper judgment in the case. But we are not sure the trial court meant his finding to be so understood, and because we are not, and because of the absence of a statement of facts bringing before us all the evidence on the issue of notice vel non, we have concluded that, while

reversing the judgment, it likely will more certainly result in a just determination of the issues between the parties to remand the case for a new trial. Therefore the judgment is reversed, and the cause is remanded.

#### WATERS-PIERCE OIL CO. v. SNELL.\*

(Court of Civil Appeals of Texas. Nov. 6, 1907.)

##### 1. EXPLOSIVES—IMPLIED KNOWLEDGE OF INFLAMMABILITY OF GAS.

One who has handled petroleum and gasoline for years is charged with knowledge of the highly inflammable character of the gases generated by them.

##### 2. SAME—DEFENSE NOT AVAILABLE.

It is no defense to an action for injury resulting from an explosion caused by the negligent drawing of gasoline from tanks near a furnace that the fire never before ignited gas arising from gasoline so drawn.

##### 3. SAME—DUTY OF OWNER OR CONTROLLER.

The owner or controller of dangerous explosives must exercise great care to prevent an injury which a prudent man would reasonably foresee might result from an explosion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Explosives, §§ 4, 5.]

##### 4. NEGLIGENCE — "INEVITABLE ACCIDENT" — DEFINITION.

An accident is inevitable if the person by whom it occurs neither has nor is legally bound to have sufficient power to avoid it or prevent its injuring another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 80.

For other definitions, see Words and Phrases, vol. 4, pp. 3751-3753.]

##### 5. SAME—DUTY TOWARDS LICENSEES.

Defendant owed a customer's employé on its premises the legal duty to exercise at least ordinary care to protect him from injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42-44.]

##### 6. DAMAGES — PERSONAL INJURIES — VERDICT NOT EXCESSIVE.

\$30,000 is not an excessive recovery for injury to an 18 year old boy caused by an explosion in which he was rendered almost blind, his hands became almost helpless, one ear was destroyed and the other badly mutilated, his neck was stiffened, his visage marred so as to render him repulsive to his associates, and where he constantly suffers, mentally and physically, and suffered excruciating agony for months.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

##### 7. SAME—PLEADING — EVIDENCE ADMISSIBLE UNDER.

In a personal injury action an allegation that plaintiff was so disfigured that he was constantly humiliated by coming in contact with his fellow men warrants proof of embarrassment arising from the staring of people who meet him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 446.]

##### 8. EVIDENCE — EXPERT TESTIMONY — EXPLOSIVES—ADMISSIBILITY.

In an action for injury caused by an explosion resulting from the drawing of gasoline from tanks near a furnace, it was proper to show by one who qualified as an expert, and thoroughly acquainted with gasoline, that gas given off by gasoline is ignitable at distances remote from the gasoline, and to show the distances; conditions having been shown upon which to predicate the testimony.

\*Writ of error denied by Supreme Court Jan. 22, 1908.

# 9. APPEAL — OBJECTIONS TO TESTIMONY — WAIVER.

A ruling admitting testimony will not be reviewed where the same testimony was given at another time during the trial without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4172.]

# 10. DAMAGES—PERSONAL INJURY — PLEADING — RECOVERY FOR FUTURE SUFFERING.

In a personal injury action recovery may be had for future physical suffering under an allegation that plaintiff was seriously and permanently burnt and injured; that his head, face, chest, shoulders, neck, and back were burned, and portions of his ears were burned off; that his hearing and eyesight were affected; that his eyelids were burned and injured; that his hands, wrists, and arms were so burned as to render them of little use to him in earning a living; that as a result he had suffered and continued to suffer great physical pain and mental anguish, and has become incapacitated to perform any kind of labor; and that he was so disfigured that he is constantly humiliated by coming in contact with his fellow men.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 442.]

# 11. TRIAL — INSTRUCTIONS — AMPLIFICATION — NECESSITY FOR REQUEST.

Where, in an action for personal injury, the court correctly instructed as to plaintiff's knowledge of the danger, as affecting the question of contributory negligence, the charge was not erroneous for failing to go into details as to the matter of the knowledge being actual or constructive, in the absence of a request for an amplification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

# 12. SAME—MATTER COVERED.

An instruction is properly refused when its matter is covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Personal injury action by Thomas M. Snell, by next friend, against the Waters-Pierce Oil Company and others. From a judgment for plaintiff against defendant company, the company appeals. Affirmed.

Tallaferro & Wilson and Andrews, Ball & Streetman, for appellant. Lovejoy & Parker, for appellee.

FLY, J. Appellee, a minor, through his father as next friend, sued appellant, Louis S. Fries, and Robert E. Armstrong for damages alleged to have accrued by reason of injuries inflicted on his person through an explosion of gas caused by the negligence of appellant. It was alleged that appellant owned and operated an extensive warehouse in the city of Houston, Tex., where it sold and distributed oil, gasoline, and other substances of like character, all being highly inflammable, and that in said warehouse was located a cooperage shop, in which appellant operated a furnace, which was about four feet square. After enumerating the injuries inflicted upon appellant, the petition proceeds: "Plaintiff alleges that his injuries, as aforesaid, were the direct and proximate result of the joint and concurrent negligence of the defendants, and each of them, in that

they and each of them negligently and carelessly caused, permitted, and directed to be constructed and maintained in dangerous and hazardous proximity tanks containing gasolines and other oils of highly inflammable character, as aforesaid, to the cooperage shop, with its open furnace, constructed, as aforesaid, and in that they negligently and carelessly permitted and directed gasolines to be drawn from one of said tanks, as aforesaid, located in dangerous proximity to said open furnace, and caused and permitted said gasolines to be transferred by its servants to other cans and put into other cans; that it was negligence and carelessness on the part of the defendants, and each of them, and their servants, to permit a fire to burn in said furnace while gasolines were being drawn from said tanks; that they negligently and carelessly caused and permitted cans of gasoline to stand in the cooperage shop near said open furnace, and that fumes, vapors, and gases arose from the tanks and cans from which the gasoline was being drawn and to which it was being transferred, and in which it was standing in the cooperage shop; that said fumes, vapors, and gases ran towards said fire, or came in contact therewith, and, as a result thereof, ignited or exploded and caught fire, as a result of which the plaintiff was burned, as aforesaid." Appellant and its codefendants answered by general demurrer, general denial, and specially pleaded assumed risk and contributory negligence. The cause was tried by jury, and resulted in a verdict and judgment in favor of Fries and Armstrong, but against appellant for the sum of \$30,000.

It appears from the transcript of the evidence that appellee, a boy 18 years of age, at the time of the accident was permanently injured by wounds inflicted on him by the explosion and ignition of gas in the warehouse of appellant in the city of Houston, that said explosion and ignition took place through the negligence of appellant in having an open fire in a furnace in such proximity to where oil and gasoline were being drawn as to ignite the gases which arose from the oil and gasoline. Appellant was charged with the knowledge that such gases would be generated, and that they would fill the tank room and cooperage room, and that they were highly inflammable, and would probably be exploded and ignited by the open fire. At the time the explosion occurred appellee was sitting in an alleyway adjoining the cooperage room, on an empty can. There was first an explosion in the furnace, followed by a flash of flame which came out of the cooperage room, and enveloped appellee, and burned him about the face, neck, chest, arms, and hands; the skin of those parts of his person being burned into a crisp condition, and his finger nails being burned until they turned back, and his whole hands were burned and up to the elbows. His mouth was so swollen from the burns that he had to be fed liquid food

through a glass tube pressed between his lips for about two months, and in places on his face the burns extended down into the muscles. Appellee's physician thus describes the condition of his patient and his treatment: "I visited him about sometimes as many as four times a day, and even at the nighttime, when he was suffering very much. As I stated before, I had a powdered preparation dusted over the surface, and where there would be a slough or hemorrhage from the part, of course that would be attended to. It kept a nurse constantly mopping the pus and bloody material that was running from his eyes and the cracked parts of the flesh; that you might term another putrefaction; and his bowels, of course, they were constipated in the beginning on account of the opiates. I had to give him opiates right along to allay the pain, and I had to give him bromides to quiet the nervous system, and he was unable to take any solid food whatever. He took liquid, and that was through a tube with his lips pressed open, and he got his food in that way; but, well, I don't remember just how long, I suppose it was a couple of months that way, and the parts, after the little tissue or skin began to spring up underneath, there was a throwing off of the other parts, and partly drying up of the surface, but there was exudate of pus and blood for over three months, and he suffered with pain that length of time very much, and his eyes, of course, the whites of the eyes—what you call the conjunctiva—after they had begun to open so I could see, they were sticking out of the parts. There was a raw piece of skin in the eye. His ears, there was a discharge from the ears; he complained of pain from them. Well, his general system, he was knocked out generally. I continued the dry treatment until the parts became hard and harsh, and then I used a stuff to soften them up periodically and also a solution. I had different antiseptics to bathe the body to prevent the formation of pus, and get it in as good sanitary condition as possible. His bowels were puffed quite a good deal on account of the flow of blood internally, and at times there were several days that his kidneys were congested to a certain extent. He did not pass urine so very freely, and at several times there were hemorrhages from the deep burn down into the muscles, not so very extensive, but now and then he would have a hemorrhage—two or three tablespoons full—and I was called several times on account of the hemorrhage, for fear he might bleed to death. His hands were burned, and, as I say, his finger nails were contracted; he couldn't move them any whatever, and he had to sit stationary, as much so as possible, just in a stationary position, to prevent any extraordinary pain." Pointing to the wounds, the physician thus described them to the jury: "Now, you see, the right ear, the upper third practically burnt off down to the head in one place, and leaving just a lit-

tle part above there on the right ear, and in front you see the scar tissue running down here; that was very deep, and I suppose that scar tissue is an inch and a fourth in length, and possible one-third inch in width, extending down below the lobe of the ear—the canal of the ear. You cannot tell very much difference there in it and the side of the face here. You will see it was burned, but the skin has grown back on it, and getting back in a more normal condition. You see the nose here is a mass of scar tissue over the top, that extends possibly a third inch down on each side; that was running for something like one year; it was a year healing up; now and then it would heal up and break loose again. The upper lid, as you will see, has scar tissue there where it was last in healing. It was burned in the muscular tissue on the right side. I suppose the scar tissue is about one-fourth inch in width, in length about the same. On the left side of the lips the same. His lips here, you see, they move all right. Now the under lip on the right side is a mass of scar tissue, that is possibly half an inch long, and quarter of an inch wide—one-third inch wide. You see the contraction of the chin there. Here on the cheek bone is a small mass of scar tissue. Now you see under his neck, at the angle of the jaw, and underneath, the skin here was very badly burned, and this is a mass of scar tissue, which might be easily broken by cold weather, or anything that would act as an irritant. This scar tissue extends from one angle of the jaw to the other, and as to the length, I suppose it is something like eight inches, and right underneath the chin here, it is an inch and a half, and contracts the skin down there. He will never be able to raise his chin up very high on account of the contraction of the tissue there and muscular fiber. Now, you see the left ear, it was not burned so badly; it left more of it; but the upper and outer rim of the ear was completely burned off, and in front there is a mass of scar tissue that extends from the top of the ear to about an inch and a half below the left, and extending in front of it something like one inch, extending from the auditory canal in front. Now this is left in the same condition as the other. It is liable at any time to crack open, as exposure from cold weather. Now, you see on the right side, over the right clavicle, is a scar that extends about one inch and a half above the junction of the clavicle with the breast bone—the right collar bone—and extends down over the breast bone there for a couple of inches; something like that. Now, on the left side there is a large scar tissue there, over the left collar bone, that in length is possibly three inches, in width inch and a half, or something like that. Now, this tissue extends down over the left collar bone, over the chest or ribs, down to the breast bone, about something like two inches, and you see that heavy scar tissue, and here is a

mass of scar tissue; that is possibly three inches from the top of the breast bone, extending down. Now, you see the right eye, there is a contraction of the upper lid to the extent he is unable to close it completely. You can show there in closing the eye that way, and on account of that being that way, there is an overflow of tears, and this lid, apparently the end of it was burnt off, and the contraction there is so great it will never come down in a normal way; there will always be a contraction there; the lower lid shows a little diversion, slightly, but very little. Now, open you eye. I don't think you could see that. There is a haziness over the right eye, you can see at a glance, or when there is a light thrown over it, extends up about half way of the pupil of the eye, and of course that obstructs the vision of the right eye." Appellee's hands were burned through the skin, and nothing was left but a mass of burned tissue, and he cannot close his hands, and they are very tender and pain him when he attempts to use them, and it was proved that these injuries were permanent, and that appellee will never be able to chop wood or perform farm work. The eyes of appellee were so badly injured that he cannot see to read, the lids are inflamed, and heat or cold so affects the right eye, which he cannot close, that it exudes water all the time, and gives him much pain and annoyance. His eyes were closed for about three months, and he suffered agonies from them and other burns, and was suffering at the time of the trial, and will probably suffer all his life. He was when burned sound and healthy, and earning about \$45 a month. It was stated by the physician that appellee's left eye would probably grow worse, and that the right eye might remain in the condition it was at the time of the trial. He also stated that glasses would relieve the eyes of some strain, but as long as the eyes were congested as they were appellee could not read with comfort.

There was no evidence tending to show that appellee was guilty of contributory negligence. The evidence of Weinberg, a witness for appellant, that after the explosion he "imagined" he saw appellee "coming in the door with two cans in his hands," was of too insubstantial a nature to deserve notice. Anyway at that time the explosion had taken place and the fire had filled the room, and the presence of appellee with two cans could not have caused the explosion and fire. Weinberg stated that from a second to four seconds before the explosion he had seen appellee seated in the alleyway, and he refused to swear that he had seen appellee coming through the door. It all amounted to a "vain imagining" and nothing more, but, if it had been true, there was nothing to indicate that standing in the door with two cans was the efficient cause of the explosion, and the evidence could have had no potency except to contradict appellee's statement that he was

seated in the alleyway when the explosion occurred.

It was in evidence that gasoline is volatile, that is, when exposed to the air it will pass off rapidly in the form of vapor, and will permeate the atmosphere; that in drawing gasoline, as it was being drawn before and at the time of the accident, the gas would rapidly pass off, and that 10 to 15 quarts of gas for each gallon of gasoline drawn in 15 minutes would be generated, and would permeate the atmosphere of the room in which it was drawn; that the furnace would draw the atmosphere laden with gas into it, and where there was a large amount of gas it could be ignited by fire in the furnace 30, 40, or 50 feet off. It was shown that under the circumstances prevailing before and at the time of the explosion the atmosphere in the cooperage room must have been laden with inflammable gas. The furnace was about 33 feet from where 6 or 8 5-gallon cans of gasoline had been drawn, which must have given off in some 15 minutes about 350 quarts of gas. There was nothing to indicate that appellee knew anything about the release of such quantities of gas, and the danger from an open fire in such proximity to it as that in the furnace; in fact, appellee testified that he did not know that there was any fire in the furnace at the time. Weinberg, the agent of appellant, knew the fire was there, and had pushed in the pieces of wood just before the explosion which took place in the furnace. The object in pushing up the fire was to make it burn more.

Petroleum and its subproduct, gasoline, and the gases generated by them, were shown to be highly inflammable, and appellant, who had for years been handling them, was charged with that knowledge, and it was no defense to this action to show that the fire in the furnace had not ignited the gas before. The very fact that dangerous agencies were being used by it in a careless way was proof of negligence, in spite of the fact that such carelessness had not theretofore resulted in disaster. It was a danger that was imminent at all times. A man might walk for years through a powder magazine, where that inflammable material was open and exposed, with lighted cigars in his mouth and no accident might occur; but if at last an explosion took place, resulting from such conduct, it would be the most culpable negligence, in spite of the fact that the disaster had not earlier occurred. Negligence for a long period of time, which does not result in injury to others, will not excuse or palliate the matter when the injury at last occurred through such negligence. The evidence indicated that an explosion under like circumstances might have occurred at any time, and because for some inexplicable reason it did not occur does not transform such negligence into the exercise of ordinary care. As said by the Supreme Court of Missouri in the case of *Fuchs v. City of St. Louis*, 133 Mo. 168, 31 S.

W. 115, 34 S. W. 508, 34 L. R. A. 118: "It is not always consistent with common prudence to await a catastrophe before taking precautions against it. Nor is it conclusive of careful management that a particular disaster has never before occurred. It is often an essential part of reasonable care to guard against those performances which men of ordinary prudence would naturally and reasonably anticipate in dealing with such dangerous agencies as science has contributed to our highly complex civilization." The owner or controller of dangerous materials, such as gunpowder, dynamite, or other explosives, is bound to exercise great care to prevent an injury which a prudent man would reasonably foresee might result from them. *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 118, 48 Am. St. Rep. 146; *Wilbert v. Brick Co.*, 129 Wis. 1, 106 N. W. 1058.

There is nothing in the evidence to support the contention that the occurrence herein described was an inevitable accident. "An accident is inevitable if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another." *Shear. & B. Neg. 6*. Appellant does not bring itself within this rule. Appellee was the servant of a customer of appellant, was lawfully on its premises for the purpose of procuring the product it sold, and it owed him the legal duty to exercise at least ordinary care to protect him from injury while there.

The facts in the case of *Moeckel v. Cross*, 190 Mass. 280, 76 N. E. 447, are very similar to those in this case, and while the fact that the defendant was carrying on his business contrary to law entered into the decision, yet it was also placed on the ground of overt negligence. The Supreme Judicial Court of Massachusetts said: "There was evidence that the defendant's servant was engaged in gluing barrels on the morning of the accident; that the door, which closed automatically, was hung on trucks at the top, and was not stable at the bottom, and would swing out from the bottom. There was also evidence that the method of filling the barrels with gasoline was through an automatic faucet, which shut off with a spring; that it did not always snap off, and then would run over. It further appeared that there was a lamp used for heating glue, which generally was kept lighted, and that there was always a strong smell of gasoline and kerosine about the room, and 'a good many feet from it.' In the explosion the defendant's servant was killed, and close to his body was found the body of a man not an employé of the defendant. The defendant contends that this man might have caused the explosion, but there is no evidence of this, and the jury were warranted in finding both that the defendant was maintaining a nuisance and was carrying on the business in a negligent manner."

Our conclusions of fact and the matters hereinbefore discussed dispose of the first and second assignments of error, and the third assignment of error, which urges excess in the verdict, cannot be sustained. There is nothing to indicate passion or prejudice on the part of the jury, and the imagination fails to draw a more pitiable picture than the one presented by the disfigured body of appellee in this case. Just verging into manhood, with his life before him, he must, almost blind, go groping through the world, with deformed, almost helpless, hands, one ear gone and the other badly mutilated, with neck so stiff that he can scarcely turn his head, and with a visage so marred and disfigured as to render him repulsive to his associates, constantly suffering, both mentally and physically, his life wrecked beyond hope. We are unwilling to hold that \$30,000 is an excessive sum for him to recover, especially when the excruciating agony that he suffered, as he lay blind and helpless for months, is taken into consideration, as it must have been by the jury. If compensation for what he has suffered and lost is the test, as well as what he will suffer and lose, appellee has not received too much.

It was alleged in the petition that appellee was so maimed and disfigured that he was "constantly humiliated by coming in contact with his fellow men." We think that allegation was broad and comprehensive enough to include embarrassment arising from the staring of people who meet appellee, and that the court did not err, as claimed in the fourth assignment of error, in admitting proof of such embarrassment. If this be not true, proof of mental suffering would be admissible under the general allegation on that subject.

The witness P. S. Tilson qualified himself as an expert chemist and thoroughly acquainted with gasoline, and it was not improper to allow him to testify that the gas given off from gasoline can be ignited at distances remote from the gasoline, and to name the distances. The conditions had been shown upon which to predicate such an answer. The gasoline had been drawn for 15 minutes or more. It had been shown that a large quantity of gas would be thereby generated; that it would fill the room, and that a fire was burning at a certain distance. The amount of the gas generated in a given length of time from the exposure of a given amount of gasoline had been estimated by the expert, and, under the circumstances shown to exist, he could express an opinion as to the distance at which the gas could be ignited by the fire. There was evidence tending to show that the furnace, when a fire was kindled, would draw the air towards it. There is no force in the objection to the evidence. The evidence complained of was given at another time by the expert, without objection, and consequently there is no foundation for the assignment of error.

The sixth assignment of error attacks the charge because it submitted the question of future physical suffering on the part of appellee. It is admitted by appellant that the evidence showed that future physical suffering would be endured, but it claims that the pleadings did not allege that appellee would suffer physically in the future. The allegations as to injuries were as follows: "The plaintiff was then and there seriously and permanently burnt and injured; that his head and face were burned; a portion of his ears was burned off; his hearing and eyesight affected; his eyelids burned and injured; that his hands, wrists, and arms were so burned as to render them of little use to him in earning a livelihood; that his chest, shoulders, neck, and back were burned; and that as a result of the burns and injuries received by him he has suffered, and continues to suffer, great physical pain and mental anguish, and has become incapacitated to perform any character of labor; that he is so disfigured and maimed and presents such a hideous aspect that he is constantly humiliated by coming in contact with his fellow men." The rule on the subject is thus stated in section 1060, Sutherland on Damages: "The general allegation of damages will suffice to let in proof and warrant recovery of all such damages as naturally and necessarily arise or result from the wrongful act complained of. The law implies such damages—that is, damages of that sort—and proof is necessary only to show their extent and amount. But where damages actually sustained do not necessarily result from the act complained of, and consequently are not implied, the plaintiff must state in his declaration the particular damage which he has sustained for notice thereof to the defendant; otherwise, the plaintiff will not be permitted to give evidence of it on the trial." The foregoing rule was approved in *Railway v. Curry*, 64 Tex. 85, but the court amplified and explained the rule as follows: "The rule, however, is satisfied when from the fact stated the law infers other fact or facts; for whatsoever the law infers from a given state of facts the adverse party is presumed to know, and must take notice of, whether it is specially pleaded or not. The law infers, when such injuries to the person are shown to have existed as are alleged and proved in this case, that physical pain resulted therefrom; for by common observation we know that in the ordinary operation of natural laws pain is a necessary result of such injuries, unless the condition of the injured person be abnormal, which will not be presumed." In that case there was no allegation of mental and physical suffering; the allegation being that the plaintiff had been cut, bruised, and wounded about his hips and spine, and the court held evidence of mental and physical suffering admissible, and if admissible in evidence, of course it would be proper to submit it to

the jury. We think the allegations were sufficient to admit proof of future physical suffering, and, the proof having been admitted, it was a proper element of damages to go to the jury. Tenderness of the skin and sensitiveness of the eyes to heat and air must necessarily have arisen from burning the head and face so that the ears were burned off and the hearing affected, and from the eyelids being burned and injured, and from the hands being so injured as to be of little use.

The court did not err in the charge complained of in the seventh assignment of error. There was no testimony that tended to indicate that appellee knew that there was any fire in the furnace on the morning of the accident; the fire not being built every day, and knew nothing of the danger of an explosion. His contributory negligence, if any, depended on his knowledge of the danger at that time. The charge as to knowledge was absolutely correct. It did not go into details as to the matter of the knowledge being actual or constructive, and, if appellant desired an amplification of the charge, it should have requested it. If there was any error in the charge, it was one of omission and not of commission.

There was no evidence to support the special charge set out in the eighth assignment of error, and the court did not err in refusing to give it to the jury. The charge did not correct any generality of statement as to knowledge made by the court in the general charge. No one testified that appellee had carried gasoline through the cooperage room on the morning of the accident, and the charge must rest on the "imagining" of Weinberg that he saw appellee standing in the doorway to the cooperage room with two cans (not "cans of gasoline," as stated by appellant in its brief) in his hands after the explosion, and the circumstance that a can with the bottom knocked out was afterwards found by the same witness near the door. Upon that foundation appellant sought to start an inquiry as to whether the gas emitted from cans carried by appellee caused the explosion. While the testimony was not in our opinion sufficient to form the basis of a charge, still the matters asked in the rejected charge were fully presented in the sixth subdivision of the charge, where the jury were instructed that if appellant "was negligent in his manner of handling the oil cans or cans of oil or gasoline, in that same were not properly closed, so as to prevent the escape of oils and gases therefrom, or in that he carried the same through the cooperage shop instead of through the warehouse, and that caused the explosion and fire, or if you believe the plaintiff, Thomas M. Snell, knew of the danger of being injured by an explosion of gas and fire, you will likewise return verdict for defendant." The charge of the court was an admirable presentation of the issues presented by the pleadings and facts, and, in addition, eight special charges requested by

appellee were given, presenting every conceivable phase of the case in its behalf.

The judgment is affirmed.

### GRAY v. SOVEREIGN CAMP WOODMEN OF THE WORLD.\*

(Court of Civil Appeals of Texas. Nov. 23, 1907. Rehearing Denied Dec. 14, 1907.)

#### 1. INSURANCE—MUTUAL BENEFIT—FORFEITURE OF CERTIFICATE—FRAUD.

The constitution of a fraternal beneficiary association designated a wife, children, adopted children, parents, brothers, sisters, or other blood relations or persons dependent on the member as those who might be named as beneficiaries in certificates. Acts 26th Leg. (Sess. Acts 1899, p. 195, c. 115), designates the family, heirs, blood relatives, affianced husband or wife, or persons dependent on the member at his death. The constitution and by-laws further provided, and the benefit certificate itself recited, that the same was issued subject to all the laws, rules, etc., and in consideration of the representations and warranties in the application, and that, if any of the statements were untrue, the certificate should be void. The application stated that applicant warranted all the statements therein as true, and that any untrue statement should avoid the certificate. *Held*, that the representation that the beneficiary named was a cousin of applicant, whereas she was no blood relative, rendered the certificate void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1861.]

#### 2. SAME—CHANGE OF BENEFICIARY.

The constitution and by-laws of a fraternal beneficiary association provided that a beneficiary might be changed on payment of a certain fee, with the member's written request, giving the name of the new beneficiary, and that on receipt thereof the sovereign clerk should issue a new certificate in the name of the new beneficiary. *Held*, that where the constitution and by-laws were not complied with, but the clerk of the local camp, on request of the member, filled out the form for a change of beneficiary, which the member signed, such attempted change of beneficiary was ineffectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1951.]

#### 3. SAME—BENEFICIARIES—PERSONS WHO MAY BE—COUSINS.

Acts 26th Leg. (Sess. Acts 1899, p. 195, c. 115), designating the classes of persons who may be named as beneficiaries in certificates issued by a fraternal beneficiary association, recognizes and names blood relatives as a class to whom certificates may be payable, and hence the designation of a cousin is not against the public policy of the state.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Rosie C. Gray against the Sovereign Camp Woodmen of the World. Judgment for defendant, and plaintiff appeals. Affirmed.

Smelser & Vaughan, for appellant. Glass, Estes & King, for appellee.

TALBOT, J. Appellant brought this suit against the appellee to recover the sum of \$3,000 upon a beneficiary certificate issued by appellee October 11, 1901, upon the life of Murray A. Gray, in favor of appellant, under the name of Rosie C. White, and as the cousin

of the said Murray A. Gray. The petition alleged the death of Murray A. Gray, proof thereof, and that at the date of his death appellant bore to him the relation of wife, and otherwise upon its face showed a cause of action. The defendant pleaded a general denial, and specially, among other things, that under its constitution and laws benefit certificates can only issue in favor of beneficiaries who are the wife, children, adopted children, parents, brothers, sisters, or other blood relations of the member, or to the persons dependent upon the member; that in the application of the said Murray A. Gray for membership in defendant's order he directed that the amount of the beneficiary fund, to which his beneficiary should be entitled at his death, be paid to Rosie C. White, and that he represented in said application that the said Rosie C. White was related to him as cousin; that at the time of the making of said application, and at the time the beneficiary certificate was issued, the officers and agents of appellee believed that Rosie C. White was the said Murray A. Gray's cousin, and had no notice that she was not, until after the death of the said Murray A. Gray; that said Rosie C. White was not at the date of said application, or at any other date, the cousin or any other blood relative of the said Murray A. Gray; that he falsely and fraudulently represented to defendant that said Rosie C. White was related to him as cousin, when in truth and in fact she was not a blood relative of his at all, all of which was well known to the said Murray A. Gray and appellant. Defendant further alleged that the application of the said Murray A. Gray for membership in its order contained a stipulation and agreement to the effect that, if any statement or answer made by the said Gray in said application was untrue, etc., his beneficiary certificate should become void, and all rights of any person thereunder should be forfeited. A trial before the court without a jury resulted in a judgment for appellee, and appellant has appealed.

The following conclusions of fact, filed by the presiding judge, were authorized by the evidence, and are adopted by this court:

"The Sovereign Camp Woodmen of the World is a fraternal beneficiary association organized and carried on for the sole benefit of its members and the beneficiaries, and not for profit, with a lodge system and ritualistic form of work, with a fund from which benefits are paid, which fund is created for the purpose of paying, upon reasonable and satisfactory proof of the death of a beneficiary member who has complied with all the requirements of the order, to the beneficiary or beneficiaries named in such certificate a sum not to exceed \$3,000, which beneficiaries shall be the wife, children, adopted children, parents, brothers, sisters, or other blood relations, or to persons dependent on the member. On October 3, 1901, Murray A. Gray made application in writing to become a mem-

\*Writ of error denied by Supreme Court Jan. 8, 1908.



ber of the Texarkana Camp No. 19 (same being a subordinate lodge at Texarkana), and to become a participant in the beneficiary fund of the order to the amount of \$3,000. In said application he named Rosie C. White as beneficiary, and represented the relationship of her to himself to be that of cousin. That said application was in due course forwarded to the Sovereign Camp of the order, whose officials on the strength of representations contained therein did authorize the issuance of and did issue on October 11, 1901, to the said Murray A. Gray a beneficiary certificate No. 62733, by the terms of which it was stated that said Gray, while in good standing, was entitled to participate in the beneficiary fund of the order to the amount of \$1,500, should his death occur during the first year of his membership, \$2,250 should his death occur during the second year of his membership, and \$3,000 should his death occur after the second year of his membership, payable to Rosie C. White, bearing the relationship of cousin to him. The said Murray A. Gray afterwards, while in good standing as a member of said lodge, and on May 5, 1905, died in the state of California, and the said Rosie C. White did thereafter make proof of his death and a verified claim for the amount of said certificate, in which claim she represented her relationship with Gray to be that of affianced wife.

"At the time said application was made and said certificate was issued, Murray A. Gray was not, in fact, the cousin of Rosie C. White, and was not in any manner related by blood or marriage to her. The said representation was at said time false and fraudulent, and the facts were that Rosie C. Gray, known to the public as Zoe Leroy, was at said time an inmate, and for 10 or 15 years prior to said time had been an inmate, of a public house of prostitution, and was living in said house in illicit and immoral cohabitation with him. At the time said application was made and said certificate issued, and until the death of said Gray, the officials of defendant, whose duty it was to decide upon the issuance of certificates and to issue certificates, had no notice or knowledge that the relationship between plaintiff and said Gray was otherwise than as stated in said application, and issued said certificate believing, and until his death believed, that said plaintiff was in fact his cousin. That said illicit and immoral cohabitation began before and continued after the issuance of said certificate. Some time after same had been issued and prior to the 10th day of July, 1904, plaintiff and said Gray contracted a marriage between themselves, which was a valid marriage at common law, but none of the requisites of our statute were complied with, and they continued to live together as husband and wife until the death of said Murray A. Gray. On the 10th day of July, 1904, the following was indorsed and signed on said policy: 'Change of Beneficiary. I

hereby cancel the designation of beneficiary named in within certificate, and hereby order that this certificate shall be payable at my death to Rosie C. Gray, as my beneficiary, who bears relationship to me of wife. Date July 10th, 1904. Murray A. Gray. Attest: Paul J. Reverra, Clerk, Camp No. 19, State of Texas.' Nothing was ever done except this to change the beneficiary. Rosie C. White and Rosie C. Gray are one and the same person. The defendant knew nothing of this indorsement until at the death of Gray. The constitution and by-laws of the defendant designate, define, and restrict the class of beneficiaries who may participate in the beneficiary fund to the wife, children, adopted children, parents, brothers, sisters, or other blood relations, or to persons dependent upon the member. The constitution and by-laws of defendant further provide, and the beneficiary certificate itself recites, that same was issued subject to all the laws, rules, and regulations then in force or that might thereafter be enacted, and in consideration of the representations, agreements, and warranties made by Gray in his application to become a member, and that if any of the statements or declarations in said application upon the faith of which said certificate was issued be found in any respect untrue, then the certificate shall be null and void, and all moneys paid on account of it be forfeited. This certificate was issued on the faith of the representations made as to the relationship between Gray and plaintiff, and would not have been issued if the fact that they were not cousins had been known to the officers of defendant."

#### Conclusions of Law.

We are of the opinion the judgment of the court below should be affirmed. Appellee is a fraternal beneficiary association organized and conducted not for profit, but solely for the benefit of its members, and that class of persons who are authorized to become beneficiaries in its certificates. These certificates and the applications therefor stipulate that the constitution and by-laws of the order are made a part of the same, and by section 3 of said constitution the wife, children, adopted children, parents, brothers, sisters, or other blood relations, or persons dependent upon the member, are designated as the class of beneficiaries who may participate in the beneficiary fund. In his written application to become a member of appellee's order Murray A. Gray named Rosie C. White as beneficiary, and represented that she was his cousin. This representation was false, and the evidence is ample to sustain the court's finding that the officials of appellee, whose duty it was to decide upon the issuance of certificates and to issue certificates, had no notice or knowledge that the relationship between the said Gray and Rosie C. White, appellant, was other than as stated in said application, until after the death of said Gray, and that they issued the certificate sued on

believing, and until his death believed, that the said Rosie C. White was in fact his cousin. The certificate itself recites that it is issued by the Sovereign Camp of the Woodmen of the World, and is issued in consideration of the representations, agreements, and warranties made by the person named therein; that, "If any of the statements or declarations in the application for membership and upon the faith of which this certificate was issued shall be found in any respect untrue, this certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which have accrued on account of this certificate shall be absolutely forfeited without notice or service." The application for membership stated: "I hereby certify, agree, and warrant that all the statements, representations, and answers in this application \* \* \* are full, complete, and true, and I agree that any untrue statements or answers made by me in this application, \* \* \* or if I fail to comply with the laws, rules, and usages of the order, now in force or hereafter adopted, my beneficiary certificate shall become void, and all rights of any person or persons thereunder shall be forfeited." In addition to the provision of appellee's constitution referred to, in which the classes of persons who could become beneficiaries in a certificate issued by it are designated, we have the statute passed by the Twenty-Sixth Legislature of this state in 1899 (Sess. Acts 1899, p. 195, c. 115), which was in force at the time the policy sued on was issued, in which fraternal beneficiary societies, as created by the laws of this state or permitted to do business in this state, are defined, and the classes of persons who can receive benefits from them are designated. The classes in this statute are designated to be the families, heirs, blood relatives, affianced husband or affianced wife, or persons dependent upon the member at the time of his death. Thus, by the terms of this statute, as well as by the constitution of appellee's association, blood relatives could become lawful beneficiaries in certificates issued by appellee, and at the time the contract sued on was executed, appellant, if she had in fact been the cousin of the deceased Gray, could have enforced said contract. It is made clear that the representation made by an applicant for membership in appellee's association of the relationship of the proposed beneficiary enables the officers of the association to determine whether such beneficiary is within the limitations prescribed by the constitution and by-laws of the order and the laws of the state where the applicant resides, and hence a material representation to be considered, and upon the faith of which, in a large measure, the certificate is issued. If the relationship, as represented in the application, is not within the classes provided for by the constitution and by-laws of the order and of the statute of the state, the Sovereign Camp or any of the offi-

cials thereof have no power or authority to issue a beneficiary certificate on such application. As has been seen, the trial court found that the certificate in this case was issued on the faith of the representations made by Murray A. Gray as to the relationship between himself and the appellant, that said representations were false and fraudulent, and that the certificate would not have been issued, if the fact that they were not cousins had been known to the officers of appellee. These conclusions, in our opinion, are correct under the evidence, and present such a case of fraud as renders the certificate upon which appellant seeks to recover void.

To this effect is the case of *Koerts v. Lodge*, 119 Wis. 520, 97 N. W. 163. In that case the facts were that William Pluma, an unmarried man, joined the order of Herman's Sons, which was a beneficiary association organized for the purpose of providing a fund payable to the survivors of a member of the order. In his written application for a benefit certificate he named Annie Koerts as beneficiary, representing her to be his sister. The facts were that she was not his sister or in any manner related to him, and on the question of false representations the court said: "In the present case, it was falsely represented to the respondent's officers that the beneficiary was one of the class for whose benefit the mortuary fund was established, and the officers relied thereon, and issued the certificate accordingly, and never ascertained the falsity of the representation until after the death of the assured. This makes a very clear case of fraud. The certificate never would have been issued in favor of the respondent, except for the false representation. Her right rests upon the certificate alone, and, when it is shown that its issuance in her favor was procured by fraud, her claim must necessarily fail." In the case of *Supreme Council v. Green*, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527, Evans was a charter member of a subordinate lodge of the Grand American Legion of Honor. Elizabeth A. Green was named in his application for a certificate as beneficiary, and represented to bear the relationship of niece to him. This representation was false, and the application, as in the case at bar, provided that any untrue or fraudulent statement made should forfeit the rights of all parties under the policy or certificate. The statement as to the relationship of the assured and the beneficiary named was treated by the court as a warranty and on the question of its falsity said: "It is contended that improper relations existed between the insured and the beneficiary named, to wit, the appellee, and that the designation of her as applicant's niece was a cover to conceal the true relation. The jury seem to have found that immoral relations did not exist, and, of course, that question is not before us. Whatever may have been the motive of the deceased for stating the plaintiff, the beneficiary, to be his niece, when she was

not, is wholly immaterial to the question for decision. A relationship was stated to exist which on its face placed the beneficiary named within one of the classes provided for by the corporation and allowed by the statute of Massachusetts; and the corporation was called on to look no further, but might rely on the warranty of its truth and the agreement to forfeit, if falsely stated. It is not pretended there was any kinship in fact between the parties. It is conceded that there was not. The plaintiff testifies that there was not any relationship by blood, but says she called him uncle, and he treated her as a niece by mutual understanding. \* \* \*

The relationship of the parties to each other was certainly peculiar, and on the theory of entire purity the deceased was marvelously generous; but whether she could be regarded as a dependent within the meaning of the society's constitution and the statute of the state of Massachusetts would admit at least of serious doubts if the case turned on that point. We think the false statement of the insured that appellee was his niece so manifestly material as it declared her a relative and qualified beneficiary in view of the warranty of its truth and agreement to forfeit rights if false should defeat this action. \* \* \*

This corporation seems to have relied wholly in that regard on the warranty of truth on the part of applicant and agreement to forfeit, if false. He warranted his statement true, and took the consequence of falsehood by forfeiture if false. Whether his statements were fraudulent or not does not seem to be open to inquiry. It was a false statement—a misleading statement—that the beneficiary was a lawful beneficiary, and the corporation had no further inquiry to make. She was declared a relative, and not a dependent; so that all that was necessary for the appellant to show was that she was not a relative in order to obtain protection through the warranty of truth and agreement to forfeit if false." We think the remarks in the cases cited apply with equal force to the case under consideration, whether the false representation of Gray as to the relationship between himself and appellant be regarded as a material misrepresentation proved or a warranty of its truth, the falsity of which worked a forfeiture.

The effort on the part of Gray to change the beneficiary named in the certificate to Rosie C. Gray, by the indorsement made on the certificate July 10th, 1904, was ineffectual for that purpose, and does not alter the case. Paul Reverra, clerk of the local camp, testified: "He just came up to me one night before he was leaving for the West, and told me he wanted to change his policy, change the certificate, and I told him, 'All right, how do you want to make the change?' and he said he wanted to make it to his wife, and I said, 'All right, have you the certificate with you?' and he said, 'Yes.' I filled it out just like he wanted it, and told him to sign it. I filled it out

myself, and he signed it in my presence. This is all that was done." He further testified that he did not know until after the death of Gray that Rosie C. White was not related to him as cousin. The constitution and by-laws of the order provide "that a beneficiary may be changed upon payment to the Sovereign Camp of the fee of twenty-five cents, which sum, together with the certificate shall be forwarded by the insured to the Sovereign Clerk with his written request on the back of his certificate, giving the name or names of such new beneficiary or beneficiaries, and upon receipt thereof, the Sovereign Clerk shall issue and return a new certificate, subject to the same conditions and rate as the one surrendered, which additional shall be a part of the new certificate in which he shall write the name or names of the new beneficiary and record said change in the proper books of the Sovereign Camp." The Sovereign Clerk testified that this certificate had never been forwarded to him, nor had the name or money; nor had he ever heard of an effort or desire to change the beneficiary until after the death of the deceased. The constitution and by-laws of a fraternal beneficiary association becomes a part of the contract of insurance; and it has been uniformly held that, where the laws of the order provide a method for changing the beneficiary, that method is exclusive, and must be complied with. *Flowers v. Woodmen of the World* (Tex. Civ. App.) 90 S. W. 526, and authorities there cited.

Appellant contends that a person has no insurable interest in the life of a cousin; that it is against public policy in this state, as announced by the decisions of our courts, for policies of insurance of any character to be issued in favor of any person as beneficiary, promising benefits to such beneficiary upon the death of another in whose life such beneficiary has no insurable interest; that, although the beneficiary who has no such interest could not recover on the policy, yet the company or fraternal beneficiary association issuing it, and which has received the premiums, could not defeat a recovery by the legal representatives, heirs, or widow of the assured. That appellee having issued the certificate in this case in favor of a beneficiary to whom it was against public policy for it to issue, even if the representation that she was his cousin had been true, it cannot avoid the certificate on the ground that it was issued upon the faith of that representation, and the certificate will, in law, and under the rules and by-laws of appellee, inure to the benefit of the appellant. This contention, which has been so ably presented and urged by counsel for appellant, seems to be predicated upon the decisions in *McCorkle v. Benefit Ass'n*, 71 Tex. 152, 8 S. W. 516, *Price v. Knights of Honor*, 68 Tex. 361, 4 S. W. 638, and other cases in line therewith. We have given the matter that careful consideration suggested by the force of the contention,

and the zeal and ability with which it has been urged, but are clearly of the opinion that the principle announced in the cases relied on is not applicable or of controlling effect. Whatever our views might be, were it not for the statute of 1899, to which we have referred, still that statute is an authoritative expression of the public policy in this state, given after the rendition of the decisions expressing perhaps a different view, and recognizes and names cousins or blood relatives as a class of persons to whom beneficiary certificates may be made payable by a member of a fraternal beneficiary association. This being true, especially does it follow that the representation on the part of Murray A. Gray that Rosie C. White was his cousin was a material representation, and being false, avoided the certificate sued on under the provision of the contract, to the effect that, if any of the statements or declarations in the application therefor and upon the faith of which the certificate was issued shall be found in any respect untrue, the certificate shall be null and void and of no effect.

We think the evidence sufficient, perhaps, to support the trial court's finding that prior to the death of Murray A. Gray the appellant became and was the common-law wife of said Gray, and appellee's cross-assignment of error attacking this finding is therefore overruled.

We believe the judgment of the lower court is correct, and should be affirmed; and it is accordingly so ordered.

Affirmed.

#### O'BEAR-NESTER GLASS CO. v. ANTIEX-PLO CO. et al.\*

(Court of Civil Appeals of Texas. Nov. 6, 1907. Rehearing Denied Dec. 18, 1907.)

#### CORPORATIONS—STOCK SUBSCRIPTIONS—ACTION AGAINST STOCKHOLDER.

In an action against the stockholders of a corporation to recover the amount of their unpaid subscriptions for stock, evidence examined, and held to show that the stock was fully paid.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by the O'Bear-Nester Glass Company against the Antiexplo Company and others as individuals. From a judgment against the Antiexplo Company and in favor of the other defendants, plaintiff appeals. Affirmed.

John W. Davis and Geo. M. Shelton, for appellant. Prendergast & Williamson and Sanford & Denton, for appellees.

**KEY, J.** Appellant brought this suit against the Antiexplo Company, a private corporation, Sam M. Hamilton, Alf. A. Edwards, Sam Sanger, John Skimming, E. F. Drake, J. S. McClintock, and Ed. Sears, seeking to recover for a debt contracted by the defendant the Antiexplo Company. The plaintiff alleged in its petition that the An-

tiexplo Company was insolvent and sought to hold the other defendants upon the theory that they had subscribed for stock of the Antiexplo Company, and had not paid the full amount of their subscriptions.

The defendants the Antiexplo Company, Hamilton, Edwards, Sanger, and Drake filed a joint answer, consisting of a general demurrer, general denial, and a special plea, which is set out in appellant's brief as follows: "They set up the facts that during the year 1903 John Skimming, after a series of experiments, discovered a compound to be mixed with gasoline, kerosene, and other oils to prevent explosion, which was of very great value; that Skimming and Dennison, prior to 1904, had an active corporation in South Dakota for the manufacture of the compound, but for lack of funds they were unable to manufacture and sell the same satisfactorily, and thereafter Dennison visited Waco, Tex., and exhibited to Hamilton and others said compound, and by experiment convinced them of its extraordinary value; that Dennison employed the defendant Drake, a broker living at Waco, Tex., to interest others in the sale of said foreign corporation or its stock, so as to organize the same in Texas for the development of said compound, and agreed with Drake that said foreign corporation or both would pay him; that the said Drake undertook the development and successfully carried out his contract; that the said Hamilton, witnessing the experiments with the compound, was convinced of its extraordinary value, and was engaged in the business that handles gasoline and other oils; that he was induced by Dennison and Drake to visit other states and cities in the investigation of said foreign corporation and its plant and compound, and was confirmed in the belief as to the extraordinary value of said compound and its discovery, and was induced with others to purchase stock and the plant of the said foreign corporation and its formula for making said compound at large expense, after which they brought the formula and right to manufacture the same to Waco, Tex., and organized a corporation on the 2d day of January, 1904, said corporation being organized by Hamilton, Dennison, and Skimming; that said Hamilton, Dennison, and Skimming believed said formula to be worth \$100,000 or more, and therefore capitalized the corporation under the name of the Antiexplo Company at \$100,000, and sold to said corporation the formula for making said compound, and turned over the same to said corporation for said \$100,000 in stock therefor; that said corporation is still the holder and owner of said formula and alone in the secret thereof, and they agreed among themselves and with said corporation that for said formula they would take to themselves stock in said company to the extent of \$82,500, in the proportion of \$35,000 to Hamilton, \$35,000 to Dennison, and

\*Writ of error granted by Supreme Court.

\$12,500 to Skimming, and that the remaining stock, \$17,500, they would leave in the treasury of said corporation, and from time to time, as said corporation needed funds for the purpose of operating and running its plant, would offer stock for sale on the market, and sell same for the best price they could get therefor, and apply the proceeds of such sales in its treasury and use the same for said purposes; that there was no subscription to said corporation by any one for said stock or any part thereof at any time; that the corporation never opened any subscription books; that all they did was done in the utmost good faith with no intention on their part or that of the corporation to deceive or defraud any creditor; that defendant Drake at no time subscribed to said corporation for any of the stock; that for services having been rendered by Drake for the launching of the corporation that stock was issued to said Drake in lieu thereof, and that said Dennison paid said Drake said stock as a private transaction; that McClintock had an agreement with the corporation to pay for his stock in commission on sales, and that he had given a note to the corporation for the stock which the corporation had used, and which is at this time pledged to a bank for a debt due by the corporation; that, immediately after the incorporation of said company, it began very active and prosperous business in the manufacture and sale of said compound; that they made many public demonstrations and advertised extensively, and that it was believed by all parties connected with said company and its stockholders and officers that the formula for making said compound and the manufacture thereof was of vast value and importance; that during the time it was engaged in business it took orders for a large amount of said compound at a price that paid handsome profits; that, whilst said corporation was a going concern, it offered for sale on the market its treasury stock for the best price it could get therefor, and made sale thereof to various and sundry persons; that there was no subscription to said corporation by any one of said persons for any of its said stock; that all those who bought the same, and especially defendants Sanger and Edwards, bought it in open market, paying what it was worth; that each of the sales of said stock was made by the corporation and its officers in the utmost good faith for the highest price they could obtain therefor, and each purchaser thereof bought the same in open market in utmost good faith and for what he could get the same at; that full and complete value was paid to said company in the sale of the formula for making said compound; that the treasury stock was in fact a gift to said company by said three persons, Hamilton, Dennison, and Skimming; that whilst said corporation was doing a large business the fire insurance companies issued circular let-

ters to all of their policy holders and to all persons who were then handling the product of said formula warning them against buying or carrying any of said compound in their business, and threatening, if they did so, that the companies would cancel the insurance held by said policies, and would not insure them, whereby the business of said corporation was wrecked and largely ruined. The defendant McClintock answered separately by general denial. The defendant Sears made no answer. Plaintiff dismissed as to the defendant Skimming. A jury was waived and the case was submitted to the court and trial commenced on the 27th of November, 1906, and before it was completed it was deferred until the 5th day of December, 1906, on which last-named date the court rendered its judgment in favor of plaintiff against the Antiexplo Company for \$1,604.54, and in favor of the other defendants.

The plaintiff has appealed, and presents the case in this court on several assignments of error, but the chief question for decision is whether or not, on the evidence presented, the trial court committed error in rendering judgment for the defendants, who were sued as stockholders in the Antiexplo Company. After careful consideration, we have reached the conclusion that appellant is not entitled to have the case reversed. Appellees submitted testimony which sustained the material averments of their special answer; such being the case, and in support of the judgment, we find the facts to be substantially as therein pleaded. While it is true that our Constitution prohibits a corporation from issuing stock or bonds, except for money paid, labor done, or property actually received, and declares void all fictitious increase of stock or indebtedness, we are of opinion that the finding of the trial court that all the stock of the Antiexplo Company was paid for by the defendants with property actually received by the corporation is supported by testimony. The testimony of the defendant Hamilton, and other testimony in corroboration, was to the effect that the secret formula which he and his associates sold the Antiexplo Company, and for which they were to receive its entire capital stock of \$100,000, was at that time worth that amount. We see no sufficient reason why this court should hold that the trial court should have discredited that testimony. Such being the facts, the plaintiff's allegation that the defendant's stockholders had not paid full value for the stock received by them from the corporation was not only unsustained, but was disproved. If the corporation received from the stockholders in payment for its capital stock the face value of such stock, whether in money or property, then none of the stockholders can be held liable to a creditor of the corporation upon the theory urged by appellant, although after the corporation had sold its stock to Hamilton one or more of the defendants may have

purchased some of the stock at less than its face value. *Cole v. Adams*, 92 Tex. 171, 48 S. W. 790; *Coit v. Gold, etc., Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, s. c. (C. C.) 14 Fed. 12; *Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Hollins v. Coal Co.*, 150 U. S. 383, 14 Sup. Ct. 127, 37 L. Ed. 1113.

There are some other minor questions presented in the briefs, which we deem it unnecessary to discuss in this opinion.

Our conclusion is that no grounds for reversal have been presented; and the judgment is affirmed.

## FIRST STATE BANK OF RAVENNA v. BARNETT.

(Court of Civil Appeals of Texas. Dec. 5, 1907.)

### 1. SALES—BAILMENT—NATURE OF CONTRACT.

Where a cotton ginner ginned cotton for the public at 40 cents per 100 pounds of lint, to be paid in money, and either saved the seed for each customer from his own cotton or ran the seed into a receptacle, and delivered seed from a common mass to each customer at the rate of 64 pounds of seed for each 100 pounds of seed cotton ginned, the arrangement as to a customer whose seed came from such common mass was a bailment, and not a sale; the customer being entitled to demand a delivery of his identical cotton and seed at his election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 7-11.]

### 2. PAYMENT—VOLUNTARY PAYMENT—SET-OFF.

Where defendant, having wrongfully converted plaintiff's cotton seed, sold the same to an oil mill to which plaintiff was indebted in a certain sum, which the mill deducted from the price of the seed remitted to defendant, such payment on the defendant's part was voluntary, and it was therefore not entitled to set it off against its liability for damages for the conversion.

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Action by J. C. Barnett against the First State Bank of Ravenna. From a judgment for plaintiff, defendant appeals. Affirmed.

McGrady & McMahon, for appellant. E. L. Agnew, for appellee.

**HODGES, J.** The appellee sued appellant in the county court of Fannin county for damages for conversion of a car load of cotton seed of about 55,000 pounds, which appellee claimed to own. Appellant answered by general denial, and specially pleaded and relied upon the following facts: That on December 5, 1906, one R. L. Barnett was engaged in business at Ravenna in ginning cotton and buying cotton seed, and was indebted to the appellant, who was furnishing him money with which to make these purchases; that said indebtedness was in the form of overdrafts as the result of checks drawn by said R. L. Barnett on the appellant bank; and that on the day above mentioned said Barnett executed to the appellant an instrument in writing, mortgaging to it all the cotton, seed, wood, bagging, and ties, and other per-

sonal property connected with his ginning business, and "all this sort of property said Barnett might purchase in the future till his bank account with said bank was fully paid, in consideration of the advances made and that might be made by said bank for purchase money, and all sales of cotton and cotton seed should be made by and through said bank." This instrument, in connection with a verbal agreement between said Barnett and the bank, is claimed to be a mortgage upon the seed in question. Prior to January 12, 1907, appellant had exhausted all other security it had, leaving said R. L. Barnett still owing it over \$800 for money so advanced, and on that day, by virtue of its mortgage, took possession of and sold the seed in question and applied the proceeds on the debt, but that said proceeds were insufficient to pay off and satisfy said debt. It further alleged that, if the appellee had any right to the seed, it was subsequent and inferior to the appellant's rights and liens, and that, if appellee ever owned any part of such seed, he had knowingly commingled the same with R. L. Barnett's seed at the latter's gin and in his possession, so that the same became the property of R. L. Barnett, and the appellant's lien attached thereto. Trial was had before the court without a jury, which resulted in a judgment in favor of the appellee for the sum of \$339.50. From this judgment, appellant prosecutes this appeal.

The court filed findings of fact and conclusions of law, which we think are fully sustained by the evidence. The findings of fact are substantially these: During the season of 1906-07 R. L. Barnett was the sole owner of and operated a gin at Ravenna in Fannin county, Tex., for the purpose of ginning cotton for the public. He charged as compensation for ginning 40 cents per 100 pounds for each 100 pounds of lint produced, and gave his customers all of the seed out of the cotton ginned, allowing 64 pounds of cotton seed to every 100 pounds of seed cotton. As the cotton was ginned, the seed, if the owner desired, were caught as they came from the gin, and delivered to the owner; but generally the seed were run from the gin into a large seedhouse, and the customers were given seed out of this house at the rate above mentioned. J. C. Barnett, the appellee, was a patron of that gin during that season, and had from 54 to 58 bales of cotton ginned; all of the seed being run into the seedhouse. A bale of lint cotton was produced from about 1,700 pounds of seed cotton. On the 8th day of January, 1907, J. C. Barnett and R. L. Barnett had a settlement by the books of the latter, and it was ascertained that J. C. Barnett was due from R. L. Barnett something over 55,000 pounds of seed. J. C. Barnett thereupon engaged R. L. Barnett to load for him that much seed in a car for shipment, in pursuance of which R. L. Barnett loaded 54,324 pounds of the seed into a car for J. C. Barnett, that amount

being all that the car would hold, and notified J. C. Barnett when the seed was loaded, and furnished him with the weigher's tickets, showing that that amount had been weighed for J. C. Barnett. The latter paid R. L. Barnett the sum of \$9.80, the expense for loading the seed. This lot of seed came out of the seedhouse, and took all that was in the house, except 40 or 50 bushels. After the car was loaded, on January 12, 1907, C. F. Christensen, cashier of the appellant bank, without the knowledge or consent of J. C. Barnett, took charge of the car of seed, shipped the same to Denison, Tex., in the name of the appellant, and sold the same to an oil company at the rate of \$12.50 per ton, the oil company paying the freight on the car. The proceeds of this sale were received by the appellant bank, and applied to the credit of a claim it held against R. L. Barnett. The court finds that the cash market value of this lot of cotton seed f. o. b. cars at Ravenna was \$12.50 per ton. Under the findings of the court, it is conclusively shown that the appellant did advance money to R. L. Barnett, both before and after making the mortgage alluded to, and that, after applying the proceeds of the sale of the seed in question, there was a balance still due to the appellant from R. L. Barnett for advances made to him under its contract. The facts in the record also show the execution of the mortgage relied on and pleaded by the appellant as its authority for taking possession of the car load of seed. It is further shown, however, that this instrument was never filed for registration, and that the appellee had no actual notice of its existence prior to the seizure of the seed by appellant.

Appellant admits the seizure and conversion of the load of seed, and seeks to justify its course of conduct in so doing upon its rights as a mortgagee of R. L. Barnett's property. It is contended by the appellant that the relation of the two Barnetts, as to the seed in controversy, was merely that of debtor and creditor; that in permitting his cotton seed to be run into a house and mingled with the seed of R. L. Barnett and other parties, and agreeing that he would take seed therefrom at 64 pounds for each 100 pounds of seed cotton, J. C. Barnett was simply a creditor of R. L. Barnett's for the value of the seed thus deposited, and not a bailor; that all the seed in the common mass became the property of R. L. Barnett. It is then concluded that J. C. Barnett could not rely upon want of notice of the appellant's mortgage, because, when he received the seed delivered to him by R. L. Barnett, he applied them to the payment of a pre-existing debt, and was not in the attitude of bona fide purchaser without notice, and could assert no such rights. The case turns upon the issue of whether or not the transaction between the Barnetts, one as ginner and the other as customer, was a sale or a bailment. If the relation of debtor and creditor existed

between the two Barnetts as to the cotton seed which had been deposited in the seed house of R. L. Barnett, then there must have been a sale from J. C. Barnett to R. L. Barnett. If there was a sale, what was the consideration, and when did it occur? As the evidence conclusively shows, the consideration for what R. L. Barnett was to perform about the cotton, ginning and baling it for market, was 40 cents per hundred pounds of lint, to be paid in money. Where he furnished bagging and ties, he charged 90 cents per bale more. Hence he was to receive no part of the cotton, or of the seed, as his compensation for his services or attention. The customers were to get all of their seed back, as well as all of their cotton. This was the understanding under which R. L. Barnett received and ginned the cotton of the appellee and that of all of his customers. We fail to see any of the elements of a sale in this transaction; on the contrary, we think it clear that it was one of bailment. The fact that the seed from appellee's cotton was permitted by him to be run into a seedhouse, and there commingled with the seed of other parties, so that it was impossible for the identical seed to again be delivered to him, did not convert what would otherwise have been a bailment into a sale. *Potter v. Roller Mills Co.*, 101 Mo. App. 581, 73 S. W. 1005; *Bretz v. Diehl*, 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706; *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Nelson v. Brown*, 44 Iowa, 455; *Id.*, 53 Iowa, 555, 5 N. W. 719; *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Rice v. Nixon*, 97 Ind. 97, 49 Am. St. Rep. 430. In the case first above referred to it is said: "The circumstances that the identical grain is commingled with other grain, and is not to be returned to the depositor, but a like quantity of the same kind and quality, are not sufficient to convert the contract into a sale." In the case of *Bretz v. Diehl*, supra, one of those cited and relied on by the appellant, the court there quoted approvingly from another case the following language: "If the dealer has the right at his pleasure either to ship and sell the same on his own account and pay the market price on demand, or retain and redeliver the wheat, or other wheat in place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property or other of like quantity and grade that the contract will be considered one of bailment. If he surrender to the other the right of election, it will be considered a sale with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is: Can the depositor by his contract compel a delivery of wheat whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." The case of *Nelson v. Brown*, supra, in effect holds that where grain in an

elevator is mixed in a common mass with that of other owners, and of a like kind and grade, the depositors become tenants in common of the mass, according to the quantity owned by each, with a right of severance at any time. The owner of the elevator does not acquire title to the wheat deposited because he may own a portion of the common mass, nor because the wheat in the elevator may have been shipped out and replaced with other wheat. Let us then apply the test adopted by the decisions referred to for determining whether or not a transaction of the kind here involved is a sale or a bailment. Could J. C. Barnett have demanded of R. L. Barnett the same quantity of seed of like kind and quality as that deposited? Undoubtedly this could have been done. The fact that 64 pounds per 100 pounds of seed cotton was adopted as the quantity that each customer should receive does not alter the nature of the relations of these parties. This was evidently done as a convenient mode of making distribution among the joint owners of the common mass. That R. L. Barnett could not have discharged his obligation to any of his customers from whom he received seed in the usual way by the tender of their value in money we think admits of no doubt. This transaction being a bailment, and not a sale, J. C. Barnett was not affected by appellant's mortgage.

In his third assignment of error the appellant complains of that portion of the court's findings of fact in which it was found that the market value of the seed in controversy was \$12.50 per ton f. o. b. the cars at Ravenna. We think the evidence fully justified the finding made by the court. The third assignment of error charges that the judgment is excessive, and claims that the court should have deducted \$39 from the sum awarded to the appellee. This contention is based upon the testimony adduced on the trial, to the effect that in the settlement between the two Barnetts J. C. Barnett assumed the payment of that sum owed by R. L. Barnett at that time to the oil mill that purchased the seed from the appellant; that at the time the seed were sold J. C. Barnett had not paid this amount as he had agreed, and the oil mill, in its settlement with the appellant, deducted that amount from the purchase price of the car load of seed, and applied the sum so deducted to the payment of this assumed debt. It is true this was J. C. Barnett's debt, and was paid in this manner by the appellant; but the appellant was under no compulsion to pay it, and the payment thus made by it was purely voluntary. We do not understand the rule measuring damages for conversion of property to go so far as to allow the wrongdoer the liberty of paying the debts of the injured party, for which the property converted is in no way liable, and, when called upon to make recompense in damages for the value of the property, to offset this claim with the amounts so paid. Such a rule would license the strong

to oppress the weak, and would destroy one of the fundamental purposes for which courts of justice are founded.

We are therefore of the opinion that there was no error in the judgment of the court below; and it is accordingly so ordered.

#### GRAND LODGE A. O. U. W. OF TEXAS et al. v. JONES.\*

(Court of Civil Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

#### INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHT TO CHANGE BENEFICIARY—EQUITABLE RIGHTS OF FORMER BENEFICIARY.

Where the by-laws of a mutual benefit association provides that a member may change his beneficiary upon delivering his certificate, etc., and a certificate is issued subject to and is to be construed by the laws of the order, and the beneficiary complies with the provisions for making a change of beneficiary, the association cannot be enjoined from issuing a new certificate to the new beneficiary, though plaintiff, to whom the certificate was formerly payable as trustee, had paid out money to keep the insurance alive, under an agreement with the insured and his beneficiary by which plaintiff was to receive the money so paid by him out of the proceeds of the certificate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1946-1949.]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by E. S. Jones against the Grand Lodge of A. O. U. W. of Texas and others to enjoin the Grand Lodge from changing a benefit certificate. From a judgment granting a perpetual injunction, defendants appeal. Reversed and rendered.

Smith & Wall, for appellants. Galloway & Vowell, J. Q. Adamson, and R. L. Caruthers, for appellee.

RICE, J. This suit was instituted in the district court of said county on the 11th of October, 1905, by appellee against appellants and also against H. C. Hedrick, John I. Hedrick, Vivian Hedrick, Sallie Hedrick, and Annie Ainsworth, guardian of Vivian and Sallie Hedrick, who were minors, to enjoin the Grand Lodge of Ancient Order of United Workmen and subordinate lodge of the order at Sherman from changing a benefit certificate issued to H. C. Hedrick on his life for \$998, payable in the event of his death to appellee, as trustee for H. C. Hedrick's son, John I. Hedrick, so as to make Will A. Hassell, Sr., trustee for Vivian and Sallie Hedrick, grandchildren of H. C. Hedrick, the beneficiaries therein. When the suit was instituted, a temporary injunction was prayed for and granted. The case was tried, and judgment rendered perpetuating the injunction, and appellants have appealed from said judgment.

Appellee alleged and proved that in 1880 H. C. Hedrick became a member of the subordinate lodge of the Ancient Order of Unit-

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.



ed Workmen at Sherman, Tex., and took out a certificate of insurance therein for the sum of \$2,000, payable at his death to his sons, Julian and John I. Hedrick, if at the time he was in good standing in the order. The said Ancient Order of United Workmen is a fraternal beneficiary association, and was incorporated in 1890 under the laws of this state, and is represented by a Grand Lodge of the state and subordinate lodges and their respective officers, which subordinate lodges derive their power and authority from the Grand Lodge, and said subordinate lodges and their officers are the agents and representatives of the order. It has a subordinate lodge at Sherman, Tex., of which S. P. Tutton is master workman, and L. S. Bonham is recorder. That in order to obtain insurance in said order it was necessary for the party to become a member of the subordinate lodge, and, in the event of a loss, all the surviving members were assessed sufficient sums to raise the amount required to pay off the policy or certificate of the deceased member. That H. C. Hedrick, in March, 1890, then being a member of such lodge, became involved in debt to plaintiff and others, which he was unable to pay, and that his son John I. Hedrick, then being the sole trustee of said benefit certificate, executed to one Sporer (with the apparent consent of said H. C. Hedrick) a certain instrument in writing, whereby he undertook to sell, transfer, and set over said policy or certificate to said Sporer, as trustee, for the purpose of collecting said policy, and after paying off said indebtedness to plaintiff and others, as well as all assessments which were paid by them to keep said policy alive, which it was recited they were to do, then the balance should be paid as follows: One-third to said John I. Hedrick's estate, and two-thirds to be paid to Mrs. Annie Ainsworth, as guardian for said two minor children, Vivian and Sallie, to be equally divided between them. That plaintiff and the other creditors named in said instrument thereafter paid all the dues and assessments made by the order against said H. C. Hedrick. That the said John I. Hedrick and H. C. Hedrick were insolvent and financially unable to do so. That on the 13th of June, 1904, H. C. Hedrick had some adjustment with his said creditors, including plaintiff, whereby the amounts then due to each of them were agreed upon, but no money was paid them; after which he executed to plaintiff an instrument of writing, whereby he recited that he had caused to be issued to plaintiff, as trustee for his son John I. Hedrick, two certain policies of insurance on his life, one for \$998 in this order, and the other for \$2,000 in the Knights of Honor, and declared that said plaintiff and his son John I. should carry out the following trust, to wit: That upon collection of said policies the said plaintiff, as trustee, should pay off the obligations he then owed, naming same,

including the amount due to plaintiff, reciting that the bulk of said indebtedness was for moneys advanced to pay off the premiums and assessments on said two policies; that the balance of said proceeds from said two policies should be invested and used by his son John I. Hedrick, one half for the education and maintenance of his two grandchildren, Vivian and Sallie, and the other half for the education and maintenance of the children of the said John I. by his second wife; providing, however, that the expenses of last illness and burial should first be paid. That on said 13th of June, 1904, said Hedrick made application, in due form, for a certificate to issue to plaintiff, as trustee, without bond, for the benefit of John I. Hedrick, and on the 25th of June, in pursuance of said application, the Grand Lodge Ancient Order of United Workmen issued a certificate in accordance with the laws of the order, and in regular form, as follows, to wit: "No. 799. This certificate issued by the Grand Lodge of the Ancient Order of United Workmen of the state of Texas, witnesseth: That Brother H. C. Hedrick, a workman degree member of Sherman Lodge No. 17 of said order, located at Sherman in the state of Texas, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen, and to designate the beneficiary to whom the sum of two thousand dollars of the beneficiary fund of the order shall at his death be paid. This certificate is issued subject to and is to be construed and controlled by the laws of the order. He designates as his beneficiary under the terms hereof Ezekial S. Jones, trustee without bond for John I. Hedrick, bearing to him the relation of son." That by indorsement on said certificate by the duly authorized officers of the Grand Lodge, with consent of the assured, the amount of said policy payable at death of the insured was reduced to \$998. That it was necessary, in order to keep said certificate alive thereafter, for said H. C. Hedrick to pay thereon the sum of 50 cents per month, which payment was made and the policy kept alive by said appellee till November 24, 1904, when the recorder of said order refused to accept any further fees from appellee, stating that he had other instructions. That on the 26th of November, 1904, the said H. C. Hedrick, in due form, made application to the Grand Lodge of Ancient Order of United Workmen, revoking his former direction as to payment of beneficiary fund due at his death, and authorizing and directing said payment to be made to Will A. Hassell, Sr., as trustee without bond, for the use and benefit of Vivian and Sallie Hedrick, his grandchildren. That in pursuance of said instruction the said order, by its Grand Lodge, on the same day, executed another certificate on the life of said H. C. Hedrick for said sum of \$998, in substance the same as the certificate theretofore issued by said order, but instead of being

payable to appellee, as trustee, the same was made payable to Will A. Hassell, Sr., trustee without bond, for the use and benefit of Sallie and Vivian Hedrick, grandchildren of said H. C. Hedrick, which said certificate had been duly signed, sealed, and issued by the proper officers of said Grand Lodge, and had been accepted by said H. C. Hedrick, and was then, on October 11, 1905, in the hands of the officers of the subordinate lodge at Sherman, awaiting their signatures, when it would become, under the laws of said order, a valid and binding obligation, and which, it was alleged, they were about to sign when said order and the officers of its Grand and subordinate lodge at Sherman were enjoined from further action in reference to the changing of said beneficiary certificate.

Appellants answered with a general demurrer, special exceptions, general denial, and by special answer, alleging: That they were incorporated January 2, 1900, under the provisions of the acts of the Twenty-Sixth Legislature, by which they were governed; and that if it was true, as alleged by plaintiff, that a certificate was issued to him as trustee for John I. Hedrick ostensibly, yet it was in fact to secure the creditors, as alleged by plaintiff, then said certificate was issued in fraud of the rights of appellants and is void. That the benefits of said association, under said laws, are payable to the families, heirs, blood relatives, affianced husband or affianced wife, or persons dependent upon a member of said order at the time of his death, and to no other person. That such benefits are not liable for the debts of the beneficiary or holder of any certificate, are not subject to garnishment or other process at the suit of any creditor, and cannot be taken, seized, appropriated, or applied by any legal or equitable process, or by the operation of law to the debts of the certificate holder or any beneficiary named in such certificate or any person who may have any rights thereunder. And further that John I. Hedrick is a son of H. C. Hedrick, that Sallie and Vivian Hedrick are minor grandchildren of H. C. Hedrick. That on the 19th of March, 1900, and since the said time, the following laws governing the Ancient Order of United Workmen were and have been in force, to wit:

"(5) Beneficiaries. Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family or some one related to him by blood, or who shall be dependent upon him. \* \* \* Provided, further, that the designation shall not be in violation of or in conflict with any law regulating and defining fraternal beneficiary societies or other laws of the state, territory or province within which the Grand Lodge so issuing such certificate is situated."

"(4) In the portion of this fund to which the beneficiaries of a deceased member are

entitled, the members themselves have no individual property right. It does not constitute a part of their estate to be administered, nor have they any right in or control over the same except the power to designate the person or persons to whom, as beneficiaries, the same, shall be paid at the death of the member. The beneficiaries thus designated have no vested right in said sum until the death of the member gives such right, and the designation may be changed by the member and a new certificate issued to him in the method prescribed by the laws of the order at any time before his death."

"(7) Change of Beneficiaries. Any member while living, desiring to change his beneficiaries, may do so on the back of his beneficiary certificate authorizing the change. He shall have his signature attested by the recorder of his lodge, and the seal of the lodge attached thereto, or attested by a civil officer under his official seal, when the member cannot sign in the presence of the recorder. When this is done he shall deliver his beneficiary certificate to the recorder of his lodge, together with a fee of 50 cents. The recorder shall forward the said certificate and fee to the supreme recorder, who shall make a record of the change on the books of the supreme lodge, and shall issue a new certificate in lieu thereof, payable as directed on the back of the surrendered certificate. The new certificate shall bear the name and number of the old one, which shall be safely filed and preserved. The provisions hereof, in special cases, may be waived by the supreme lodge at its option."

It was shown that El. S. Jones is not related to H. C. Hedrick. That of the indebtedness owing to appellee Jones by Hedrick, \$242.80 was for money paid by Jones on assessments and dues owing by Hedrick to the order, and which payments were necessary for keeping alive the insurance of said Hedrick in said order. The allegations of the petition, as well as of the special answer, were sustained by the evidence.

Appellants complain in their first assignment of the action of the court in overruling their general demurrer to plaintiff's petition, and by their second assignment claim that the court erred in rendering judgment enjoining defendants from changing the beneficiary certificate of H. C. Hedrick, because, under the laws of the state, plaintiff Jones had no such interest in the beneficiary fund as entitled him to the relief prayed for, because said fund under the laws, was not subject to be appropriated to the debts of a member of said order. It will be recalled that the laws of the order expressly grant the privilege to any member to change the beneficiary, only limiting the exercise of this privilege to the designation of some person or persons falling within the class named, to wit, some member or members of the assured's family, or some one related to him by blood, or who shall be dependent upon him, and further provided

that such designation should not be in violation of or in conflict with any law regulating and defining fraternal beneficiary societies, or other laws of the state. It will be further remembered that the laws of the order provide that the assured himself has no individual property right in the fund thus intended to be raised, and the same constitutes no part of his estate; nor did he have any right or control over the same, except to designate the person or persons to whom, as beneficiaries, the same should be paid at his death, and that the beneficiaries thereunder had no vested right in said sum, until the death of the member gave said right.

The question here presented for determination is not whether the certificate issued to the appellee, as trustee for the benefit of the said John I. Hedrick, was valid or not, but merely whether the assured, granting the same to be regular and valid, could make a new designation of a beneficiary, and whether or not the order itself had the right, and was required to recognize his privilege of so doing, and issue a new certificate in lieu of the former. We do not think this question is an open one in this state. Since the case of *Splawn v. Chew*, 60 Tex. 532, this right seems clearly to exist. Judge Willie in that case, delivering the opinion of the court, says: "It seems to be well settled by authority that in cases of an ordinary life insurance policy the beneficiaries named in such policy become the owners of it the moment it is issued, and the person procuring the insurance cannot, by any subsequent act of his, transfer to others the interest of those beneficiaries. The principle upon which this doctrine rests is that 'the rights under the policy become vested immediately upon its being issued, so that no person other than those designated in it can assign or surrender it.' The person procuring the insurance is held to divest himself of all interest in the policy and to vest it exclusively in the beneficiaries, and to make an irrevocable settlement upon them of the amount for which the policy is issued. *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289. But this is merely a matter of legal construction obtaining where a different understanding is not had between the original parties to the contract. The law does not prohibit the person procuring the policy from entering into such arrangements with the insurer as may be agreed on, either as to the persons who are to receive the benefit of the policy, or as to what control over it the assured is to exercise. In these respects an insurance policy does not differ from any other contract authorized by law, and should be subject to the same interpretation. The person procuring a policy for the benefit of another may reserve the right to change this designation in whole or in part, and the law will respect any change he may make in the beneficiaries of the policy in pursuance of such right. *Bliss on Life Insurance*, § 318; *Hutchings v. Minor*, 46 N.

Y. 456, 7 Am. Rep. 369. In such case there is no indefeasible interest in the insurance money vested in the beneficiaries named in the policy, nor settlement made upon them which cannot be revoked. Such reservation, being allowable, may be made expressly in the policy, or may become a part of it by being included in any instrument or paper which enters into the insurance contract." In the case just quoted from, *E. J. Chew* took out a beneficiary certificate in the American Legion of Honor, payable to *W. R. and Helen Chew*, his father and mother. He was a member of a local lodge of that order, by reason of which he obtained the certificate. Thereafter he made his will bequeathing this benefit certificate and the proceeds of it to his two minor children and his wife during her widowhood, naming his executors and appointing guardians of said minor children. The will after his death was duly probated, and the beneficiaries named in the certificate and the guardian and executors both claimed the money secured by said certificate, and which had been collected and deposited in bank, subject to the judgment of the court in the case. The mother and father, beneficiaries named in the certificate, filed suit as against the guardian and executors, setting up the facts. The court below rendered judgment for the plaintiffs, directing the payment of the fund by the bank to them. An appeal was taken from said judgment, and the only question for determination in the case was whether or not, under the laws of the order, the assured had the right to change the beneficiaries as he undertook to do. It was shown that the rules and regulations of the order granted this privilege to the assured. The Supreme Court reversed, and rendered the judgment in favor of the executors of the estate and guardian of the children, holding that the assured had a right to change the beneficiary, and that the original beneficiaries named in said certificate had no vested right or interest therein.

Since the decision of that case, our Supreme Court, in the case of *Byrne v. Casey et al.*, 70 Tex. 247, 8 S. W. 38, reviewed and approved the doctrine announced in *Splawn v. Chew*, supra, from which time it seems to have been followed in this state. This doctrine has recently been applied in the late case of *Fuos et al. v. Dietrich* (Tex. Civ. App.) 101 S. W. 291, wherein the court say that under a life policy, providing that the insured might change the beneficiary at any time during the continuance of the policy, the interest of the beneficiary was subordinate to that right, and a new beneficiary might be substituted without the consent of the old. But appellee seems to contend that the present case is differentiated from the cases heretofore cited in this, that in the present case appellee had paid out, under and by virtue of the contracts made by both the beneficiaries and the assured, and which were introduced in evidence, a considerable sum of

money for assessments and dues, for the purpose of keeping said benefit certificate or policy alive, and without which the same would likely have lapsed, said assured and his son being unable to pay same. Wherefore he contends that he has a vested interest in said certificate and an equitable right to the proceeds of same, and cites in support of his contention the case of *Coleman v. Anderson*, 98 Tex. 570, 86 S. W. 730. We do not think that said case is in point, and believe the same is easily distinguishable from the case at bar. In *Coleman v. Anderson*, supra, the contention was not between the company or order issuing the certificate and the plaintiffs, but it was a contention for the possession of the certificate solely between the plaintiffs, one of whom was the beneficiary and the other the assured and the pledgees holding said certificate under assignment from the beneficiary for moneys paid out by them during long series of years for the purpose of keeping said certificate alive, and therefore is not decisive of the point at issue herein, but, on the contrary, the right contended for by appellants in this case, to wit, that of changing the beneficiary in the certificate, seems to have been expressly recognized in said case. Judge Williams, delivering the opinion in that case, says, in part: "In *Schonfield v. Turner*, 75 Tex. 329, 12 S. W. 626, 7 L. R. A. 189, there are expressions to the effect that the member owned a beneficial interest in the certificate, and that the beneficiary who had no insurable interest in the life of the member held it in trust for the member; but the certificate there in question was issued at the time when the member was allowed by the order to make it payable as he may direct, and this would have permitted him to make it payable to his estate. At least this much was evidently assumed, since the court held that as the named beneficiary had no insurable interest beyond the amount advanced, the heirs were entitled to the money. The decision does not conflict with the rule stated by us that under the rules shown in this case the member during life has no property interest in the benefit, but only the power to appoint a beneficiary among the class designated by the laws of the order. That right R. B. Coleman (the assured) still has, and there is nothing in the record to show that he is in any wise hindered or obstructed in its exercise by the defendant's possession of the certificate. He still has power to change the beneficiary at will, and does not make it appear that the delivery of the paper is essential to the exercise of that right, nor even intimate that he desires its possession for such a purpose." In that case the suit was for the possession of the certificate which was held by the defendant *Anderson* as pledgee, he having advanced money upon it. In the present case the assured, H. C. Hedrick, is alive, and the certificate is in the hands of the subordinate lodge, who were in the act of making the change in the beneficiary therein, as request-

ed by Hedrick, and which change would have been made but for the injunction sued out in this case.

Counsel for appellee also rely upon the recent case of *Kelly v. Searcy* (Tex. Sup.) 102 S. W. 100. This last case, we think, is but a re-enunciation of the principle decided in *Coleman v. Anderson*, supra. In the case of *Kelly v. Searcy*, supra, the contention was over the right of the guardian of the minor children of the assured to the insurance money as against Kelly, who had paid out a considerable amount of money to keep the certificate alive upon a contract between himself, the assured, and the beneficiaries, he holding said certificate as pledgee under said contract. It was merely held in that case that Kelly had such an equity in the fund that his rights could not be defeated, and he was allowed to recover the amounts that he had paid upon said certificate. We conclude, under the authorities heretofore cited, that appellants had a clear legal right to change said certificate, and it was their duty so to do, upon an application therefor by the member, H. C. Hedrick.

Believing that the court below, in the light of the authorities cited, erred in perpetuating the injunction and holding that appellants had no right to change said certificate, we therefore sustain appellants' assignments of errors, and now here reverse the case, and render judgment in favor of appellants.

Reversed and rendered.

#### WADE v. WADE.

(Court of Civil Appeals of Texas. Dec. 4, 1907.)

#### 1. HUSBAND AND WIFE — CONVEYANCES TO MARRIED WOMEN—COMMUNITY PROPERTY.

Land conveyed to a married woman becomes community property, unless paid for by her separate means, or unless the title was placed in her own name for the purpose of making a gift to her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 889.]

#### 2. SAME.

Where land conveyed to a married woman was community property, she owned only a half interest therein, and could not, in seeking to set aside her deed to her son owning an interest by inheritance from her husband, recover all the land, though the deed was procured by fraud.

#### 3. COMPROMISE AND SETTLEMENT—OPERATION.

A voluntary agreement supported by a valuable consideration made by a grantor, binding him to dismiss a suit to set aside a deed on the ground of the fraud of the grantee, is available as a defense to the action to avoid the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 35-39, 66-70.]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Action by Mrs. C. A. E. Wade against H. P. Wade. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Finley, for appellant.

KEY, J. This is a suit by Mrs. C. A. E. Wade against H. P. Wade, her son, to recover 90 acres of land and certain town lots, and to cancel and annul certain deeds by which the plaintiff conveyed the property to the defendant. The plaintiff charged that the deeds referred to were procured by fraud and threats. The defendant answered by a plea of not guilty, general and special denial, and a special plea, averring that the parties had made a settlement and entered into a written contract, by which it was agreed that the suit was to be dismissed and plaintiff estopped from asserting any right to the property. By supplemental petition the plaintiff charged that the contract referred to was procured by fraud and intimidation. There was a trial which resulted in a verdict and judgment for the plaintiff for the real estate, and the defendant has appealed.

We sustain the first, second, and third assignments of error. The plaintiff put in evidence deeds conveying the property to her. The testimony indicates that at the time those deeds were executed she was a married woman, and the deeds contained nothing tending to indicate that the property was conveyed to her in her separate right. The court, in substance, instructed the jury that the deeds referred to conveyed the property to Mrs. Wade in her separate right, and then submitted to the jury the issues presented by the plaintiff's averments that the deeds from her to the defendant were procured by fraud and threats, and instructed them that, if they found for the plaintiff upon those issues, to return a verdict for her for the land in controversy, and for a cancellation of the deeds conveying the same. These instructions were erroneous. If the property was conveyed to Mrs. Wade during coverture, it became community property, unless there was proof showing that it was paid for with her separate means, or that the title was placed in her name for the purpose of making a gift to her. If it was community property, the plaintiff never owned but a half interest in it, and the defendant owned an interest by inheritance from his father; and the plaintiff was not entitled to all the land, even if the deeds from her to the defendant were procured by him in the manner alleged by the plaintiff.

We also sustain the sixth and seventh assignments, which complain of the charge of the court and the refusal of a requested instruction. If, after making the deeds to the defendant, the plaintiff, for a valuable consideration, voluntarily executed a written contract, agreeing to a dismissal of the suit, and declaring that she was to be estopped, such agreement ought to avail the defendant as a defense, although the deeds from the plaintiff to the defendant may have been procured in the manner alleged by the plaintiff.

To some extent the fifth and sixth paragraphs of the court's charge are subject to the same objection.

The other assignments are overruled. However, we suggest that upon another trial the jury be required to make a finding in the verdict upon the issues of rents and part payment of the purchase money.

For the errors pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

## FALLS CITY CLOTHING CO. v. CANNON.

(Court of Civil Appeals of Texas. Nov. 30, 1907.)

### 1. SEQUESTRATION — WRONGFUL SEQUESTRATION—EXCESSIVE DAMAGES.

Plaintiff sold defendant a bill of clothing amounting to \$280.50. Thereafter defendant closed his store because of financial trouble, and plaintiff sued to recover the clothing, and caused the sequestration in question to be issued. The store being closed, and not being able to secure the key, plaintiff's agent instructed the sheriff to take the lock off, which was done. The sheriff then went in, seized the clothing, and boxed the same up. In a few hours, on the same day, defendant replevied the clothing, and it was turned over to him, it not having been removed from the store. *Held*, that a judgment for \$400 actual damages, in reconviction for the wrongful suing out of the sequestration, was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sequestration, § 53.]

### 2. SAME—EVIDENCE—ADMISSIBILITY.

Where, in reconviction for damages, actual and exemplary, for a wrongful sequestration, malice, express or implied, is shown, evidence relating to injury to defendant's credit, loss of trade, customers, etc., was admissible on the question of exemplary damages.

### 3. SAME—DAMAGES—EXCESSIVENESS.

Where, in reconviction for damages, actual and exemplary, for a wrongful sequestration, there was a judgment for actual damages alone, it will be presumed that evidence relating to injury to defendant's credit, loss of trade, customers, etc., was not considered in arriving at the decision, so that the judgment being in excess of the actual damages was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sequestration, § 53.]

Appeal from Hunt County Court; J. W. Manning, Judge.

Action by the Falls City Clothing Company against W. C. Cannon. There was a judgment for plaintiff for \$280.50, and for defendant in reconviction for \$400, and plaintiff appeals. Reversed and remanded.

Wood & Melson, for appellant. Pierson & Starnes, for appellee.

RAINEY, C. J. Appellant, as plaintiff below, instituted this suit against defendant to recover a certain lot of clothing alleged to have been procured from it on certain false representations, and caused a writ of sequestration to be issued and levied on said clothing, and prayed in the alternative for \$260, the value of said clothing. The defendant reconvened for \$600, actual damages, and \$400, exemplary damages, for the wrongful suing out and levy of said writ. A trial resulted in a judgment for plaintiff for the

value of said clothing, \$260.50, and in favor of defendant for \$400, actual damages, from which the plaintiff appeals.

The appellant complains that the judgment is excessive, and is unwarranted by and contrary to the evidence. There was testimony to the effect that appellant, through its agent, one Brinker, in October, 1905, sold to appellee a bill of clothing amounting to \$260.50, which was delivered in December, 1905. Said bill was payable in May, 1906. In January, 1906, appellee closed his store because of financial trouble, with a view of settling with his creditors by compromise, and called a meeting of said creditors. Brinker, appellant's agent, learning of this fact, on January 25, 1906, had this suit instituted, and caused the writ of sequestration to issue, and levied on the said clothing, none of which had been disposed of. The store being closed, and not being able to secure the key, Brinker instructed the sheriff to take the lock off, which was done. The sheriff then went in, seized the clothing without interfering with anything else, and boxed the clothing up. In a few hours, on the same day, the appellee replevied the clothing, and it was turned over to him, it never having been removed from the house.

On the trial counsel for the appellant admitted that the sequestration was wrongfully sued out, and that the appellee was entitled to judgment for damages by reason of said wrongful levy. It is evident that appellee was entitled to a judgment for the damages he sustained by the wrongful levy, but we think the evidence fails to sustain the judgment for \$400, actual damages, and the same is excessive. There are several errors assigned, predicated upon the admission of certain evidence over objections, relating to injury to appellee's credit, loss of trade, customers, etc. If malice, either express or implied, is shown, and this is a question of fact for the court, the evidence was admissible on the question of exemplary damages, which was pleaded by appellee. Besides, the court not having found for exemplary damages, it will be presumed that this evidence was not considered by the trial court in arriving at his decision.

For the reason that the evidence adduced on the trial does not warrant a verdict for \$400, actual damages, the judgment is reversed, and cause remanded.

#### FT. WORTH & D. C. RY. CO. v. MOORE.

(Court of Civil Appeals of Texas. Dec. 5, 1907.)

#### APPEAL—BRIEFS—FAILURE TO FILE—DISMISSAL.

Where appellant has failed to file briefs in the trial court and in the Court of Civil Appeals within the time prescribed by Rev. St. 1895, art. 1417, and Supreme Court Rule 29, the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3108.]

Appeal from Hall County Court; T. R. Phillips, Judge.

Action by W. W. Moore against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Turner, Boyce & Deaver, for appellant. Hamilton & Elliott, for appellee.

LEVY, J. This is a suit for damages arising from alleged negligence in shipment of live stock. There was a judgment for the plaintiff, and the defendant railway company appeals.

The appeal bond was filed by the appellant on the 31st day of January, 1907; and the transcript filed in the Court of Civil Appeals of the Second District on the 19th day of April, 1907. The appeal was transferred to this court by order of transfer of the Supreme Court. This appeal was reached on the trial docket of this court in its regular order, according to the filing of the cases as they stand thereon, and notices of its submission were properly sent by the clerk to the attorneys of record of the parties, as required. The appellee, after the service of notice of submission of this cause, files a motion in this court to dismiss the appeal because the appellant had failed to file briefs both in the court below and in this court, as required so to do by article 1417, Rev. St. 1895, and rule 29 adopted by the Supreme Court for the government of Courts of Civil Appeals. The day of submission of this appeal is reached in this court. We are of the opinion that the appellant's motion to dismiss the appeal should be granted. *Bowman v. Hoffman et al.*, 28 Tex. Civ. App. 311, 67 S. W. 152.

The appeal is ordered dismissed.

#### BARCKELL v. STATE.\*

(Court of Civil Appeals of Texas. Nov. 6, 1907. Rehearing Denied Nov. 27, 1907.)

#### 1. INTOXICATING LIQUORS—INJUNCTION—APPEAL—PRESUMPTIONS.

In an action to enjoin defendant from selling intoxicating liquor, on the ground that he did not have the necessary license and had not paid the taxes required by law, where defendant's answer alleged that he had a certain license for the sale of intoxicating liquor, and the interlocutory judgment appealed from recited that the court had heard the pleadings of plaintiff and answer of defendant, together with the affidavits thereto annexed and the evidence thereunder adduced, but no statement of facts appears in the record showing what the evidence was, it will be presumed in favor of the judgment that defendant was at the time alleged engaged in selling intoxicating liquors without any other license than that set out in his answer or having paid the tax required by law, if such facts do not sufficiently appear from defendant's answer.

#### 2. SAME—STATUTORY PROVISIONS—CONSTITUTIONALITY.

Act April 6, 1907 (Gen. Laws 30th Leg. p. 166, c. 81), declaring any person selling intoxicating liquor without having procured the necessary license and paid the tax required by

\*Writ of error denied by Supreme Court.

law to be the creator and promoter of a public nuisance, and providing that he may be enjoined at the suit of any county or district attorney in behalf of the state, is not unconstitutional.

### 3. SAME—TEMPORARY INJUNCTION.

Under Act April 6, 1907 (Gen. Laws 30th Leg. p. 166, c. 81, § 2), relating to enjoining creators and promoters of public liquor nuisances, and providing that the procedure in all cases brought thereunder shall be the same as in other suits for injunction as nearly as may be, a temporary injunction pending the suit may be granted as in other cases.

### 4. SAME—LICENSES AND TAXES—STATUTORY PROVISIONS—SUFFICIENCY OF COMPLIANCE.

Where defendant had procured no license, and paid no tax under Act April 18, 1907 (Gen. Laws 30th Leg. p. 258, c. 188), providing new regulations for the sale of intoxicating liquor, but was selling liquor in September, 1907, he had not procured the necessary license and paid the tax required by law, notwithstanding he had under the previous law procured a license which covered a period ending November, 1907.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 104.]

Appeal from District Court, El Paso County; S. P. Welsiger, Judge.

Action by the state against Charles M. Barckell for an injunction. From a judgment granting an interlocutory injunction, defendant appeals. Affirmed.

E. B. Elfers, for the State.

NEILL, J. This is an appeal from an interlocutory or preliminary injunction, granted at the instance of the state in a suit brought in her behalf by the county attorney, restraining the appellant from further selling or offering for sale intoxicating liquors in the city of El Paso, Tex., at No. —, San Antonio street, between Stanton and Kansas streets, in the building known as the "Trust Exchange," without having first procured the license and paid the taxes required by law. The substance of the petition upon which the writ was granted is that the defendant, as an individual, was on the 22d day of September, A. D. 1907, and has been since, and is now, keeping and maintaining a public nuisance at No. —, San Antonio street, between Stanton and Kansas streets, in the city and county of El Paso, Tex., in a building and saloon known as the "Trust Exchange," situated in block 88, Campbell's addition of the city of El Paso, Tex., in this: "that he was on said date, has been since, and is now, engaged in and pursuing the business of selling intoxicating liquor at the aforesaid place without having the necessary license and paid the taxes required by law." The prayer in the petition is for a temporary writ of injunction, such as was awarded, and upon final hearing that it be perpetuated. The defendant, after interposing general and special exceptions to the petition, answered, in substance, that long prior to the dates alleged by complainant he filed his application for a license as required by law, and that such license was issued, which he holds, covering the period from November 1, 1906, to November 1, 1907, for which he paid, not only the amount due the state, but the

amount due the county of El Paso, and that, having procured said license, he executed a bond in due form, as provided by law, which was duly approved by the county judge of El Paso county and filed in accordance with the law; that, under the terms of said license and bond, he became and was entitled to sell liquor as a retail liquor dealer, and continues so to do; and that, if he made any sales during the time alleged in said petition in the manner therein averred, such sales were made under the terms and pursuant to said license and bond. Though the interlocutory judgment appealed from recites that the court heard the pleadings of plaintiff and original answer of defendant, together with the affidavits thereto annexed and the evidence thereunder adduced, no statement of facts showing what the evidence was appears in the record. Therefore, in the absence of such a statement, it will be presumed in favor of the judgment, if it does not sufficiently appear from defendant's answer that he was at the time and place alleged engaged in and pursuing the business of selling intoxicating liquors without having any license other than is set out in his answer, or having paid the tax required by law.

The act of April 6, 1907, declares "any person, firm or corporation who may engage in or pursue the business of selling intoxicating liquor, without having first procured the necessary license and paid the tax required by law" to be the creator and promoter of a public nuisance, and provides he may be enjoined at the suit of any county or district attorney in behalf of the state, or any private citizen thereof. Gen. Laws 30th Leg. p. 166, c. 81. The suit in which the interlocutory injunction was granted is evidently based upon this statute; for without it, or a similar statute, a bill for an injunction would not probably lie. *Manor Casino v. State* (Tex. Civ. App.) 34 S. W. 769; *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S. W. 478. But it is contended by appellant that the statute is unconstitutional. We can perceive no tenable ground for this contention. In other jurisdictions, where the Constitutions are similar to ours, statutes declaring the business of selling intoxicating liquors without a license to be a public nuisance, and providing that one may be restrained by injunction from maintaining such nuisance, have generally been held constitutional. *Devanney v. Hanson* (W. Va.) 53 S. E. 603; *State v. Thomas* (Kan.) 86 Pac. 499; *Commonwealth v. Howe*, 79 Mass. 26; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. Rep. 446; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; *Davis v. Auld*, 96 Me. 559, 53 Atl. 118; *State v. Collins*, 74 Vt. 43, 52 Atl. 69; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; *Walker v. McNelly*, 121 Ga. 114, 48 S.

E. 718; *Lofton v. Collins*, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 151. See, also, *Black on Intoxicating Liquors*, § 339. Every objection urged by appellant to the constitutionality of the statute under which the suit was brought has been met and answered by the opinions in the cases cited; and we only deem it necessary to refer to them for the reason given for sustaining similar statutes, and in which we concur in holding the one in question constitutional. Section 2 of the act referred to provides that the procedure in all cases brought thereunder shall be the same as in other suits for injunction as nearly as may be; but provides that, when suit is brought in the name of the state by any of its authorized officers, the petition for injunction may not be verified. In view of these provisions we see no reason why a temporary injunction should not be granted, as in other cases, restraining the defendant during the pendency of the suit from maintaining the nuisance.

The only other question raised by the assignments that need be considered is: Had the defendant procured the necessary license and paid the tax required by law for pursuing the business of selling intoxicating liquors? He had procured no license nor paid any tax under the act of April 18, 1907 (Gen. Laws 30th Leg. p. 258, c. 188), though he was selling intoxicating liquor on September 22, 1907. In view of these facts, the question must, under the authority of the recent opinion of the Court of Criminal Appeals in *Ex parte Steve Vaccarezza*, 105 S. W. 1119, be answered in the negative.

There is no error requiring the reversal of the interlocutory judgment granting the temporary injunction; and it is affirmed.

#### MINGS v. GRIGGSBY CONST. CO.

(Court of Civil Appeals of Texas. Nov. 21, 1907. On Rehearing, Dec. 19, 1907.)

##### 1. APPEAL — REVIEW — EVIDENCE — OBJECTIONS NOT MADE BELOW.

Objection to the admissibility of evidence if not made in the trial court will not be entertained on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258-1260.]

##### 2. SAME — HARMLESS ERROR — ADMISSION OF EVIDENCE.

The admission of evidence is not prejudicial error, where, if it had been excluded, the court could properly have directed the verdict it did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4033, 4034, 4153-4160.]

#### On Rehearing.

##### 3. MONEY PAID—LIABILITY OF PERSON FOR WHOM PAYMENT IS MADE.

A payment made by one person on account of another, where not made at the other's request, will not create, as against the other, an obligation in favor of the person making the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Paid, §§ 1-5.]

##### 4. EVIDENCE — DOCUMENTARY EVIDENCE — BOOKS OF ACCOUNT.

Where plaintiff, who had made a payment on defendant's account, brought suit to recover the amount, the entry in plaintiff's account book of the payment as a debit item in defendant's account is not evidence that the payment was made by plaintiff at defendant's request, since entries in a merchant's account books of money advanced or loaned are not competent evidence to show the advance or loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1451.]

Appeal from Upshur County Court; Albert Maberry, Judge.

Action by the Griggsby Construction Company against W. M. Mings. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Barnwell & Eberhart, for appellant. P. M. Young and Warren & Briggs, for appellee.

WILLSON, C. J. This suit was brought in the county court of Upshur county by appellee against appellant for a balance of \$435.51, claimed to be due on the itemized and verified account made a part of appellee's petition. The debits in the account aggregate \$1,574.59. Of this amount \$1,232.87 is for cash charged in the account as having been paid to appellant, and to have been paid for him to the Lee Hardware Company, W. F. Taylor Company, Ardis & Co., J. Rubenstein, and J. Rubenstein & Bro. The remaining items of debit, aggregating \$291.63, are for goods, wares, and merchandise claimed to have been furnished to appellant by appellee. The credits noted in the account aggregate \$1,198.08. Of this amount \$13 was on account of appellant's services in moving railroad ties for appellee, and the remaining \$1,128.08 was on account of his services in moving 2,115 cubic yards of earth at 14 cents per cubic yard, and 1,411 cubic yards of earth, called "gumbo," at 18 cents per cubic yard, on miles 39 and 40 of a line of railway being constructed by appellee for the T. & P. Ry. Co., and in moving 3,200 cubic of "gumbo" at 18 cents per yard on mile 64 of said railway. Appellant, by an affidavit filed with the papers in the case, denied the justness of appellee's account against him, and by his answer to appellee's petition alleged that he was entitled to a credit on said account of \$703 for moving 3,596.4 cubic yards of "gumbo" and 399.6 cubic yards of other earth at miles 39 and 40 on said line of railway, instead of the credit of \$550.08 given to him by appellee; that he had moved 5,500 instead of 3,200 cubic yards of earth on mile 64, and for this was entitled to a credit of \$414 over and above the credit given him by appellee in said account; and that he had cleared and grubbed six stations 100 by 200 feet on mile 64, and 28 stations on miles 39 and 40, for which appellee had agreed to pay him at the rate of \$30 per acre, whereby he was entitled to a further credit on appellee's account of \$448. On a trial had November 23, 1906, G. H. Marshall, as



a witness for appellee, testified that at the time covered by the account he was appellee's bookkeeper and general manager; that in 1902 appellee undertook to construct for the T. & P. Ry. Co. a line of railway from Shreveport to Natchitoches, in Louisiana; that appellee sublet a portion of the work to be done by it to appellant, agreeing to pay him \$30 per acre for such clearing and grubbing as he might do on the right of way, 18 cents per cubic yard for "gumbo" moved by him, and 14 cents per cubic yard for other earth moved by him in the work; that the payments to appellant for the work he might do were to be made on estimates thereof to be furnished as it progressed by the railway company's engineer; that the account sued upon was made up by the witness from appellee's books, and covered transactions between the appellant and appellee while the former was engaged in the work undertaken by him for appellee; and that to the best of witness' knowledge and belief the account sued upon was true and correct and unpaid. On his cross-examination the witness testified that he had no knowledge other than such as he had acquired from appellee's books of any of the transactions shown by the account, except those covering payments of sums of money to appellant and sums of money paid for him to the Lee Hardware Company, the W. F. Taylor Company and Ardis & Co.; that the sums so noted in the account, aggregating \$1,167.35, were paid by witness in person; that he knew nothing about any indebtedness of appellant to the Lee Hardware Company, to the W. F. Taylor Company, or to Ardis & Co.; that the sums paid to these parties as noted in the account were paid to them on the presentation by them of accounts against appellant; that a statement shown to him by appellant's attorney, crediting appellant with \$60 on account of clearing and grubbing done by him on mile 64, and showing that he had moved 2,743 cubic yards of "gumbo" on miles 39 and 40, was made by witness November 1, 1902; that he thought appellant was entitled to the credit of \$60, and did not know why it was not given him on the account sued upon; that an apparent discrepancy in the account sued upon and a statement exhibited to him by appellant's attorney in the amount of "gumbo" moved on miles 39 and 40 by appellant the witness thought was due to the use by him in making the statement exhibited of a preliminary estimate of the quantity of earth, made before it was moved. Appellee offered in evidence, and same was admitted over appellant's objection, estimates of work done for the railroad company on miles 39, 40, and 64. One of these estimates showed that appellant had moved 3,525 cubic yards of earth and cleared 13.5 acres of land on miles 39 and 40. With reference to the 13.5 acres of land the estimates showed appellant to have cleared and grubbed on miles 39 and 40, the witness Marshall testified that the same was a

mistake; that the clearing and grubbing covered by the item in the estimate was really done, not by appellant, but by appellee, and it so appeared in another estimate. Appellant offered no evidence, and on the testimony hereinbefore detailed the court peremptorily instructed the jury to return a verdict for appellee for the sum of \$268.79, and in accordance with such a verdict judgment was rendered against appellant. From the judgment so rendered he appeals, and by his assignments of error insists that the evidence was wholly insufficient to support a finding against him, that the court erred in peremptorily instructing a verdict against him, and that the court erred in admitting in evidence over his objection the estimates of work done for the railroad on miles 39, 40, and 64.

In the absence of evidence that appellee's account books had been correctly kept, and that the entries therein, from which the account declared upon was made up, were made in the regular course of appellee's business, the books themselves, had they been offered in evidence and objected to on proper grounds, would not have been admissible to prove the indebtedness claimed to exist in appellee's favor. *Baldrige v. Penland*, 68 Tex. 443, 4 S. W. 563; *Bupp v. O'Conner et al.*, 1 Tex. Civ. App. 328, 21 S. W. 619; *Cahn v. Salinas*, 2 Willson's Civ. Cas. Ct. App. §§ 615, 616; *Thenus v. Jipson*, 3 Willson's Civ. Cas. Ct. App. § 189. It is obvious, therefore, that the testimony relied upon to establish the indebtedness claimed by appellee against appellant, had it been objected to on proper grounds, should have been, and doubtless would have been, excluded by the trial court. Appellee might then, by evidence admissible for the purpose, have established his claim against appellant. Objections which should have been urged in the trial court, where appellee would have had an opportunity to have resorted to other evidence to prove his claim, are for the first time urged in this court. They cannot be considered here. It has been repeatedly held that an objection to the admissibility of evidence, if not made in the trial court, will not be entertained on an appeal from a judgment based upon it. *Insurance Co. v. McGregor*, 63 Tex. 408; *Underwood v. Parrott*, 2 Tex. 172; *Long v. Garnett*, 59 Tex. 231; *Mensing v. Cardwell*, 83 Tex. Civ. App. 16, 75 S. W. 347; *Cook v. Halsell*, 65 Tex. 6; *Porter v. Heath*, 2 Willson's Civ. Cas. Ct. App. § 124. The only matter, therefore, left for us to determine in connection with the assignments of error questioning the sufficiency of the evidence, is its effect. If appellee's books of account, after a proper predicate therefor had been furnished, had been admitted in evidence, they would have established *prima facie* the indebtedness claimed by appellee against appellant. The contents of these books, so far as they affected the account between the parties, was established by the evidence of the witness

Marshall, and we think this evidence, admitted without objection from appellant, must be held to have established, as the books if admitted in evidence would have established, *prima facie*, the indebtedness as claimed. If so, then the burden resting on appellee was discharged, and it was entitled to a judgment for the amount sued for, in the absence of evidence showing that appellant was entitled to credits not given him in the account sued upon. The burden of proving credits claimed and not acknowledged in the account was upon appellant. He offered no evidence to establish any of the credits claimed by him, and the only evidence in the record suggesting that he might be entitled to a credit not acknowledged in appellee's account is the testimony of the witness Marshall that he believed appellant should be credited by appellee with \$60 on account of clearing and grubbing on mile 64. No evidence was offered by appellant to show that he had done the work represented by this \$60, and he could have claimed it as a credit, and the court could have allowed it as a credit, only on the theory that appellee was in the attitude of admitting it. The record fails to show any authority on the part of the witness to bind appellee by such an admission. Therefore it is not clear that it should have been allowed. The verdict of the jury as directed by the court, however, shows that it was allowed, and so appellant has no cause for complaint on account of this item. There is an utter absence of evidence showing him to have been entitled to any other credit against appellee's claim.

We do not think there is any merit in appellant's contention that the court erred in admitting in evidence the estimates furnished the railroad company of work done on miles 39, 40, and 64. According to the view we take of it, had these estimates been excluded by the court, on the evidence remaining it would have been proper for the court to have instructed the verdict.

The judgment is affirmed.

#### On Rehearing.

In his motion for a rehearing appellant insists that we erred in holding the evidence sufficient, *prima facie*, to establish the items in the account representing money paid to the Lee Hardware Company, W. F. Taylor Company, Ardis & Co., J. Rubenstein, and J. Rubenstein & Bro. There was in the record no direct evidence showing Mings to have been indebted to the parties mentioned as claimed by them in their accounts against him paid by appellee. And there was in the record no evidence showing that the accounts were paid by appellee at Mings' request.

It seems to be well settled that a payment made by one person on account of another under such circumstances will not create as against the party on whose account the payment was made an obligation in favor of the person making the payment. *Crumlish's*

*Adm'r v. Central Improvement Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 126, and notes, 45 Am. St. Rep. 872. This being true, the fact that such payment might be entered as an item of debit in a book account kept by the person making the payment against the person on whose account the payment was made would not relieve the former of the necessity of proving as a part of his case when he sought a recovery against the latter of the amount of such payment that it was made by him at such person's instance and request. The production and admission in evidence of the book containing the account would not be evidence of such request. That it was made would have to be otherwise shown. 9 Am. & Eng. Ency. Law (2d Ed.) 931, notes. In *Cole v. Dial*, 8 Tex. 348, it was held that entries in a merchant's books of money loaned or advanced were not competent evidence to show such loan, etc. While it is not clear that a contrary conclusion was not reached by the court in *Ward v. Wheeler*, 18 Tex. 250, the refusal to so extend the rule admitting a plaintiff's account books as to make them evidence of such items seems to be supported by the weight of authority and to be based on satisfactory reasons. *Hall v. Chambersburg Woolen Co.*, 52 L. R. A. 708, notes; 2 Ency. Ev. 647; and see notes to *Smith v. Smith*, 52 L. R. A. 547. The necessity of the case is the ground upon which such books are admitted as evidence of an indebtedness claimed. Frequently they furnish the only evidence obtainable of the existence of such indebtedness. The reason for the rule does not apply to such items as those claimed in this case, on account of payments made by appellee to the Lee Hardware Company, W. F. Taylor Company, Ardis & Co., J. Rubenstein, and J. Rubenstein & Bro. The nature of these items authorizes a presumption that better evidence than the entries in appellee's account books exists and is obtainable to prove the indebtedness claimed by appellee on account of them. Therefore, and because we believe a refusal to so extend the rule as to permit a plaintiff by his account books alone to prove as a debt due him by a defendant a payment on his account to a third person will in most instances render more certain a due administration of justice, the motion for a rehearing is granted, and the judgment is reversed, and the cause is remanded for a new trial.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HALL.\*

(Court of Civil Appeals of Texas. Nov. 23, 1907. On Rehearing, Dec. 14, 1907.)

#### 1. WITNESSES—EXAMINATION—LEADING QUESTIONS.

A question not suggesting the desired answer is not leading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-851.]

\*Writ of error denied by Supreme Court Jan. 23, 1908.

**2. EVIDENCE—OPINION EVIDENCE—STATEMENT OF FACTS—CONCLUSION OF WITNESS.**

Statement of one suing for personal injuries received by his team running away and becoming frightened by an engine that his team got frightened at the engine was the statement of a fact, and not his conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2151.]

**3. SAME—EXPERT TESTIMONY.**

An expert may testify to a person's life expectancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2311.]

**4. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

To permit a life insurance agent to testify to the life expectancy of one suing for a personal injury, in the absence of a showing that he was not an expert on the subject, was not reversible error, especially where the damages were not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4156.]

**5. SAME.**

The error in permitting plaintiff in a personal injury action to testify in rebuttal that a physician testifying for defendant told plaintiff several weeks after the injury to consult a certain physician about his injury was harmless.

**On Rehearing.****6. SAME—ASSIGNMENT OF ERROR—SPECIFYING ERROR.**

Under court rule 24, providing that an assignment of error must distinctly specify the grounds of error relied on, or the error is waived, an assignment of error allowing plaintiff to state that a certain physician had told him to consult a certain other physician for his injuries was insufficient to permit review on appeal of the action of the trial court in allowing plaintiff to state that such physician had told him that his injuries were serious and permanent.

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by J. K. Hall against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, D. Upthegrove, and Templeton, Crosby & Dinsmore, for appellant. Evans & Elder and Robt. F. Spearman, for appellee.

**TALBOT, J.** This is the third appeal in this case. See 81 S. W. 571, 10 Tex. Ct. Rep. 96; 85 S. W. 786, 98 Tex. 480, 12 Tex. Ct. Rep. 377; 92 S. W. 1079, 15 Tex. Ct. Rep. 869. It is a suit brought by appellee, Hall, to recover damages for personal injuries received by him through the negligent operation and movement of one of appellant's engines by its servants in charge thereof, while appellee was in the act of driving his wagon and team over a public street crossing in Wolfe City, Tex., whereby appellee's horses were frightened and caused to run away, and throw him from the wagon. Appellant answered by a general denial and a plea of contributory negligence on the part of appellee. From a judgment in favor of appellee for the sum of \$2,250 appellant has appealed.

The evidence warrants the following conclusions of fact: On August 29, 1902, appel-

lee, while driving his wagon and team, approached the appellant's railroad at a public street crossing in Wolfe City. When he reached a point near said crossing, he observed one of appellant's locomotive engines standing near and headed toward the crossing. He stopped his team in view of appellant's servants operating said engine, and awaited for a time its movements. The engine did not move, and he undertook to drive over the crossing. When his team got fairly upon the crossing, the servants of appellant, seeing appellee's position, negligently commenced to propel and move the engine at a rapid rate of speed towards appellee and over said crossing, passing within a short distance of his wagon, making considerable noise and emitting steam. By reason of the proximity of said engine, its sudden, and rapid movements, and the noise, etc., made thereby, appellee's horses became frightened, ran away, and threw him from the wagon to the ground with great force, permanently injuring him in different parts of the body. The appellee was not guilty of contributory negligence, and sustained damages in the amount awarded by the verdict of the jury.

There was no error in admitting the testimony complained of in appellant's first assignment. The question was not leading, in that it did not suggest the desired answer. Neither did it call for an opinion or conclusion of the witness. It sought to elicit, and the answer tended to show, one of the injuries appellee claimed to have suffered.

Nor do we think the court erred in permitting the appellee to testify: "They [the team] got frightened at the engine when the bell commenced ringing and at the steam. They started right then when they run toward them." We think the appellee was in a position to know what frightened his horses and caused them to run away, and the testimony quoted, and of which complaint is made by appellant's second assignment of error, was the statement of a fact and not the mere expression of the opinion or conclusion of the witness. Besides the witness Georgia Rowe testified, without objection, to the same effect, in that she says: "When the engine started towards him, the team became frightened. The engine scared the team."

Appellant's fourth assignment of error complains that the court erred in permitting the witness Mattox to state, over its objection, the life expectancy of a man of appellee's age. This testimony was objected to on the ground that the witness had not qualified to answer, and was but an opinion and conclusion of the witness. The objection was overruled, and the witness answered, "Twenty-six and seventy-two one-hundredths years." The witness had testified that he was a life insurance agent and represented the Mutual Life Insurance Company; and, while we regard such statements as meager proof of his qualification to speak concerning the matter interogated about, yet we think the point raised

is insufficient to warrant a reversal of the case. An expert may give such testimony, and, in the absence of any showing or effort to show that the witness Mattox was not an expert upon the subject inquired about, we are inclined to the opinion his answers were sufficient to authorize the reception of his testimony as such. Besides, the testimony bore on the amount of the damages sustained by appellee, and there is no complaint that the judgment is excessive.

Appellant's fifth assignment points out no reversible error. It simply complains that "the court erred in permitting plaintiff, while testifying in his own behalf in rebuttal, to state that Dr. Will Cantrell, a witness for the defendant and who treated plaintiff at the time of the injury and for a long time thereafter, told plaintiff several weeks after the injury to consult Dr. Roberts about his injuries. Defendant's counsel objected to the question as to what Dr. Cantrell told plaintiff, because it called for hearsay testimony, and because no predicate had been laid for the question and answer, and because the matter inquired about was immaterial and irrelevant." We think the predicate was sufficiently laid; but, if it be conceded that the objection should have been sustained, it is difficult to conceive how the statement of the witness that "Dr. Cantrell told plaintiff several weeks after the injury to consult Dr. Roberts about his injuries" could have injuriously affected the rights of appellant. Clearly, if the admission of the statement was error, it was harmless error.

The sixth assignment will be overruled. The question and answer complained of were made the subject of an assignment of error on a former appeal of this case, and by the Court of Civil Appeals for the Third District decided adversely to appellant's contention. 81 S. W. 571, 10 Tex. Ct. Rep. 96.

The seventh and eighth assignments complain, respectively, of the third and fourth paragraphs of the court's charge. We have carefully considered the correctness of these charges as applied to the facts, and conclude that there is no such error in either of them as requires a reversal of the case. The seventh is not upon the weight of the evidence, or otherwise erroneous, as complained of. When considered with reference to all the testimony adduced, it is a fair application of the law to the facts. The eighth paragraph, when taken and construed with other parts of the main charge and special charges given at the request of the appellant, is not, we believe, subject to the criticism "that it tells the jury that the exercise of the proper degree of care by defendant's servants in charge of the engine at the time of the injury would

be a defense to the cause of action upon condition that the engine was 60 or more feet away from the road crossing and was moving at a moderate rate of speed, when the exercise of such care was a complete defense without regard to where the engine was or the speed with which it was moving." If the defense of ordinary care, in the respect mentioned, was not sufficiently submitted in the court's main charge, the same was fully cured by special charges requested and given, and especially by special charge No. 2.

No reversible error is disclosed by any of appellant's assignments of error; and the judgment is affirmed.

#### On Rehearing.

Appellant's fifth assignment of error, attacking the court's action in permitting plaintiff to state what Dr. Cantrell "told plaintiff," does not complain that the court erred in allowing the witness to testify "that Dr. Cantrell told him that he [plaintiff] had a serious injury in the shoulder, and that the muscle was detached and that the injury would last as long as he lived." The assignment, as indicated in the original opinion, is simply as follows: "The court erred in permitting plaintiff, while testifying in his own behalf in rebuttal, to state that Dr. Will Cantrell, a witness for the defendant and who treated plaintiff at the time of the injury and for a long time thereafter, told plaintiff several weeks after the injury to consult Dr. Roberts about his injuries. Defendant's counsel objected to the question as to what Dr. Cantrell told plaintiff, because it called for hearsay testimony, and because no predicate had been laid for the question and answer, and because the matter inquired about was immaterial and irrelevant." An assignment of error must distinctly specify the grounds of error relied on, and, if not so specified, shall be considered as waived. Rule 2. If the plaintiff was permitted to testify, over the objection of appellant, to the effect that Dr. Cantrell told him that he (plaintiff) had received an injury to the shoulder, etc., and that such injury was permanent, and appellant desired that action of the court reviewed, it should have been distinctly pointed out by its assignment of error. This was not done; and hence that specific question was not before us. We will, however, add that, if it can be said the question was raised by the assignment of error, then we are of the opinion that the predicate for the admission of the testimony was sufficiently laid.

Adhering to our original conclusion that no error is disclosed requiring a reversal of the case, the motion for rehearing will be overruled.

## FELSBERG v. MOORE.

(Supreme Court of Arkansas. Nov. 25, 1907.)

## 1. APPEAL—REVIEW—QUESTIONS NOT RAISED IN TRIAL COURT.

Where the seller did not request an instruction that there was no evidence on a point material to be proved by plaintiff, he cannot present the point for the first time on appeal, though the proof warranted the giving of such a charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1309.]

## 2. SALES—CONTRACTS—CONSTRUCTION—TIME OF PAYMENT.

A contract for the sale of goods, to be paid for as delivered, contemplates that the delivery and payment shall be concurrent acts, and the seller cannot justify a failure to deliver on the ground that the buyer failed to offer the price in advance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 231, 232.]

## 3. SAME—TENDER OF PAYMENT—EXCUSE FOR FAILURE TO TENDER.

Where, in an action for breach of contract for the sale of goods, the seller showed that he offered to deliver, but was prevented by the buyer's refusal to accept, and the buyer showed that the seller refused to allow the buyer to inspect the goods when offered, the question of a tender of the price was not in issue.

## 4. SAME—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT.

A contract for the sale of a specified quantity of lumber at a fixed price required delivery at a designated place as needed. The seller notified the buyer that he must accept lumber before a specified time, that the lumber was on a car at a station, and that he should send a man to inspect it. The buyer sent a man to inspect, but the seller did not permit him to inspect it. Held, that the buyer, in an action for breach of contract, was entitled to recover.

Appeal from Circuit Court, Clay County; L. C. Going, Special Judge.

Action by J. W. Moore against Will Felsberg. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee alleged that on or about the 1st of August, 1905, appellant agreed to sell to appellee 40,000 feet of No. 2 common pine flooring, 4 inches wide, well seasoned, to be paid for as delivered at \$18 per 1,000; that the flooring was to be delivered at shed in rear of Barnes' building as needed. Appellee alleged breach of the contract to his damage in the sum of \$280, for which he prayed judgment. Appellant in answer alleged that there was no definite time fixed in which the lumber should be delivered, and that within a reasonable time after the execution of the contract he offered to deliver the lumber at the contract price, and that appellee refused to accept same. He therefore denied liability. The contract is as follows:

"I hereby agree to sell to J. N. Moore, 40,000 ft. No. 2 common pine flooring, four inches wide, well seasoned, to be paid as delivered at \$18.00 per M., said flooring to be delivered at shed in rear of W. F. Barnes' building, on West Second street, as needed. [Signed] Will Felsberg.

"I hereby accept the above offer. [Signed] J. N. Moore."

Appellee is uncertain when this contract was executed, but appellant fixes the date as the 13th day of July, 1905. On behalf of appellee, the proof tended to show that on the 13th day of July, 1905, he, in conjunction with one Barnes, began the erection of a building with concrete blocks, 88 feet 5 inches by 77 feet, 2 stories high. Appellee commenced the building with the expectation of completing it as soon as he could, but a number of things combined to delay in its construction, such as a failure to get the concrete, and the blocks, the man employed to lay the blocks giving up his contract, and the rainy weather. Appellee expected delays, but did not foresee the things mentioned. He did not know just when he would need the lumber, and when he could get it, and that is the reason the words were put in the contract, "as needed." With reference to the time the lumber should be delivered, appellee said he wanted it as soon as he "needed it." It was shown, on behalf of appellee, that when appellant came to him, and demanded that he take the lumber at once, he replied to appellant that he did not know what he had, and could not take it until he saw it, whereupon appellant said: "Get somebody to go look at it." Appellee then requested one Black, a lumber dealer, to examine the lumber for him, and see if it was No. 2 common pine flooring, and instructed him, if the lumber was of the grade he (appellee) had ordered, to have it sent around. Black, on behalf of appellee, testified that, at the request of appellee, he went to the side track near the depot where the lumber was, to see the lumber; that he met appellant there, and informed him that he was sent there by appellee to look at the lumber; and that appellant replied that "I need not mind, that he was going to unload it in his shed." Appellee proved that the value of lumber of the kind mentioned in the contract at the time he demanded same of appellant, and when appellant refused to deliver it, was \$20 per 1,000 feet. This was some time in February or March, 1906.

On behalf of appellant, the evidence tended to show that appellee said he wanted the lumber as soon as he could get it. Appellant ordered the lumber in a few days after the contract was made, on the 26th of July. It came on the 3d and 10th of August. Appellant went to appellee when the first car came, and notified appellee. He said, all right, he would see about it. The third time, he told appellee if he did not take it by noon the "contract would be off." He also told appellee that he (appellee) would have to pay appellant for the lumber. Appellant denied that Black saw him about the lumber. He said that he told Bradford, his agent in charge of the lumber, that, if appellee did not come by noon of a certain day to take the lumber, to hold same for appellant. He said that he told appellee that he would haul the lumber down if appellee would pay him for it. He

wanted appellee to pay him for the lumber. Appellee said he would see about it. Appellant ordered the lumber especially for appellee. It was shown that the value of lumber from August 8d to the 10th was \$12.75 per 1,000 feet.

The court gave the following instructions:

"(1) In this case the plaintiff sues the defendant, and seeks to recover damages for the alleged breach of a certain contract. Plaintiff contends that he entered into a written contract with the defendant, by the terms of which he purchased from the defendant 40,000 feet of No. 2 common pine flooring, four inches wide, and well seasoned, at \$13 per 1,000, to be paid for as delivered, and to be delivered as needed, and the defendant failed to deliver said lumber in accordance therewith, and that by reason of said failure he has been damaged.

"(2) The defendant admits the execution of alleged contract, and that he failed to deliver said lumber in accordance therewith, but denies that his failure to do so resulted from his negligence or refusal, and says that he offered to deliver said lumber to plaintiff within a reasonable time after the date of said contract, but that plaintiff neglected and refused to receive and pay for the same.

"(3) Under the terms of this contract, it was contemplated by the parties that the lumber should be delivered within a reasonable time after the date of said contract.

"(4) The question of what was a reasonable time in which to deliver said lumber under said contract is a question for you to determine, and in arriving at your conclusion upon this proposition you will take into consideration the question of whether or not the plaintiff told the defendant what use he intended to make of said lumber, the conduct of the parties, and the other facts and circumstances connected with the case.

"(5) If plaintiff told the defendant that the lumber was to be used in the construction of a certain building, then you will take into consideration what would be a reasonable time to prepare said building for the use of said lumber; and, if defendant offered to deliver said lumber before the time which the parties contemplated it should be delivered, such offer does not excuse his failure to subsequently deliver said lumber within a reasonable time.

"(6) If you find from the evidence that on August 8, 1905, defendant told plaintiff that, unless he accepted and received said lumber before noon of that date, he would consider the contract broken, and that said plaintiff did not accept and receive said lumber by the time mentioned, then, if you believe that offer was within a reasonable time after the date of the contract, you will find for the defendant.

"(7) But if you find from the evidence that the defendant on August 8, 1905, demanded of the plaintiff payment for the lumber before delivery, and that, upon plaintiff's re-

fusal to comply, repudiated said contract, you will find for the plaintiff.

"(8) If you find from the evidence that the defendant offered to deliver the lumber to the plaintiff within a reasonable time after the contract was made, and plaintiff refused to receive same, you will find for the defendant.

"(9) If you find for the plaintiff, the measure of his damages will be the difference between the contract price and the market value of said lumber at the time it should have been delivered under the contract.

"(10) You are instructed that if, on or about August 8, 1905, and after he had notified plaintiff that he must accept the lumber before noon, the defendant notified plaintiff that the lumber was on the car at the station, and to come or send a man to inspect it, and plaintiff at once sent a man to inspect the lumber, and that this man was not permitted by defendant to inspect the lumber, then you will find for the plaintiff."

There was a verdict for appellee for \$140. Judgment was entered accordingly, motion for new trial reserving the exceptions saved was overruled, and this appeal taken.

J. L. Taylor and D. Hopson, for appellant.  
G. B. Oliver, for appellee.

WOOD, J. (after stating the facts as above). Appellant contends that there is no evidence of a willingness on the part of appellee to comply with his contract, shown by a tender of the amount of the purchase money due under the contract, or by an offer to pay same when the lumber was offered for delivery, or when it should have been delivered. Appellant did not request specific instructions covering this phase of the case, which he presents here for the first time. He is not therefore entitled to a reversal on that ground, even if the proof had warranted the giving of such requests. *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550; *State Mutual Ins. Co. v. Labourette*, 71 Ark. 242, 74 S. W. 300, 100 Am. St. Rep. 63; *Newton v. Russian*, 74 Ark. 88, 85 S. W. 407; *Schenck v. Griffith*, 74 Ark. 557, 86 S. W. 850; *Williams v. Bennett*, 75 Ark. 312, 88 S. W. 600, 112 Am. St. Rep. 57. But, under the plain terms of the contract, appellant could not justify a failure to deliver the lumber, on the ground that appellee had not tendered or offered in advance to pay the purchase price. The lumber was to be paid for "as delivered." The most that can be said of this language is that it contemplated that the delivery and payment should be concurrent acts, not that payment should precede delivery. But the uncontroverted proof is that there was no delivery in this case, and hence no tender of payment was called for. Under the most favorable view of the evidence for appellant, he was not only ready, and offered to deliver, but was prevented from doing so by appellee's refusing to accept. On the other hand, the proof on behalf of appellee warranted a finding to

the effect that appellant refused to allow appellee to inspect the lumber when it was offered, and therefore prevented, by his own conduct, the acceptance of the lumber by appellee. Under these circumstances, we do not see that the question of a tender or offer to pay the purchase money was an issue in the case.

We find no error in instructions 7 and 10. Indeed, the charge of the court as a whole was a full and fair presentation of the law applicable to the issues. There was ample evidence to sustain the verdict.

The judgment is correct, and is affirmed.

**CHICAGO, R. I. & P. RY. CO. v. STATE.**  
(Supreme Court of Arkansas. Nov. 23, 1907.)

**1. CORPORATIONS—ACTIONS—DEFENSES.**

Where the complaint alleges that defendant is a corporation, a denial of corporate existence is a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2052-2081.]

**2. PLEADING—ANSWER—AMBIGUITY.**

Where the complaint alleges that defendant is a corporation owning and operating a railroad, an answer denying that defendant is a corporation owning and operating a railroad is ambiguous, and bad both at common law and under the Code.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 40; vol. 12, Corporations, §§ 2058, 2073.]

**3. STATUTES—CONSTRUCTION.**

In construing a statute regard must be had to its various provisions, and such effect given them as they indicate they were intended to have, and as will render the statute operative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-263.]

**4. RAILROADS—OPERATION—STATUTORY REGULATIONS—"OWNING."**

A railway corporation operating a line of railroad is the corporation "owning" the railroad within Kirby's Dig. § 6595, imposing a penalty on a corporation "owning" a railroad for failing to equip its locomotives with bells or whistles, etc.

Appeal from Circuit Court, Saline County; W. H. Evans, Special Judge.

Action by the state against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Buzbee & Hicks, for appellant. Wm. F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for the State.

HART, J. A penalty of \$200 was recovered from the Chicago, Rock Island & Pacific Railway Company in a civil action brought by the state because of a violation of section 6595 of Kirby's Digest, which reads as follows: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under

a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one half thereof to go to the informer and the other half to the county; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The defendant asks that the case be reversed because no proof of its corporate existence was offered. The state contends that the answer of the defendant was not sufficiently certain to put that fact in issue. The complaint alleged "that the defendant is a corporation owning and operating a line of railway running through Saline county, Ark." The answer in traversing this allegation used this language: "It denies that it is a corporation owning and operating a line of railway running through Saline county, Ark." In this case a denial of corporate existence is a defense, and, as stated by Judge Riddick in the case of *J. I. Porter Lumber Co. v. Hill*, 72 Ark. 66, 77 S. W. 906: "This form of denial is ambiguous, and has been frequently condemned both at the common law and under the Code."

The appellant also contends that it is not the owner of the railroad within the meaning of the statute. This precise question was determined in the case of *State of Mo., to the Use of Ray County, v. Railroad Co.*, 46 Mo. App. 466, in which the court said: "If the defendant was at the time in the possession of, and running and operating, the railroad in question, it was presumptively the owner; and, in the absence of a contrary showing, the court would be authorized in holding defendant to be the owner. More than this, whether the defendant was operating this railroad as absolute owner, lessee, or otherwise, it was liable for the violation by it of the provisions of this statute. It filled the requirement of 'owner' under this statute." The Missouri statute requires the giving of the statutory signals, "under a penalty of \$20 for every neglect of the provisions of this section to be paid by the corporation owning the railroad." To the same effect, see *Proctor v. Railroad Co.*, 64 Mo. 112; *Camp v. Rogers*, 44 Conn. 291; *Parker v. Railroad Co.*, 79 Minn. 372, 82 N. W. 673; *B. & O. R. R. Co. v. Walker*, 45 Ohio St. 577, 16 N. E. 475; *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201. This court has held that "a foreign corporation, which is the lessee of a railroad in the state is liable, under the statute requiring railroads to erect stock gaps where the road passes through inclosed lands"; and the reason given is that "our statutes provide that any railroad corporation of another state leasing any railroad in this state shall become subject to all the regulations and provisions of law governing railroads in this state, and held liable for the violation of any such laws." *St. Louis & S. F. R. Co. v. Hale* (Ark.) 100 S. W. 1148.

In the construction of statutes, regard must be had to their various provisions, and such

effect given them as the provisions indicate they were intended to have, and as will render the statute operative. We are of the opinion that the operating corporation is the "corporation owning the railroad" within the meaning of the statute. The testimony for the state (and none was offered by the defendant) shows that the railroad in question was operated by the defendant.

Judgment affirmed.

CHICAGO, R. I. & P. RY. CO. v. ADAMS.  
(Supreme Court of Arkansas. July 15, 1907.)

1. RAILROADS—OPERATION—STOCK GUARDS.

Under Kirby's Dig. § 6644, requiring every railroad on 10 days' notice from the owner of the lands through which its road runs to construct stock guards and keep same in repair, a notice by a tenant of the lands is insufficient, and the notice must be given by the owner, who may authorize a notice in his own name by the tenant.

2. SAME.

Under Kirby's Dig. § 6644, requiring every railroad on 10 days' notice to construct stock guards and keep the same in repair, notice to repair is as essential as notice to construct, and must be given.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Dean Adams against the Chicago, Rock Island & Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered for defendant.

Busbee & Hicks, for appellant. W. S. McCain, for appellee.

BATTLE, J. Dean Adams alleged in his complaint that during the year 1905, and for about one month thereafter, "he was the owner and occupant as a tenant of an inclosed parcel of land in the county of Pulaski, in this state; that the roadbed of the defendant, the Chicago, Rock Island & Pacific Railway Company, ran through the inclosure, and that the defendant allowed a stock guard on the land to get out of repair, and failed to keep it in repair during the latter part of the year 1905, and the month of January, 1906; and that he gave the defendant notice to repair the guard, which it failed to do."

Defendant answered and specifically denied each allegation of the complaint.

The jury returned a verdict in favor of plaintiff for \$75, and the defendant appealed.

The statute upon which this action was based (Kirby's Dig. § 6644) makes it the duty of railroad companies to construct stock guards and to keep the same in good repair upon receiving 10 days' notice, in writing, from the owner of the lands to do so. They are required to construct such guard upon notice given only by the owner of the land. It is evident that notice given by a tenant would not be sufficient. In all cases where there is a tenant, there is an owner; and the statute requires the owner to give the notice, and there can be no doubt as to which of the

two is the owner. The owner can authorize the tenant to give the notice in his (owner's) name.

Appellee argues that, there being a stock guard already constructed, it is the duty of the railroad company to keep it in repair, and there was no necessity for a notice to do so in order to recover the penalty. Why is notice to construct necessary? For the purpose of indicating the wishes of the owner in that respect, and to enable the railroad company to protect itself against penalties in an unguarded moment. For the same reason notice to repair is equally necessary and useful, and must be given.

Notice in this case was given by the tenant, and is insufficient.

Judgment reversed, action dismissed, and judgment rendered in favor of the defendant.

MORTON et al. v. LACY BROS. & KIMBALL.  
(Supreme Court of Arkansas. Nov. 25, 1907.)

LANDLORD AND TENANT—LEASE—CONSTRUCTION.

A lease provided for an annual rental of \$2,000, but that if an overflow prevented the making of a crop no rent should be payable, and that in the event of a partial overflow the tenants should notify the landlords on the 1st day of June of such year if they claimed damage thereby, and if no agreement could be made as to the amount of reduction in rent for that year because of the damage the landlords should receive a specific portion of the crops. *Held*, that after a partial overflow substantially injuring the crop and the giving of notice neither party was required to attempt to bring about an agreement as to the amount of reduction of rent, but that, in the absence of an agreement, the rent was fixed at the division of the crops specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 340-345.]

Appeal from Circuit Court, Desha County; Antonio B. Grace, Judge.

Action by J. G. Morton and another against Lacy Bros. & Kimball. From a judgment for plaintiffs for \$878.35, plaintiffs appeal. Affirmed.

Pugh & Wiley, for appellants. Taylor & Jones, for appellee.

McCULLOCH, J. This is an action instituted by appellants against appellee, Lacy Bros. & Kimball, to recover \$2,000, alleged to be due upon written contract for rent of land. The contract stipulated an annual rental of \$2,000, but provided that if an overflow prevented the making of a crop no rent should be payable. It also contained the following stipulation: "In the event of a partial overflow of said lands second parties shall notify first parties on the 1st day of June of such year if they claim damage to crop thereby. If no agreement can be made between the parties hereto as to amount of reduction in rent for that year on account of said damage, then first parties shall



receive as rent for such year one-third of all corn, hay, and other feed produced on the land, and one-fourth of the cotton and cotton seed, and shall have the use of the ginhouse and machinery for the year." On a former trial of the case the plaintiffs recovered judgment for the full amount of the stipulated rent, the court having given the jury a peremptory direction to return a verdict in favor of the plaintiffs for that amount on the alleged ground that the lessees had failed to give timely notice, as provided in the contract, of damages by reason of overflow. The defendants appealed, and this court reversed the judgment on account of the erroneous direction, and remanded the case for a new trial. 76 Ark. 603, 89 S. W. 842. On the second trial below it was conceded that there was a partial overflow, which substantially damaged the crop, and that timely notice of the claim of damage had been given. Appellants (plaintiffs) requested the court to give several instructions to the effect that unless the defendants, after having given notice of a claim of damage, made an effort in good faith to come to an agreement with plaintiffs as to reduction of the rent, they could not claim the benefit of the contract with reference to payment only of the stipulated share of the crop, and that the plaintiffs would, in that event, be entitled to recover the full amount (\$2,000) of rent. The court refused to give these instructions, but instructed the jury to return a verdict in favor of the plaintiffs for the value of one-third of the corn and one-fourth of the cotton and cotton seed produced on the lands, and for the value of the use of the ginhouse and machinery. The jury returned a verdict for plaintiffs for the sum of \$878.35. The instruction was correct.

This court, in the opinion on the former appeal, said that "if, after the overflow and notice thereof, the parties could not, or did not, agree on the amount of the reduction in rent, the contract fixes it by providing that the rent shall then be one-fourth of the cotton and one-third of the corn, hay, and other products of the land for that year." Without stopping to consider whether, as argued by appellant's counsel, that the statement in the opinion was dictum, we have no hesitancy in saying now, since it is the point in the case directly raised by this appeal, that it expresses a correct interpretation of the contract. It was not necessary, after the occurrence of the partial overflow, such an overflow as was sufficient to substantially injure the crop, and the giving of notice of claim of damages, for either party to attempt to bring about an agreement as to the amount of reduction of the rent. The contract in that event fixed the rent at the stipulated share of the crop, unless the parties should agree upon a reduced amount to be paid. If no agreement as to the amount was reached, the contract fixed the basis of settlement regardless of whether the parties did anything

toward reaching an agreement or not as to the amount of reduction. This is a reasonable construction of the contract. It fixes the rent at the lump sum of \$2,000, without stating the amount per acre, in the event of no damage by overflow; and the contracting parties, bearing in mind the fact that a hurtful overflow in that locality was not improbable, and that it might not be practicable for them in the event of such contingency to agree upon a proper reduction, stipulated for a certain fair and just division of the crops produced on the leased premises in lieu of the payment of money rent, unless they should agree upon a reduction of the rent.

Judgment affirmed.

#### EAST v. KEY et al.

(Supreme Court of Arkansas. Nov. 25, 1907.)

##### 1. PARTNERSHIP — ACCOUNTING — PROCEEDINGS—REFERENCE.

Where, in a suit for a partnership accounting, a motion for reference was not made until the chancellor had made a detailed statement of the account and reported his special findings therefrom, the refusal to refer was proper, and the chancellor was authorized to make a report of the details of the business in the same manner as a master on reference would have done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 790.]

##### 2. APPEAL—FINDINGS—CONCLUSIVENESS.

The findings of the chancellor will be sustained, unless clearly contrary to the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

##### 3. SAME.

Appellant has the burden of showing that the findings of the chancellor are clearly contrary to the weight of the evidence.

##### 4. SAME—RECORD—EVIDENCE.

A party in a suit for a partnership accounting who appeals from the findings of the chancellor must show, separated from the items conceded to be correct, the testimony on the issue contested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2323.]

##### 5. SAME—REVIEW.

Where the transcript does not contain depositions read as testimony in the case, the court on appeal must presume that the findings of the chancellor are correct.

Appeal from Clark Chancery Court; Jas. D. Shaver, Chancellor.

Suit by W. G. L. Key and another against T. M. East, Jr. From a decree for plaintiffs, defendant appeals. Affirmed.

This bill was filed by W. G. L. Key and J. A. McMenis against T. M. East, Jr., on the 10th day of August, 1905. The parties had been equal partners in running a sawmill under a verbal contract made about the 1st of January, 1904, and the partnership continued until the 1st of June, 1904. No period of duration was fixed in the contract of partnership. The object of the bill was to have an accounting and an adjustment of the differences between the partners, and for damages

claimed by plaintiffs against the defendant on account of the termination of the partnership. The answer admitted the partnership, and averred that the plaintiffs were indebted to the defendant on account of the partnership business, and that the dissolution was by consent of the partners. The testimony, of which a large amount was taken, shows the partnership accounts to be complicated. There was a decree for the plaintiffs, and the defendant has appealed.

McMillan & McMillan, for appellant. C. V. Murry, for appellees.

HART, J. (after stating the facts as above). Appellants objected that the account was not referred to a master. In the case of Bryan v. Morgan, 35 Ark. 115, Eakin, J., said that it was not erroneous for the chancellor to refuse a reference to a master, but that it was not good practice. In that case the chancellor refused a motion for a reference made before he had considered the testimony. He then took the account, and announced the result without making any special findings. Here the motion for a reference was not made until the chancellor had made a detailed statement of the account and transactions between the parties, and reported his special findings therefrom. Upon application of the defendant, the chancellor set aside the decree, made further examination of the accounts, and made his report of the details of the business in same manner as if done by a master upon a reference to him. His report and special findings therefrom are embodied in the recitals of the decree. The presumptions in a case of this sort are in favor of a chancellor's findings of fact, and such findings will be sustained unless clearly contrary to the weight of evidence, and the burden is upon the appellant to show this.

It becomes the duty of appellant's counsel to eliminate from the confused mass of testimony the particular issues separated from the items conceded to be correct. Counsel have undertaken to restate the account in different forms. There is a conflict in the testimony in regard to the disputed items, but, after careful review of the testimony as abstracted, we are of the opinion that the special findings of the chancellor are not contrary to the weight of evidence.

Besides, the decree recites that the depositions of T. M. East, Jr., C. W. East, J. W. Sorrels, and Frank Park, taken June 6, 190-, were read as testimony in the cause, but the transcript which appellant caused to be filed in this cause does not contain these depositions. This being true, the presumption is that the findings of the chancellor are correct. Matlock v. Stone, 77 Ark. 199, 91 S. W. 553.

Decree affirmed.

WOOD, J., concurs in judgment for the reason that some of the depositions recited in the decree are not in the transcript.

## WILLIAMS v. BUCHANAN.

(Supreme Court of Arkansas. Nov. 25, 1907.)

### SUPERSEDEAS—STAY PENDING HEARING.

Where, on appeal from a judgment ousting one from a public office, appellee contends that the judgment cannot be superseded, and appellant contends that Kirby's Dig. §§ 2860-2864, only authorizes a judgment finding the result of a contest and does not authorize a judgment of ouster, the Supreme Court will not consider the nature of the judgment on a motion to discharge the supersedeas, but will, under the authority granted by Const. art. 7, § 4, issue a writ of supersedeas to stay the execution of judgment until the hearing on the merits.

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action between R. L. Williams and S. A. Buchanan. From a judgment for the latter, the former appeals. Motion to discharge supersedeas denied, and cause advanced.

R. G. Davies, C. V. Teague, and Jas. P. Clarke, for appellant. Wood & Henderson and Greaves & Martin, for appellee.

PER CURIAM. This is a motion filed by appellant to discharge the supersedeas and place in force the judgment of the Garland circuit court purporting to oust Williams from the office of sheriff and to induct Buchanan therein, and giving judgment in favor of Buchanan for the emoluments of the office enjoyed by Williams to the date of the judgment, from which judgment Williams has appealed to this court.

Appellee contends that the judgment of the Garland circuit court ousting Williams from the office of sheriff cannot be superseded, and that, if the judgment is capable of being superseded, the conditions of the bonds are defective, and a bond should be given properly conditioned to fit the nature of the judgment. Appellant contends that the statute (sections 2860-2864, Kirby's Dig.) pursued in this action only authorizes a judgment finding the result of the contest as a basis for the revocation of the commission of the officer, and does not authorize a judgment of ouster or for the emoluments of the office. Thus it is seen that this controversy goes beyond the mere matter of supersedeas, and reaches to the nature of the judgment itself. The case should not be determined by piecemeal; and the consideration of the nature of the judgment, and, consequently, the effect of the supersedeas bond, will be postponed until the consideration of the cause on the merits. It is contrary to public policy that the incumbency of a public office should be changed by the decision of the intermediate courts so long as an appeal is being diligently prosecuted in good faith to a final hearing in the Supreme Court.

Aside from any question of the supersedeas bond staying the transfer of the office pending the hearing of the appeal, the judgment should be superseded until the merits of the case can be determined. Under the authority

granted by article 7, § 4, of the Constitution to this court to issue writs of supersedeas, a supersedeas is hereby ordered to issue staying the execution of the judgment in question until the hearing of the case in this court or the further orders of the court. When the court exercises this power as a matter of public policy, it is proper that the case be speeded to a hearing; and the court of its own motion hereby advances this case as one of public interest, and will set it down for hearing at an early date. Counsel on the opposing sides are requested to agree upon a date for submission as early as possible. If they fail to agree, then the court will fix a date.

### ARKANSAS MUT. FIRE INS. CO. v. STUCKEY.

(Supreme Court of Arkansas. Dec. 16, 1907.)

#### 1. INSURANCE—FIRE POLICY—STIPULATIONS—COMPLIANCE.

In determining whether an insured in a fire policy complied with the stipulations thereof, the court must consider that a substantial compliance is sufficient, under the express provisions of Kirby's Dig. § 4375a.

#### 2. SAME—ACTION—BURDEN OF PROOF.

Where the insured, in a fire policy stipulating that he should keep a set of books presenting a record of the business transacted, including all purchases and sales for cash and credit, kept books in which the daily sales were entered in gross at the end of each day's business, without itemizing the sales for cash and credit, insurer had the burden of proving that there was not a substantial compliance, sufficient under the express provisions of Kirby's Dig. § 4375a.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1650, 1655.]

#### 3. SAME.

Where a fire policy stipulates that invoices of purchases shall be produced by the insured when required, the failure of the insured to preserve invoices, and keep them in a fireproof safe, does not operate as a forfeiture of the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 853.]

#### 4. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

The granting of a new trial on the ground of newly discovered evidence rests to some extent in the sound discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 10.]

#### 5. INSURANCE—FIRE POLICY—ACTIONS—ATTORNEY'S FEES—PENALTIES.

In an action on a fire policy, issued before the passage of Act March 29, 1905 (Acts 1905, p. 307), it is improper to include in the judgment the attorney's fees and penalty authorized by the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1805, 1806.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by S. M. Stuckey, trustee in bankruptcy, against the Arkansas Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. & M. House, for appellant. M. M. Stuckey, J. W. Phillips, and C. M. Erwin, for appellee.

**McCULLOCH, J.** This is an action to recover upon a fire insurance policy issued by appellant upon a stock of merchandise. The plaintiff recovered judgment below, and the defendant appealed.

Violation of the following clauses of the policy, which by its terms are made warranties, is pleaded in defense: "(1) The assured shall take a complete itemized inventory of stock on hand, at least once in each calendar year, and unless such inventory has been taken of the property covered by this policy within 12 calendar months prior to the date thereof, this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. (2) The assured shall keep a set of books which shall clearly and plainly present a complete record of business transacted in reference to the property herein mentioned, including all purchases, sales, and shipments, both for cash and credit, from the date of the inventory provided for in the preceding section, and during the life of this policy, or this policy shall be null and void. (3) The assured shall keep such books and inventory, and also the last-preceding inventory, if such has been taken, and also all books kept in his business since the date of such last-preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or shall keep such books and inventories in some secure place not exposed to a fire, which would destroy the aforesaid building, and, after a fire, shall produce all such books and inventories and deliver the same to this company for examination, or this policy shall be null and void, and no suit or action shall be maintained thereon for any such loss; it being agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under this policy, nor a waiver of any defense to the same." These several provisions constitute what is termed the "iron-safe clause" of the policy.

Violation of another clause of the policy is also pleaded, being as follows: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to an examination under oath by any person named by this company, and subscribe the same, and, as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

The evidence shows affirmatively and indisputably that the first clause enumerated

above was strictly complied with by the assured. The policy was issued on February 10, 1905, and the fire occurred within the calendar year during which the policy was issued. The assured also kept a set of books, which were preserved in an iron safe and produced after the fire; but it is claimed that these books were not kept in compliance with the requirements of the policy, in that the sales, cash, and credit were not itemized. The daily sales were entered in gross on the books at the end of each day's business. In all other respects the books came up to the requirements of the policy. Was this sufficient? One of the members of the firm insured under the policy testified as to the amount of the loss, and produced the books before the jury. He testified in detail concerning the amount of the loss, the amount and value of goods according to the last preceding inventory, the amount of purchases and sales since then, the average profits on sales, and finally the amount of stock on hand at the time of the fire. His testimony was not disputed.

A consideration of the requirements of the policy must be with reference to the statute providing that in actions upon fire insurance policies upon personal property "proof of a substantial compliance with the terms, conditions, and warranties of such policy, upon the part of the assured, \* \* \* shall be deemed sufficient, and entitle the plaintiff to recover in any such action." Kirby's Dig. § 4375a. This statute has been applied in several decisions of this court to the method of bookkeeping employed by the assured in considering clauses in policies similar to that in this case. *Insurance Co. v. Gorham*, 79 Ark. 160, 95 S. W. 152; *Security Mutual Ins. Co. v. Woodson*, 79 Ark. 266, 95 S. W. 481; *Arkansas Mutual Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226. In the *Woolverton* Case the books were kept in precisely the same manner as in this case, the only difference between that case and this being that in that one there was evidence introduced to the effect that this was the customary method of bookkeeping in vogue among the merchants in that locality. In the case of *Western Assurance Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067, the same method had been practiced as in this case, except that the amount of each sale was recorded, not mentioning the article sold. Expert witnesses testified that this was considered good bookkeeping, and the court held it to be sufficient compliance with the terms of the policy. That was before the passage of the statute referred to above. The court there said: "The parties had not stipulated as to the particular kind or system of bookkeeping required to show a complete record, etc. They had stipulated for a 'set of books'; but the plaintiff affirming, and the defendants denying, that a 'set of books' had been kept as required by the policy, the court very properly, upon this state of the contention, instruct-

ed the jury what the terms of the contract imposed, leaving them to determine from the testimony of the experts, the books themselves, and other evidence, as to whether the conditions had been fulfilled."

Learned counsel for appellant distinguish the present case from that one on the point that no expert testimony was introduced showing that this was considered good bookkeeping according to common usage. They also rely on the case of *Pelican Insurance Co. v. Wilkinson*, 53 Ark. 353, 13 S. W. 1103, where the method of bookkeeping there shown to have been practiced was held to be insufficient. In the latter case, however, a specimen of the bookkeeping is quoted which is wholly unintelligible, and the court so declared it. We cannot say, as a matter of law, that the method of bookkeeping shown in the present case was sufficient. That was a question of fact for the jury. It devolved upon the insurance company, which claimed a forfeiture, to show that the method of bookkeeping practiced was not sufficiently intelligible to enable an adjuster to ascertain the amount and value of the property insured and lost. Of course, where the books themselves show that they are not fairly intelligible, as in the *Wilkinson* Case, *supra*, the court should so declare; but where, as in this case, the books are kept in a manner apparently in intelligible condition so as to show a record of the business transacted and indicate with reasonable certainty the amount of purchases and sales of merchandise from day to day, then it is the duty of the company to show wherein they fall short of the standard of bookkeeping required by the terms of the policy. To hold otherwise would be to disregard the plain terms of the statute which declares that substantial compliance only with the terms of the policy is required.

A forfeiture is also claimed on the ground that the assured failed to preserve the invoices of goods purchased after the inventory of December 5, 1904, was taken. The invoices were not kept in the safe and were burned. The policy did not require the keeping of the invoices in the safe. The only requirement of the policy with respect to the invoices of purchases is that the assured should, as often as required, produce them, "or certified copies thereof, if the originals be lost." The evidence shows that the amounts of the purchases were entered in the merchandise account on the books. No demand upon the assured for production of copies of the invoices was ever made, there was no refusal to produce them; therefore no forfeiture resulted.

The only remaining ground for reversal insisted upon is that the court should have granted a new trial on account of newly discovered evidence. After verdict and judgment the defendant filed affidavits of certain persons tending to show that the assured was guilty of fraud in taking large quanti-

ties of goods out of their store immediately before the fire and concealing them, and that the quantity of goods left in the store at the time of the fire was much less than claimed by the assured. We think that sufficient diligence in discovering and producing this testimony was not shown to warrant the court in granting a new trial. This was a matter, to some extent, within the sound discretion of the trial court, and we do not think this discretion was abused.

The court rendered judgment, in addition to amount of the verdict, for attorney's fees and penalty, under Act March 29, 1905, Acts 1905, p. 307. This was erroneous, as the policy was issued before the passage of the statute. *Arkansas Mutual Ins. Co. v. Woolverton*, supra. Appellee offers to remit this amount, which is ordered done. The remainder of the judgment is affirmed.

### CHOCTAW, O. & G. RY. CO. v. STANFORD.

(Supreme Court of Arkansas. Nov. 25, 1907.)

#### CARRIERS — CARRIAGE OF PASSENGERS — PERSONAL INJURIES — EVIDENCE.

In an action against a railroad company for illness caused by lack of accommodations at a station, evidence that all regular passenger trains except fast trains stopped, that from 10 to 100 passengers used it daily, that hacks attended trains regularly, and that the deed to defendant's predecessor had been drawn to the land for a station, *held* competent to show whether the station was a regular or only a flag station.

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by T. W. Stanford against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following instructions were given at defendant's request:

"(1) The duty of railroads to have their waiting rooms open and heated for the reception of passengers applies only to stations where the railroad has a building which is used as a depot for the reception and accommodation of passengers.

"(2) The mere fact that the defendant had a building at Lawrence, which could be used for a depot for the reception and accommodation of passengers, did not impose upon it the duty of keeping the waiting rooms in such building open and heated, unless such building was, in fact, with its knowledge and consent, used as a depot for the reception and accommodation of passengers.

"(3) A railroad is under no obligation to have a depot and waiting room at a flag station, where there is no agent and where passengers are only taken on and put off on signal."

"(5) The defendant had a right to make regulations forbidding the soliciting of patronage on its trains for hotels and other enterprises, and to refuse to accept for pas-

sage parties who desired passage for that purpose; and, if you find from the testimony that the plaintiff desired to take passage upon defendant's train for the purpose of soliciting patronage for hotels or other enterprises, in violation of the rules and regulations of the defendant, then the defendant was under no obligation to afford him accommodations required for other passengers, and a failure to do so will not make it liable in this case.

"(6) It is not the duty of the defendant to receive for passage those who intend to take passage on its trains contrary to its rules and regulations, and, if you find from the evidence that such was the purpose of the plaintiff in taking passage on defendant's train, and that the defendant's employes did not know that he was taking passage upon said train for that purpose, then the defendant did not owe him the duty of providing for him a waiting room while waiting for said train."

"(10) The defendant was under no obligation to provide waiting rooms and other accommodations for persons coming to its depot an unreasonable length of time before the schedule departure of its trains, although said persons may have intended to take passage thereon.

"(11) The plaintiff had no right to expect that defendant should provide waiting rooms and other accommodations for him for more than a reasonable time before the schedule departure of its train. Defendant was not under obligations to furnish a place for him to stay between trains, or for any other purpose than to wait for the train which he intended to take such a reasonable time."

The following instructions were also given at plaintiff's request:

"(3) If you find from the evidence that the plaintiff went to defendant's depot at Lawrence station on the day mentioned in the complaint to take passage on defendant's train, and at that time the weather was such as to require the waiting room to be heated in order to make it comfortable, it was defendant's duty to keep said depot open and to keep its waiting room in said depot comfortably heated.

"(4) If you find from the evidence that defendant had a depot building at Lawrence, erected for the accommodation of passengers, and it ran its trains over said lines both day and night, then it was its duty to keep the same open for the free and unrestricted use of its passengers, and the waiting rooms thereof at all proper times and seasons comfortably heated."

Buzbee & Hicks and George B. Pugh, for appellant. Wood & Henderson, for appellee.

HILL, C. J. Stanford went from Hot Springs to Lawrence Station, on the line of appellant railroad company, six miles distant

from Hot Springs, and, desiring to return therefrom, went to the station five or ten minutes before time for the train to arrive. He was unable to get any information as to when the train would come, and waited an hour or two for it. It was the 20th of December, and the weather had turned cold during the day. There was a house at the station, owned by the railroad company, used as a section house; and there is a controversy as to whether it was used as a station house. One of the rooms, which had been used as a negro waiting room, was open; but there was no fire therein. It was occupied by some negroes, who were waiting for the train. The room which had been used as a white waiting room was closed. Stanford and others made a fire near the station house, and tried to make themselves comfortable; but he got wet and contracted pneumonia from his exposure. The testimony connecting the pneumonia with the exposure is as definite as that in the case of *Railway v. Hook*, 104 S. W. 217. In fact, that is not the ground of contention here. The question in this case is whether the station of Lawrence was a flag station or a regular station. The court gave certain instructions as to the duty of a carrier to provide station facilities at its stations, the material parts of which will be set out in the statement of facts; and certain instructions were given at the instance of the appellant presenting its contentions if Lawrence was a flag station.

Appellant begins its argument by stating: "The uncontradicted testimony in this case shows that Lawrence was a mere flag station on the road of appellant." In this the appellant errs. The testimony of Stanford (and another witness substantially to the same effect) is that all the regular passenger trains passing Lawrence stopped at this station regularly for the purpose of taking on and discharging passengers, and the only trains which did not stop there were the fast trains carrying guests to Hot Springs. On the other hand, the appellant has testimony tending to prove that this building was originally built as a station house, and was many years ago used as such, but that for some 20 years or more it had not been so used, and was only opened now and then for the accommodation of the people waiting for trains, and that Lawrence was only a flag station. The verdict of the jury amounts to finding that it was a regular station, and not a flag station, and the argument based on the duty, or want of duty, to furnish station facilities at flag stations is academic.

There was testimony adduced showing that from 10 to 100 passengers were daily using the station at Lawrence; that hacks from the hotel at Potash Sulphur Springs, about a mile distant, regularly attended the trains; and that a deed to the appellant's predecessor had been made to the tract of land for a station, to be known as Lawrence Station, and

directing that the depot be on the north side of the railroad track. It is contended that this testimony is incompetent; that its tendency was to show that there should have been a regular station there at the time complained of, but not that there was one. The complaint alleged that there was a station building in use at Lawrence, which allegation the answer denied; and thus an issue of fact was developed in the pleadings, and it was fairly competent to introduce testimony as to the passenger business handled there, as tending to prove whether it was really a regular station, or whether it was merely a flag station. While this testimony is not very material, yet it was competent as tending to prove the truth of the controversy.

Objection is also made as to Stanford testifying that after suit was brought the railroad company put a stove in the station house, as well as a water-cooler, and that it kept water therein. This was brought out in answer to a question asking what he knew of the station being lighted and heated prior to the occurrence in question. Immediately on this answer coming in, his counsel told him he did not want anything after the occurrence, and to confine his answer to the question. No objection was then made to this testimony. Had the attention of the court been called to it, he would doubtless have emphasized what the counsel had said, and told the jury not to consider the statements made by witness in this regard.

Judgment is affirmed.

#### CRAWFORD v. McDONALD.

(Supreme Court of Arkansas. Nov. 25, 1907.)

##### 1. SET-OFF — EQUITABLE SET-OFF — CLAIMS AVAILABLE.

Where plaintiff, as administrator of a vendor, sued to foreclose a vendor's lien, defendant, though not having filed his claim for breach of warranty in the sale against intestate's estate, was entitled to set off the damages sustained by such breach against the administrator's action; both claims having arisen out of the same transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 47, 48.]

##### 2. EVIDENCE—BEST AND SECONDARY—CERTIFIED COPIES.

Under the statute providing that, if any deed or instrument duly acknowledged or proved of record is lost or not within the power of the party wishing to use it, the record thereof or a certified transcript may be read in evidence, a certified copy of a recorded lease not executed or transferred to defendant, and not in his possession or control, was admissible; he having testified that he did not know where the original was, and could not produce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 595.]

##### 3. COVENANTS—IMPLIED COVENANTS — WORDS IN DEED.

Where the words "grant, bargain and sell," contained in a deed, were not limited by express words, they imported a covenant by the grantor with the grantee, his heirs and assigns, that the land was free from incumbrances made

or suffered by him, as expressly provided by Kirby's Dig. § 731.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 11.]

#### 4. SAME—LEASE.

Where land was conveyed by a deed containing a covenant against incumbrances at a time when the entire land was subject to a lease, such lease constituted a breach of the covenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 118.]

#### 5. SAME—BREACH—DAMAGES—APPORTIONMENT.

Where a lease which constituted a breach of covenant against incumbrances covered the entire land conveyed, there could be no apportionment of the damages occasioned by such breach; the lessee having possession of the land and a portion of the improvements.

Appeal from Clark Chancery Court; J. D. Driver, Chancellor.

Action by J. H. Crawford, as administrator of T. J. Stewart, deceased, against James H. McDonald, to foreclose a vendor's lien, in which defendant filed a cross-action for damages for breach of covenant. From an adverse decree, plaintiff appeals. Affirmed.

John H. Crawford, for appellant. McMillan & McMillan, for appellee.

BATTLE, J. On the 24th of January, 1902, T. J. Stewart and his wife, Helen A. Stewart, for \$160, \$75 of which were paid, and for the remainder two notes for \$42.50 each were executed by the purchaser to T. J. Stewart, sold and conveyed to James H. McDonald a certain tract of land, and retained a lien thereon for the unpaid purchase money. One of the notes was due on the 15th day of November, 1902, and the other on the 15th day of November, 1903. Both were executed on the 23d day of January, 1902, and bore "ten per cent. interest till paid." T. J. Stewart having died, J. H. Crawford, as his administrator, brought this suit against James H. McDonald to foreclose the lien on the land for the unpaid purchase money.

Defendant answered and admitted the allegations of the complaint, but alleged that T. J. Stewart sold and conveyed the land to him on the 24th day of January, 1902; that he and his wife, both deceased, by the deed "covenanted with the defendant that they would forever warrant and defend the title to the land against all lawful claims whatever; that the lands were free from all liens and incumbrances of every kind and nature whatever, for the quiet enjoyment thereof against the grantors, their heirs and assigns, and from the claims or demands of all other persons"; that the land at the time of making and delivery of the deed was not free from all incumbrances; that Thos. J. Stewart, December 16, 1899, executed a lease upon same to the Longview Lumber Company, for 10 years, which covered stables, lots, wells of water, and other improvements; that the lumber company transferred the lease to J.

G. Clark, who was in possession of the land at the time of the conveyance to appellee, who still holds same, and refused to quit and deliver possession to appellee; that Clark has cut all the merchantable timber from the land; that the reasonable rent value of the part of premises so held by Clark is \$5 per month from January 24, 1902, a period of 46 months, to appellee's damage, \$230.

He asks for judgment against the plaintiff for \$550 for damage on account of the incumbrance and for other relief. On December 10, 1906, appellant filed his motion to dismiss the cross-complaint, as follows: "That same was based upon an alleged covenant of warranty contained in a deed to appellee made by appellant's intestate. That, in order to maintain such a demand against said estate, it was necessary for the defendant, within two years after the grant of letters of administration, to present to him for allowance a statement of his demand, with his affidavit appended thereto, to the effect that nothing has been paid or delivered towards the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due. That no such verified demand was ever made or presented to appellant, as such administrator. That more than two years have passed since letters of administration were granted to plaintiff herein."

On hearing of the motion to dismiss, it was admitted that, prior to the filing of appellee's cross-action, December 11, 1905, the appellee had not attached to his claim the authenticating affidavit required by the statute; "that he made no affidavit, except the one attached to his answer and cross-complaint; that more than two years had passed since letters of administration were granted to plaintiff."

The deed executed by Stewart and wife to the defendant, which was admitted as evidence, contained this granting clause, "I hereby grant, bargain, sell and convey," and the following covenant: "And we hereby covenant with the said James H. McDonald and his heirs and assigns that we will forever warrant and defend the title to the said lands against all lawful claims whatever." The statutory meaning of the words "grant, bargain and sell" are not limited by any express words in the deed.

The evidence adduced at the hearing showed that T. J. Stewart on the 16th day of December, 1899, executed to Longview Lumber Company a lease of the land in controversy for 10 years, which included stables, lots, wells of water, and other improvements. This lease was filed for record and recorded. Defendant testified that the original lease was not in his possession, and he did not know where it is, and it was not in his power to produce it as evidence, and offered a certified copy of the lease as evidence. The court, over the objection of the plaintiff, admitted it. The lease was transferred to

J. G. Clark. He took possession of the land and a portion of the improvements and held the same for at least 80 months. The rental value thereof for such time exceeded the amount due on defendant's notes.

It is not necessary to mention other incumbrances adduced as evidence. The court overruled appellant's motion to dismiss, and he excepted. On the merits it found that the covenant of warranty in the deed from Stewart to McDonald had been broken, and that appellee had been damaged in a greater amount than the notes sued upon, and that appellant on that account should recover nothing in this action, and adjudged the cost against appellant. To this decree appellant excepted and appealed.

The decree of the court, as a whole, is correct. It would not allow the claim of the appellee for damages as a claim against the estate or a basis for judgment against the appellant, but as a recoupment to the extent of the claims of appellant, as a bar to the recovery of appellant against appellee. Both claims grow out of the same transaction, and it is equitable that one should be set off against the other. He who seeks equity should do equity. The motion to dismiss was properly overruled.

The copy of the lease was admissible. Defendant testified that he did not know where the original is, and it was not within his power to produce it. The statute in such cases provides: "If it shall appear at any time that any deed or instrument duly acknowledged or proved and recorded as prescribed by this chapter, is lost or not within the power or control of the party wishing to use the same, the record thereof, or a transcript of such record certified by the recorder, may be read in evidence without further proof of execution." In this case the lease was not executed or transferred to the defendant, and was not in his possession or control, and he did not know where it was. The certified copy was properly admitted. *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 346; *Eaton v. Campbell*, 7 Pick. (Mass.) 10.

The words "grant, bargain and sell," contained in the deed, not being limited by express words, were a covenant of Stewart with McDonald, his heirs and assigns, that the land was free from incumbrances done or suffered by him. *Kirby's Dig.* § 731. A lease is an incumbrance, within the meaning of that term as defined in *Seldon v. Dudley E. Jones Company*, 74 Ark. 348, 351, 85 S. W. 778, and was broken when the deed to McDonald was executed. See *Am. & Eng. Encyc. of Law* (2d Ed.) 129, and note 4, and cases cited. The damages occasioned by the breach of this covenant were at least equaled to the amount sued for by the appellant.

As the whole of the land conveyed was covered by the lease, the rule requiring an apportionment of damages between parts of the land affected by the covenant and the re-

mainder of it does not apply in this case. The covenant was broken as to the entire tract of land in controversy.

Decree affirmed.

## CHICAGO, R. I. & P. RY. CO. v. SLAUGHTER.

(Supreme Court of Arkansas. Nov. 25, 1907.)

### 1. CARRIERS—CARRIAGE OF LIVE STOCK—CONNECTING CARRIERS.

In an action for injuries to cattle shipped on defendant's line, evidence held sufficient to warrant a finding that a line to which the cattle were transferred by defendant was a connecting carrier.

### 2. SAME—LIMITATION OF LIABILITY—ACTIONS—DAMAGES.

Where the contract of transportation of cattle by defendant over its line and connecting lines limits defendant's liability to damage occurring on its own line, the carrier is not liable for damage resulting from negligence on the connecting line after delivery of the cattle to such connecting line.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 9, Carriers, § 951.]

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by D. P. Slaughter against the Chicago, Rock Island, & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee by this suit seeks to recover of appellant for damages alleged to have accrued to appellee by reason of injury to two car loads of cattle caused through the negligence of appellant in transporting same from Magazine, Ark., to St. Louis, Mo., under contract with appellee. The complaint specifically sets forth the alleged negligence from Magazine, Ark., to Ft. Smith, Ark., and from Ft. Smith to St. Louis, Mo., and also specifically sets forth the damages sustained, amounting in the aggregate to \$525, for which judgment was prayed. The appellant in its answer admitted the contract with appellee for the shipment of cattle, and alleged that appellant was only liable under the contract for damage done through its negligence while the cattle were in its possession, denied that any damage was done through its negligence, and set forth that the cattle were delivered to its connecting carrier, the St. Louis & San Francisco Railway Company, at Wister, Ind. T., in as good condition as when received by defendant at Magazine, Ark. The answer also denied that there was any negligence after the cattle were delivered to the connecting carrier at Wister, but alleged that appellant was not liable for such negligence, if it was shown. The contract, as proved, was one in which the appellant undertook for a specified rate of freight to transport appellee's cattle from Magazine, Ark., to St. Louis, Mo.; the rate being less than the rate charged for shipments at the carrier's risk. On account of the "reduced rate" and other considerations, it was "mutually agreed between the



parties," among other things, that "under no circumstances shall the Chicago, Rock Island & Pacific Railway Company be held liable for any injury to or loss of the stock transported hereunder, from any cause whatsoever, happening or accruing beyond its own line, and in the event of injury to or loss of said stock, only the carrier on whose line the injury or loss actually occurs shall be liable." On the cross-examination of appellee the following occurred: "Q. To what railroad company were your cattle delivered at Wister, Ind. T.? A. I presume to the Frisco; I don't know. I thought the whole thing was the Rock Island System. Q. You knew it was not the regular line of the Rock Island; but you thought it was a branch of it? A. I thought the Rock Island was a branch of the Frisco. Q. But you know at Wister that your cattle were delivered to the Frisco, and carried from there by them to St. Louis? A. Yes, sir. Attorney for Defendant: I desire to move the court to exclude from the consideration of the jury all the testimony of this witness as to delays, rough treatment, and injury to the cattle after they left Wister, Ind. T., and before they reached St. Louis, on the ground, as stated in my opening, that defendant, under the contract of shipment in this case, is not liable for any damages which occurred after the cattle were delivered to the connecting carrier, St. Louis & San Francisco Railroad Company, at Wister." The court overruled defendant's motion, and the defendant excepted. The record shows at another place the following: "Q. State, Mr. Slaughter, whether you were unnecessarily delayed at any other point between Wister and Ft. Smith. Attorney for Defendant: To save frequent interruptions, may I not have the privilege of saving exceptions with reference to delays after leaving Wister, without calling the court's attention to each separate objection? The Court: You may. The court understands your contention. Go ahead, Mr. Slaughter." The appellee introduced evidence tending to show negligence in the carrier from Wister to Ft. Smith, and from Ft. Smith to St. Louis. It is conceded by appellant that it is liable, and that the judgment is correct, if it is liable for the injuries occurring on the St. Louis & San Francisco Railroad. The court instructed the jury as follows: "This is a contract of shipment from Magazine, Ark., to St. Louis, Mo., and under it defendant is liable, under the proof here, for all damages, if any, sustained by the shipment from the acts of negligence charged in the complaint, if proven, or such of them as are proved, if any, anywhere from Magazine, Ark., to St. Louis, Mo." Appellant duly saved its exceptions, and asked the following: "(3) You are instructed that, under the contract of shipment in this case, the defendant is not liable for any damages which may have occurred to said cattle after they were delivered to the St. Louis & San Francisco Railway Company at Wister, Ind.

T." The appellant again duly excepted. The verdict and judgment were for appellee; and this appeal duly prosecuted.

Buzbee & Hicks and Geo. B. Pugh, for appellant. Priddy & Chambers, for appellee.

WOOD, J. (after stating the facts as above). The contract itself showed that the parties to it contemplated that the cattle were to be delivered by appellant to a connecting carrier; for it expressly limits the liability to injuries occurring on its own line, and specifies that the liability of appellant "terminates upon delivery by it of said cars to its connecting carrier." The proof showed that appellee's cattle at Wister "were delivered to the Frisco and carried from there by them to St. Louis." This evidence was at least prima facie proof that the Frisco was a connecting carrier, and, in the absence of any evidence to the contrary, was sufficient to warrant a finding to that effect. The court in passing upon the evidence offered well understood the contention of appellant that the Frisco was a connecting carrier, and the ruling indicates that the court assumed that such was the fact, without the necessity of further proof upon the subject. The court erred in giving the instruction set out in the statement, and in refusing the request asked by appellant.

The trial court under the rule announced by this court in *L. R. & F. S. Ry. Co. v. Odom*, 63 Ark. 326, 38 S. W. 339, should have confined the inquiry to the damage if any produced by the negligence of appellant before the delivery of the cattle to the connecting carrier. See, also, *Taylor, Cleveland & Co. v. Little Rock, M. R. & T. R. Co.*, 32 Ark. 393, 29 Am. Rep. 1; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *St. Louis, I. M. & S. Ry. Co. v. Weakly*, 56 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *International & G. N. R. Co. v. Earnest & Bost* (Tex. Civ. App.) 77 S. W. 29, 30; *Int. & G. N. R. Co. et al. v. Startz*, 97 Tex. 167, 77 S. W. 1.

Judgment reversed, and cause remanded for new trial.

#### MISSISSIPPI HOME INS. CO. v. ADAMS & BOYLE

(Supreme Court of Arkansas. Nov. 25, 1907.)

##### 1. INSURANCE — AGENTS — COMPENSATION — CONTRACT OF EMPLOYMENT — CONSTRUCTION.

A contract of employment of an agent of an insurance company provided for the payment of a contingent commission by the company to the agent on the profits of the business to be first computed on a designated date and at the end of each year thereafter, and reserved to either party the right to terminate the employment after giving 30 days' notice, in which event payment of compensation should be made. *Held* that, on the termination of the employment by notice before the designated date, the computation of the commission must be made at the time of the termination.

## 2. CONTRACTS—CONSTRUCTION—INTENTION OF PARTIES—CONFLICTING CLAUSES.

The court, in arriving at the intention of the parties to a contract, must give effect to all the provisions thereof, and the language as a whole must be construed and thereby make the apparently conflicting provisions consistent so as not to give one of the parties an unfair advantage over the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 744.]

## 3. INSURANCE — AGENTS — COMPENSATION — CONTRACT OF EMPLOYMENT—CONSTRUCTION.

A contract of employment of an agent of an insurance company stipulating for payment by the company to the agent of a contingent commission on the profits of the business, after deducting "the expenses, reinsurance, return premiums and losses for the current year," gives to the agent a commission on the business less the deductions provided for, and the company cannot demand further reductions.

## 4. CONTRACTS — AMBIGUITY — CONSTRUCTION AGAINST PARTY USING LANGUAGE.

A contract must, in case of doubt, be construed against him who used the doubtful wording.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

Appeal from Circuit Court, Pulaski County; El. W. Winfield, Judge.

Action by the Mississippi Home Insurance Company against Adams & Boyle. From a judgment for defendants, plaintiff appeals. Affirmed.

The firm of Adams & Boyle, insurance agents, were employed by the appellant, a foreign corporation, to establish and conduct for appellant the business of fire insurance in this state. Under the contract, appellee was a general agent, with all the powers, duties, and the obligations of such. Appellee was to pay all expenses incident to the business except legal expenses in resisting losses. As compensation for its services in planting the business and conducting it, the contract provided: "Fourth. The party of the first part [appellant] agrees to pay the parties of the second part [appellee] a flat commission of thirty per cent. (30%) on the net premiums for business written in said state, meaning thereby the gross premiums, less return premiums and reinsurance. Said commission to be in lieu of all expenses whatsoever, except legal expenses in resisting losses. A further contingent commission of ten per cent. (10%) is to be paid to the parties of the second part on the profits of the business after deducting all expenses, reinsurance, return premiums and losses for the current year; said contingent commission to be first computed on August 1, 1906, and at the end of each year thereafter." There were various provisions in the contract defining the duties of the respective parties to it unnecessary to set forth here. The contract contained these further provisions: "Ninth. This agreement may be terminated at any time by either party after giving (30) days' written notice to the other, in which event payment of compensation as above provided shall be made, and will be in liquidation of all payments to the party of

the second part by the party of the first part. Tenth. This agreement will take effect from the date." The contract took effect August 8, 1905. The contract was terminated on the 1st of December, 1905, after giving the notice specified in the ninth paragraph, supra. Appellant sued appellee for the sum of \$1,010.69, which it claims appellee was due upon a settlement as per terms of the contract. Appellee denied liability. On the termination of the contract, November 30, 1905, appellee rendered a statement of its accounts with appellant, as of that date, showing that the amount of the net premiums, after deducting reinsurance, commissions, and three-sevenths of the amount paid for entrance fee, and certificates to agents, and losses incurred and paid, was \$9,254. Appellee credited itself with 10 per cent. of this amount, as its contingent commission under the contract. This credit of \$925, contingent commission, which appellee claims, was disputed by appellant. Appellant contends that, under the terms of the contract, the settlement of appellee's contingent commission should be made on August 1, 1906, and it adduced proof to show that on that day the business that had been written by appellee had resulted in a loss to appellant of \$1,400.64, not taking into account the unearned premiums, and that, if these were deducted, the loss would be \$20,885.15. Appellant contends that the unearned premiums should be deducted, and that, in no event, making the settlement as of August 1, 1906, was there any amount due for contingent commission. Appellee, on the other hand, contends that its contingent commission was due on the day of the termination of the contract, that settlement final should be made on that day, and that appellant was due appellee a contingent commission on all the premiums received by appellant on business that had been written by appellee at that time. After deducting 30 per cent. for flat commission, the amount paid for reinsurance, losses incurred, and paid at that time, and an amount representing three-sevenths of the sum which appellee had paid for entrance and license fees, said sum being for time unexpired. Appellee testified to the correctness of the statement of account which it had rendered in accordance with its contention. The trial court sustained appellee's contention, and rendered judgment in its favor. The motion for a new trial contained only one ground, namely, "that judgment is contrary to the evidence." This being overruled, appellant prosecutes this appeal.

Rose, Hemingway, Cantrell & Loughborough, for appellant. Ashley Cockrill, for appellee.

WOOD, J. (after the stating the facts as above). First. It is obvious from the provision of the contract, to wit—"said contingent commission to be first computed on August, 1st, 1906, and at the end of each year there-

after"—that the parties to it contemplated that the contract might last more than one year, yet the provision following this in paragraph "ninth" shows that the parties did not make this time for the computation of the contingent commission of the essence of the contract, because in this latter provision the right to terminate the contract by either party on 30 days' notice is expressly reserved. And payment "in that event" of compensation, as provided in paragraph "fourth," shall be made, and will be in liquidation of all payments to the party of the second part by the party of the first part. The last paragraph must be taken to qualify the preceding one, and the two together mean that if the contract should continue till the 1st of August, 1906, and for years thereafter, the time for the computation and settlement of the amount due under the provision for a contingent commission should be the 1st day of August of each recurring year that the contract continued; but, if it should be terminated earlier, then the computation of the contingent commission should be made, and settlement thereof had at the time the contract was terminated. The basis of the computation as to the amount to be paid for the part of the year while the contract is in existence is the same as if the contract had continued for the full year. The only difference is that, when the contract is terminated, the settlement must be made then of all that is due under it. And, when the contract is ended, all commissions by way of compensation are due, and the computation of the amount and the payment thereof cannot be postponed. This is the only reasonable construction of which the contract is susceptible, when all of the terms of the two paragraphs are considered. It is our duty in arriving at the intention of the parties to give force and effect to all the provisions, and every word, if possible. The language as a whole should, if possible, be so construed as to make the apparently conflicting provisions reasonable and consistent, and so as not to give one of the parties an unfair and unreasonable advantage over the other. 9 Cyc. 579, 583, 587, and authorities cited; 1 Crawford's Digest, "Contracts," "Construction," p. 186; Kelly v. Dooling, 28 Ark. 582; Railway v. Williams, 58 Ark. 58, 13 S. W. 796. It follows that the court was correct in concluding that the com-

putation should be made, and the settlement had as of the day of the termination of the contract.

Second. As we construe the contract, the amount of the contingent commission should have been computed on the following basis: Appellee should have been allowed a commission of 10 per cent. on the premiums on business written by it at the time of the termination of the contract, less "expense, reinsurance, return premiums, and losses" that had accrued at that time. This would show the profits of the business at that time, and is according to the very terms of the contract. It is insisted by appellant that the amount should be still further reduced by the unearned premiums, that there could be no showing of profits unless the unearned premiums were taken into the account. But the answer to this is that by the plain terms of the contract the parties have specified that the profits are to be estimated by what remains "after deducting all expenses, reinsurance, return premiums and losses." Having undertaken to enumerate the things that should be considered, the things not mentioned cannot be supplied by inference or intentment, for the very terms of the contract show that the parties had in mind the things that they intended should govern in fixing the basis for the estimate, and the mention of these necessarily excluded others not mentioned. If no mention had been made of the things to be deducted, and the contract had read that "a contingent commission of ten per cent. was to be paid the parties of the second part on the profits of the business," then it would have been a matter of proof allunde as to what should be deducted in order to ascertain whether there were profits. But here the contract has fixed the definite standard, and, as appellant has written the contract, in case of doubt the words will be construed against it. 9 Cyc. 590; Leslie v. Bell, 73 Ark. 338, 84 S. W. 491; Allen West Com. Co. v. Bank, 74 Ark. 41, 84 S. W. 1041. The burden of proof was on appellant. It adopted an erroneous theory as to the time when the contingent commission was to be computed and settled under the contract, and failed in its proof to show that appellee had received more than the contract authorized.

Judgment affirmed.

## BROYLES v. BROYLES.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

## 1. DIVORCE—ACTION—EVIDENCE—WEIGHT.

Evidence in a divorce action held to sustain findings that defendant made certain statements causing plaintiff to leave their home.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 442-445.]

## 2. SAME—CRUELTY—ACTS CONSTITUTING.

A husband was guilty of cruelty warranting a divorce from bed and board where about a week after the marriage he offered his wife \$150 to return to her former home, because an abscess developed upon one of her lungs; he stating that he could not afford to marry a doctor's bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 68.]

## 3. SAME—ALIMONY—AMOUNT.

A wife is entitled to \$2,000 alimony, a \$250 attorneys' fee, and other costs where a week after the marriage, she left her husband's home through his cruelty, and he is worth about \$18,000; they having made an antenuptial contract whereby she relinquished any interest in his estate at his death, and she owning a farm worth about \$3,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 675-678.]

Appeal from Circuit Court, Boyle County. "Not to be officially reported."

Divorce action by Rachel E. Broyles against W. G. Broyles. From the judgment, defendant appeals, and plaintiff cross-appeals. Reversed and remanded.

Emmett Puryear, Robert Harding, and Greene & Van Winkle, for appellant. H. W. Rives and John W. Rawlings, for appellee.

CLAY, C. Appellant, W. G. Broyles, and appellee, Rachel Broyles were married in November, 1906. At the time of the marriage appellant was a widower 82 years of age, and appellee a widow about 20 years his junior. Appellant's children were all married and living to themselves, but a grandson and his wife lived with appellant, and did the housework and managed the farm, which was located near Perryville, in Boyle county. Appellee resided on a small farm in Marion county, and living with her were two single daughters and a brother-in-law. Appellant was possessed of an estate consisting of lands, bank stock, etc., worth about \$18,000. Appellee owned a farm worth about \$3,500. Just before their marriage, appellant and appellee entered into a marriage contract, by the terms of which each released and relinquished all claim to dower, homestead or distributive right in the property of the other which might accrue by virtue of the marital relation about to be entered into. There was also a provision that appellant was to pay appellee the sum of \$50 per annum so long as they should live together as husband and wife, such payments to cease, however, with the death of appellant or the separation of the parties. After living together for about a week appellant and appellee separated. A few weeks later appellee instituted this action for divorce from bed and board and for alimony. Upon

submission of the case, the chancellor granted appellee the divorce, and awarded her alimony in the sum of \$20 per month, to be paid to her so long as she lived and remained single. She was also allowed her costs, including an attorneys' fee of \$250. From this judgment W. G. Broyles has appealed, and appellee is prosecuting a cross-appeal.

It appears from the record that during their courtship appellant assured appellee that he did not want his wife to work; that he wanted her as a companion, and not as a servant; that a horse and buggy would always be at her disposal; and that he had abundant means with which to provide such other conveniences as would make her life a happy one, and enable her to pass her declining days in comfort and ease. Yielding to his persuasions, appellee consented to the marriage, leased her farm, and prepared for the wedding and change of home. About a fortnight before the marriage, appellee, while on a visit to her married son, contracted a deep cold, which developed into bronchitis. During this time appellant continued his visits, and appeared anxious, not only that she should recover as soon as possible, but that the wedding should take place at the appointed time. By the time of the wedding, appellee's condition was much improved. Immediately after the ceremony the couple went in a buggy to the home of appellant. Whether from the long trip and inclement weather, or the poorly heated condition of appellant's home, appellee became worse, and an abscess developed upon one of her lungs, resulting in such frequent coughing and expectoration as to lead appellant to believe that she had consumption. Appellee remained at appellant's home for one week, and left under the following circumstances: Her son, C. H. Lankford, and daughter, Daisy Lankford, came by appellant's home. Appellant came out and invited them to remain to dinner. They replied that they were in a hurry, and did not have time. Appellant then said: "Well, get out. Your mother is going home after dinner." Just then appellee came out; and, when her children told her they were going, she said: "There's no use going. He is going to send me home after dinner." They then went into the house. A fire was made, and appellant informed them that he wanted to have a talk with them. After dinner appellant, in the presence of appellee, and others, told C. H. Lankford that he had found his mother in very bad health. He believed she had the consumption. Lankford said he did not believe she had it. Appellant replied that nobody could make him believe that she did not have it; that he had made her a proposition to give her \$150, and have a notary public come out inside of two hours and cancel all contracts; that then she could go home; that he could not afford to room with her, bed with her, or even talk to her through his trumpet, as it would be injurious

to his health; that he could not afford to keep her; that he could not afford "to marry a doctor's bill." The above is the testimony of appellee's son and daughter. On the other hand, appellant's grandson and his wife testified that the conversation detailed above did not take place; that appellant told Mr. Lankford he thought appellee had the consumption, and that he would give her \$150 to take home with her; that, if she got down sick, he could not wait on her there, but, if she was at home, her children could wait on her and look after her in the proper way. There was also testimony to the effect that appellee stated before the arrival of her son and daughter that she intended to go home that afternoon. On December 7, 1906, a few days after appellee left, appellant wrote her the following note: "Mrs. R. E. Broyles: Well, how are you getting along? Would like to hear from you. If you accept my proposition, all right; if not, you can come home when it suits you. Respt. W. G. Broyles."

It is earnestly insisted by counsel for appellant that, as the number of witnesses is the same on each side, the chancellor was not justified in concluding that the version of appellee's witnesses was the correct one; furthermore that, as appellee had stated prior to the arrival of her son and daughter that she intended to leave, her departure was not occasioned by the statements of appellant, even if he made the statements detailed by appellee's witnesses. With this contention we are unable to agree. As the statements, though made for appellee's benefit and in her presence, were directed particularly to C. H. Lankford, we think he would be more apt to remember them correctly than a person who merely happened to hear them. Furthermore, the expressions claimed by appellee's witnesses to have been used by appellant are so peculiar, unusual, and unique in their character as to preclude the idea that they were manufactured for the purpose of being used as evidence in this case. And, if appellee did announce before the statements were made that she intended to go home, we have no doubt that such intention was the result of appellant's having made to her, before the arrival of her son and daughter, substantially the same proposition that he subsequently made to her in their presence. Furthermore, the language of the note referred to confirms the view that appellant expected appellee to remain at her home, if she accepted his proposition, and to return to him only in the event that she did not accept it. And, if appellant's proposition had been simply to furnish her \$150 to provide for her while she was being treated and nursed temporarily at her own home, we do not believe appellee would have left appellant's home with the purpose of never returning.

While it is not natural to expect of old age the same sentiment and tenderness found

in youth, yet the obligations imposed by law upon both husband and wife are just as binding when the contracting parties are old as when they are young. And, when at the very threshold of the honeymoon the husband, because of her illness, proposes to the wife to take \$150 and go home, and accompanies the proposition by the statement that he cannot afford to marry a doctor's bill, the proposition is so cruel and humiliating as to justify the wife in leaving her husband's home. By such conduct he shows an entire disregard of the marital relation, and is as guilty of cruelty as if he had inflicted blows upon his wife's person. *Irwin v. Irwin*, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417. Under such circumstances the wife is entitled to alimony. The only question is how much. In view of the amount of appellant's estate, and of the further fact that appellee because of the antenuptial contract will have no interest in appellant's estate at the time of his death, we have concluded to allow appellee the sum of \$2,000 in cash, in addition to her attorney's fees of \$250, and other costs.

For the reasons given, judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

#### PRESTON v. ATKINS.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

##### 1. WITNESSES—COMPETENCY — TRANSACTIONS WITH DECEDENT.

Under Civ. Code Prac. § 606, subsec. 2, disqualifying one to testify for himself concerning any transaction, etc., with a decedent, except to affect one living, unless decedent or a representative of, or some one interested in, his estate, shall have testified against such person respecting it, claimant against an estate was disqualified from testifying concerning any verbal transaction had with decedent about which claimant was not interrogated by the estate's representative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 582-597.]

##### 2. SAME—LETTERS.

Claimant against a decedent's estate may testify as to letters written by him to decedent, and explain the subject-matter thereof and the circumstances which induced him to write them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 686.]

##### 3. SAME—PERSON INTERESTED.

Under Civ. Code Prac. § 606, subsec. 2, disqualifying one to testify for himself concerning any transaction, etc., with a decedent, on a claim against decedent's estate for goods sold his employé, the employé was an incompetent witness for claimant as to verbal transactions with decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 598, 599.]

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

In a suit to settle the estate of L. M. Atkins, deceased, John H. Preston filed a claim which was rejected on the executor's exceptions, and claimant appeals. Affirmed.

C. B. Wheller, for appellant. R. T. Burns, W. R. Brown, and C. B. Schofield, for appellee.

**LASSING, J.** In a suit to settle the estate of L. M. Atkins, deceased, a claim was presented by appellant, John H. Preston, for a balance due him on account. This claim was proven by the affidavits of Preston and one George Osborne. Exceptions were filed by the representative of the estate to the testimony of both of these witnesses, on the ground that it was incompetent. The exceptions were sustained and the claim was rejected. Of this ruling appellant, Preston, complains.

The record shows that the decedent, Atkins, had employed George Osborne to cut and haul a lot of timber; that the appellant, Preston, was operating a country store near the place where this work was being done, and that he furnished a lot of goods to Osborne, and that from time to time, during the progress of the work, the decedent Atkins, made payments to Preston on the written orders of Osborne; that the amount so paid on these orders was something like \$800; that there still remained due Preston on the Osborne account a balance of about \$300. There was no contractual relation existing between the decedent and the claimant, Preston; on the contrary, the record shows that the contract was between the decedent and the witness Osborne. Nor is there anything in the record even tending to show that decedent Atkins assumed to pay claimant Preston any sum whatever on account of his claim against Osborne. Subsection 2 of section 606 of the Civil Code of Practice provides that: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who when over fourteen years of age and of sound mind heard such statement or was present when such transaction took place or when such act was done or omitted, unless the decedent or a representative of, or some one interested in, his estate shall have testified against such person with reference thereto." The provisions of this section of the Code disqualify appellant from testifying at all concerning any verbal transaction he had with decedent about which he was not inquired of by appellee. On cross-examination appellee introduced several letters which had been written by appellant to decedent, and he was asked concerning same. It was competent for him to testify as to the letters and to explain the subject-matter thereof, and the circumstances which induced him to write them, but his testimony upon this point is limited strictly to the facts surrounding the letters in question, and such

explanations as he may have desired to have made about them. Neither these letters nor his testimony concerning same support his claim. In *Apperson's Ex'r v. Exchange Bank of Kentucky*, 10 S. W. 801, 10 Ky. Law Rep. 943, this court held: "It was not necessary that a witness should be a party to or directly interested in the result of a suit against the representative of one who is dead in order to render such testimony incompetent as to a transaction with the decedent. That to do so it must appear that it would have the effect to directly or indirectly benefit the witness peculiarly." In that case the witness in question had a pecuniary interest in the result of the suit, and he was disqualified from testifying as to a business transaction with the decedent which formed the basis of the litigation in question. The same principle was adhered to in the case of *Smick's Adm'r v. Beswick's Adm'r*, 113 Ky. 439, 68 S. W. 439. In the case before us the witness Osborne had a direct personal interest in the result of this litigation, for any recovery had must be for his benefit, as it was to pay a debt which he owed to the claimant, Preston. Under the rule announced in the cases of *Apperson's Ex'r v. Exchange Bank of Kentucky*, and *Smick's Adm'r v. Beswick's Adm'r*, he, having a direct personal interest in the result of this litigation, was not a competent witness to testify concerning any verbal transactions between himself and decedent in regard thereto.

For the reasons given, the judgment of the lower court is affirmed.

#### SIMS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

##### 1. CRIMINAL LAW—APPEAL—REVIEW—QUESTIONS OF FACT.

Under Cr. Code Prac. § 340, providing that a judgment of conviction shall be reversed for any error of law prejudicial to defendant, the Court of Appeals is restricted to the single inquiry as to whether there is any evidence of defendant's guilt, and cannot reverse where there is some evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3075.]

##### 2. SAME—HARMLESS ERROR—REJECTION OF EVIDENCE.

To authorize a reversal of a conviction for rejection of evidence offered by defendant, it is not sufficient that the rejected evidence be shown to have been material, relevant, or technically admissible, but it must be important for defendant in view of the whole case as presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3145.]

##### 3. SAME—RESERVATION AND PRESENTATION OF ERROR—OBJECTIONS FIRST RAISED ON MOTION FOR NEW TRIAL.

Under Cr. Code Prac. § 281, providing that decisions of the court on motion for a new trial shall not be subject to exception, the Court of Appeals cannot review the action of the trial court in passing on the objection that the jury at times during the trial was permitted to pass and see the place of killing without de-

fendant's knowledge or presence, where first brought to the trial court's attention on motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2647.]

**4. HOMICIDE — APPEAL — HARMLESS ERROR — ERRONEOUS INSTRUCTION.**

Error in an instruction on voluntary manslaughter, in that it failed to require the jury to believe that the killing was intentional or unlawful on defendant's part, was not prejudicial to defendant, where he admitted that he intentionally shot and killed decedent.

Appeal from Circuit Court, Lincoln County.  
"Not to be officially reported."

R. E. L. Sims was convicted of voluntary manslaughter, and he appeals. Affirmed.

M. C. Saufley, Robt. Harding, J. W. Alcorn, and K. S. Alcorn, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellant was indicted by the grand jury of Lincoln county on November 8, 1905, for the willful murder of John R. Farris. The case was tried at the November term, 1905, and at the June term, 1906, and on both occasions a mistrial was the result, the respective juries being unable to agree upon a verdict. The third trial, which was had at the June term, 1907, resulted in a verdict of conviction for the crime of voluntary manslaughter, and fixed his punishment at 8 years' confinement in the penitentiary.

The evidence is voluminous, there being over 500 pages of it. It would be of no benefit to any one to recite and discuss the evidence in detail. It is sufficient to say that there was evidence introduced by appellee conducing to show that appellant was guilty of the crime charged; and likewise evidence which tended to show that the act of appellee in taking the life of Farris was in his necessary self-defense. There being some evidence showing the guilt of the defendant, under section 340 of the Criminal Code of Practice this court has not power to reverse the judgment of conviction. This court is restricted to the single inquiry as to whether there was any evidence before the jury conducing to show the guilt of the accused. See *Vowles v. Commonwealth*, 83 Ky. 193, and *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387.

Appellant complains that the court erred in refusing to allow him to introduce certain competent and relevant testimony. We have examined the transcript containing the evidence, and found several instances in which the court rejected testimony offered by him, in which avowals were made showing what the answers of the witnesses would have been had they been permitted to answer. Without going into detail, we will say that in some few instances the court should have permitted the witness to answer the questions; but the evidence was not material, and would have thrown but little light upon the question at issue. To authorize a reversal of a judgment of conviction for felony,

upon the ground of rejection of evidence offered on the part of the defendant, it is not sufficient that the rejected evidence be shown to have been material, pertinent, relevant, or technically admissible. It must be important for the defendant in view of the whole case as presented. See *Champ v. Commonwealth*, 2 Metc. 17, 74 Am. Dec. 388.

Appellant also complains that the jury, at times during the trial, was permitted to pass and see the place where the killing occurred, without the knowledge or presence of the defendant. There is nothing in the record showing that the jury had viewed the place of killing, except the affidavit of F. L. Hill, a deputy sheriff, who was placed in charge of the jury, and from this affidavit it appears that the jury, once or twice, in walking around the town, looked toward the place where one witness said she was at the time of the killing, and if any remarks were made with reference thereto by any of the jury he did not hear them. This matter was first brought to the attention of the court on a motion for a new trial, and for this reason alone this court cannot review the question. See section 281 of the Criminal Code of Practice, *Merritt v. Commonwealth*, 11 S. W. 471, 11 Ky. Law Rep. 16, and *Van Dalsen v. Commonwealth*, 89 S. W. 255, 28 Ky. Law Rep. 238. The same objection was raised in the case of *Tudor v. Commonwealth*, 43 S. W. 187, 19 Ky. Law Rep. 1039, and the court said: "A further objection is based upon the fact that, while the jury were in charge of the sheriff taking exercise, they were permitted to go to a store \* \* \* in front of which the killing occurred; and it is urged that there was an invasion of appellant's constitutional rights in that the jury received evidence out of court by the view thus obtained of the place of the killing not had in accordance with section 236 of the Criminal Code of Practice. Nothing was pointed out to the jury when they went to Powell's store, where they went for the purpose of procuring some tobacco, nor was any remark made in regard to the position of the combatants or about any feature of the case, and we do not regard this visit as prejudicial error any more than the passing or repassing of the jury to and from the courthouse would have been if the killing had taken place at the courthouse door."

Appellant further contends that the court erred to his prejudice in giving to the jury instructions No. 2 on voluntary manslaughter and No. 5 on self-defense. The counsel's criticism of instruction No. 5 is without merit. This instruction clearly presented the law upon the question of self-defense. Instruction No. 2, on the question of voluntary manslaughter, is not in proper form. It failed to require the jury to believe that the killing was intentional or unlawful on the part of appellant; but in the opinion of the court this defect was not prejudicial to the substantial rights of appellant in this case, for

the reason that in his testimony he stated that he intentionally shot and killed Farris, but he also stated that he did so to save his own life.

Under the law and evidence appellant, if guilty at all, was either guilty of the crime of murder or voluntary manslaughter, for he admitted that he intentionally shot Farris. Therefore the jury must have convicted him of one or the other of the crimes named, unless they believed from the evidence that he acted in his necessary self-defense. The jury convicted him and fixed his punishment for the lesser crime, voluntary manslaughter.

For these reasons the judgment of the lower court is affirmed.

### BOTTOM et al. v. BOTTOM.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

#### 1. WILLS — PROBATE — PRESUMPTIONS AND BURDEN OF PROOF.

Where the due execution of a paper offered as a will is established, the propounders may rest, and it is not necessary to show that testator was of sound mind or that the execution of the will was not procured by undue influence, though the will on its face shows an unequal distribution of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110.]

#### 2. SAME.

A paper, offered as a will on its face so inconsistent, absurd, unreasonable, or irrational as to make at first blush the impression that it was made by a person who did not have testamentary capacity, must be supported by proof, when offered, not only of its due execution but also that testator was of testamentary capacity at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110.]

#### 3. SAME—INSTRUCTIONS.

An instruction on a will contest, defining soundness of mind of a testator to be sufficient mind and memory to know the natural objects of his bounty and his obligations to them, and "to take a rational survey of his property," and to dispose of that estate according to a fixed purpose of his own, was not erroneous, because not including the language that testator must have mind and memory sufficient "to know the character and value of his estate."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 779.]

#### 4. SAME—EVIDENCE OF TESTAMENTARY INCAPACITY—INEQUALITY OF DISTRIBUTION.

Gross inequality of distribution between the natural objects of testator's bounty is competent in connection with other evidence of testamentary incapacity or undue influence to establish the same, but does not of itself establish testamentary incapacity or undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 129, 130.]

Appeal from Circuit Court, Boyle County.  
"Not to be officially reported."

Application by S. B. Bottom for the probate of the will and codicil of A. B. Bottom, deceased. From a judgment for propounders sustaining the will and codicil, contestants W. A. Bottom and others appeal. Affirmed.

E. V. Puryear, Rawlings & Voris, Robt. Harding, and Greene & Van Winkle, for appellants. H. Rodes, C. R. McDowell, and O. M. Saufey, for appellee.

CARROLL, J. This litigation grows out of an effort to set aside a will and codicil made by A. B. Bottom, who died in the early part of 1906, aged 94 years. The will was made in 1891, when the testator was 77 years of age, and the codicil in 1906. The testator was a bachelor, and his kindred at the time of his death consisted of three sets of nephews and nieces, the children of his two brothers and his sister. In the will made in 1891 he gave to S. B. Bottom, C. F. Bottom, Lizzie Cecil, and Amelia Cook, the children of his brother Samuel E. Bottom who was then living, the sum of \$8,000; to the first-named \$5,000, and to the others \$1,000 each; to his sister, Mary Jane Gibson, who was then living, he gave \$500, and to her children each \$100; excluding entirely the children of his brother Turner Bottom. After making these special bequests, he directed that the residue of his estate be equally divided between the children of his brother Samuel E. Bottom, whom he nominated as executor of his will. In the codicil he gave to the children of his deceased brother Turner Bottom, the sum of \$100 each, and to a Mrs. Campbell for her services in waiting on him the sum of \$500. He also provided that no charge of any kind should be made against any of the devisees on account of money or property given to them since 1891. His brother Samuel E. Bottom having died since his will was written, he nominated in the codicil as executor S. B. Bottom, a son of Samuel E. Bottom. The contestants, who are now appellants, are the children of his brother Turner Bottom, and his sister, Mrs. Gibson. The contestees, who are now appellees, are the children of his brother Samuel E. Bottom. The will and codicil were contested upon the grounds that the testator lacked testamentary capacity and was unduly influenced to make them. Upon a trial before a jury, both papers were sustained, and the contestants appeal.

At the time of his death, the testator left an estate valued at about \$16,000. Of this sum he only gave to his sister, Mrs. Gibson, and her children, and the children of his brother Turner Bottom, \$1,100—leaving the balance of his estate, except \$500, to the children of his brother Samuel E. Bottom. There is evidence conducing to show that at various times before his death he had given to the children of Samuel E. Bottom about \$17,000. A reversal is asked (1) for error in refusing to give a peremptory instruction at the conclusion of the evidence in chief for the contestants, (2) for error in refusing and giving instructions, (3) for error in admitting and rejecting evidence, (4) because the verdict is flagrantly against the evidence.

Upon the trial, the contestees introduced



the draughtsman of the will and codicil, the attesting witnesses, and the will. By these witnesses they only proved the proper execution of the testamentary papers, and did not offer any evidence showing the testamentary capacity of the testator or any explanation of what is said to be the gross inequality in the disposition of his estate. When the due execution of a paper offered as the last will is established by the propounders, they may rest their case in chief. It is not necessary that they should at that stage of the proceedings show that the testator was of sound mind, as the law presumes that he was; nor is it required that they introduce any testimony tending to show that the execution of the paper was not procured by undue influence, as in the absence of evidence to the contrary the presumption is that it was not. Nor does the fact that the will on its face shows an unequal distribution of the estate, or that one devisee or legatee was given more than another one, make it incumbent upon propounders to explain the apparent inequality.

In support of the proposition that evidence in chief concerning this matter should be introduced by the persons offering a paper, our attention is called to the cases of *Harrel v. Harrel*, 1 Duv. 204, and *Walls v. Walls*, 99 S. W. 969, 30 Ky. Law Rep. 848. Those cases do not sustain counsel in their contention upon this point. It is not held in either of them, nor in any other that has come under our notice, that it is necessary for the propounders in their evidence in chief to explain inequality in the testamentary paper offered. In discussing the gross inequality that appeared in the will made by *Harrel*, the court said: "Its apparent unreasonableness required satisfactory evidence that it was the free act and deliberate offspring of a rational, self-poised, and clearly disposing mind; and all this has not in our opinion been shown by the testimony with sufficient assurances." In *Walls v. Walls*, supra, the court said: "It has often been said that if under all the circumstances of the case the will is unnatural in its provisions, and inconsistent with the obligations of the testator to the different members of his family, the burden rests upon the propounders to give some reasonable explanation of its unnatural character." But these expressions merely apply to the sufficiency of the evidence introduced by the propounders in rebuttal of that offered by the contestants, and do not in any way change the rule that the propounders need not in chief introduce any evidence except to show the due execution of the paper. As said in *Milton v. Hunter*, 13 Bush, 163: "When the propounders of a will have proved the due execution of a paper not irrational in its provisions nor inconsistent in its structure, language, or details with the sanity of the testator, the presumption of law makes out for them a prima facie case, and the burden of showing the testator was

not in fact of sound and disposing mind and memory at the time of the execution of the will is shifted upon the contestants." This practice was approved in *Henning v. Stevenson*, 80 S. W. 1135, 118 Ky. 318, and in numerous cases cited therein.

A paper might be offered as a will that on its face was so inconsistent or absurd, or unreasonable, or irrational, as to make at first blush the impression that it was made by a person who did not have testamentary capacity; and when such a paper is offered, the propounders should not only prove its due execution, but also that a testator was of sufficient mind and disposing memory at that time. But, the mere fact that a will makes an unequal distribution of the estate as between children and kindred or other persons, or gives to one devisee or legatee largely more than another, or the fact that one or more children or relatives are excluded, does not in itself manifest lack of testamentary capacity, nor is it irrational in its provisions, or inconsistent in its structure.

The instruction defining soundness of mind is as follows: "Unless you further believe from the evidence that when he signed his name thereto, he did not have sufficient mind and memory to know the natural objects of his bounty, and his obligations to them, and to take a rational survey of his property, and to dispose of that estate according to a fixed purpose of his own." The objection to this instruction is that it does not include the language "and did not know the character and value of his estate," which is often found in instructions defining testamentary capacity. There is little substantial difference between saying to the jury that the testator must have mind and memory sufficient "to take a rational survey of his property," and telling them that he must have mind and memory sufficient "to know the character and value of his estate." A person cannot well know the character and value of his estate unless he is competent to take a rational survey of his property; nor can he take a rational survey of his property unless he knows the character and value of his estate. The word "rational" has no legal or technical meaning, and is defined by Webster as "having reason, faculty of reasoning, endowed with reason and understanding, agreeable to reason; not absurd, preposterous, extravagant, foolish, fanciful, or the like; wise, judicious—as rational conduct, a rational man." And in this sense it is commonly used and generally understood. When we speak of a rational man, we mean a sensible man, a man of good mind. To make a man competent to take a rational survey of his estate, he must be able to know its character and value. Sometimes one expression is used, and then the other; but we know of no case in which this court has condemned an instruction similar to the one in the case at bar. *Wise v. Foote*, 81 Ky. 10; *Phillips' Ex'rs v. Phillips' Adm'rs*, 81 Ky. 328; *King*

v. King, 42 S. W. 347, 19 Ky. Law Rep. 368; Woodford v. Buckner, 111 Ky. 241, 63 S. W. 617; Murphy's Ex'r v. Murphy, 65 S. W. 165, 23 Ky. Law Rep. 1460.

The contestants requested the following instruction: "The court instructs the jury that if they believe from the evidence that A. B. Bottom made a grossly unequal distribution of his estate between the natural objects of his bounty, and no reason is suggested for same than the papers read in evidence, satisfactory evidence is required to show that it was a free and deliberate offspring of a rational, self-poised, and clearly disposing mind; and if you believe from the evidence that the paper or papers is not the free and deliberate offspring of a rational, self-poised, and clearly disposing mind of A. B. Bottom, they should find such paper or papers not to be the last will of said Bottom." And it is strongly insisted that the court erred in failing to give this instruction, or one presenting the idea conveyed in it. The testator was under no obligation to the contestants or any of them, nor was he to the contestees, although he doubtless felt kindler to the relatives to whom he gave the bulk of his estate than he did to his other nieces and nephews, growing out of the intimate relations that had existed from boyhood between him and his brother Samuel E. Bottom, and that only terminated upon the death of the latter. The testator accumulated by industry, frugality, and safe business methods the estate disposed of. He had the right, being of sound mind and not unduly influenced, to dispose of it as he pleased, and none of his kindred had the legal right to question the equality of the distribution made by him. The disposition was not unreasonable, and it has been settled in numerous cases that it is not proper to instruct the jury that inequality evidences lack of testamentary capacity. It is a fact that is competent to go to the jury to be considered by them in connection with the other evidence offered; but it should not be especially called to their attention any more than any other evidence in the case. Thus, in *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837, an instruction in substance the same as the one requested was condemned, the court saying: "While gross inequality of distribution between the natural objects of the testator's bounty does not of itself or by itself establish undue influence or the want of testamentary capacity, yet in connection with other evidence of testamentary incapacity or undue influence, such inequality is competent evidence. But is not the singling out of such evidence in an instruction misleading? It seems to us that it is. \* \* \* A testator has a legal right to dispose of his estate as he may wish, even to discard the natural objects of his bounty, and give his estate to a stranger, without assigning or having any good reason for so doing whatever. This is his perfect right of alienation. And to say that the fact that

he disposed of it out of the natural or usual course, thereby exercising his perfect right, was of itself evidence of a want of a disposing mind or of undue influence, would virtually defeat this right. It is therefore taken alone incompetent evidence of incapacity or undue influence. But after the introduction of other evidence tending to show testamentary incapacity or undue influence, the fact of gross inequality may also go to the jury to be considered by them as evidence of that fact. And it then goes to the jury as any other competent evidence upon that subject." In *Broadbudd's Devisees v. Broadbudd's Heirs*, 10 Bush, 299, in expressing its disapproval of a like instruction, this court said: "The failure to make a devise to the two sons, disconnected with the other facts, constituted no sufficient reason for invalidating the will. If the testator had the requisite capacity to execute the paper, he had the legal right to make such disposition of his estate as he saw proper. And the fact that he omitted to make a devise to two of his children can only be considered by the jury as a circumstance in connection with other evidence bearing upon the question of the testator's capacity to execute such a writing." To the same effect is *Hoerth v. Zable*, 92 Ky. 202, 17 S. W. 360; *Newcomb's Ex'r v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *Herbert v. Long*, 23 S. W. 658, 15 Ky. Law Rep. 427.

It is not seriously insisted that when he made the will in 1891 the testator was unduly influenced, or was not of sound mind and disposing memory. When the codicil was written, 16 years afterwards, at the age of 93, he was physically feeble and his mind in sympathy with his body had lost a large measure of the strength that characterized it in the earlier and even later years of his life, and it is probable that his nephew S. B. Bottom, the principal beneficiary of his bounty, exercised some influence over him in making the codicil. But, whatever the influence was, the contestants should not complain of it, because the codicil is more favorable to them than the will. Under it the children of Turner Bottom who were excluded by the will were given a small portion of his estate, and the children of his sister were not deprived of anything given them by the will. After the death of his brother S. E. Bottom the testator relied with great confidence upon his son S. B. Bottom, and consulted him about all his business affairs; but, considering the strong attachment the testator had for the father of S. B. Bottom, and the fact that S. B. Bottom was a safe, reliable business man, it is not strange that in the declining years of his life the testator should frequently turn to him for assistance and advice, and depend largely upon his judgment. A year or so before his death he made a gift of \$6,000 to the four children of his deceased brother S. E. Bottom. Whether he was competent to make that gift or not, we express no opinion, as that

question is not before us in any of its phases. It was brought out in this record and was competent only for the purpose of showing the influence that S. B. Bottom exercised over the testator.

Some question is made about the admission of incompetent evidence and the rejection of competent evidence, but the errors in this respect were not substantial or material. Each of the parties was allowed by the trial judge the widest latitude in the presentation of the case, and no fact or circumstance throwing any material light upon the issues involved was overlooked by vigilant counsel, or excluded from the jury.

We cannot reverse this case for the reason that the verdict is flagrantly against the evidence, because it is not. There is no evidence whatever tending to cast discredit upon the will made in 1891, and this is the only paper contestants are really concerned in setting aside. Nor can it be conceded that in respect to the codicil the verdict is so palpably against the evidence as that we would be authorized in disturbing the verdict of the jury for that reason.

Upon consideration of the whole case, the judgment must be affirmed.

## UNIVERSITY OF LOUISVILLE v. HAMMOCK.

(Court of Appeals of Kentucky. Dec. 13, 1907.)

### 1. ABATEMENT—MISNOMER OF DEFENDANT—NECESSITY OF PLEADING IN ABATEMENT.

A corporation, when sued under a wrong name, must by answer or plea in abatement set forth the misnomer and disclose its true name, so that plaintiff may amend, and it cannot object to the misnomer for the first time on appeal.

### 2. APPEAL—QUESTIONS NOT RAISED IN TRIAL COURT—MISNOMER OF DEFENDANT.

Where, in an action against a corporation sued under a wrong name, it appeared that it owned and controlled the hospital in which plaintiff sustained the injuries complained of, and it failed to object in the court below to the name given it or to disclose its true name, but made a defense on the merits, it could not complain on appeal that judgment went against it in the name by which it was sued.

### 3. HOSPITALS—INJURIES TO PATIENTS—NEGLECT—EVIDENCE.

In an action for injuries to a patient in a hospital assaulted by a demented patient therein, evidence held to show negligence on the part of the employees of the hospital in permitting the demented patient to escape from his room and assault the patient, authorizing a recovery.

### 4. DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A patient in a hospital was assaulted by a demented patient, and injured. Her illness was immediately and greatly aggravated in consequence of the assault, and her health was, to some extent, permanently impaired thereby. Held, that a verdict of \$1,000 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 372.]

### 5. CHARITIES—HOSPITALS—INJURIES TO PATIENT—LIABILITY.

Where a hospital is maintained as a charitable institution, either by the government, or

by a corporation or by an individual, there is no liability for injuries to a patient therein in consequence of torts of the employees in charge thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 103.]

### 6. HOSPITALS—INJURIES TO PATIENT—LIABILITY.

A hospital maintained by a university as an adjunct to its school of medicine for the advantage of its students and professors, and conducted for profit by requiring compensation from patients able to pay, though receiving free of charge patients unable to pay, is not a charitable institution, and the corporation is liable to a pay patient for the torts of its agents and employees.

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division. "To be officially reported."

Action by Addie Hammock against the University of Louisville. From a judgment for plaintiff, defendant appeals. Affirmed.

Burnett & Burnett, for appellant. Bennett H. Young, for appellee.

SETTLE, J. The appellee, Addie Hammock, recovered a verdict and judgment for \$1,000 damages in the court below against the appellant, University of Louisville, for injuries to her person, alleged to have been received while a patient in its infirmary at the hands of a demented or partially demented patient of the same institution, who, it was charged, had negligently been permitted to escape from his room and keeper, wander into that of appellee, and assault and maltreat her.

Falling to obtain in the lower court a new trial, appellant asks of this court a reversal of the judgment in question upon three grounds: (1) That it was not sued in its true corporate name; (2) that no negligence was shown, and that the verdict returned by the jury was contrary to law and flagrantly against the evidence; (3) that appellant is a charitable institution and by reason thereof exempt from liability for the torts of its agents or servants.

As to the first proposition, little need be said. Obviously appellant was sued and judgment recovered against it as the "University of Louisville," when its true corporate name was and is the "President and Trustees of the University of Louisville," but the misnomer cannot be objected to for the first time on appeal. It should have been made in the circuit court by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name of the defendant. When this is done, the plaintiff may amend his petition, and then proceed against the defendant in his true name. *L. & N. R. R. Co. v. Hall*, 12 Bush, 131; *Teets v. Snider Heading Mfg. Co.*, 120 Ky. 653, 87 S. W. 803; *Pike, Morgan & Co. v. Wathen*, 78 S. W. 137, 25 Ky. Law Rep. 1264; 14 Ency. of Plead. & Prac. 295. The record shows that the corporation sued was the same corporation that

owned and controlled the hospital in which appellee sustained her injuries; and, as it failed to object in the circuit court to the improper corporate name given it or to disclose its true corporate name and there made defense on the merits, it is estopped to complain that judgment went against it in the name by which it was sued.

In our opinion the second contention of appellant is equally without merit. There was testimony conducing to prove negligence on the part of appellant and its employes in charge of the hospital, and that such negligence was the proximate cause of appellee's injuries. The facts, as disclosed by the evidence, were, in substance, that appellee, a married woman, who was laboring under a serious illness, and greatly prostrated thereby, had placed herself in the hospital at the instance of her physician. She was a pay patient, and had the right to except of appellant and its employes in charge of the institution careful and skillful nursing and treatment such as her case particularly required. Indeed, the sick leave their homes and enter hospitals because of the superior treatment there promised them. On the day after appellee entered the hospital, its manager received as an inmate thereof a patient known as Dr. Meador, who was at the time afflicted with delirium tremens, a disease resulting from the excessive, habitual use of intoxicating liquors. This patient was placed in a room of the hospital on the floor beneath that occupied by appellee. At 10 p. m. of the same day Meador became so uncontrollable that he overawed the single female nurse in whose charge he had been left, and, escaping from his room, passed through the hall of the building and upstairs, talking in a loud voice and using profane language. Upon reaching the upper floor, he entered the room occupied by appellee, and approaching the bed where she was lying, seized her by the arms, struck and bruised her person, and dragged her from the bed, to her great fright and injury. Meador was finally captured, removed from the room, and securely tied by two nurses with the assistance of a negro porter, and a little later was returned to and confined in his own room. Whatever may have been his condition at other times, Meador, according to the evidence, was manifestly violent, uncontrollable, and delirious, if not actually crazy, when he escaped from his room and entered that of appellee and assaulted her. He was a large man of more than 200 pounds weight and great physical strength. Howard, the negro porter, admitted that he was physically unable to cope with him without assistance. The fact that physicians had diagnosed Meador's case as delirium tremens before he entered the hospital, and that such was his disease when received there, was known to one of the physicians in charge of the hospital, to its head nurse, Miss Parsons, and two other nurses of the institution, one of whom was Miss

Zeigler, from whose custody he escaped just before appellee was assaulted by him. One of the nurses admitted that she was directed by Meador's physician not to make an entry on the hospital chart of his true malady, and this direction she obeyed, thereby concealing the fact that the patient was afflicted with delirium tremens. Whether Meador manifested a disposition to become violent between the time of his admission to the hospital and the time of his breaking away from the nurse does not, definitely appear from the evidence, but his disease being known, as it was, to a physician of the institution, its head nurse, and two of her assistants, when Meador was received, and their further knowledge, especially that of the physician, that a person so afflicted might reasonably be expected to become violent, uncontrollable, and dangerous at any time, ought to have induced them to take such reasonable precautions with reference to his control or confinement as would have prevented his inflicting injury upon other inmates of the hospital. Yet this powerful man, crazed from the excessive use spirituous liquors, and by reason of that fact uncontrollable and dangerous, was left in an insecure apartment and in charge of a single woman, who was utterly powerless to restrain him. Under these circumstances, it would seem to a reasonable mind that what happened was to have been expected, if not inevitable. There was therefore some evidence of negligence to go to the jury, and, in the light of that evidence, we do not feel called upon to declare that the verdict finding appellant guilty of negligence was unauthorized. It cannot be denied that the attack made by Meador upon appellee was disastrous to her. If we accept her version of the matter, and it is not materially contradicted, the only wonder is that, in her physically weak and nervous condition, she was not frightened to death by the cries and violence of the madman. Much of the testimony went to show, not only that her illness was immediately and greatly aggravated, but that her health was, to some extent at least, permanently impaired thereby. In view of these facts, the amount recovered cannot be regarded excessive.

Appellant's third contention, that it is a charitable institution and by reason thereof exempt from liability for the negligence of its servants, is in conflict with more than one decision of this court. The hospital in which appellee received the injuries complained of is an adjunct of the appellant's school of medicine, known as the "University of Louisville," and is maintained principally because of the advantages it affords to the students and professors of that institution. It is, however, also conducted for compensation and profit. In the main, patients received and treated at the hospital are required to compensate those in charge of it for the services rendered. This is certainly

true, according to the evidence, as to patients able to pay. It is true some patients unable to pay are received and treated free of charge, but this does not show that appellant conducted a purely public charity; and, to escape liability for the wrongful acts or negligence of its servants, it should have proved that such was the character of the hospital and the use to which it is devoted. The hospital is not maintained by taxation, or controlled by the state, or city of Louisville. Eleemosynary institutions and other institutions of like character devoted to purely charitable uses, whether maintained by government, corporations, or individuals, are exempt from such liability as was here imposed upon appellant, on the ground that they are mere instrumentalities brought into being to aid in the performance of governmental or public duty; but such is not the character of the hospital maintained by appellant. Hence its attempt to escape liability for the negligence of its agents resulting in appellee's injuries was properly prevented by the trial court. The question under consideration was decided adversely to the contention here urged by appellant, in the case of *Gray Street Infirmary v. City of Louisville*, 65 S. W. 1, 23 Ky. Law Rep. 1274, 55 L. R. A. 270. In that case the Gray Street Infirmary sought to escape taxation for municipal purposes on the ground that it was an institution of public charity, and therefore not subject to taxation. But, in rejecting that contention, this court said: "Dr. Grant testifies that the institution would not have been established, except that the incorporators hoped to receive pecuniary advantage from it, either directly or through their connection with the college. We have no doubt from the testimony that the professors in the medical college do a great deal of charitable work in the infirmary, yet the real purpose in establishing the infirmary was to make their college more attractive to students, and to induce attendance by reason of the instruction and clinical experience received in the infirmary. And in this way to increase the profits of the professors operating the college. Certainly such an institution cannot be exempted from taxation on the ground that it is purely an institution of public charity." The same view of the law is expressed in the later case of *Wathen v. City of Louisville*, 85 S. W. 1195, 27 Ky. Law Rep. 635, in the opinion of which it is said: "It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instruction and the operations by the professors in the presence of the students, the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows that a great deal of charity

work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit. As it is operated for gain, no part of it is exempt from taxation under section 170 of the Constitution. This conclusion is supported by *Gray Street Infirmary v. City of Louisville*, 65 S. W. 1, 23 Ky. Law Rep. 1274, 55 L. R. A. 270." We think these two cases control the case at bar, and hence we adhere to the doctrine therein expressed. If, as must be conceded, appellant's hospital is subject to taxation because it is not a charitable institution, it is for the same reason responsible for the torts of its agents and employés. No criticism is made of the instructions, and they were clearly correct, unless the appellant had shown itself entitled to a peremptory instruction, on the ground of the exemption from liability claimed, which we have said it could not do.

Finding no error in the rulings of the lower court, the judgment is affirmed.

#### COMMONWEALTH v. HOME & SAVINGS FUND CO. BLDG. ASS'N.

(Court of Appeals of Kentucky. Dec. 13, 1907.)

##### 1. BUILDING AND LOAN ASSOCIATIONS—DESCRIPTION.

Building and loan associations are a peculiar kind of corporation usually composed of aggregations of people dealing exclusively among themselves in accumulating a savings fund for investment in homes, more in the nature of limited co-operative home building copartnerships than commercial bodies.

##### 2. TAXATION—BUILDING AND LOAN STOCK.

Under Ky. St. 1903, § 4093, providing for the taxation of building and loan shares to the shareholders to the amount paid in and not withdrawn on September 15th of each year, provided that borrowing members should not be required to list their shares, if the amounts borrowed equalled or exceeded the amount paid in on the shares, members are only taxable on the amount of their stock remaining in the association on the date specified over and above the amount of any loan or withdrawal that may have been made on such stock.

##### 3. SAME—NOTES AND BONDS FROM BORROWING MEMBERS.

Under Ky. St. 1903, § 4093, providing for the assessment of shares in building associations, and section 4094, providing for the assessment to the association of its surplus funds and undivided profits, the association is not taxable on notes and bonds given by borrowing members to secure loans from the association.

##### 4. SAME—BOND ISSUE.

Where it was not shown that money raised by a building and loan association on bonds, and loaned out on mortgages, was a part of the association's "surplus" or undivided profits, it was not taxable to the association under Ky. St. 1903, § 4094, providing that such associations should list only surplus funds and undivided profits for taxation.

##### 5. SAME—UNDIVIDED EARNINGS.

Ky. St. 1903, § 4094, declares that each building and loan association shall list with the assessor the amount of its surplus fund and undivided profits on hand and undistributed on September 15th of every year. *Held*, that undivided profits on hand on such assessment date, less the payment of current indebtedness as of

that date, were taxable, notwithstanding the association's distribution dates were January 1st and July 1st, respectively.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by the commonwealth against the Home & Savings Fund Company. Building Association to recover taxes on alleged omitted property. From a judgment for defendant, the commonwealth appeals. Reversed and remanded.

Johnson & Hieatt, for the Commonwealth.  
John S. Jackman, for appellee.

O'REAR, C. J. This was a proceeding in the Jefferson county court by the auditor's agent against appellee, a building and loan association organized under the laws of this state, to have assessed for taxation for county and state purposes what was claimed by the auditor's agent to constitute parts of the surplus fund and undivided profits of the association which had been omitted in its tax assessment for the years 1901 to 1905. Upon the agreed facts which will be adverted to presently, the county court refused to list the assets mentioned, which action, upon appeal to the circuit court, was affirmed.

Omitting from the agreed statement of facts what appears to us to be mere book-keeping features, the following, for the year 1904, will serve to illustrate the situation, showing assets and liabilities of the corporation for that year, as of September 1, 1904:

Assets.		
Mortgage loans .....	\$777,500 00	
Pass Book Loans .....	15,658 00	
Real Estate .....	2,591 80	
<b>Total Assets .....</b>	<b>\$795,749 80</b>	
Liabilities.		
Cash overdrawn .....	\$ 6,522 70	
Dues .....	653,000 04	
Paid up stock .....	47,500 00	
Bonds outstanding .....	64,900 00	
Interest on bonds .....	1,288 00	
Sundry expenses .....	40 00	\$773,268 74
<b>Excess of assets over liabilities .....</b>	<b>\$ 22,480 56</b>	
Reserve Fund .....	\$ 10,918 94	
<b>Balance .....</b>	<b>11,561 62</b>	<b>22,480 56</b>
<b>Total Assets .....</b>	<b>\$795,749 80</b>	
Paid in by stockholders:		
Dues .....	\$653,000 04	
Paid up stock .....	47,500 00	700,500 04
<b>Surplus and undivided profits .....</b>	<b>\$ 95,249 26</b>	
Amount listed by taxation 1905:		
Personalty .....	\$ 11,068 94	
Real Estate .....	3,070 00	14,138 94
<b>Balance .....</b>	<b>\$ 81,110 32</b>	

Now it is contended by appellant that the difference between the book assets and stock liabilities of the association constituted its undivided profits and surplus, being \$95,249.26; that, as only \$14,138.94 were assessed (\$3,070 of the sum representing real estate), the balance of \$81,110.32 is the unassessed or omitted surplus and undivided profits.

It becomes necessary at this point to examine the statutes under which this assessment was made. They are:

Section 4093, Ky. St. 1903: "That the shares of building associations or building and loan associations shall be taxed as other individual personal property, and shall be listed with the assessor for that purpose by the owners of said shares, the amount so listed by every owner or shareholder to correspond with the amount paid in and not withdrawn by the said shareholders on the fifteenth day of September of every year: Provided, that the borrowing members shall not be required to list their shares, if the amounts borrowed by certain members equal or exceed the amount paid in on their respective shares. The shares of infants shall be listed by the parents or guardians of such infants."

Section 4094, Ky. St. 1903: "The president or secretary of every such building association or building and loan association shall list with the assessor the amount of such surplus funds and undivided profits as the association may have on hand and undistributed on the fifteenth day of September of every year."

It will be at once perceived by those who are familiar with the taxing statutes of this state that there is not only a specific, but a different, mode provided for assessing building association shares and other property. But the difference exists only in the method of assessment. There was neither purpose nor power in the Legislature to discriminate in favor of either class. The general policy of taxation in this state is to tax all property once, and once only, for each fiscal year. It is well recognized that, in spite of the minute pains of the Legislature and taxing officials, it sometimes happens that some property is not taxed at all, while other kinds are sometimes indirectly taxed twice. Still, the general purpose prevails, and it is believed is attained. It must be conceded that the Legislature has, and must have, a free hand in adopting methods of assessment best calculated to further the great purpose of equal and just taxation. It must be manifest that no system could well be adopted applicable alike to all property that would afford equal taxation. The system of assessment adapted to one kind of property would be wholly inadequate for another kind. Numerous instances are afforded by the statute of such dissimilarity.

Building and loan associations are a peculiar kind of corporation. They are usually aggregations of people who deal exclusively among themselves in accumulating a kind of savings fund for investment in homes. They are not commercial bodies in the large or popular sense of the term. They are, rather, limited, co-operative, home building co-partnerships. The chapter of the statutes providing for their organization treats them differently from other corporations. So the taxing statutes treat them with respect to their real character. It is recognized that property invested in such associations should be taxed

once for each unit of government under which it exists. In devising a just system of reaching this property, and to tax it only once, the Legislature has looked below the mere apparent thing, and ignored as far as was practical, the corporate entity. It required the shareholders' or members' interest to be assessed against such owner, where it was susceptible of a separate valuation. To that end it required all shares of association stock to be assessed to the shareholders. It fixed the sure method of valuation, of assessing each share at what had been paid in on it and not withdrawn by the member. Obviously, if a share nominally rated at \$100 had paid in on it only \$10, its assessable value ought not to be greater than \$10, because that is all that it could be worth, and is all the property that the shareholder owns in that form of investment. But if the shareholder has withdrawn \$5 on that share, then what he has left in that investment is only \$5. He should be taxed on that sum as represented in the building and loan share, and no more. The \$90 not yet paid in ought not to be taxed, because it does not represent property at all; at most, it is only a liability. Nor should the \$5 withdrawn be taxed as a share value, because it is no longer there. For the same reason, if the member has withdrawn the total sum invested in the share, evidenced by a loan or withdrawal, he ought to be taxed upon that share, because its value as property has been extinguished, and that which once gave it value, to wit, the sum paid in on it, has been withdrawn and invested elsewhere, where it doubtless pays a tax. But there may be an accumulation in the hands of the association above the sums paid in on each share, and which, until divided among the shareholders, none of them can be said to have an exclusive right to. This fund, whether it be a surplus which the association carries as a guaranty against losses, or for the profit of the members, not being otherwise taxed, is assessed as against the association. That part of the accumulations in addition to surplus, and out of which dividends may be apportioned to the shareholders, is likewise assessed against the association.

But the object of the association is to loan its funds to its members, out of which loans they build houses upon their lots. As some may borrow more than they have paid in on their "shares," thus anticipating their own payments on their share subscriptions, they secure their obligation to continue paying on their shares till they are matured, by mortgage on their land. These obligations, whether they are called mortgage notes or mortgage bonds, are primarily to secure the obligor's agreement to continue paying in on his share subscription until it has come to be equal to its par value, at which time his obligation is fulfilled. In this co-operative plan by which the weekly or monthly installments, small in each instance, but considerable in the aggregate, are loaned to one another by

the membership, in their co-operative capacity, it is at last each one's furnishing the means to build his own home. For that reason the notes and bonds of the corporation are not made assessments under the statute. The property which they represent must from its very nature surely be subject to taxation. The Legislature saw that to tax such notes, and to tax the corporate shares, too, would be double taxation in its worst form, for that would tax both the member's property, and his indebtedness representing its value. The statute has been upheld in not taxing such notes as being not in contravention of the provision of the Constitution that all property shall be taxed. *Commonwealth v. Fayette Building Ass'n*, 71 S. W. 5, 24 Ky. Law Rep. 1223.

It was pointed out in argument that some property holders are taxed upon the value of their property without being allowed to deduct their indebtedness constituting a lien upon the property, although such debt was also taxed in the hands of the creditor. From this it is claimed that a discrimination is worked in favor of members of building and loan associations. We think it is exceptional in our tax system when the result is that the property holder is taxed upon his indebtedness, or rather upon his property in spite of his indebtedness. Property may assume so many different forms that it is difficult, if not impossible, to devise a plan by which none would escape taxation. For that reason, probably, legislators are always careful to lay hold upon that form which is least apt to escape assessment. Tangible property is therefore nearly always taxed. As the holder of mere choses in action may in so many ways elude listing them, or may even be beyond the taxing jurisdiction, if the debtor were allowed to deduct them it would frequently happen that the primary property would be excused, while its secondary form (the debt) would escape. It may be that some such consideration has deterred the Legislature in the past from allowing such deductions, although it was recognized that frequently double taxation (though not against the same owner) would ensue. But where it is sure, as in the case of domestic building associations confining their operations to the legitimate business for which they were formed, that no escape from taxation is possible by the failure to assess the real value of the property in one form or another, it is both permissible and proper (if we may express an opinion concerning a matter purely legislative) that the deduction should be allowed. There is enough of difference between such properties and the peculiar form of indebtedness upon them to the association, and property generally indebted, to uphold the distinction recognized by the Legislature in providing different modes of assessment, to support the classification as reasonable and natural. A wise government taxes property, not liability. It taxes a man upon what he

has, not upon what he has not. If the member of the association has a lot unimproved, it is taxed at its value. If he has invested his earnings in shares in a building and savings association until he can have accumulated enough to begin the building of a house, such accumulation in the hands of the association is taxed as against him. If he "borrows" from the association, withdrawing all he has paid in, and anticipating his future payments, such sum is necessarily invested in the real estate which is pledged to secure his obligation. He pays then upon the enhanced value of the real estate; enhanced by employing this very money in building a house upon the lot. Thereafter he is not taxed upon his "shares," because thenceforth they represent, not property, but debt. However, he is taxed upon his lot, although some part of it may also represent debt; but that is inevitable, and is in accordance with the state's plan of taxation as generally exercised. Besides, the "nonborrowing" members of the association pay taxes upon their share investments, which are invested in the loans to the "borrowing" members. Thus it is seen that every feature of property owned by anybody in these ventures is taxed certainly once. The scheme of taxation is legitimate, just, and not discriminatory.

It is true some loans are made upon "pass books," meaning that the association has allowed its "borrowing" member to temporarily withdraw a part of his share investment. But he nevertheless pays taxes upon what is left in the association, represented by his shares, and the debt, so-called, is only another form of his obligation to mature; that is, pay up in full his share subscription.

It further appears in this case that appellee issued bonds and sold them, of which \$64,900 are now outstanding. Appellant contends that in the item of \$777,500 of loans is the money realized from the bond issue, and hence that, to the extent that borrowed money is loaned out on mortgages, the latter should be taxed as against the association. A sufficient answer to this contention seems to be that the statute does not authorize such an assessment against the association unless it be among either its "surplus" or "undivided profits." There can be legally neither surplus nor undivided profits so long as there is an indebtedness against the association above its assets. But it is contended that there was for the year 1904, as shown in the statement above, a difference of \$22,480.56 between assets and liabilities, of which \$10,918.94 was set apart as a reserve fund by the association (and which was duly listed by it), leaving \$11,561.62 of earnings not listed. Appellee contends that this balance should not be regarded as taxable until after the period of distribution, viz., January 1st or July 1st, and the county court and circuit court each so held. But we think that whatever was on hand on September 15th (now September 1st) of undivided earnings is tax-

able against the association. But as the undivided earnings are subject to the payment of current indebtedness against it as of that date, and as the statute clearly indicates that only the surplus earnings were intended to be taxed, we think current indebtedness should be deducted. The apparent difference between assets and stock liabilities is shown on the statement above to be \$95,249.28. From this should be deducted bonds outstanding of \$64,900, balance \$30,349, which should be further credited by cash overdrawn by the association, and which it was owing its bankers \$6,522.70, interest on bonds \$1,298, sundry expenses \$40, balance undivided \$7,860.70, profits and surplus \$22,488.56. Of this sum there was listed by the association personalty \$11,068.94, real estate \$3,070, total \$14,138.94, balance \$8,349.62, which sum we hold was assessable as undivided profits for the year 1904, and should have been listed, but was omitted by the association.

Without setting out here the detailed calculation, we will add that, following the same principle, for the year 1900, there was omitted \$2,433.07; for 1901, \$1,731.25; for the year 1902, \$4,357.54; and for the year 1903, \$5,819.46.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

#### WALSTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 20, 1907.)

#### 1. CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED.

Cr. Code Prac. § 184, provides that, if the indictment be for a misdemeanor, the trial may be had in defendant's absence. Section 157 declares that on the arraignment, or on call of the indictment for trial, if there be no arraignment, the defendant must either move to set the indictment aside, or plead, and section 153 provides that arraignment is required on indictments for felony unless waived by defendant, but not on indictments for misdemeanor. Section 180 requires all issues of fact, except where the punishment is limited to a fine of \$16, to be tried by a jury, and section 182 provides that an issue of fact arises on a plea of not guilty, or of former acquittal or conviction. *Held* that, where accused is indicted for a misdemeanor and is duly summoned or on bail, he may be tried in his absence, and may, though absent, by counsel, put in any plea save that of guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1465-1467.]

#### 2. SAME—JUDGMENT.

On a trial of an indictment for a misdemeanor in the absence of defendant, judgment under such sections may go against him by default, if no plea is entered for him by counsel, and, if the fine is fixed by law at a specified sum, it may be imposed by the court without the intervention of a jury; but otherwise a jury is required.

#### 3. SAME—INSTRUCTIONS.

Where accused, indicted for a misdemeanor, was tried in his absence, and judgment rendered against him by default, and a jury was required to assess the punishment, the court properly instructed the jury to find defendant guilty as charged, and to assess the punishment authorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1923-1930.]



## 4. SAME—EFFECT OF BAIL.

Under Cr. Code Prac. § 184, providing that accused may be tried on an indictment for a misdemeanor in his absence, the fact that he was on bail at the time of the trial did not prevent the court from proceeding with the trial in his absence; bail in a misdemeanor case being simply to secure compliance with the judgment when rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14. Criminal Law, §§ 1465-1467.]

## 5. LIBEL—CRIMINAL PROSECUTION—INSTRUCTIONS.

Cr. Code Prac. §§ 180, 235, declare that all questions of law arising on a trial shall be decided by the court, and section 225 provides that the court shall instruct the jury in writing. *Held*, that the fact that the court, in a prosecution for criminal libel, charged the jury as to the law, did not constitute a violation of Bill of Rights, § 8, declaring that in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases.

"Not to be officially reported."

On rehearing. Petition denied.

For former opinion, see 102 S. W. 275.

G. W. Whiteside, Baskerville & Collier, and Delaney & Delaney, for appellant. N. B. Hays, Atty. Gen., C. H. Morris, and L. B. Finn, for the Commonwealth.

**SETTLE, J.** The petition of appellant for a rehearing contains the complaint that this court, in the opinion affirming the judgment appealed from (see *Walston v. Commonwealth*, 102 S. W. 275, 31 Ky. Law Rep. 378), improperly rejected his contentions: (1) That the trial court erred in instructing the jury to find him guilty in the absence of a plea of guilty; (2) that the trial court likewise erred in depriving him of the constitutional right to have the jury, without direction from the court, decide the law as well as the facts of his case.

We think the first ground of complaint sufficiently answered by the opinion; but, as a more elaborate statement of our reasons for the conclusion expressed in the opinion on that point seems to be desired, we will say that the action of the lower court in instructing the jury to find appellant guilty and fix his punishment as by the instruction directed, though done when he was not present and in the absence of any plea from him, was clearly authorized by the Kentucky Criminal Code of Practice, section 184 of which provides: "If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant." Section 157 provides: "Upon the arraignment, or upon the call of the indictment for trial, if there be no arraignment, the defendant must either move to set aside the indictment, or plead thereto." "Arraignment, unless waived by the defendant, is required on indictments for felony, but not on indictments for misdemeanor." Cr. Code Prac. 155. Section 180 directs that all issues of fact, except where the punishment is limited to a fine of sixteen dollars, be tried by a jury, and section 182 declares: "An issue of fact arises upon a plea of not guilty, or of former

acquittal, or conviction." In view of these several sections of the Code, it is apparent that, upon an indictment for misdemeanor, the defendant, if duly summoned or on bail, may be tried in his absence, and may, though absent, by counsel, put in any plea save that of guilty. *Com. v. Cheek*, 1 Duv. 26; *Johnson v. Com.*, 1 Duv. 244; *Payne v. Com.*, 30 S. W. 416, 16 Ky. Law Rep. 839. In other words, upon a trial on indictment for misdemeanor in the absence of the defendant, judgment may go against him by default, if no plea be entered for him by counsel, and the fine, if fixed by law at a certain sum, may be imposed by the court without the intervention of a jury. But if the fine be not fixed by law, or if imprisonment in jail be a part or all of the punishment that may be imposed, the intervention of a jury will be required. In such a case, if a jury be required to fix the punishment, they should be instructed by the court, as was done in the case at bar, to find the defendant guilty of the offense charged, as well as to assess the punishment authorized. The fact that appellant was on bail at the time of the trial did not prevent the court from proceeding with the trial in his absence. The object of bail in misdemeanor cases is simply to secure compliance with the judgment when rendered.

Of the several decisions of this court cited by appellant's counsel, only one (*Canada v. Commonwealth*, 9 Dana, 304) is apparently in conflict with the conclusions herein expressed, and it was decided in 1840, several years before the adoption of the Kentucky Civil and Criminal Code. The case of *Lucas v. Commonwealth*, 118 Ky. 818, 82 S. W. 440, is one of the cases cited by counsel, but it does not sustain appellant's contention. Lucas was indicted for maintaining a nuisance. On the trial, at which he was present, two pleas were entered by him to the indictment, viz., not guilty, and former conviction. A demurrer was properly sustained to the second plea, but the first, of not guilty, remained. Notwithstanding that fact, the jury were instructed by the lower court to find Lucas guilty, and such was their verdict. This court on appeal held that, in view of the defendant's plea of not guilty, the giving of the instruction in question was error, and for that reason the judgment of conviction was reversed. The excerpt from the opinion contained in the petition for rehearing is a fugitive expression, unnecessary to the decision of the question involved, and was inadvertently written in the opinion, or, what is more probable, it is a remnant of a sentence from which some essential part was omitted by mistake of the copyist.

Appellant's second contention is rested upon the following provision of the state Constitution, found in the last clause of section 9, Bill of Rights: "And in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." The

same provision was contained in each of the former Constitutions of the state. It was doubtless taken from the English statute, known as the "Fox Libel Act," which became a law in 1792. Whatever may have been the effect of this statute in England, our attention has been called to no authoritative utterance of this court giving to the provision of our Constitution quoted such meaning as would prevent the court, in a prosecution on indictment for libel, from instructing the jury as to the law of the case, or even directing their verdict, as was done in the case at bar. Sections 180 and 235, Cr. Code Prac., declare that all questions of law arising on the trial shall be decided by the court, and section 225, that the court shall instruct the jury in writing. In prosecutions for libel, as in all other cases, it is the duty of the court to instruct the jury as to the law of the case, and it is the duty of the jury to accept the instructions of the court as the law of the case; but, if they disregard them and acquit the defendant on an issue of fact, the court could not for that reason grant a new trial. The jury derive a knowledge of the law from the instructions of the court, but must make application of it. Therefore in a sense they have the ultimate decision of the law, as well as the facts of the case, thereby meeting the requirements of the provision of the Constitution, *supra*. *Com. v. Van Tuyl*, 1 Metc. 1, 71 Am. Dec. 455. In the case at bar there was no issue of fact to submit to the jury, and no plea. Therefore it only remained for the court to instruct the jury to find appellant guilty and fix his punishment.

Manifestly the sections of the Criminal Code quoted are not in conflict with the provision of the Constitution. Wherefore the petition is overruled.

#### WOOD et al. v. WOOD et al.

(Court of Appeals of Kentucky. Dec. 12, 1907.)

#### 1. WILLS — CONSTRUCTION — PRESUMPTION AGAINST PARTIAL TESTACY.

It is presumed that a testator intended to dispose of his entire estate, and the law favors such construction as will carry such intent into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 965.]

#### 2. SAME—ESTATES CREATED.

Testator devised real estate to a sister for life with remainder to her children, gave property to his parents for life with gift over, and devised and bequeathed to his wife all the remainder of his estate, and declared that it was his request that his library should be kept intact for a specified period, and that, if at the end of that period his brother showed in the judgment of the wife sufficient promise, it was testator's desire that she should give the library to him, and further provided that it was his "request" that, should the wife die without heirs and the estate devised should be intact, she should will the same to such of his brothers and sisters as it might seem proper to her. *Held*, that under Ky. St. 1903, § 2342, providing that, unless a different purpose appears by express words or necessary inference, every estate in land created by will

without words of inheritance shall be deemed a fee simple, the wife acquired an estate in fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1832-1834.]

#### 3. SAME—PRECATORY TRUSTS.

To create a trust and make precatory words operative in a will, it must appear that the estate is not an absolute estate; that the disposition thereof is not unrestricted; that the subject of the devise and the devisees are certain and the trust definite; that the language used is positive and imperative, and not such as indicates a mere desire on the part of the testator which may be complied with or not at the pleasure of the legatee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1587-1593.]

#### 4. SAME.

Testator devised his residuary estate to his wife absolutely, and provided that "it is my request" that my law library be kept intact for a specified period, and "it is my further request" that my wife give the library to my brother if he shows in the judgment of my wife, "sufficient promise," and "it is my further request" that, should my wife die without heirs of her body and the estate devised to her be intact, she "will and devise" the same to such of my brothers and sisters as might seem proper to her. *Held* not to create a precatory trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1587-1593.]

Appeal from Circuit Court, Nicholas County.  
"To be officially reported."

Action by Lillie L. Wood, executrix of the estate of Charles W. Wood, deceased, and others, against J. N. Wood and others for the construction of the will of the deceased. From a judgment construing the will, defendants appeal. Affirmed.

Jno. C. Strother and Strother & Wycoff, for appellants. Holmes & Ross and J. P. McCartney, for appellees.

LASSING, J. Charles W. Wood, a distinguished lawyer and citizen of Nicholas county, Ky., died in June, 1904. He left a will, which in due time was regularly probated, and his wife qualified as administratrix, and entered upon the discharge of her duties. The will disposed of a considerable estate, and, there being some question raised as to the interest which his wife, Lillie L. Wood, took under said will, she filed a suit in the Nicholas circuit court seeking a construction thereof. All of the other devisees named in the will were made parties defendant to this suit. Upon final hearing, the circuit court adjudged that Lillie L. Wood, by the terms of the will of her deceased husband, took a fee-simple title to all his property, except that specifically described in paragraphs 2 and 3 of said will. It was earnestly contended in the lower court by some of the devisees that Lillie L. Wood took only a life estate in said property, and, the court having decided adversely to their contention, they have prosecuted this appeal.

The will in question is in words and figures as follows:

"I, Charles W. Wood, of Carlisle, Nicholas county, Kentucky, do hereby make and publish this as my last will and testament.

"First: I will that all my just debts, including funeral expenses, be paid.

"Second: I will and devise to my sister, Maggle Wood Wheelock, of Troup, Texas, during her natural life and at her death to her children, share and share alike, a certain lot of real estate lying and being in the corporate limits of Troup, Smith county, Texas, a part of the Eason Gee League, being the same land conveyed to me by Ben Cross and wife by deed dated March 12, 1902, and recorded in said Smith county, in Book 75, page 332, to which deed a reference is made for a more particular description of said land. Said land shall be held by her free from the control and any debts of the husband now living, or which she may hereafter have, and the said land shall not be sold or mortgaged or in any way encumbered as it is now conditioned, or as the proceeds arising from it may hereafter be invested for a period of thirty years. The said land may be sold and re-invested in rent producing real estate but the same shall be done upon the order of a court of proper jurisdiction, and then only when it shall appear to said court to be to the best interest of the devisees under this section of this will. All accretions in value shall be held and treated as a part of the capital invested.

"Third: I will and devise to my father and mother, J. N. Wood and Nannie M. Wood, during their natural life, the farm upon which they now reside, including all the farming implements and all the live stock thereon, except one horse named 'Jack.' It is my will that at the death of my father and mother or the one surviving the longest, that the income from said farm, or from the property in which the proceeds of it may be invested shall be used to maintain my sisters, Alice Wood, Nettle Wood and Lizzie Wood, so long as they remain single, and in the event of the marriage of any of them, the said income shall be used for the support of the other or others.

"In the event of the marriage of all of them or the death of those unmarried, the said farm or the property in which the proceeds may have been invested shall descend to my brothers and sisters, share and share alike.

"The property devised under this section of the will shall not be mortgaged or sold except the proceeds be re-invested in rent producing real estate, except so much, not exceeding \$2,000.00, as may be necessary to procure a home for the devisees under this section. If so sold it shall be the duty of the purchaser to see that the proceeds are re-invested as herein provided.

"Fourth: I will, devise and bequeath to my wife, Lillie L. Wood, all the remainder of my estate, real, personal and mixed. Said estate consists of 137½ acres of land in Nicholas county, Kentucky, and being the same land conveyed to me by W. T. Buckler and wife on October 29, 1901, and the deed for

the same being recorded in Deed Book 19, page 235; also an undivided one-half interest in a tract of 105 acres of land conveyed to W. B. Ratliff and me by Frank P. Call on July 10th, 1900, the deed for the same being recorded in Deed Book 18, page 279. Reference is made to said deeds for a more particular description of said lands. Also certain houses and lots in Carlisle, Kentucky, on Main street, the whole block being abutted by Main street on the north, by the property of Cain Brothers on the west; by Sugar Tree alley on the south and by the lot of C. C. Ratliff on the east.

"My personal property consists of stock in the Mutual Trust Company, the Deposit Bank of Carlisle, Kentucky, and in the Van Buren Iron and Manganese Company, also my library and other personal belongings.

"All other property, if any, which may not have been specifically named and devised I give to my wife, Lillie L. Wood.

"Fifth: It is my request that my law library be kept intact for a period of five years, and if at that time my brother, B. H. Wood, shows in the judgment of my wife sufficient promise, it is my further request that she give to him the said library.

"It is my further request that should my wife die without heirs of her body, and the estate herein devised to her be intact that with the exception of the sum of \$5000.00 she will and devise the remainder to such of my brothers and sisters as may seem proper to her.

"It is my further request that no monument exceeding in price \$250.00 be placed at my grave.

"Sixth: I nominate and appoint my wife Lillie L. Wood as executrix of this my last will and request that she be permitted to qualify without bond.

"It is my further request that no inventory of my estate be required to be filed, since there is but one legatee or devisee except the special bequests herein provided in sections two and three.

"In testimony whereof I have hereunto set my hand this January 2nd, 1904."

The testator had no children. He left surviving him besides his wife, appellants, J. N. Wood, his father, Nannie M. Wood, his mother, and his brothers and sisters, the other appellants. It will be observed that in item 2 of said will he provides a comfortable home for his sister, who was living in Texas, by giving her certain real estate to hold during her natural life, and at her death to go to her children, share and share alike. This clause of the will is so drawn that his sister, even though she desired to do so, could not sell or dispose of, or even incumber this property, which was intended to furnish her a home during her life. In item 3 he makes a commendable provision for his aged father and mother by giving to them the old home farm, with all of its farming implements and stock, save one horse, "Jack," which he reserved,

and in this clause be provided, further, that, upon the death of both his father and his mother, the income from the farm, or other property in which the proceeds thereof might be reinvested in the event of a sale thereof, as provided for in this clause, should be used to maintain his three sisters, Alice, Nettie, and Lizzie, so long as they remained single, and, as they married, if any of them should, the income from said farm should be used to support the other or others during the period that they remained single, and, in the event of the marriage of all of them or the death of those unmarried, then, in that event, the farm or the proceeds thereof should descend to his brothers and sisters, share and share alike. In item 4 he devises to his wife, the appellee herein, all of the remainder of his estate, real, personal, and mixed. He then proceeds in this same clause to describe the property which he intended to pass to his wife, and at the close thereof he uses this language: "All other property, if any, which may not have been specifically named and devised, I give to my wife, Lillie L. Wood." This clause, therefore, clearly disposes of his entire estate except so much as had been previously disposed of in items 2 and 3.

It is insisted for appellee that, by this clause of the will, she takes the absolute fee-simple title to all of the property described therein; while, on the other hand, it is argued with much force for appellants that item 5 of said will shows clearly an intent on the part of the testator to limit the estate of his wife in the property devised to her to a life estate. The language referred to in item 5 is that in which he requests his wife to keep his law library intact for a period of five years, and if, at the end of that time, his brother, B. H. Wood, in her judgment shows sufficient promise, that she should give to him the library, and also the language that in the event his wife should die without heirs of her body, and the estate devised to her be intact, that, with the exception of the sum of \$5,000, she should will and devise the remainder to such of his brothers and sisters as to her seemed proper. It is undoubtedly true that under the fourth clause of the will Lillie L. Wood is given the fee to all of the property which her husband owned, except that which is specifically devised in items 2 and 3. No stronger language could have been used to give her an absolute estate in said property. In arriving at the intention of the testator, the will must be read as a whole, and each item must be read in connection with every other item thereof, and, where it can be done without doing violence to the evident intention of the testator, it should be so construed as to uphold each clause of the will. In item 2 the testator created a life estate with remainder over upon the death of the life tenant to her child. In item 3 he created another life estate in favor of his father and mother, and, if they died before his single sisters, or any one

of them married, then those remaining single were to have a life estate in this property, and upon the marriage or death of all of them then this property described in item 3 was to go in fee to his brothers and sisters or their heirs.

From the reading of these two clauses in the will, the conclusion is irresistible that the draughtsman knew perfectly well how to create a life estate, for he uses language about which there can be no mistake, words and terms which are susceptible of no double meaning; and, when he comes to that clause of his will which is the subject of contention in this litigation, to wit, item 4, he uses language by which he shows an unmistakable intention to give to his wife an absolute estate in all of the property described therein. The question which naturally presents itself, then, is: What was the purpose of item 5 if it was not to limit in some wise the bequest made in item 4? It will be observed that the language in item 5 is very different from that which is used in items 2 and 3. Instead of the words "I give," or "I devise," he uses the words, "I request," etc., "that you give," etc., clearly indicating that the testator, while recognizing that the property was his wife's, desired, without attempting to control her action, to let her know what disposition thereof would be pleasing to him under certain conditions and in certain events. It is presumed that the testator intended to dispose of his entire estate, and the law favors such construction as will carry into effect this intent. The construction sought by appellee disposes of the entire estate, whereas that sought by appellants leaves a portion of the estate undisposed of. Chancellor Kent, in his Commentaries (volume 4, p. 270), says: "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee and if he dies possessed of the property without lawful issue, the remainder over, or remainder over of the property, which he dying without heirs should leave or without selling or devising the same, in all such cases the remainder over is void as a remainder because of the preceding fee, and it is void by way of executory devise because this limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise cannot subsist under an absolute power of disposition in the first taker." And in *Mitchell v. Morse*, 77 Me. 423, 1 Atl. 141, 52 Am. Rep. 781, it is said: "A devise of real estate without words of limitation vests in the devisee an estate in fee simple; and this result is not defeated by a devise over of the remainder. When by the terms of the devise an estate in fee simple is given, the addition of a devise over of a remainder is void, because, the whole estate having already been disposed of, there is nothing for it to act upon." Section 2342 of the Kentucky Statutes of

1903, is as follows: "Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." When we consider the language used in the fourth clause of the will in connection with the section of the statute above quoted, it is clear that Lillie L. Wood is the owner of the fee-simple title of the property described therein with full power of disposition. Her husband intended that she should have this property to do with as she pleased. As stated above, the testator was a lawyer of prominence, and had acquired a comfortable estate. During all of the years of his married life his wife had, no doubt, labored with him, and counseled and advised with him in all of his undertakings. She had, most likely, aided and assisted him in accumulating the property of which he was making disposition, and it is but natural to suppose that when in item 4 he said he devised to her certain property that he intended that she should have it absolutely to do with as she pleased, and this idea is very much strengthened when items 4 and 5 are read in connection with item 6 of the will, which requests that no inventory of his estate be required to be filed, "since there is but one legatee or devisee except the special bequests herein provided in sections two and three." This legatee or devisee referred to in item 6 is none other than his wife, referred to in item 4.

In the case of *Cox, etc., v. Anderson's Adm'r*, 69 S. W. 953, 24 Ky. Law Rep. 721, this court, in construing the following language of the testator, to wit: "I give, devise, bequeath to S, my wife, all of my cash, notes and lands and bank stock and my other stocks that I may have and also all my live stock, growing crops, house-hold and kitchen furniture, to have and to hold for her own use and benefit. When she, S. is done with it I give to Mt. Zion Church as an endowment \$1,000.00 the proceeds of which are to go paying the expenses of the church"—held that: "The church could not recover said sum. After devising the fee-simple title to his wife, the subsequent expression of a desire to give a part of the same property to the church was ineffectual." To the same effect is *Barth v. Barth*, 38 S. W. 511, 18 Ky. Law Rep. 840; *McCallister v. Bethel*, 97 Ky. 1, 29 S. W. 745; *Cralle v. Jackson*, 81 S. W. 669, 26 Ky. Law Rep. 417. The case of *Clay v. Wood, etc.*, 91 Hun, 398, 36 N. Y. Supp. 317, is very similar to the case at bar. In that case the will, after directing the payment of certain debts and particularly a mortgage debt upon the home of the testator, gave to the wife and her heirs and assigns forever the house and lot absolutely. Then, after making provision for sundry relatives, he devised the rest and residue of his estate to his wife and her heirs forever, and followed this

devise with a request and desire that his wife should sustain and provide for one W., and should make said W. and certain other relatives of the testator joint heirs after her death in the estate bequeathed to her. The court, in construing this will, held that the wife took an absolute and beneficial interest in all of the property devised and bequeathed to her, and that the words in the final clause in the will gave no interest to the persons named therein, and created no trust for their benefit. The will in this case is so like the will under consideration that we quote from the opinion in this case at some length: "What was the dominant intention of Mr. Clay in making his will as he did? To discover that, we must take into consideration the whole scheme of the will, and weigh the expressions which he has made use of when defining the interest of his wife. \* \* \* His general scheme was to give everything to his wife upon his death, except the legacies which he gave by the third and fourth clauses. Where there is an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show an equally clear intention to do so. \* \* \* That is a general rule; and can it be said of the concluding clauses of this fifth paragraph that it stands the test? We cannot think so. It undoubtedly contains the desire and request of the testator that his wife should make the persons named her 'joint heirs' after death; but, in view of the very emphatic and precise language which he had seen fit to employ in defining the estate which his wife should take in his property, it would be going too far in the effort to give effect to testator's desire to hold that it dominated his previous expressions of intention and affected their legal force and significance. \* \* \* Whether the precatory words in a will shall be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. When to impose such a trust would be to nullify previous expressions in the will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt. \* \* \* Thus we see that the pivotal point of construction is as to the significance of the expressions used by the testator when giving his estate to his wife, and the inferences to be drawn therefrom. In our view they are unmistakable, and create an atmosphere about the instrument of an entire subjection of the claims of others upon his bounty to the paramount claim of his wife, and to her ultimate testamentary disposition. In this case we can only read the language in which the testator expresses his desire and request in the light of the emphatic language previously used in the will,

and, as so read, award to it the force of a suggestion and an expectation, which, however strongly phrased, were only morally binding upon the widow." In the case at bar, the testator in item 4 of the will used language which in unmistakable terms conveyed to his wife the absolute fee to the property described therein, and, adopting the language of the learned judge in the opinion just quoted, "we can only read the language in which the testator expresses his desire and request" in item 5 "in the light of the emphatic language previously used" in item 4 "and, as so read, award to it the force of a suggestion and an expectation, which, however strongly phrased, were only morally binding upon the widow."

We come next to a consideration of the question as to whether or not a precatory trust was created in the will. If the devise is in fee and absolute precatory words following cannot cut down and destroy the absolute devise. Justice Story, in his work on Equity Jurisprudence (section 1069) says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions, and words of positive direction and command; and that, in using the one, and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that, where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying the confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, the words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders; and therefore ought to be so construed, unless a different sense is forced upon them by the context. Accordingly, in modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." Page on Wills, § 611, thus states the rule: "Where testator expresses a request or makes a suggestion as to the disposition at the death of the devisee of such property as the devisee does not dispose of during his lifetime, such words do not create a trust." In Pomeroy on Equity, § 1016, and note, it is said: "In order that a trust may arise from the use of precatory words, the court must be satisfied from the words

themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. The modern decisions have adopted a rule and require the intention to exist as a fact and to be expressed in unequivocal language. No other conclusion can be reconciled with these general principles of construction which are based upon reason and universal experience." In order to create a trust and make precatory words operative in a will, it must appear that the estate is not an absolute estate, and that the disposition thereof is not unrestricted; that the subject of the devise and the devisees must be certain, and the trust definite, and the language used must be positive and imperative, and not such as would indicate a mere wish or desire on the part of the testator, which might be complied with or not at the pleasure or discretion of the legatee. The latest enunciations of this court upon this subject are the cases of *White v. Irvin*, 74 S. W. 247, 24 Ky. Law Rep. 2458; *Igo v. Irvin*, 70 S. W. 836, 24 Ky. Law Rep. 1165; and *Goslee's Adm'r v. Goslee's Ex'r*, 94 S. W. 638, 29 Ky. Law Rep. 654, and in each of these cases the principle above announced is clearly upheld.

Measured by this rule, we find that the will before us is lacking in all of the elements which go to create a precatory trust. In the first place, the estate is given to Lillie L. Wood absolutely; second, her disposition thereof is unrestricted; third, the devise is not definite, the devisees are uncertain, and the language is such as to indicate a mere desire and could not in any sense be construed to be a command.

For the reasons indicated, the judgment of the lower court is affirmed.

#### EMIG'S ADM'R v. MUTUAL BENEFIT LIFE INS. CO.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### 1. INSURANCE—LIFE INSURANCE—DIVIDENDS.

An insured in a life policy, dated March, 1893, providing for dividends, who borrowed money from the insurer for premiums due March, 1902, and who defaulted in the payment of subsequent premiums, is entitled to the dividends on his policy for the year 1903 in computing the amount available for extended insurance as provided in the policy.

##### 2. SAME—BORROWING AMOUNTS OF PREMIUMS.

An insurance company in lending money to its policy holders occupies the same position as any other money lender, and is entitled only to collect the debt with 6 per cent. interest, and a contract allowing it to demand more will not be enforced.

##### 3. USURY—STATUTES—ENFORCEMENT.

The laws against usury prohibiting schemes resorted to by lenders to enable them to charge more than the legal rate of interest are rigidly enforced, and no plan will be allowed to defeat them.

#### 4. INSURANCE — LIFE INSURANCE — EXTENDED INSURANCE.

Where a life policy stipulated that if it should become void by the nonpayment of any premium the entire net reserve should be applied for the purchase of extended insurance, a provision that if there was any loan on the policy the indebtedness should be paid out of the cash surrender value and the remainder paid in cash or applied for the purchase of extended insurance was void, because discriminating against a policy holder in debt to the insurer, and where an insured borrowed money from the insurer for the payment of the premiums and did not repay it and defaulted in the payment of future premiums, the insurer must ascertain the amount of the net reserve and deduct from it the amount of the debt and interest and use the balance for the purchase of extended insurance.

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by George Emig's administrator against the Mutual Benefit Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and new trial ordered.

L. J. Crawford, Hazelrigg, Chenault & Hazelrigg, and R. A. Nagel, for appellant. Dodd & Dodd and W. O. Harris, for appellee.

CARROLL, J. On March 20, 1898, the appellee company issued to George Emig a policy upon his life for the sum of \$5,000, in consideration of \$195, paid by him, and the agreement to pay annually a premium of \$195 on the 20th day of March in every year during the continuance of the policy. The policy was an ordinary life policy, and was made payable to the insured. It contained several stipulations as to nonforfeiture, extended insurance, loan and cash surrender value; but, as in 1897 a new contract was made, and this substituted contract was in force from that time until the death of Emig, we will treat it as the contract under which the rights of the parties must be adjudicated. The contract of 1897 is as follows:

"\* \* \* When after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American experience mortality and interest at four per cent. yearly (provided there be no loan on the policy) shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except

as to payment of premiums, as those of this policy. Third, if preferred the company will on the surrender of the policy fully receipted within the said three months pay as a cash surrender value its entire net reserve by the American experience mortality and interest at four and one-half per cent. yearly, less a surrender charge equal to one per cent. of the sum insured by the policy.

"If there be any loan on the policy such indebtedness shall be paid off out of the cash surrender value, and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value.

"If death shall occur within one year after the nonpayment of premium and during the term of extended insurance, there shall be deducted from the amount payable any premium that would have become due on this policy if it had continued in full force, also the amount of any indebtedness on this policy at time of such nonpayment of premium.

"The company will at any time while the policy is in full force loan up to the limit secured by its cash surrender value upon satisfactory assignment of the policy to the company as collateral security.

"The figures given in the following table are based upon the assumption that all premiums (less current dividends) have been fully paid in cash. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

At End of Year.	Cash Surrender Value. Loan Value.	In Case of Lapse of Policy.		
		Extended Insurance.		Paid-up Policy.
		Years.	Days.	
5th	\$400 00	5	218	\$ 880
6th	497 55	6	194	1,050
7th	596 05	7	8	1,210
8th	698 30	7	206	1,370
9th	801 50	8	2	1,525
10th	905 45	8	180	1,675

Having paid the first premium when the policy was issued, Emig began to borrow money from the company to meet his subsequent premiums until on March 20, 1902, he owed the company \$854.35. He defaulted in the payment of the premium which fell due March 20, 1903, and also in the one that became due March 20, 1904, and died on June 1, 1904. By the default in the payment of the premium on March 20, 1903, his policy became forfeited unless it was kept alive until his death by the nonforfeiture system set out in the contract heretofore mentioned.

It will be observed that a clause in this contract provides in part that "if there be any loan on the policy, such indebtedness shall be paid out of the cash surrender value and the remainder paid in cash by the

company." It being conceded that on March 20, 1903, Emig owed the company \$854.85, with interest from March 20, 1902, and that he defaulted in the premium due March 20, 1903, it is the contention that on that date he was only entitled to the cash surrender value of the policy, less the loan. The cash surrender value on March 20, 1903, according to the calculation made by the company, and which is shown by the table, was \$906.45, and the loan and interest to that date being \$905.61, it only left due Emig on that day 84 cents. It is further insisted for the company that if the other paragraph of this clause is put into operation, which provides, "or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value," that the net reserve of the policy by the American experience mortality and interest at 4 per cent. was on March 20, 1903, \$1,001.95, and that, reducing this in the ratio of the indebtedness to the cash surrender value, left only 90 cents to be applied to the purchase of extended insurance at the company's rates published and in force at the date of the policy, which sum would have purchased insurance for \$5,000, for two days and no longer. So that, in either event, looking at the matter from the company's standpoint, Emig is not entitled to recover more than 84 cents.

Emig's administrator insists that the provisions relied on by the company are against public policy and void, and that he is entitled to recover \$5,000, less the amount of the note and interest thereon, and the premiums due in 1903 and 1904. It does not appear that Emig made any election, or requested or demanded any settlement of any kind from the company, and so the matter stood from 1903 until this suit was brought, when the company for defense set up that it did not owe Emig anything.

In the body of the policy it is provided that "in case the premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof \* \* \* then and in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system as indorsed hereon with the accompanying table"; and further, "this policy while in force will participate annually in the company's distribution of surplus, and after two years will be incontestable except for nonpayment of premiums." The company does not distinctly claim a forfeiture of the policy by reason of the nonpayment of the note; but it insists that because of Emig's failure to pay the premium due March 20, 1903, it had the right under the contract to deduct from the sum then due him on the policy ascertained according to its method of calculating the amount of its note and inter-

est, and by this process a forfeiture was in effect accomplished.

It is true the contract gave it the right to make the character of settlement it did, but it remains to be seen whether or not the provisions of the contract under which the company elected to settle with Emig are valid and enforceable or void as against public policy. In brief, the question is, will provisions of a policy be upheld that give an insurance company the right to settle on a different plan with a borrowing policy holder from that adopted with the policy holder who is not a borrower, thereby enabling it to exact more than its debt and legal interest? Under the contract, if Emig had not been a borrowing member, after he had paid two full annual premiums the entire net reserve by the American experience mortality and interest at 4 per cent. yearly would be applied by the company as a single premium at the company's rates to the purchase of nonparticipating insurance for the full amount insured by the policy, or, upon his written application for the reserve would have been applied to the purchase of a nonparticipating paid-up policy, or, at his election the company would pay as the cash surrender value of the policy its entire net reserve by the American experience mortality with interest at  $4\frac{1}{2}$  per cent. yearly, less a surrender charge equal to 1 per cent. of the sum insured by the policy. But, if a policy holder happened to be at the same time a borrower from the company, and had defaulted in the payment of a premium, then the company under the contract had the right to deduct the indebtedness out of the cash surrender value and pay the balance in cash, or allow a value in the form of extended or paid-up insurance, the amount of such value to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash value. It will thus be seen that the borrowing and the nonborrowing members are not treated alike; that the nonborrower has advantages and privileges that are not allowed the borrowing member. To illustrate, if on March 20, 1903, Emig had not been indebted to the company, and had defaulted in the annual premium then due, he would have been entitled to demand from the company nonparticipating term insurance for the full amount of his policy for such period as the same could be purchased by its entire net reserve by the American experience mortality and interest at 4 per cent. yearly, or he could have demanded that the net reserve be applied to the purchase of a nonparticipating paid-up policy. But, being a borrower from the company, it claims the right to settle with him on an entirely different basis, and one that does not secure the benefits that as a nonborrower he could have demanded. It must be kept in mind that the cash surrender value of the policy as fixed in the tables and under which the company settled its account



on March 20, 1903, with Emig, is not the full value of the policy that he would have received if he was not a borrower. By its settlement the company did not deduct the amount of Emig's note with 6 per cent. interest and give him extended insurance for the time he was entitled to it. It arbitrarily adopted a method by which it exacted from him more than his debt and interest by failing to allow him credit for the full amount to which he was entitled.

To make plain the manner in which Emig was discriminated against, and the fact that the company exacted in the settlement it made more than the amount of its debt and legal interest, it is only necessary to direct attention to the admissions in the answer which show that the net reserve of the policy by the American experience mortality and interest at 4 per cent. was on March 20, 1903, \$1,001.95, whereas the cash surrender value on that date was only \$906.45. Electing as it did to take the amount of Emig's debt and interest, \$905.61 from the \$906.45, only left 84 cents due the assured. When if the debt had been deducted from the net reserve of the policy, which was \$1,001.95, there would have been due him \$95.50; but, upon a fair settlement, the amount due him would have been more than this because he was entitled to the dividend on his policy for the year 1903, which was not allowed him in fixing the amount at \$1,001.95, as this sum only includes the dividends to March, 1902. *Mutual Benefit Life Ins. Co. v. Davis*, 115 Ky. 404, 73 S. W. 1020. In computing under the other clause by which it allowed him a value to be applied to the purchase of extended or paid-up insurance, and finding that there was only due him 90 cents, it reduced the net reserve in the ratio of the indebtedness to the cash surrender value of the policy, and again discriminated against him and exacted more than the amount of the debt and legal interest.

We are wholly unable to perceive why an insurance company should be allowed to discriminate between its policy holders in this manner or exact indirectly more than legal interest. In lending money to its policy holders an insurance company occupies exactly the same attitude as any other money lender. It is entitled to demand and collect the amount of its debt with 6 per cent. interest thereon, and no more. It is true the contract allows it to demand more than this, and the right to require the borrowing member to pay a larger sum than his debt and interest; but this character of contract, no matter how carefully it may be worded, or how skillfully devised, will not be enforced. When the company lends money and takes as security for the loan a policy that amply secures it, there is no reason why it should be allowed privileges or rights not extended to ordinary money lenders. Our laws against usury, and other devices and schemes resorted to by lenders to enable them to charge debtors

more than the legal rate of interest, are rigidly enforced, and no plan, however ingenious, will be allowed to defeat them.

Viewing the matter from this standpoint, what were the rights of the respective parties on March 20, 1903, when Emig defaulted in the payment of the premium then due? He owed the company \$854.35, with interest thereon from March 20, 1902, and the company as security for this had a lien upon his policy. On that date the company had the right to ascertain the amount under the contract that Emig, treating him as a nonborrower, was then entitled to, which was the entire net reserve by the American experience mortality and interest at 4 per cent. yearly, and to deduct from it the sum of his note and interest, and for the difference, if any, he was entitled—as he made no election—to extended insurance for the full amount of his policy for such period as this balance would carry it. If on March 20, 1903, Emig had not been a borrower from the company, the premiums he had paid would under the contract and tables have carried his insurance for the full amount for 8 years and 130 days. But, being a borrower, with his policy pledged to the company as security for the loan it had the right on that day to demand the payment of its loan and give Emig on the basis herein indicated nonparticipating term insurance for the balance due. The fact that Emig had paid a sufficient number of premiums to carry his insurance 8 years, 130 days, did not give him the right to insist that the company must carry his full insurance for that period of time and take out of it if he died within that period the amount of his debt with interest. This conclusion would give the insured the unreasonable advantage of having the full amount of insurance in force for a period of 8 years and 130 days, during all of which time he would be indebted to the company in the full amount of the loan value of his policy, and this without the payment of either premiums on the policy or interest on his note. The result would be that Emig's debt would be increasing and the value of his policy decreasing, until at the expiration of the 8 years and 130 days the company would have his note and as security a policy without value. To put it in another way, if he had outlived the period of extended insurance, the policy that the company accepted as security for the note would have lapsed entirely and been of no value, and consequently the company would have no security for the money advanced on it if the insured was insolvent, and yet the insured during this time would have had in his pocket practically the full value of the policy and on his life insurance for the full amount of the policy. *Jagoe v. Aetna Ins. Co.*, 96 S. W. 598, 29 Ky. Law Rep. 984; *Penn Mutual Life Ins. Co. v. Barnett's Adm'r*, 96 S. W. 1120, 29 Ky. Law Rep. 1234. But provisions in a policy that give the company the right to take undue advantage of the

insured, or that allow it the right to arbitrarily adopt a method by which it may indirectly exact from a borrowing member more than the debt and interest due by him, or to settle an indebtedness upon an erroneous and unfair basis, and one that will in effect work a forfeiture of the policy, will not be enforced. They are against public policy and void. *New York Life Ins. Co. v. Curry*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297; *Mutual Life Ins. Co. v. Twyman*, 89 S. W. 178, 28 Ky. Law Rep. 167. These principles do not, of course, deny to an insurance company the right to declare a policy forfeited or lapsed for nonpayment of premiums, or prevent it from providing options in its policy between which the insured may elect and that will bind him when an election has been made. These are reasonable conditions, and are not in the same class as the carefully adopted clauses that discriminate against borrowing members.

In support of its rights to settle with Emig in the manner it did, the company relies upon the case of *Mutual Benefit Life Ins. Co. v. First National Bank*, 115 Ky. 757, 74 S. W. 1066. There the contract and policy contained the same provisions as the one in the case at bar, in fact it was issued by the same company. Sudduth, who was the policy holder and who had paid the premiums for 12 years, borrowed from the company on the policy \$599.32, payable July 30, 1899, on which date his note fell due, but neither the note nor premium was paid. Sudduth died the following November. In a suit on the policy the company set up the defenses that are here made—the only difference being that here the company found a balance due Emig of 84 cents, whereas in the Sudduth Case the amount of the note and interest was exactly the amount of the cash surrender value of the policy. This court—three of the judges dissenting—held that the company was entitled under the contract to make a settlement similar to the one made by the company with Emig.

The case of *New York Life Ins. Co. v. Meinken's Adm'r*, 80 S. W. 175, 25 Ky. Law Rep. 2113, also relied on by appellee, is not in point. It appeared that on November 8, 1893, the appellant insured the life of Meinken for \$2,500, in consideration of \$59.50 payable annually on the 8th of November in each year. The policy provided for extended insurance. The annual premiums were paid for the first three years in cash, and entitled the insured under the tables contained in the policy to extended insurance for the full amount of the policy up to April 8, 1899, or if he demanded it paid-up insurance for \$167. Meinken defaulted in the payment of a premium note due in 1897, and died in February 1901. In a suit by his administrator to recover \$2,500, the full amount of the policy, the company denied liability, and alleged that the premiums paid did not carry the policy under the terms of the contract up to the date of

the death of the insured, and that the policy had lapsed. In the course of the opinion, this court said: "In case of default in the payment of the annual premium, the insured had two options, first, the policy provided that he should be entitled to extended insurance for the full amount of the policy for a definite period, or, second, that if the insured should make demand therefor, and surrender the policy within six months after default, he was entitled to paid-up insurance for a stipulated sum. But he could not claim both of these surrender values. Having failed to demand paid-up insurance, the policy by its terms continued in force for the full amount of \$2,500 for a definite period, but which had expired before his death." Here it will be observed that the insured defaulted in the payment of a note given for the premium, which was in effect the same as if he had failed to pay a premium, and the court held that, having failed to make an election within six months or at all, the company under the terms of the policy gave him extended insurance for the full amount for the full period to which under the tables he was entitled to extended insurance, and under the tables he was only entitled to extended insurance to April 8, 1899; and, consequently, as said by the court: "Having failed to demand paid-up insurance, the policy was by its terms continued in force for the full amount of \$2,500 for a definite period, but which had expired before his death."

Nor is *Mutual Benefit Life Ins. Co. v. Harvey*, 117 Ky. 834, 79 S. W. 218, authority for appellee. In that case Harvey paid the first five annual premiums on his policy, but failed to pay the one due in November, 1892, and the policy lapsed in accordance with its terms at that date. Harvey died in 1902. Suit was brought against the company to recover \$507, the amount of paid-up insurance, which under the contract it was claimed Harvey was entitled to in November, 1892, when he defaulted in the payment of premiums then due. The contract of insurance provided that the policy holder if after paying two full premiums defaulted in the payment of a premium, the amount due him should be applied "first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and surrender of the policy, to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force." In its answer the company averred that as no written application was made for paid-up insurance it gave to Harvey nonparticipating term insurance for the full amount of the policy for 8 years and 134 days, this being the extended insurance which the amount due him would purchase. The court, in upholding the contention of the company, said: "It will be observed that the non-

forfeiture provisions of the policy provided that the insured shall be entitled to the first-named, or term, insurance, for the full amount of the policy, unless he makes application and surrenders his policy at his default. But he failed to make such application. And there can be no question under the terms of the policy that such application and surrender by the beneficiaries of the policy is a condition precedent to the issue of paid-up insurance; otherwise it became the duty of the company without application or request to set aside for the benefit of the insured extended insurance for the full amount of the policy."

It will therefore be observed that in the Meinken and Harvey Cases the insured failing to elect which option they would accept, the company made the only election it was authorized by the contract to make, and this election the court held binding on the insured.

There is no conflict between the doctrine announced by us in the case at bar and the opinions in these cases. We do not hold that there may not be options given in a policy, nor that if the insured fails to elect the company may not make an election for him. We are dealing distinctly with the rights of a borrowing member, and the principles announced are fully sustained by the opinions in *Mutual Benefit Life Ins. Co. v. Davis*, 115 Ky. 404, 73 S. W. 1020; *Penn Mutual Life Ins. Co. v. Barnett's Adm'r*, 98 S. W. 1120, 29 Ky. Law Rep. 1234. The First National Bank Case, *supra*, in so far as it conflicts with this opinion, is overruled.

We are not prepared to say upon the record before us what balance was due Emig on March 20, 1903, computed upon the basis herein indicated. Upon a return of the case evidence may be taken by both parties, and the court will ascertain and adjudge the full amount that Emig was entitled to on March 20, 1903, and after deducting therefrom the amount of his debt and interest, will compute the period for which the balance due would purchase extended insurance, and if the extended insurance carried the policy beyond the time of Emig's death judgment will be rendered in favor of appellee for the amount of the policy and interest from the time it was due; otherwise the judgment will be for appellant.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

**TOWN OF LA GRANGE v. PRYOR et al.**  
(Court of Appeals of Kentucky. Dec. 18, 1907.)

**1. TOWNS—PROCEEDINGS OF BOARD OF TRUSTEES—NOTICE OF MEETINGS.**

An ordinance designating the time and place of meeting of the board of trustees of a town, passed at the same time that an ordinance annexing territory was passed, does not fulfill the requirements of Ky. St. 1903, § 3696, that all meetings of the board shall be held at such time and place as may be designated by ordinance, and does not afford notice of the meeting

at which the ordinance of annexation was passed.

**2. SAME—BURDEN OF PROOF.**

Where the board of trustees of a town passed an ordinance not in compliance with the requirements of Ky. St. 1903, § 3696, that all meetings of the board shall be held at such time and place as may be designated by ordinance, and it was alleged that complainants had actual notice of the time and place of meeting, the burden was on the town to prove that fact.

Appeal from Circuit Court, Oldham County.  
"Not to be officially reported."

Action by W. C. Pryor and others against the town of La Grange. Judgment for plaintiffs, and defendant appeals. **Affirmed.**

A. T. Ladd, for appellant. James S. Morris and Chas. H. Morris, for appellees.

**LASSING, J.** On September 4, 1903, the town of La Grange passed an ordinance annexing certain territory lying contiguous to the town. Section 3664 of the Kentucky Statutes of 1903 provides that this may be done. On the 3d of October following the appellees filed suit in the circuit court, as provided by section 3665 of the Kentucky Statutes of 1903, in which they sought to prevent the town from annexing the proposed territory. In their suit they set out at length their reasons, which were several, why the territory should not be annexed, and, among others, alleged that the town had never passed, adopted, and published an ordinance fixing the time and place for the regular meetings of the board, as required by the statute, and that by reason of its failure so to do the petitioners had no notice of the meeting at which the ordinance was passed, and no opportunity to be present and object to or be heard upon the passage of the ordinance. The answer traversed all the allegations of the petition, and, in addition, pleaded that the petitioners had actual notice of the times and place of the meeting at which the ordinance was passed. The affirmative matter in the answer was traversed by a reply. The case was finally submitted on the pleadings for judgment, and, the trial court having decided adversely to the town, it appeals.

Section 3696 of the statute provides that all meetings of the board of trustees shall be held within the corporate limits of the town, at such time and place as may be designated by ordinance, and shall be public. The purpose of this provision of the statute was to enable the public to know when and where the council would hold its sessions, so that any one having an interest in any matter pending before the council might have an opportunity to be present at the meeting, and see and hear what steps were being taken in any particular case pending before that body. In the case under consideration, the persons interested in the passage of this ordinance were not residents of the town, and were not supposed to know, nor were they required to know, the time and place of the meeting of the board of trustees. They were vitally interested in the passage of the ordinance in

question, and, if they had known when and where the meeting was to be held, at which this ordinance was passed, they would have, no doubt, been present in person or by counsel, protesting and objecting to its passage. This court in the case of *Wells v. Mt. Olivet*, 102 S. W. 1182, 31 Ky. Law Rep. 577, upheld the right of a citizen to go before the board and protest against the passage of an ordinance annexing certain territory. The record shows that the ordinance was passed fixing the time and place for the meeting of the board of the town of La Grange, but it appears that this ordinance was passed at the same time that the ordinance annexing the territory in question was passed. Of course, the citizens had no opportunity of knowing that such an ordinance was under consideration for passage unless actual notice of the time and place of the meeting was given to those interested. The answer alleges that this actual notice was given and the burden to support this pleading rests upon the trustees. They offer no proof on this question.

The annexing of territory to a town imposes upon the citizens embraced within the territory additional burdens in the way of taxation, and, before they can be compelled to bear such burdens and be subject to such rules and regulations as the town council may, while acting within the scope of its authority, pass, they have a right to require that the provisions of the statute be fully complied with. One of the provisions, and, indeed, a most important one in cases of this kind, is that the town council shall by ordinance designate the time and place at which its stated meetings are to be held. An ordinance designating the time and place of meeting which was passed at the same time that the ordinance annexing the territory was passed would not meet the requirements of the law. The exhibits filed with the pleadings show that the ordinance fixing the time and place of the meeting had not been passed at a meeting previous to the date on which the ordinance annexing the territory was passed, and, the trustees having sought to avoid the effect of this irregularity by alleging that the complainants had actual notice of the time and place of the meeting, the burden was upon the town to prove this fact. It failed to offer evidence in support of this allegation, and the trial court properly found in favor of the appellees.

We see no error in his finding and judgment.

#### MOBILE & O. R. CO. v. CALDWELL.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

#### 1. RAILROADS—OPERATION—FIRES—INSTRUCTIONS.

In an action against a railroad for negligently setting fire to plaintiff's timber land, evidence that the plaintiff and her son lived on the same tract, but that she tended to her own business and he to his, and that he was 42 years old and had a family of his own, and that he saw the fire start from a spark from the

engine, but did not stop to put it out, as he had to tend to another fire on his own part of the tract and save his cattle, is not sufficient to authorize an instruction that, if the son was his mother's agent and failed to put out the fire, the jury should find for the defendant.

#### 2. NEW TRIAL—NEWLY DISCOVERED CUMULATIVE EVIDENCE.

Where, in an action for negligently setting fire to timbered land, plaintiff introduced three witnesses as to the extent of damage done, and defendant one, newly discovered evidence of two witnesses, who had gone over the land after the fire, as to the extent of damages, is cumulative, and not ground for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 218-220.]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by Mollie Caldwell against the Mobile & Ohio Railroad Company for negligently setting fire to land. From a judgment for plaintiff, defendant appeals. Affirmed.

Lansden & Leek and Bullock & Flatt, for appellant. Bennett, Robbins & Thomas, for appellee.

HOBSON, J. Mrs. Mollie Caldwell owned between 75 and 100 acres of timbered land near the line of the Mobile & Ohio Railroad Company. In November, 1904, a fire was started by sparks from a locomotive passing on the road, which fell upon dried grass and bush on the right of way. The fire spread from the right of way to the timbered land of Mrs. Caldwell, and burned up a large quantity of wood and injured a great many of the trees and undergrowth. She brought this suit against the railroad company to recover damages. The jury found for her, and fixed the damages at \$900. The court entered judgment upon the verdict, and, the defendant's motion for a new trial having been overruled, it appeals.

The proof for the plaintiff showed that the railroad company had cut the grass and brush off its right of way some months before, and had left all of it lying on the ground; that this stuff was very inflammable, and that the fire started in it. The proof for the plaintiff also showed that the engine emitted sparks as large as the end of a man's thumb. The proof for the defendant was that sparks larger than a quarter of an inch could not get through the screens if in order. If the testimony of the plaintiff was true, the screens were either not in order or were not properly adjusted. The proof for the plaintiff also showed that section 790, Ky. St. 1903, had not been complied with: "Every company shall keep its right of way clear and free from weeds, high grass, and decayed timber, which, from their nature and condition, are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property." John Caldwell, a son of the plaintiff, testified that he was passing along the railroad

track, and was passed by an engine throwing out large sparks, which set the leaves afire. The defendant thereupon filed an amended answer, in which it averred that John Caldwell was his mother's agent, and that he was negligent in not putting out the fire when he saw the sparks fall from the engine. The amended answer was controverted of record. There was no other proof offered on the subject, except the testimony of John Caldwell himself.

At the conclusion of the evidence, the court refused to give an instruction to the jury which the defendant asked, to the effect that, if he was his mother's agent, and was present when the train passed which started the fire, and could have extinguished the fire, but failed to do so, the jury should find for the defendant. The refusal of the court to give this instruction is earnestly relied on to reverse the judgment. The principle that the plaintiff must minimize his damages so far as he can do so by ordinary care, and that he must use ordinary care to protect his property when it has been placed in peril by the negligence of another, has been often recognized by this court, but the proof here is not sufficient to make out the defense. John Caldwell testified that he was 42 years of age; that he did not live with his mother; that he had a family of his own, and they lived on a part of her tract, but that she attended to her business and he attended to his; that he did not have charge of her business; that at the time he saw the engine throwing out sparks, and saw the fire started on the right of way in the leaves and brush, he was going to put out another fire, and to save some cattle which he had a little way beyond; that he did not think then that the fire that he saw starting would do any damage, as he did not think it would go over the ridge, but that he had to go on to look after his cattle. This evidence is not sufficient to show that his mother should be charged with his conduct, or that there was any such want of care on his part as to bar a recovery in the action. Both fires were burning, and it was natural that John Caldwell should look first after his own cattle that were in danger. There was neither plea nor proof that the plaintiff herself was in any wise negligent.

The damages are not so excessive as to warrant us in disturbing the verdict on this ground. The proof was conflicting, but if the jury believed the witnesses who testified for the plaintiff, and had been over the timber and examined it, their verdict was not unwarranted. The newly discovered evidence was clearly cumulative. The rule is that a new trial will not ordinarily be granted on account of the discovery of new testimony which is cumulative. The plaintiff introduced on the trial three men who had been over the timber and counted the trees. The defendant introduced one man who had made a similar investigation. The newly dis-

covered evidence was the testimony of two other men who had been over the timber and examined it. The defendant was apprised by the suit that damages would be claimed for the burning of this timber. It could, at any time after the suit was brought, have had the timber inspected, so that the amount of damages would be known. Any man who was acquainted with timber could have examined it and testified on the subject. Ordinary care on the part of the defendant could have obtained at the time any amount of evidence that was necessary, for the physical facts were plain to be seen, and anybody could go and make an investigation. If new trials were granted for newly discovered evidence such as this, little confidence could be placed in judicial proceedings.

Judgment affirmed.

## NOEL & MCGINNIS v. KAUFFMAN BUGGY CO.

(Court of Appeals of Kentucky. Dec. 20, 1907.)

### 1. SALES — DELIVERY AND ACCEPTANCE OF GOODS—PAYMENT.

A vendee of goods who accepts them or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them, or exercises ownership over them, cannot thereafter refuse to pay for them, though he does not agree to accept them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 456-468.]

### 2. SAME—ACTS CONSTITUTING ACCEPTANCE.

One receiving goods sold him and using them as his own thereby accepts them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 451-455.]

### 3. SAME—ACTIONS FOR PRICE—INSTRUCTIONS.

In an action for the price of vehicles, an instruction that, if defendants accepted and used the vehicles shipped them by plaintiff, the jury should find for plaintiff the value of the vehicles, not to exceed the price, with interest, was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1060-1062, 1072.]

### 4. SAME.

Where vehicles shipped defendants by plaintiff were not as ordered, the fact that plaintiff's agent gave defendants permission to use the vehicles temporarily until they could be replaced by others of the desired kind did not authorize defendants to use the vehicles until they were practically worthless, and then decline to pay for them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 451-455.]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by the Kauffman Buggy Company against Noel & McGinnis. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben. G. Williams, for appellants. John W. Rodman, for appellee.

CLAY, C. Appellants, Noel & McGinnis, partners in the livery business in Frankfort, Ky., ordered from appellee, Kauffman Buggy Company, doing business at Miamisburg, Ohio.

a buggy with rubber tires and arch axles, and a surrey with steel tires and arch axles, to be shipped about April 1, 1903. Instead of the goods ordered, appellee shipped to appellants a buggy with steel tires and drop axles, and a surrey with rubber tires and drop axles. The goods reached Frankfort about April 12, 1903. Appellants claim that, before taking the goods out of the freight depot, they communicated by phone with appellee's agent who effected the sale, and that he told them to take the goods out, and use them temporarily until they could be replaced by those of the style and quality ordered. This, however, the agent denies, and his letter written on the same day that the conversation took place merely directed appellants to advise appellee what was wrong with the goods, and assured them that appellee would make it all right. Appellants then took the goods out of the station, and used them in their business until they were practically worn out. On June 15, 1903, they wrote appellee that the goods were not as ordered, and asked on that account a rebate from the sale price which was \$265. As appellants had been using the vehicles right along, appellee declined to make any deduction. Appellants never at any time offered to return the goods. Frequent statements of the account were sent to them, to which they paid no attention. Finally appellee instituted this action to recover the value of the vehicles. Evidence was heard, and the case submitted to a jury, which returned a verdict for appellee in the sum of \$235. From the judgment entered thereon, Noel & McGinnis prosecute this appeal.

The law is well settled that if the vendee of goods accepts them, or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them, or exercises ownership over them, he cannot thereafter refuse to pay for them. *Yelser, etc., v. Russell & Co.*, 83 S. W. 574, 26 Ky. Law Rep. 1151. Counsel for appellants insists, however, that the trial court erred in refusing to instruct the jury that appellee could not recover unless appellants agreed to accept the vehicles. This is not the law. No oral or written agreement to accept in such cases is necessary. A party who receives goods and uses them as his own necessarily accepts them.

Counsel for appellants further complains of the instructions given by the court. These instructions are as follows: "(1) If the jury believe from the evidence that the defendants, Noel & McGinnis, accepted and used the buggy and surrey shipped to them by defendant, they ought to find for plaintiff the value of the vehicles, not to exceed \$265, with interest from June 1, 1903. (2) If the jury believe from the evidence that defendants received and accepted the vehicles to be used temporarily, or until the plaintiff should furnish them the vehicles ordered, and that

plaintiff failed to furnish the vehicles ordered, they ought to find for plaintiff damages in the amount the buggy and surrey, or both the buggy and surrey were damaged, if at all, by the defendants." The first instruction is correct in every particular, and clearly presents the proposition of law heretofore announced. The second instruction, while subject to criticism, is really more favorable to appellants than the facts warrant; for even conceding that appellee's agent had the authority to give, and did give, appellants permission to use the vehicles temporarily, that privilege did not confer the right to use the vehicles until they were practically worthless, and then decline to pay for them.

Judgment affirmed.

## RAND, McNALLY & CO. et al. v. COMMON-WEALTH et al.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

### 1. VENUE—CHANGE—LOCAL PREJUDICE.

In an action on a school book publisher's bond, defendants were not entitled to a change of venue on the ground that all the citizens of the county had an interest in the result, because any recovery would go to the public school fund of the county; the interest of any one who might be called as a juror being too remote and small to justify changing the venue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 73.]

### 2. SCHOOLS AND SCHOOL DISTRICTS — TEXT-BOOKS — ACTION ON PUBLISHER'S BOND — EVIDENCE—ADMISSIBILITY.

In an action for a school book publisher's breach of a bond to furnish books equal to sample copies filed, it was proper to exhibit books which had been used in the county in different families, and to permit persons who had used them or were familiar with them, with the date of their purchase or the extent of their use, to state how they had been used, and to permit others who had bought and used books to testify as to the character and quality of the binding, though the books were not exhibited to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 340.]

### 3. SAME.

Where, in an action for a school book publisher's breach of bond to furnish books bound in a certain manner, the publisher's representative testified that the books sold conformed in all respects to the contract, though he had no personal knowledge as to the quality of work done upon each book bound and sold by his company, it was proper to show through him that book binderies, including his company, occasionally sent out imperfectly bound books.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 340.]

Appeal from Circuit Court, Barren County.  
"Not to be officially reported."

Action by the commonwealth of Kentucky, by certain officers, against Rand, McNally & Co. and others, for breach of a bond to furnish school books of a certain quality. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. M. Beckner, W. L. Porter, Porter & Sandidge, and Duff & Hutchison, for appellants. Baird & Richardson, Harlan & White, and Greene & Van Winkle, for appellees.

LASSING, J. This is the second appeal of this case. The opinion on the former appeal is found in 94 S. W. 643, 29 Ky. Law Rep. 696, and in that opinion the facts are fully stated. Two questions are presented now for consideration: First, should the trial court have granted a change of venue? And, second, did the trial court err in admitting certain testimony complained of? On the former appeal it was urged that the court had erred in refusing to grant a change of venue, but it appeared that the petition seeking a change of venue had not been verified, as required by the statute, and for this reason it was held that a change of venue was properly denied. A consideration of the facts upon which the petition was based was not discussed at length in the opinion, although it was said that this court recognized the fact that a trial court has, in the matter of granting a change of venue, a broad discretion, and for this reason this court has been loath to interfere with the ruling of the trial court on this subject, unless the action of the trial court was manifestly erroneous.

The ground upon which the motion for a change of venue is based is that all of the citizens of the county of Barren have a direct interest in the result of the litigation by reason of the fact that the money, if a recovery is had, goes to and forms a part of the public school fund of that county. This whole question was thoroughly considered in the case of *Graziani v. Burton, Co. Supt.*, etc., 97 S. W. 800, 30 Ky. Law Rep. 180, recently decided by this court, in which it was held that the interest in a recovery which any citizen, who might be called upon to do jury service, would have, was so remote and small that it did not furnish grounds which would justify the trial court in transferring the case for trial to another county. Identically the same facts are presented here as were presented in that case, and, for the reasons there assigned, the motion for a change of venue was properly denied.

We come next to a consideration of the court's ruling upon the introduction of certain testimony. The point in issue was: Were the books which were supplied to the public schools of Barren county, under the contract which appellants had with the state, equal in all respects to the sample copies filed in the office of the superintendent of public instruction? Several of these books, which had been in use in the county in different families, were exhibited to the jury, and those who had used them or were familiar with them, with the date of their purchase, or the extent of their use, were permitted to testify to the jury as to how they had been used. Other witnesses who had bought these books were permitted to testify as to the character and quality of the binding, although the books were not exhibited to the jury, and of this testimony appellants also complain most seriously. We are of

opinion, however, that appellees, in this particular, were conforming to the requirements of the former opinion, in which this court said: "We think it was necessary that the children who used the books, or, at least, some one who knew the facts, should state whether the falling out of the leaves was the result of hard or rough usage, or the insufficiency of the binding; that, without this, testimony as to the usage or production of the books with the lost leaves was incompetent for the end sought to be reached." The testimony complained of was that which was offered for the purpose of showing that the binding of the books furnished under contract was of poor quality. Several of these books, which were exhibited to the jury, were shown by the proof to be in bad condition, and, when the jury learned from these witnesses the length of time these books had been in service, the use to which they had been put, and the manner in which they had been handled, they were then better able to judge as to whether or not the binding of the books was in all respects equal to that of the sample copy. Along this same line, and for the same purpose, certain other witnesses were permitted to testify as to the faulty condition of the books which they had bought and used, but which were not placed in evidence. This testimony conformed, in the main, to what this court said in the former opinion should be proven before it would be competent to exhibit the books to the jury as evidence.

It is further insisted that the court erred in permitting appellees to show through the representative of appellants that book binderies, his company included, occasionally sent out books that were imperfectly bound. This witness was shown by appellees to have written letters to the county superintendent, appellee herein, to this effect, and, as he later testified that the books which had been sold in Barren county conformed in all respects to the requirements of the contract, this question and answer was proper, and had a direct bearing upon the accuracy of his testimony, and the weight to which it was entitled. It is not possible that he could have personal knowledge of the character and quality of work that was done upon each book which his company printed, bound, and sold. He could only speak of the general character of this work, and, having testified that the work which they did was of the required standard, it was not incompetent for him to be interrogated along the line about which appellants now complain. Besides, as many witnesses had already testified that several of the books which appellant company had sold for use in Barren county were faulty in their binding, the statement of this witness, in answer to the particular question complained of, was but cumulative upon that point, and the case of appellants was not prejudiced by reason of his answer, for he merely stated a fact which

was already known to the jury, if they believed as true the statements of the witnesses who had previously testified upon this point.

There was ample testimony to support the finding of the jury that some of the books sold by appellant company in Barren county were not in all respects equal to the samples which it had filed with the superintendent of public instruction, and, being of the opinion that there were no errors in the conduct of the trial prejudicial to the substantial rights of appellants, the judgment is affirmed.

**COMMONWEALTH, on Inf. of McELROY, v. WALSH'S TRUSTEE.**

(Court of Appeals of Kentucky. Dec. 13, 1907.)

**1. TAXATION—EXEMPTIONS—CORPORATIONS — SHARES OF CAPITAL STOCK—STATUTORY PROVISIONS—CONSTRUCTION.**

Under Ky. St. 1903, § 4088, providing that the individual stockholders of corporations required to pay taxes on the corporate franchise shall not be required to list their shares so long as the corporations pay the taxes on the corporate property and franchise, shares of capital stock of a corporation, paying taxes only on that part of its property situated in the state, were not exempt from taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 110, 221.]

**2. SAME—UNIFORMITY—CONSTITUTIONAL PROVISIONS.**

Const. § 170, exempts certain property from taxation. Section 171 provides that taxes shall be uniform. Ky. St. 1903, § 4088, provides that the individual stockholders of corporations required to pay taxes on the corporate franchise shall not be required to list their shares so long as the corporations pay the taxes on the corporate property and franchise. *Held*, that if the Legislature intended to exempt from taxation shares of capital stock in corporation, not exempt from taxation and paying taxes only on that part of their property situate within the state, it had no power to do so, and the section was void to that extent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 100-103.]

Appeal from Circuit Court, Fayette County.  
"To be officially reported."

Proceeding by the commonwealth by John McElroy, sheriff, against Clara Bell Walsh's trustee, to enforce a tax. Judgment for defendant, and the commonwealth appeals. Reversed.

G. S. Shanklin, J. R. Morton, and Geo. C. Webb, for appellant. J. R. Allen, John T. Shelby, and J. D. & J. R. Hunt, for appellee.

**NUNN, J.** The sole question on this appeal is whether 500 shares of the capital stock of the Western Union Telegraph Company, held by appellee at the several assessment periods for taxation for the years 1902, 1903, 1904, and 1905, were by the laws of Kentucky exempt from taxation. It is agreed that appellee owned the stock in the several years named, and did not list it for taxation, and that each share of stock was worth \$90.

The lower court held the stock to be exempt, and the commonwealth has appealed. It is also agreed that the corporation itself, the Western Union Telegraph Company, fully complied with the laws of Kentucky governing the taxation of foreign corporations doing business and exercising a franchise within this state; that it made reports to the state board of valuation and assessment conforming in all respects to the law, as the basis of the assessment of its franchise as provided by law, which reports were approved and accepted by the state board; and that the corporation had paid in full the state, county, and city taxes due on the assessment, and also all taxes due on tangible property owned by it in this state. It is conceded that only about 1 per cent. of the property of the Western Union Telegraph Company is situated and taxed in the state of Kentucky, and 99 per cent. of it is situated and taxed in other states.

It is conceded by counsel for appellee that section 4088, of the Kentucky Statutes of 1903, unequivocally exempts from taxation the shares of stock of that corporation in the hands of its stockholders. The section reads as follows: "The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise, shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchise as herein provided." After a careful consideration we cannot agree to the construction placed upon this section by appellee. We are of the opinion that such construction, in the first place, was not intended by the General Assembly; and, second, if so intended, it had no power to grant the exemption. In the case of Franklin County Court, etc., v. Deposit Bank of Frankfort, 87 Ky. 370, 9 S. W. 212, this court said: "It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. \* \* \* The shareholder is entitled only to share in the profits. So the capital stock and the shares of capital stock are distinct things, and both may be taxed."

Appellee's counsel conceded this principle; but says that the General Assembly had the power to exempt appellee's stock from taxation, and it did so by the section referred to. The meaning of the section referred to is that so long as a corporation pays the taxes on the corporate property and franchise, as therein provided, the stockholders of the corporation shall not be required to list and pay taxes on their shares. But when it says to pay taxes on the corporate property it was not intended to mean that when the corporation pays taxes on 1 per cent. of the value of the corporate property the stockholder should be relieved from taxation. Manifestly the meaning of the statute and the obvious



intention of the General Assembly was to recognize the rule that the shares of stock in a corporation were subject to taxation, and should pay their proportion of revenue to the state. Each one of the shares of stock represent an interest in the entire property of the corporation wherever it may be situated, and if all the property of the corporation was in Kentucky, and the taxes paid thereon in Kentucky, the General Assembly seemed to realize that in such a case to require the shareholders also to pay taxes on their stock would be double taxation. It is conceded that shares of stock in a foreign corporation, which is not doing business in this state, nor paying taxes here, owned by a resident of this state, are subject to taxation; but it is contended that such shares of stock are exempt, provided the foreign corporation does business and pays taxes to the state, and it matters not how infinitesimal the amount as compared to the whole of its property throughout the states. Such construction of the statute was never intended by the General Assembly. In the case of *Commonwealth, by, etc., v. Lovell, Jr.'s Trustee*, 101 S. W. 970, 31 Ky. Law Rep. 105, this court said: "As the case must be reversed for the error pointed out, we think it is proper to say that, on the merits, the stock owned by the trustee in the foreign corporation was not exempt from taxation, because the foreign corporation paid taxes on certain real property in this state. Section 4088, Ky. St. 1903, upon which the theory of exemption is based, is as follows: 'The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchise as herein provided.' The foreign corporation does not pay taxes to this state upon its corporate franchise, or upon any of its personal property, and therefore its shares of stock do not come within the purview of the statute. In the case of *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240, the Supreme Court of the United States, in reviewing the statute of Ohio, substantially the same as section 4088 of our statute, and where the same question we have here arose, said: 'The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the state. \* \* \* This means clearly those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio.'" In the case of the *City of Lexington, etc., v. Walsh's Trustee*, 102 S. W. 891, 31 Ky. Law Rep. 448, the appellee being the same as in this case, the court said:

"It may not be inappropriate to say that in our opinion the court erred to the prejudice of the city in holding the \$80,000 of the Western Union Telegraph Company stock not assessable in the hands of the appellee; but as the city did not prosecute a cross-appeal, we are powerless to correct it. It seems to us, upon the whole case, that the appellee had been charged with a much less sum than it should have been. *Commonwealth, by, etc., v. Mrs. H. L. Lovell, Jr.'s Trustee*, opinion rendered April 28, 1907, 101 S. W. 970, 31 Ky. Law Rep. 105; *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240." The Supreme Court of the United States, in the case of *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240, in construing the statutes of Ohio, which in substance and effect are the same as our statutes upon this subject, said: "The plaintiff in error relies upon an exemption contained in the main subdivision of the third section of the act, which reads as follows: '(9) Each individual in this state may hold exempt from taxation personal property of any description, of which the individual is the actual owner, not exceeding fifty dollars in value; \* \* \* no person shall be required to include in his statement, as a part of the personal property moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, which he is required to list, any share or portion of the capital stock or property of any corporation or company which is required to list or return its capital and property for taxation in this state.' Swan & C. Rev. St. § 1441. Section 59 of the same act provides that 'no person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company.'"

As the finding of the circuit court shows that a part of the property of the Western Union Telegraph Company was in the state of Ohio, and that it paid taxes on the same to the state, the plaintiff in error insists that the shares of stock held by him in the company were exempt from taxation by the clause of the act of April 5, 1853, which we have quoted. This contention cannot be sustained. The law taxes the shares of the plaintiff in error unless they are "expressly exempted." The burden is on him to show an express exemption. There is no exemption, unless the payment by the Western Union Telegraph Company of the tax imposed on its property situated in the state, and which the finding of fact made by the circuit court show was but a small part of the whole property, relieves from taxation its shares held by a resident of the state. It may be conceded that generally the capital or the capital stock is its property. *Bank Tax Case*, 2 Wall. (69 U. S.) 200, 17 L. Ed. 793; *Nat. Bank v. Commonwealth*, 9 Wall. (76 U. S.) 353, 19 L. Ed. 701. But the shares held by the stockholders are distinct from the capital stock of the corporation, and the

taxation of both is not necessarily double taxation. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547. The claim therefore of the plaintiff in error is to the exemption of a certain class of his property from taxation. But it has been repeatedly held by this court that an exemption from taxation must be expressed in clear and unmistakable terms, and cannot be shown by doubtful or ambiguous language. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Gilfillan v. Canal Co.*, 109 U. S. 401, 27 L. Ed. 977.

The case therefore depends upon the construction of the statute. The Supreme Court of Ohio has decided that shares owned by a resident of Ohio in a foreign corporation, none of whose capital was taxed in Ohio, but all of it in the state where the corporation had its home, was taxable in Ohio. *Bradley v. Bauder*, *supra*. The controversy on this part of the case is therefore reduced to the question whether the Legislature has clearly and unmistakably expressed the purpose in the act under consideration to exempt from taxation shares in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in Ohio. The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the state. *Jones v. Davis*, 35 Ohio St. 474. This clearly means those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio. If the Legislature had intended to allow an exemption in such a case, it could and would have expressed that purpose by words not admitting of doubt. As the shares of the plaintiff in error in the Western Union Telegraph Company were not only not expressly, but not even by fair implication, exempted from taxation, we are of the opinion that the tax complained of was authorized by law.

Even conceding that the General Assembly in the enactment of section 4088 intended to relieve the shares of stock in a case like this, from taxation, did it have the power to do it? By section 171 of the Constitution it is provided that taxes should be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and by section 170 it is provided what property is exempted from taxation. It is certain that appellee's property sought to be taxed herein is not included within the exemptions, and by section 171 the property is required to be assessed for taxation. By these provisions the General Assembly is clearly limited in exempting property from

taxation; and if it intended to require only a small part of the personal property subject to taxation to be assessed, as in this case 1 per cent., it clearly had not the power to do it, and if so intended, the section of the statute referred to is void to that extent.

For these reasons the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

#### CUMBERLAND TELEPHONE & TELEGRAPH CO. v. OVERFIELD.

(Court of Appeals of Kentucky. Dec. 13, 1907.)

##### 1. TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF—PLAINTIFF—DEPOSITION.

Civ. Code Prac. § 606, subd. 3, declaring that no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief, did not prohibit the reading of plaintiff's deposition after several witnesses had testified for her in chief, where her deposition was taken before such witnesses testified.

##### 2. SAME — INSTRUCTIONS — ASSUMPTION OF FACT.

An instruction to find for defendant telephone company, unless, while plaintiff was driving along the road, she came in contact with a wire belonging to defendant, and which defendant had negligently permitted, if it had done so, to hang over and near the roadbed, and obstruct the travel thereon, did not assume that defendant telephone company "negligently permitted" its wire to hang over the road and obstruct public travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

##### 3. DAMAGES—PLEADING—GENERAL DAMAGES.

General damages need not be averred, being such as the law presumes to have accrued from the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 406-413.]

##### 4. SAME.

A petition in a personal injury action, alleging that plaintiff was thrown with great force from her buggy, rendering her unconscious, severely injuring her head and neck, wrenching and spraining her spine, bruising, spraining, and laming her right leg and arm, cutting and bruising painfully her face, and causing great internal injury and physical and mental shock, and that she was permanently disabled and her health permanently impaired, was sufficient to authorize a recovery for a permanent reduction in power to earn money; it being a necessary incident of permanent disability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 410, 441-448.]

##### 5. SAME—EVIDENCE—SUFFICIENCY — IMPAIRMENT OF EARNING CAPACITY.

In a personal injury action, evidence that prior to the accident plaintiff was in good health and had done the cooking, washing, ironing, and general housework for a large family, and that thereafter she was unable to perform any of those duties, authorized a recovery for permanent reduction in power to earn money, the extent thereof to be determined by the jury from their common knowledge and experience.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 509.]

##### 6. APPEAL—REVIEW—HARMLESS ERROR — INSTRUCTIONS.

In a personal injury action, defendant contended that error in instructing to find "also

a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction, after the conclusion of the argument and just as the jury was retiring. It did not appear that defendant asked permission to reargue the case, and the court not only erased the objectionable words, but admonished the jury to disregard them. *Held*, that defendant was not in any way prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228; vol. 46, Trial, §§ 553, 718.]

#### 7. EVIDENCE—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY—PERMANENCY OF INJURIES.

In a personal injury action, the permanency of injuries shown may be proved by the opinion of a physician.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2336, 2337.]

#### 8. DAMAGES—EVIDENCE—SUFFICIENCY—PERSONAL INJURIES.

Evidence, in a personal injury action, *held* to justify a finding both as to the character of plaintiff's injuries and the cause thereof in accordance with her contention.

#### 9. SAME—EXCESSIVE.

After the accident, plaintiff was up a few times, but finally went to bed, and was thereafter confined to her room. She suffered a great deal. The accident produced a concussion of the brain and spinal cord, and a functional derangement of the bladder, and she was partially paralyzed in her right leg and arm, and at the time of the trial, more than a year after the accident, she was in a helpless condition, and her injuries were permanent. *Held*, that a verdict of \$7,500 was not so excessive as to justify a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Personal injury action by Mrs. Frank Overfield against the Cumberland Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Yeaman & Yeaman and W. L. Granberry, for appellant. N. Powell Taylor, for appellee.

CLAY, C. Appellant, Cumberland Telephone & Telegraph Company, owned and operated a telephone line along the Dixon and Henderson road, in Henderson county, Ky. The wire at the place of the accident which will be hereinafter described was attached to the limb of a tree on one side of the road, and to a fence post on the other, and hung so low as not to permit a buggy with a top to pass under it. This condition of the wire was known to appellant for some time prior to the accident to appellee. On December 7, 1905, appellee was driving a gentle horse along the road, when her buggy came in contact with the wire. The horse became frightened, and, after rearing and plunging several times, finally ran away. The wire cut through the bed of the buggy below the seat, and hurled the top of the buggy and appellee to the ground, inflicting upon her certain injuries which will be hereafter discussed.

On April 1, 1906, appellee instituted this action to recover of appellant damages for her

injuries. The first trial took place in September, 1906, and resulted in a hung jury. The second trial, which occurred in February, 1907, resulted in a verdict for appellee in the sum of \$7,500. A new trial was refused, and the Cumberland Telephone & Telegraph Company is here on appeal with the following assignment of errors: (1) The court erred in permitting the deposition of appellee, plaintiff below, to be read to the jury after several witnesses had testified for her in chief. (2) Instruction No. 1 assumes that appellant, defendant below, "negligently permitted" its wire to hang over the road and obstruct public travel thereon. (3) The instruction to find for appellee "for any permanent reduction in her power to earn money" was error, as there was no averment nor proof justifying it. (4) The error in instructing the jury to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction after the conclusion of the arguments on both sides and just before the jury retired. (5) A verdict for \$7,500 for personal injury, caused by being thrown from a buggy, with no proof of its permanency, and no evidence nor instruction authorizing punitive damages, is flagrantly excessive.

These alleged errors will be considered in their order.

1. It appears that the deposition of appellee taken on September 1, 1906, was read in evidence over the objection of appellant, after some eight or nine witnesses had previously testified for her in chief. Appellant contends that subsection 3 of section 606 of the Civil Code of Practice prohibits such practice. That provision is as follows: "No person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief; nor in an equitable action, after taking other testimony for himself in chief." The manifest object of this provision was to prevent a party to a suit from sitting by and hearing his own witnesses, and then taking the stand in his own behalf and supplying the deficiencies in their testimony. This section of the Code should be interpreted in the light of the purpose for which it was enacted. To testify is to make a solemn declaration on oath or affirmation, for the purpose of establishing or making proof of some fact (*Nash v. Hoxie*, 59 Wis. 388, 18 N. W. 408), and it signifies the giving of testimony whether orally or in writing (*Case v. James*, 90 Wis. 320, 63 N. W. 237). In this sense it is used in the above section of the Code, for it provides that a party shall not testify for himself in chief in an equitable action, where testimony is usually taken by deposition, after taking other testimony for himself in chief. We are therefore of the opinion that, so far as this provision of the Code is concerned, a party who testifies by deposition testifies when he is sworn and de-

poses, and not when the deposition is read. All that is necessary then is for a party to give his deposition before his other witnesses testify in chief, either orally or by deposition. As appellee's deposition was the only one used by her, and as it was taken long before her other witnesses testified for her in chief, it was entirely proper, under the circumstances, to permit it to be read to the jury.

2. Appellant contends that instruction No. 1 assumes that appellant "negligently permitted" its wire to hang over the road and obstruct public travel. That instruction is as follows: "The court instructs you to find for the defendant, unless you shall believe from the evidence that while plaintiff was driving along the public road at the time and place mentioned, and while she was exercising ordinary care for her own safety, if she was so, she, the plaintiff, came in contact with a line of wire belonging to or under the control of the defendant, and which defendant or its agent in charge of said line had negligently permitted, if it had done so, to hang over and near the roadbed, and obstruct the travel thereon at said time, and if you shall also believe from the evidence that the defendant or its agent in charge thereof knew, or by the exercise of ordinary care could have known, of its said condition in time to have repaired or removed the same and prevented the alleged injury, if any, but failed to do so, if it did so fail, and if under these circumstances and by reason thereof the plaintiff was thrown to the ground and injured by such contact with the said wire, then, in that event, you will find for plaintiff, and award her such amount in damages as will fairly and reasonably compensate her on account of her mental and physical suffering endured by her, if any, by reason thereof, also a reasonable compensation for the time she has lost from her business, if any, by reason thereof, together with a reasonable compensation for any permanent reduction in her power to earn money, if any, by reason thereof, not exceeding upon the whole the sum of \$15,000, the amount claimed in the petition." Counsel for appellant, after stating that the language is, "If the jury shall believe from the evidence that \* \* \* the plaintiff came in contact with a line of wire \* \* \* which defendant had negligently permitted—if it had done so—to hang over the roadbed and obstruct travel," etc., argue that the only question submitted to the jury was whether the plaintiff came in contact with the wire, and that the question of negligence upon the part of the defendant was assumed, or at least the average juror would so construe the instruction, notwithstanding the parenthetical words, "If it had done so." It will be observed, however, that counsel are mistaken both as to the language used and as to its effect. The proposition in regard to negligence is coupled with the preceding propositions by the copulative conjunc-

tion "and," and in such manner as to make it necessary for the jury, in order to find for appellee, to believe, not only the preceding propositions, but this particular proposition itself. The meaning of the language is just the same as if the court had said: "And that the defendant or its agent in charge of said line had negligently permitted said wire, if it had done so, to hang over and near the roadbed," etc. Besides, the language used contained the qualifying clause, "if it had done so," and the effect of this was to exclude from the minds of the jury the idea that negligence was assumed.

3. Counsel for appellant insist that because there was no averment in the petition of any permanent reduction in appellee's power to earn money, and no proof that she was a money earner, it was error to allow compensation on that account. The petition, after alleging that "plaintiff was thrown with great force from said buggy, and hurled with much violence against the said roadway, rendering her unconscious, severely injuring her head and neck, wrenching and spraining her spine and the tendons and ligaments thereof, bruising, spraining and laming her right leg and right arm, cutting and bruising painfully her face, and causing her great internal injury, and physical and nervous shock," further alleges that "she is permanently disabled and crippled, and her health permanently impaired, as a result of her said injuries." It is insisted by counsel for appellant that the above allegations are not sufficient to authorize a recovery for permanent reduction in power to earn money, but that the petition itself should have specifically alleged a permanent reduction in power to earn money. In support of this position, counsel cite a large number of authorities to the effect that special damages should be specially pleaded. This proposition is undoubtedly true, for this court has held in a number of instances that a plaintiff cannot recover for special damages such as loss of time, physicians' bills, bills for medicines and nursing, etc., unless such items are specially pleaded (*South Covington, etc., v. Ware*, 84 Ky. 267, 1 S. W. 293; *L. & N. R. R. v. Mason*, 72 S. W. 27, 24 Ky. Law Rep. 1623; *Jesse v. Shuck*, 12 S. W. 304, 11 Ky. Law Rep. 463; *L. & N. R. R. Co. v. Reynolds*, 71 S. W. 516, 24 Ky. Law Rep. 1402; *Barles v. Louisville Electric Light Co.*, 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186; *C. & N. Ry. Company v. Hamner*, 66 S. W. 375, 23 Ky. Law Rep. 1846; *Illinois Central R. R. Co. v. Hanberry*, 66 S. W. 417, 23 Ky. Law Rep. 1867; *L. & N. R. R. Co. v. Farris*, 100 S. W. 870, 30 Ky. Law Rep. 1193. This whole question depends upon whether a permanent reduction in power to earn money is an item of special damage, or may be recovered for under a claim of general damages. General damages are such as the law presumes to have accrued from the wrong complained of, and need not

be averred. *Alexander v. Humber*, 8 Ky. Law Rep. 619; *Brown v. Railway Co.*, 99 Mo. 310, 12 S. W. 655. In *Maxwell on Code Pleading*, p. 79, the rule is thus stated: "Damages which necessarily and generally result from the wrongful act which is the subject of the action may be recovered under a general claim for damages." In *Bradbury v. Benton*, 69 Me. 199, the court said: "In legal contemplation all damages which will be sustained as the effect of the injury are sustained immediately. The future effect of the injury is not special damage, which must be alleged, but general damages which necessarily flow from the injuries received." In *Watson on Personal Injuries*, p. 383, we find the following: "It has been held that it is not necessary to claim damages for the future effects of injuries sustained, as such consequences are general, as distinguished from special, damages." And on page 639 the same authority says: "There need be no special averment of diminution of earning capacity, where the injuries described are of a nature usually and ordinarily to produce such results." We are therefore of the opinion that permanent reduction in power to earn money is a necessary incident of permanent disability. All that it is necessary to allege is permanent injury or such facts as show that the injury is permanent. *Maysville & Big Sandy R. R. Co., etc., v. Willis, etc.*, 104 S. W. 1016. Permanent reduction in power to earn money is merely the test to be applied by the jury in determining the compensation to be awarded for the permanent injury. As appellee alleged permanent disability, it was proper for the court, so far as the pleadings were concerned, to instruct the jury to award her damages for any permanent reduction in her power to earn money.

But counsel for appellant further insist that appellee was not entitled to recover compensation for any permanent reduction in her power to earn money, as there was no evidence of her earning capacity. In *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598, the rule is thus stated: "A party personally injured from negligence may recover of the defendant damages for his inability to labor or transact business in the future, without any evidence of his success in business prior to his injury, or the extent of his earnings. Direct proof of any specific pecuniary loss is not indispensable to a recovery." In *Macon v. Paducah St. Ry. Company*, 110 Ky. 680, 62 S. W. 496, this court said: "The court also allowed for loss of capacity to perform the kind of labor for which he was fitted. This was error. It is not for the court or jury to undertake to determine the kind of labor for which he was or might become fitted." In *South Covington & Cincinnati Ry. Co. v. Bolt*, 59 S. W. 28, 22 Ky. Law Rep. 906, this court laid down the following rule: "Under the laws of this state she was entitled to earn wages, and, if she was deprived of her

ability to do so by the negligence of the appellant, she is entitled to recover a fair equivalent in money. \* \* \* Our opinion is that, if a married woman is injured by the negligent act of another, she is entitled to maintain an action for damages, and the same criterion of damages exists as to her as to a man or a single woman." Furthermore, in the case of a permanent injury to an infant, his recovery for permanent reduction in power to earn money, in a suit by his next friend, is limited to the time after he arrives at his majority. It is manifest, therefore, that it would be impossible to furnish any direct evidence of his earning capacity at that time. If, then, such evidence were a prerequisite to a recovery, there could be no recovery, for any statement as to the future earning capacity of an infant would be mere speculation, and not evidence. Of course, evidence of earning capacity is always proper, but we do not think the failure to offer such evidence is fatal to a recovery. Appellee showed that prior to the accident she was in good health, and had done the cooking, washing, ironing, and general housework for a large family. After that time she was unable to perform any of those duties. It would have been difficult either to allege or prove the value of such services in dollars and cents. She had the right, however, to earn money. Her power to do so was impaired. To what extent was a question for the jury, to be determined by the application of their common knowledge and experience to all the facts and circumstances of the case.

4. Counsel for appellant complain that the error in instructing the jury to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction, after the conclusion of the argument on both sides, and just as the jury was retiring to consider their verdict. It does not appear in the record that counsel for appellant asked permission to reargue the case. Furthermore, the change made in the instruction was in favor of appellant. The court not only erased the objectionable words, but admonished the jury to disregard them. The effect of this action was to impress upon the minds of the jury that, in no event, were they to award damages for loss of time. Indeed, that fact was made even more apparent than if the instruction had been altogether silent upon the subject. We therefore fail to see how appellant was in any way prejudiced by the action of the court.

5. Appellant contends that the verdict for \$7,500 is flagrantly excessive. To determine this question, it will be necessary briefly to review the evidence. The testimony for appellee, including her own and that of her daughter, her neighbors, and two reputable physicians, is to the effect that prior to the accident she was a fairly strong woman;

that she had eight children, and did the washing, ironing, and scrubbing and general housework for the entire family; that after the accident she got up for a few times, but finally went to bed, and had been confined to her bed or room ever since; that she had suffered a great deal from her back and head; that she did not see well out of one eye, and had a roaring all the time in one ear; that the accident produced a concussion of the brain and spinal cord, and a functional derangement of the bladder; that she was partially paralyzed in her right arm and leg; that at the time of the trial, more than a year after the accident, she was in a helpless condition, and growing worse all the time; that she was unable to keep anything on her stomach, and had frequent rigors and sinking spells; that her family had frequently to take her up and bathe her limbs in order to ease her pain; that before the accident she weighed about 120 pounds, while at the time of the trial she weighed about 85 or 90 pounds. One of the physicians also testified that her injuries were permanent, but upon objection by appellant this evidence was excluded by the court. This ruling of the court was not proper; for, under such circumstances, it is always proper to prove the permanency of injuries by the opinions of physicians.

One of the physicians who testified for appellant stated that he called to see appellee on September 1, 1906; that he examined her, and found her right side and arm sore and tender; that appellee said she was paralyzed, but she was not; that she could put her hand to her head, and could walk across the floor with difficulty; that it was exceedingly painful, and that she could not bear weight on her right leg; that in his opinion she was suffering from neurasthenia, and kind of nerve tire and exhaustion, and that she also had symptoms of hysteria; that he did not believe her condition was due to the injury received; that he did not know what it was due to; that it might be due to massage or a number of causes; that without any knowledge of her accident he would say that she was a neurotic, and that she was suffering from hysteria alone; that he found no evidence of concussion of the brain or spinal cord. The other physician who testified for appellant said that he called to see appellee on January 26, 1907; that she seemed thin, emaciated, and her general health not good; that this condition was due to the nervous strain through which she had been going, and was not due to the accident; that she seemed anæmic and of a weak, nervous make up; that he ascribed her condition to hysteria, confinement in the house, and lack of exercise; that hysteria was a very difficult disease to treat and overcome; that it might have been due to the accident; that in his opinion appellee was able to come to court. It is manifest from the verdict in this case that the jury adopted the views of appellee's

witnesses both as to the character of her injuries and the cause thereof. And we confess that this conclusion appears altogether reasonable in view of the fact that prior to the accident appellee's health was good, and there was no evidence even of that neurotic condition discovered by appellant's physicians after the accident, and for which they do not satisfactorily account on any other ground. According to the testimony of her witnesses, appellee was severely injured and suffered intense physical and mental pain. By reason of her injuries, she was partially paralyzed and became a mental and physical wreck. At the time of the trial, which occurred more than a year after the accident, she was practically in a helpless condition, and was growing weaker all the time. Without regard to the statement of her physician, which should have been permitted to go to the jury, we are of the opinion that there was sufficient evidence to lead to the conclusion that her injuries were permanent. When the character of her injuries is considered in connection with the suffering she must have experienced, both physically and mentally, we are unable to say that a verdict of \$7,500 is so excessive as to justify us in reversing this case.

Judgment affirmed.

BEGLEY et al. v. COMBS et al. (FUGATE, Intervener).

(Court of Appeals of Kentucky. Dec. 20, 1907.)

1. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding of the chancellor supported by evidence will not be set aside on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

2. LIS PENDENS—NOTICE—PURCHASER PENDING SUIT—BONA FIDE PURCHASER.

A vendor delivered to the purchaser a title bond, reciting the payment of the price. The bond was recorded. The vendor sued to enforce his lien for the unpaid price, but failed to file notice of lis pendens as required by Ky. St. 1903, § 2358a. Pending the suit a third person in good faith, and without notice, purchased the premises from the purchaser. Held that, since the recording of the title bond was, under section 500, notice that the purchase money had been paid, the third person acquired title as against the vendor.

3. ESTOPPEL—EQUITABLE ESTOPPEL—NEGLIGENCE.

Where one of two innocent purchasers must suffer, the one whose negligence occasioned the loss must bear it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 188.]

Appeal from Circuit Court, Knott County. "Not to be officially reported."

Action by Felix Begley and another against Robert Combs and another, in which Nancy Fugate intervened. From a judgment for the intervenor, plaintiffs appeal. Affirmed.

See 87 S. W. 1081.

Hazelrigg, Chenault & Hazelrigg and S. O. Kilgore, for appellants. J. J. O. Bach and Smith & Combs, for appellees.

BARKER, J. Felix Begley and wife sold to Laura Combs a tract of land belonging to Mrs. Begley for the sum of \$500, of which \$300 was paid down and a note executed for \$200. The vendors executed and delivered to the vendee a title bond, by which they bound themselves to make her a good title to the property. The bond recited that all the consideration was paid. Afterwards, the note for \$200 not being paid, Begley and wife instituted an action in the Knott circuit court to enforce their lien against the land for the unpaid purchase money. Upon the trial of the case the circuit judge dismissed the petition, and from this judgment Begley and wife prosecuted an appeal to this court, with the result that the judgment was reversed, the opinion for the court being written by Judge Hobson, and to be found in 87 S. W. 1081, 27 Ky. Law Rep. 1115. We do not deem it necessary to enter into the particulars of this branch of the case. The facts are set out in the opinion cited. It is sufficient to say that, under the issues as joined between the original vendors and vendee, we then thought that justice required that the contract of purchase should be set aside, and the purchaser given a lien for what she had paid. When the case returned to the circuit court, the appellee here, Nancy Fugate, intervened, claimed the land in question, and in her petition set up the following facts as a basis for her claim: That pending the appeal of the case between Begley and wife and Combs and wife she had purchased the property from Combs and wife for the sum of \$750 cash; that she had no notice of the Begley and wife suit, and none that they had a claim for unpaid purchase money on the land. Issue was joined upon the allegations of her petition, and the trial before the chancellor resulted in a judgment in favor of the intervener, and of this Begley and wife are here for the second time on appeal.

There is no pretense that a notice of the *lis pendens* lien of Begley and wife was ever recorded in the county clerk's office of Knott county, as required by section 2358a, Ky. St. 1903, and therefore, if the intervener had no notice of the suit, and was a purchaser in good faith for value, undoubtedly the judgment of the trial court was correct. The question is one wholly of fact. The evidence for Begley and wife, taken as a whole, and giving it full value, in our opinion simply serves to create a suspicion that Mrs. Fugate knew, or might have known, of the pendency of their suit against Combs and wife; but against this is her positive testimony that she knew nothing whatever of it, or that there was any question as to the title of Combs and wife. In this she is strongly corroborated; and, without going into the details of the testimony, we deem it sufficient to say that there was ample room for the chancellor to conclude that she was a bona fide purchaser without notice, and we do not

feel, under these circumstances, at liberty to set aside his judgment on the facts. The whole trouble in this case was due to Mrs. Begley's negligence. In the first place, she placed in the hands of her vendee, Combs, a bond for title reciting that all of the purchase money had been paid. This was recorded, and, under the provisions of section 500, Ky. St. 1903, was notice to all the world that the purchase money had all been paid. In the second place, she failed to comply with the statute as to recording notice of her *lis pendens* lien. This enabled the Combs to impose upon Mrs. Fugate. If one of two innocent persons must suffer, the law is elementary that this must be borne by him whose negligence occasions it.

For these reasons, the judgment is affirmed.

### COMMONWEALTH v. LEDMAN.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

#### 1. TAXATION—TAXABLE ASSETS—CORPORATIONS—ORGANIZATION EXPENSES.

Money paid by a corporation for the purpose of effecting an organization or putting the company into legal shape to do business is not a taxable asset in the hands of the company, as the value of the corporation's franchise is not dependent on the amount expended in creating it.

#### 2. SAME—FOREIGN CORPORATIONS—PAYMENT OF LICENSE FEES.

That a corporation, organized in New Jersey, but doing all of its business in Kentucky, was required to pay an annual license fee to the state of New Jersey to continue its corporate existence, did not enhance the value of its franchise taxable in Kentucky.

#### 3. SAME—TAXATION OF CORPORATE SHARES—STATUTES.

Ky. St. § 1903, § 4085, provides that the property of all corporations, except as otherwise provided, shall be assessed to the corporation, and that so long as the corporation pays the taxes on all of its property the stockholders shall not be required to list their shares for taxation. *Held*, that under Const. § 171, providing that all taxation shall be equal and uniform, section 4085 was applicable to foreign as well as domestic corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 292.]

#### 4. STATUTES—CONSTRUCTION.

Where a statute is susceptible of two constructions, one inequitable and unjust, as well as rendering the statute unconstitutional, and the other rendering the act valid and equitable, the latter construction will be applied.

#### 5. TAXATION—FOREIGN CORPORATIONS—HOLDING COMPANIES—SHARES OF STOCKHOLDERS.

A Kentucky railway company, desiring to increase its capital, procured the organization of a foreign corporation, with additional rights and powers, which, however, owned no property and exercised none of its powers, except to hold the stock of the railway company, for which the holding company's stock was exchanged according to a specified proportion; the only assets of the holding company being the stock in question, and the amount paid to it by the railway company to be disbursed to the holders of its stock as dividends. Though the nominal capital of the holding company exceeded that of the railway company, the only property represented was that owned by the railway company, on which full taxes were assessed and

paid. *Held*, that the shares of the holding company were not subject to taxation, under Ky. St. 1903, § 4085, providing that, if the assets of a corporation are fully taxed and taxes paid by it, its shares shall not be taxable to the holders.

**6. SAME—FRANCHISE—RIGHT TO BE A CORPORATION.**

A foreign corporation, organized merely to hold the stock of another corporation, so long as it never acquired any property or engaged in any business, was not taxable; its "right to be" a corporation being of no taxable value.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 45, Taxation, §§ 214, 287.]

**7. SAME—REMOVAL OF CAUSES.**

A foreign corporation's right to remove actions against it to the federal court does not give to its shares a taxable value, under the rule forbidding the states to abridge rights guaranteed by the federal Constitution by a state tax.

**8. SAME—CAPITAL STOCK—VALUATION.**

Under Ky. St. 1903, § 4079, requiring the board of valuation and assessment to value the capital stock of railway companies for taxation, the board in its valuation must consider every element of property, tangible or intangible, owned by the company, together with the corporation's franchise and earning capacity; but the board, in making the valuation, is not governed by the property value of the railway company's shares.

**9. SAME—REVALUATION.**

Where all the property of a railway company was valued for taxation by the board of valuation and assessment for certain years, a revaluation for those years could not be made.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the commonwealth, by George H. Alexander, revenue agent, against S. R. Ledman. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

M. J. Holt (B. F. Washer, of counsel), for appellant. Humphrey & Humphrey and L. R. Yeaman, for appellee.

**LASSING, J.** The question involved in this appeal is the right of the state, under existing laws, to tax the shares of the Louisville Traction Company in the hands of their owner. Proceedings were instituted in the Jefferson county court, under section 4241 of the Kentucky Statutes of 1903, to assess for the purpose of taxation in the hands of appellee certain shares of stock which he owned in the Louisville Traction Company as of September 15, 1903, September 1, 1904, and September 1, 1905. Appellee denied the right of the state to have said stock assessed on the ground that it was fully tax-paid. The county court having decided in favor of appellee, the commonwealth appealed to the circuit court; and, the circuit court having likewise ruled against the commonwealth, it has appealed to this court.

It appears that appellee's stock was not issued until April 1, 1904, and that on September 15, 1903, appellee owned merely the right to have this stock issued to him at a later date; but, inasmuch as he owned the property which was surrendered up to the Louisville Traction Company in considera-

tion for its issuing the shares in question, the case may be treated as though the shares of stock were on September 15, 1903, in actual existence. This brings us, then, to the consideration of the question: Was this stock of the Louisville Traction Company in the hands of appellee subject to taxation on September 15, 1903, September 1, 1904, and September 1, 1905? or was it tax-paid, and therefore not subject to further assessment and taxation under existing laws? In order to arrive at a proper determination of this question, it is necessary to go somewhat into the history of the organization and formation of the Louisville Traction Company.

Some time prior to the year 1903 all of the street railway lines in the city of Louisville were merged into one corporation, known as the "Louisville Railway Company." At that time, owing to the growth and development of the city of Louisville, it became necessary for the Louisville Railway Company to extend its lines and make certain betterments and improvements in its properties. In order to do this it either had to issue bonds or increase the issue of its stock and sell same for the purpose of raising the necessary money. It was deemed advisable at that time to raise \$1,750,000 for the purposes which have been designated. The Louisville Railway Company had issued both preferred and common stock. By reason of the growth of the city and the steadily growing business, the value of the common stock very much exceeded that of the preferred, and in 1903 the common stock was selling in the open market for about \$175 per share. The company did not deem it wise to further increase its bonded indebtedness, and elected to raise the desired money by issuing and selling common stock. A dispute arose between the holders of the preferred and the holders of the common stock as to who had the right to receive and pay for this common stock when issued; it being the contention of the common stock holders that, as the dividend on the preferred stock was guaranteed and secured to the preferred stock holders before any dividend could be paid on the common stock, they should have no voice in the sale of the common stock, and that the common stock holders alone should have the right to receive and pay for such common stock as was issued. To this proposition the preferred stock holders refused to agree. As a result of this disagreement it was finally determined that a "holding company" should be formed, and that this "holding company" should issue certificates of preferred and common stock, in exchange for the stock of the Louisville Railway Company, and that a fair and equitable adjustment of the differences existing between the preferred and the common stock holders would be to have the "holding company" issue one share of preferred stock in the "holding company" and one-fifth of a share of common stock in the "holding company" to the preferred share holders in the



railway company in exchange for each share of preferred stock in the railway company, and to issue to the share holders of common stock in the railway company three shares of common stock of the "holding company" in exchange for one share of common stock in the railway company and a "bonus" of \$55; or, in other words, each share of preferred stock in the railway company was entitled to receive one share of preferred stock and one-fifth of a share of common stock in the "holding company," and each share of common stock in the railway company was, when surrendered up, together with \$55 in cash, entitled to receive three shares of common stock in the "holding company." It was further agreed that, if any additional issues of common stock became necessary, the preferred stock holders should have no voice in determining the amount of stock that should be issued or the disposition that should be made thereof. Upon investigation it was found that the laws in this state would not permit of this discrimination against the preferred stock holders in the conduct of the affairs of the company, and it was therefore found necessary that the "holding company" should be incorporated in some state where this provision of the agreement would not be in conflict with the general laws. For this reason, and for this reason only, the Louisville Traction Company, which was organized for the sole purpose of acting as a "holding company" for the share holders of the Louisville Railway Company, was organized under the laws of the state of New Jersey.

Notice of the plan agreed upon for the settlement and adjustment of the differences between the common and preferred share holders was sent to each of the stock holders of the Louisville Railway Company, with the request that, if they approved of the plan of settlement and adjustment and desired to participate therein, they would deposit their stock at the place designated by the officers of the Louisville Traction Company, for the purpose of having the plan of adjustment carried into effect. That this proposed settlement was acceptable to the stock holders of the Louisville Railway Company is evidenced by the fact that more than 99 per cent. of all of the stock of the Louisville Railway Company accepted the proposition and deposited its stock (the common stock holders paying the necessary amount of money), and all so doing were issued certificates of stock, according to the terms of the agreement, in the Louisville Traction Company, in exchange for their stock in the Louisville Railway Company. In order to perfect and carry out this arrangement, some considerable time was necessary, and between September, 1903, and April, 1904, the transfer was made. The stock of the Louisville Traction Company was not issued to holders of shares in the Louisville Railway Company until some time in April, 1904, although the shares were surrendered up by

them along during the fall and winter of 1903 and 1904. During the formative period above referred to the traction company received large sums of money from the holders of common stock in the Louisville Railway Company under the terms of the agreement. This money was from time to time turned over by the Louisville Traction Company to the Louisville Railway Company, to be used for the purpose of making extensions and betterments. The record discloses that upon one assessment period there was a large sum of this money in the hands of the traction company. This, in another proceeding, the traction company was required to list and pay taxes on. On the other assessment periods covered by this litigation there was no fund in the hands of the Louisville Traction Company. All of the stock holders of the Louisville Railway Company not having accepted this proposition, it became necessary for the company to retain its corporate existence. This it has done, and annually, as required by law, the officers of the Louisville Railway Company have made out and filed the reports that the proper taxing authority, which is the board of valuation and assessment, desired, and it has at all times been amenable to the orders and directions of the board of valuation and assessment, in so far as furnishing any desired information relative to the conduct of its business is concerned. These reports, as made and furnished by the railway company, have been received by the board of valuation and assessment, and based upon them the property, including the tangible property, as well as the value of the franchise of the Louisville Railway Company, has been annually assessed and the taxes paid thereon by the Louisville Railway Company, as fixed and determined in said assessment.

There is no complaint on the part of the commonwealth that any part of the tangible property of the Louisville Railway Company has escaped taxation, or that its franchise has not been fully and fairly valued for taxation. The contention of the commonwealth is that inasmuch as the Louisville Traction Company is a foreign corporation, a separate and distinct organization, holding a charter giving it many rights and privileges which, if not now enjoying and exercising, it may later exercise and enjoy, and for which it pays to the state of New Jersey an annual license tax of \$4,000 or more, therefore its stock cannot be said to be tax-paid because the Louisville Railway Company has been fully assessed and its taxes paid. Stress is laid by the commonwealth upon the fact that it cost something like \$20,000, attorney's fee and other expenses, in order to organize and incorporate the Louisville Traction Company under the laws of New Jersey, and that it pays annually to said state a license tax for the privilege of continuing in existence. We are unable to see wherein the payment of any sum of money, large or small, for the purpose

of perfecting an organization or putting the company into legal shape to do business, can be regarded as a taxable asset in the hands of the company, or as giving to the company so organized any greater value than if its organization had been perfected without incurring any expense. The value of a franchise is not dependent in any sense upon the amount of money which is expended in creating it; but, on the other hand, we can readily see how the value of a franchise might be materially lessened because of the expenditure of a large sum of money in creating it, or in effecting its organization. Nor is the value of the franchise of the Louisville Traction Company in any wise enhanced because it is required to pay annually a license tax to the state of New Jersey for the purpose of continuing its corporate existence, any more than its value is enhanced by reason of its having to pay, under the existing laws in this state, an annual license tax in order that it may continue to do business in this state. If the contention of the commonwealth in this particular was sound, then the value of the franchise would be increased in proportion to the amount of the license tax—the larger the license tax, the greater the value of the franchise; but, on the contrary, we are rather inclined to the opinion that the converse of this proposition would more nearly represent the correct theory.

The contention of appellant that these shares should be taxed because the traction company is a foreign corporation is not well taken. Section 4085 of the Kentucky Statutes of 1903 applies alike to all corporations, and it is immaterial where the corporation is organized; the sole question being, where is it property? If all of the property of the corporation is in Kentucky, and has been taxed in Kentucky, then its shares of stock ought not again to be taxed, no matter where the corporation is incorporated. The state is not interested in the question of organization; but its aim is to reach and tax the property of every description owned by the corporation, and if this has been done the ends of the law have been fully met and the purpose of the statute satisfied. This particular point in the construction of this statute has never been passed upon by this court; but in Michigan and Ohio, with a similar provision in their tax laws to section 4085 of our statute, it has been held that, where the property of a foreign corporation is in the state and taxed, the shares of stock in such corporation are not subject to further assessment and taxation, any more than they would be if the corporation in question were domestic, instead of foreign. *Stroh v. Detroit*, 131 Mich. 109, 90 N. W. 1029, and *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829. The Constitution (section 171) provides that all taxation shall be equal and uniform, and the Legislature, in enacting section 4085 of the statute, must have intended that it should apply alike to foreign and domestic corporations

where all of their property is in this state; otherwise, not only the spirit but the very letter of the Constitution would be violated thereby, and the purpose and aim of the lawmaking power, as construed by this court, to avoid double taxation, would in many instances be defeated. It is a uniform rule of construction of this court that, where there is a doubt as to the meaning of a statute, that construction is placed upon it which will make it nearest conform to the fundamental laws as expressed in the provisions of the Constitution, and, where one construction will tend to work a hardship and another construction to relieve an inequitable and unjust burden, the latter construction is invariably given. Where one construction would produce double taxation, and another avoid it, the latter is applied. *Livingston v. Paducah*, 80 Ky. 656; *Aetna Life Insurance Company v. Coulter*, 115 Ky. 787, 74 S. W. 1050; *Cumberland Telephone & Telegraph Company v. Hopkins*, 90 S. W. 594, 28 Ky. Law Rep. 846; *Commonwealth v. Bank of Commerce*, 118 Ky. 547, 81 S. W. 679. This same rule of construction has been adopted with a degree of uniformity throughout the several states; hence it follows that the only fair construction to place upon section 4085 of our statute is that which conforms nearest to the requirements of the Constitution and will produce equity and equality in the burden of taxation, to wit, that it applies alike to foreign and domestic corporations, where all of their property is in the state of Kentucky.

This being true, we come next to address our attention to the question as to whether or not all of the property of the Louisville Traction Company is in fact in Kentucky, and whether or not all of the property it has in Kentucky is the property of the Louisville Railway Company? The tendency of courts in recent years is to look to the substance, rather than to the forms, of transactions, as is aptly illustrated by the rulings of the court in the cases of *Northern Securities Company v. United States*, 193 U. S. 301, 24 Sup. Ct. 436, 48 L. Ed. 679, *State v. St. Paul Depot Company*, 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234, and *Commonwealth v. Fall Brook Company*, 156 Pa. 488, 26 Atl. 1071. For the purpose of taxation the state is not interested in the question as to whether or not the shares are held by an individual for himself, or by some one else as representative, agent, trustee, depository, custodian, or holder. Nor can it make any difference for the purposes of taxation that a corporation, which is but an artificial person, holds this stock in a fiducial capacity, instead of an individual. Neither the character nor the value of the property is changed because it is held by a trustee or agent, whether that trustee or agent be a natural or an artificial person. Nor can it affect the value of the property that the trustee holding same should be designated a "holding company." It is immaterial, so far as the state is concerned, that

the property of the Louisville Railway Company is split up or divided into legal and equitable shares or estates. More than 99 per cent. of all of the stock of the Louisville Railway Company is held by the traction company, under an agreement entered into between the share holders representing this amount of stock in the Louisville Railway Company. The remaining fraction of 1 per cent. of the stock of the Louisville Railway Company is still in the hands of its original owners. Can it be said that this 99 and a fraction per cent. of the stock of the railway company has an increased value because of the fact that it is held by the Louisville Traction Company, as trustee or agent for the original holders? Can it be successfully contended that, because it is so held, it should bear a burden of taxation greater than that portion of the stock which is in the hands of the original owners and not in the hands of the trustees? We think not. The fact that it has been deposited with the "holding company," and that this "holding company" has issued trustee's certificates, as it were, in lieu of the original stock, does not warrant the imposition upon the property represented by this original stock of any additional burden of taxation.

But the contention of the commonwealth is that these shares are issued by the Louisville Traction Company, and the Louisville Traction Company is a separate and distinct corporation, with many charter rights and privileges, and for this reason the shares which it has issued should be made to bear a part of the burden of taxation. This contention would be entirely right and proper, since the traction company has not reported and paid upon its franchise, as provided by section 4088 of the Kentucky Statutes of 1903, if it were shown that the Louisville Traction Company had any property whatever anywhere, other than that represented by the shares of stock of the Louisville Railway Company, which it had deposited with it and for which it issued its shares of stock in exchange. Likewise the contention of the commonwealth would be true if the Louisville Traction Company were exercising any of the rights and privileges which its charter empowers it to exercise, other than acting as a "holding company" for the stock of the Louisville Railway Company. It has these rights and privileges, just as any other trustee has rights and privileges which he might exercise; but it cannot be contended that, because a trustee might exercise other rights and privileges, therefore the trust fund in his hands has a greater value than it would otherwise have. The "right to be" is not a subject of taxation under either the laws of this state or the laws of New Jersey. The "right to be" is not an item of property at all. Under the laws of New Jersey three persons may form a corporation, just as under section 538 of the Kentucky Statutes of 1903 three persons may organize for the purpose

of forming a corporation for general purposes, or as under section 673 any seven persons may form a corporation to construct a railroad. But we do not understand that the mere formation of a corporation under our laws creates property which is subject to taxation. If a corporation was formed with a capital stock of \$1,000,000, all that the state would require would be that the expenses provided for by statute in the way of organization tax or fee should be paid. Such corporation, merely upon complying with the requirements of the statute and the payment of the incorporation tax, would have the right to do business—in other words, the "right to be," to "exist"; but this "right to be" would not be an element of property that could be taxed. It might exist for any number of years; but, if it never acquired any property or engaged in any business, its "right to be" would have no taxable value. It would have no cash value, and no assessment value. A corporation so formed would likewise have a right to transact business; but until it acquired property or actually transacted some business it would have absolutely no value, and hence would not be a subject for taxation. As said in the case of Cumberland Telephone & Telegraph Company v. Hopkins, 90 S. W. 594, 28 Ky. Law Rep. 846, in speaking of the value of a corporate franchise: "This value will depend largely upon its money-earning capacity as it may be employed, and depends at last upon its being exercised." Nor can its "right to be" ever become an element of property that is subject to taxation. Its "right to be" can merely authorize or give it the "right to do," and, whenever this "right to do" is exercised or utilized by acquiring property or engaging in business, then that property or that business would be subject to taxation, and the amount of that taxation would depend altogether upon the value of the property acquired or the amount of business done. So long as the traction company, therefore, owns no property, other than the stock of the Louisville Railway Company, which has been placed in its hands under the terms of the agreement entered into between the stockholders of the Louisville Railway participating in that agreement, and is engaged in no business other than the holding of those shares and the paying over to those holding its certificates, representing those shares, such dividends as are from time to time apportioned to it, its shares are exempt from taxation, because the entire property which they represent is fully tax-paid, and therefore, by virtue of sections 4085 and 4088 of the Kentucky Statutes of 1903, it is relieved from paying the taxes a second time.

It is also insisted for the commonwealth that the Louisville Traction Company, being a foreign corporation, when questions of dispute arose between it and citizens of Kentucky, would have a right to have that question transferred to and determined in the

United States court, and that this right gives to its shares a value which should be taxed. No authority is cited to sustain this contention, nor do we believe that any can be found. This is a right which is guaranteed to a citizen by the federal Constitution. It has no taxable value, and, should the state attempt to put a value upon this right or abridge it in any way, it would be a violation of the federal Constitution. It is a well-settled principle that no right which is guaranteed by the federal Constitution can be abridged, or burdened, or incumbered by a state tax. However, since the record in the case before us shows that the traction company is engaged in no business whatever, other than paying over the dividends which it receives from the railway company to its stock holders, it is not the subject of litigation which could be removed to the federal court. It does not operate the railway company, could not be sued for damages, and any liability for personal injury must be brought against the Louisville Railway Company; and the Louisville Railway Company, being a Kentucky corporation, could not remove its cases to the federal court, but must try them in the state courts, just as it would if the "holding company" had never been formed.

We come next to consider the only remaining question in the case, and that is the contention of the commonwealth that the difference in capitalization between the Louisville Railway Company and the Louisville Traction Company should be assessed. The Louisville Railway Company has 25,000 shares of preferred stock and 46,000 shares of common stock, each of the par value of \$100 per share, making a total capital stock of \$7,100,000 par value. The traction company has 25,000 shares of preferred stock, and 110,000 shares of common stock, each of the par value of \$100 per share, making a total capitalization of \$13,500,000 par value. There is a difference, therefore, in the par value of the capitals of these two companies of \$6,400,000; and yet these capitalizations are based upon the same identical property, the tangible property of the Louisville Railway Company, to which must be added the value of its franchise. The excess, then, of the aggregate of the par value of the traction company over the aggregate par value of the railway company cannot represent actual property. The par value of a share of the stock of a corporation has no necessary relation to the actual value of such stock. For instance, two corporations may be engaged in the same business, owning similar plants and stocks of raw material of exactly the same value. The business of the corporations may be exactly the same in extent and value. The taxable value of the corporations would be precisely the same. Yet, if one had twice as many shares of stock as the other, the market value of the one would necessarily be double that of the other. For the purposes of taxation we look, not to the par value, but to the

actual value, of the shares. In order to throw light upon the actual value, many items are taken into consideration, of which the par value of the shares is but one. The earning capacity, as represented by the net profits after taking the operating expenses from the gross receipts, is a far more potent factor in determining the taxable value of the shares of a corporation than is the par value. The question to which the taxing authority must address its inquiry is: What property gives value to the stock of the Louisville Traction Company? The record shows that the stock of the Louisville Railway Company is the only property owned by the Louisville Traction Company, and hence this stock alone gives value to the shares of the Louisville Traction Company. The difference in par value between the stocks of the two companies can furnish no aid in arriving at a determination as to what is the true taxable value of the Louisville Traction Company. While it is true that the capitalized value of the Louisville Railway Company is much less than that of the Louisville Traction Company, yet as a matter of fact the market value of the two stocks at the time of the organization of the "holding company" furnishes a most apt illustration of the fact that, although capitalized at a much larger sum, the Louisville Traction Company stock is in fact worth no more in the aggregate than is the stock of the Louisville Railway Company; for we find that at the time the "holding company" was organized the common stock of the Louisville Railway Company had a market value of about \$175 per share, and for each share of common stock in the railway company, plus \$55, the holder received three shares of common stock in the traction company. Hence, each share holder contributed \$230 for every three shares of stock in the traction company which he received, and the market value of the common stock of the traction company was \$75 per share. Hence each share of common stock in the railway company, plus \$55, was actually worth its equivalent of three shares in the traction company; as shown by the value of each stock in the open market.

The total assessment of the railway company, as fixed by the board of valuation and assessment in 1904, was \$8,500,000. It is not contended that any property of the Louisville Railway Company was omitted by the board in the assessment as of September 15, 1903, or in its assessment as of September 1, 1904, or that there was any substantial change in conditions during this time. On September 1, 1905, the value of the traction company's stock had increased, and on said date the board of valuation and assessment raised the assessment of the railway company from \$8,500,000 to \$9,500,000. Whether this increase in valuation was due to the increase in the market price of the traction stock or to an increase in the net earnings of the railway company, the record does not

disclose; but, as it is a well-known fact that the market value of all stocks is more or less influenced by conditions and circumstances which have no direct bearing upon the actual value of the stock, it is not unlikely that this increase was due to the showing made in the report filed by the Louisville Railway Company that its net income had been greater the year just passed than it had during the preceding year. The only income of the traction company was the money which it received from the railway company for dividend purpose, so that, had the traction company reported, it could have given the board of valuation and assessment no information on the question of income which had not already been supplied in the report made by the railway company. This record shows that the Louisville Railway Company paid in dividends for the preceding year \$342,083.33. It is alleged that this sum was the total income of the traction company; and this is not denied, for the reason, we presume, that it could not be. Under section 4079 of the Kentucky Statutes of 1903 the duty of the board of valuation and assessment was to value the capital stock of the railway company, and in order to do this it had to take into consideration, in its valuation, every element of property, tangible or intangible, owned by that company. In fixing this valuation the board is not governed by the property value of the railway company's shares (as decided in *Henderson Bridge Company v. Commonwealth*, 90 Ky. 623, 31 S. W. 486, 29 L. R. A. 73); but it must take into consideration its franchise, its earning capacity, and its assets of every description. From the report, as filed by the company, and such other information as it may possess, it assesses the property at a fair valuation, and when once so assessed the action of the board is final and conclusive, and no further action can be taken looking to a further assessment or revaluation of the property. *Coulter v. Louisville Bridge Company*, 114 Ky. 42, 70 S. W. 20. In the present case, the board having acted and valued this property as of September 1, 1904, and again as of September 1, 1906, and the record in this case showing that the property so valued by the board is all, and in fact the identical, property which was represented by the stock of the Louisville Traction Company on those dates, no further assessment or revaluation can be made thereof; and yet that is what the effort of the commonwealth amounts to.

If it was shown that there was any property, tangible or intangible, belonging to the traction company, other than its shares of stock in the Louisville Railway Company, then the Louisville Traction Company should be required to pay taxes upon such property. There is no such showing made in this case. It is the policy of the law that all property of whatever kind or description should bear its just proportion of the public burden of taxation; that it should be taxed once, and

no more, during the same taxing period; and, where it is shown that the actual property which is here sought to be taxed has been assessed and the taxes paid thereon by the Louisville Railway Company, then this same property, though represented by the certificates of the Louisville Traction Company, is not subject to further taxation in the hands of the share holders. It will be observed that these owners and holders of stock in the Louisville Railway Company, who entered into the contract out of which the "holding company" grew or was created, surrendered up their shares of stock in the railway company and received in lieu thereof certificates of stock in the Louisville Traction Company. These certificates of stock in the Louisville Traction Company are but the representatives of the original stock which they held in the Louisville Railway Company, and are no more subject to taxation in the hands of their owners than the shares of the Louisville Railway Company were in the hands of their owners, prior to the organization of the "holding company."

For the reasons given, the judgment is affirmed.

#### BAKER et al. v. GIBSON et al.

(Court of Appeals of Kentucky. Dec. 18, 1907.)  
MARRIAGE—EVIDENCE.

In the settlement of decedent's estate, evidence held sufficient to show that the marriage between decedent and one of the defendants was legal.

Appeal from Circuit Court, Kenton County.  
"Not to be officially reported."

Action by Hetty J. Brink against W. H. Metcalfe, as administrator of Rebecca N. Gibson, and others, for the settlement of decedent's estate, consolidated with a proceeding by Mary A. Baker for a sale of the lands of Rebecca N. Gibson and distribution of the proceeds among her heirs. James Gibson entered an appearance. From a judgment in the consolidated suit, Hetty J. Brink, Mary A. Baker, and others appeal. Affirmed.

J. G. Tomlin and John L. Vest, for appellants. O. M. Rogers, for appellees.

LASSING, J. Appellee James Gibson married one Rebecca N. Ross, in Kenton county, Ky., in May, 1895. They lived together without question as to the legality of their marriage until in March, 1905, when she died. No children were born to them. At the time of her death, she owned a farm of about 100 acres of land in Kenton county, Ky., and personal property to the value of perhaps \$1,500. She left surviving her husband, James Gibson, and the appellants, who are her brothers and sisters, and the descendants of such as are dead. Appellee W. H. Metcalfe qualified as her administrator, and a few days after his qualification as such appellant Hetty J. Brink brought suit against the administrator and the heirs at law of Rebecca N. Gib-

son for a settlement of her estate. E. W. Brink, husband of Hetty J. Brink, shortly after the death of Rebecca N. Gibson, charged that James Gibson was not the lawful husband of Rebecca Gibson, and threatened to institute some sort of an inquiry or proceeding. This threat alarmed appellee Gibson, and he left Kentucky and went to Ohio. He was later induced by E. W. Brink to return to Kentucky, and convey to appellant Hetty J. Brink all of his right, title, and interest in the estate of his deceased wife for the stated consideration of \$200. Appellant Mary A. Baker filed a petition in the Kenton circuit court, seeking a sale of decedent's real estate and the distribution of the proceeds thereof among the heirs at law of Rebecca N. Gibson, deceased. Appellee James Gibson was not a party to this suit. Some time thereafter appellant Hetty J. Brink filed an amended petition, setting up the fact that James Gibson was the lawful surviving husband of Rebecca N. Gibson, and as such was entitled to a life estate in one-third of the real estate and to one-half of the personalty absolutely, and that by virtue of a deed which the said James Gibson had made to her she had acquired title to all of his right and interest in the estate. The suit to settle the estate and the suit to sell the real estate were consolidated, and appellant Mary A. Baker filed an answer to the amended petition of Hetty J. Brink, and in this answer she denied that James Gibson was the lawful husband of Rebecca N. Gibson, and denied that he had any right whatever in the estate of Rebecca N. Gibson. Issue was joined between the other heirs of Rebecca N. Gibson and Hetty J. Brink on the question as to whether or not James Gibson was the lawful husband of Rebecca N. Gibson. Thereafter James Gibson entered his appearance in the consolidated cases by filing an answer and cross-petition, in which he alleged that he was the lawful surviving husband of Rebecca N. Gibson; and he also attacked the deed, which had been filed and set up by Hetty J. Brink, and which purported to convey his interest in the estate of his deceased wife to her, on the ground that it was without consideration and had been procured through fraud and coercion, and asked to have it canceled and set aside, and his interest in his wife's estate restored to him and his rights protected therein. The affirmative matter in this answer was traversed by appellants, and they each joined issue with him upon the question of the legality of his marriage to Rebecca N. Ross. The administrator presented a claim against the estate for services which he had rendered decedent during her lifetime, amounting to \$595. The case was referred to the master commissioner to hear proof on exceptions filed to this claim. The commissioner, after hearing much proof, reported that \$250 was a reasonable allowance for these services covering the five years next before the death of decedent, and his report was afterwards

confirmed, and the claim allowed over the objection of appellants. Upon final hearing, the trial court adjudged that the deed from James Gibson to Hetty J. Brink was obtained by fraud, and was of no binding force or effect upon appellee James Gibson, and passed no title whatever to the appellant Hetty J. Brink, and that the appellee James Gibson was the lawful husband of Rebecca N. Gibson, and as such entitled to a dower interest in her estate. To test the correctness of this ruling of the trial court on these three questions this appeal is prosecuted.

The administrator offered proof showing that covering a period of some 17 years he had counseled and advised with the decedent and attended to business for her, and that, though she had frequently promised to compensate him for this service and told others that she intended to compensate him therefor, she had never done so. Appellants having interposed the plea of the statute of limitation to this claim, the master rejected all of the claim for services which antedated five years before the date of the death of Rebecca N. Gibson; and, upon final hearing, allowed him for said services to her during the last five years of her life the sum of \$250. The proof shows that the services were valuable, and it amply supports the commissioner's finding and the judgment of the court.

In the face of the record the chancellor was fully justified in finding that the deed from James Gibson to Hetty J. Brink was procured through fraud, and was not a free and voluntary transfer and sale of his interest in the estate of his deceased wife to her.

We come next to a consideration of the real question in this case: Was James Gibson the lawful husband of Rebecca N. Gibson? That he married her in due form in 1895 there is no question. That he lived with her as her husband until her death in 1905 is admitted. It is further admitted that in 1888 he married a woman in Newport, Ky., Katherine Reddick; that he separated from this woman the year following. It is insisted for appellee that this woman Katherine Reddick was at the time of her marriage to him in 1888 a married woman with a husband then living, and that she could not therefore legally enter into the bonds of matrimony with him. Much time and importance are devoted by both appellants and appellee to a consideration of the question as to where the burden of proof lies in this case. They have both come into a court of equity asking that justice be done and that the right may triumph. It is therefore a matter of small moment where the burden is placed; the inquiry of the court being directed to a just, fair, and proper determination of the question in issue. The whole case turns upon whether or not Katherine Reddick was capable of entering into the bonds of matrimony with James Gibson in 1888, when they were married. If she had at that time a living husband, then, under the well-settled

rule of law in this state, her marriage to appellee Gibson was a nullity, and of no binding force and effect; while, on the other hand, if at that time she did not have a husband living, then her marriage to James Gibson was in every respect a lawful marriage, and his subsequent marriage to Rebecca N. Gibson was a nullity. So, in order to arrive at a true and fair determination of this case, we must confine our inquiry to the question as to whether or not in 1888, when she married James Gibson, Katherine Reddick had a husband living. Appellants, realizing that this was the crucial point in their case, took the deposition of Katherine Reddick. She testified on direct examination that she was married to appellee James Gibson in 1888, and had never been divorced from him so far as she knew. On cross-examination, when asked if she, at the time she married James Gibson, had a living husband, she declined to answer or to give the name of her first husband, or to state whether or not she had been divorced from him. Upon being repeatedly pressed for answers to these questions, and after having consulted an attorney, she made this statement: "My first husband's name was Frank Redfern. He lived in Richmond, Ind., when I married him. I don't remember when. I think it was in 1879. When I left him, we were separated from that time on, when I heard from a reliable authority that he was dead. He was in a railroad wreck, and was supposed to have been killed. I then failed to hear from him for seven years and more—almost eight years. I then consulted Lawyer James Berry, of Hamilton, Ohio, and he advised me that I had a right to get married if I cared to. About a year after I was married I heard from him. I heard that he was living—that was the first I heard from him after the wreck. It was claimed that he married Hannah Roof of Cincinnati. My son claimed he saw him at Coney Island. That is the basis I have that he was alive. My son said he saw him with a woman. He thought that it was him. Son has since died—on the 16th of last March. When I said that I heard from him, I meant that I heard from him from what my son told be about Coney Island. Q. How often did your son see him, and what investigation did he make? A. He never thought he saw him but once, and he never made any investigation. I heard through other parties that he married Hannah Roof of the Arcade Laundry. Other people said he was not married to her, but was living with her. A few months later Mr. Gibson and I separated." This is all of the testimony that was introduced bearing upon the question as to whether or not Katherine Reddick was capable of entering into a marriage contract with James Gibson at the time that their marriage ceremony was performed in 1888. It is plain from her statement that she was prior to her marriage to James Gibson married to one Frank Redfern. How she acquired the name of Red-

dick does not appear from the record. She was never divorced from Redfern, but says that after she had left him she learned that he was in a railroad wreck and was supposed to have been killed, and that she heard of him no more for nearly eight years, and that she had been advised by a lawyer that she had a right to marry again; that about a year thereafter she did marry appellee; that after her marriage to appellee her son told her that he had seen her husband, Redfern, at Coney Island. She then proceeds to qualify this statement by stating that her son thought it was her former husband, but later, when interrogated further, she states facts which are most convincing that her husband was still living, for she says that some people told her that he had married a woman named Roof, while still others told her that he had not married her, but was simply living with her. These conversations with people, evidently her friends and acquaintances, about her husband Redfern, certainly overcome the presumption of his death by his prolonged absence during the period when she says she did not hear from him, and show that as a matter of fact he was not dead, but was still living, and this after the date of her marriage to appellee Gibson. It was shortly after she learned through her son and friends and acquaintances that her husband was living that she and appellee separated. The cause of their separation is not stated, but it is fairly inferable from the proof offered that it was due to the fact that her former husband was discovered to be still living.

Under this proof, we are of opinion that the court was warranted in its conclusion and finding that the marriage between appellee James Gibson and Katherine Reddick in 1888 was a nullity, and that the marriage between appellee James Gibson and Rebecca N. Ross in 1895 was in every respect a legal and binding marriage.

Perceiving no error in the record prejudicial to the rights of appellants, the judgment is affirmed.

#### ALLEN et al. v. HODGE.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### 1. JUDGMENT—ADMISSION IN PLEADING.

Where defendant in his answer admits that there was due plaintiff a larger amount than is claimed in the complaint, subject to certain credits, and plaintiff accepted the amendment as to the amount and admitted the credits, the plaintiff is entitled to a judgment for the sum admitted to be due him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 137-140.]

##### 2. SET-OFF AND COUNTERCLAIM — CAUSE OF ACTION ON ANOTHER CONTRACT—COUNTERCLAIM.

Plaintiff and defendant entered into a written contract, by which defendant was to purchase for plaintiff a large amount of tobacco. Later plaintiff engaged defendant to sell a consignment of tobacco for him. In an action by plaintiff to recover the proceeds of the sale, defendant counterclaimed for his commission on

tobacco bargained for by defendant under the written contract, which plaintiff refused to accept from defendant, and afterwards purchased directly from the owner. *Held*, that the claim for commission did not arise out of the contract or transaction stated in the petition as the foundation of plaintiff's claim, nor was it connected with the subject of the action, within the provisions of Civ. Code Prac. § 96.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 43-51.]

### 3. BROKERS—COMMISSIONS—SERVICES—RENDITION.

Where defendants contracted in writing to purchase for plaintiff a given amount of tobacco on commission, and defendants were negotiating with a party for tobacco under the contract, the fact that plaintiff objected to the tobacco, and then went to the owner and purchased it directly from him, would not give defendants a cause of action against plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 85-96.]

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Thomas Hodge against G. R. Allen and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hendrick, Miller & Marble, for appellants. Wheeler, Hughes & Berry, for appellee.

**BARKER, J.** The appellee, Thomas Hodge, consigned to the appellants G. R. Allen and W. B. Kennedy a quantity of tobacco to be sold on commission on his account. After making the sale, the appellants failed or refused to account to him for the proceeds; and to recover the same he instituted this action, claiming that there was due him as the net proceeds of the sale \$1,517.20. The appellants answered in two paragraphs. In the first they admitted the sale as alleged, and confessed that, instead of selling 14 hogsheads on account of appellee, they had sold 16, and that, instead of there being due him the amount claimed in his petition, there was really \$1,703.70 due, subject to one or two small credits. We may dispose of this branch of the case now by stating that in the reply the appellee accepted the amendment as to the amount due him, and admitted the credits as named in the answer, and, so far as this part of the case is concerned, it may be said that, except for the second paragraph, the appellee was clearly entitled to a judgment for the sum admitted by the answer to be due him.

In the second paragraph of the answer the appellant attempts to state what is called a counterclaim arising out of alleged fraudulent conduct on the part of the appellee in a contract by which appellee employed appellants to purchase tobacco on his account. After amending this paragraph twice, the court sustained a general demurrer to it, and, the appellants declining to plead further, a judgment was rendered in favor of appellee for the amount admitted to be due him, less the credits admitted to be due appellants by appellee in his reply.

The only substantial question involved on this appeal is the correctness of the ruling of the court in sustaining the general demurrer to the counterclaim attempted to be set up therein. Section 96 of the Civil Code of Practice is as follows: "A counterclaim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract, or transactions, stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action." The contract of purchase, out of which it is alleged that the counterclaim arose, is as follows: "Mayfield, Kentucky, March 27, 1906. This contract made and entered into this day between the firm of G. R. Allen & Co., of Mayfield, Ky., and Thomas Hodge, of Henderson, Kentucky. Witnesseth: Whereas, the firm of G. R. Allen & Co. have taken over a loose purchase of tobacco from I. Haines & Co., and agreed to pay said Haines & Co. 50 cents per 100 lbs. profit scale weight on their purchase of about 450,000 lbs., and said Allen & Co. have since bought about 150,000 lbs. additional, making a total of about 600,000 lbs., which said Allen & Co. agree to deliver to said Hodge in English dry order, said Hodge agreeing to pay the cost of the tobacco contracted for at the price said Allen pays, and pay said Allen & Co. \$1.00 per 100 lbs. commission for handling same. Said Hodge agrees to take all of the purchase of said Allen & Co., and further agrees that said Allen & Co. can increase the purchase up to 1,000,000 lbs., said additional purchase to cost not over \$5.75 per 100 lbs. All of said tobacco is to be neatly classed as to length and color, the leaf to be classed in length as follows: 20 inches down in one class; 21 inches to 24 inches in another length; and all over 24 inches in the long grade. Said tobacco is to be classed in color, and all green colors to be thrown out and prized separately, the lugs to be made in two classes of dark and brown. It is also understood that all damaged tobacco is to be kept separate. Said tobacco is to be invoiced and shipped as per Hodge's instruction and invoiced and shipped and prized and draft made against said Hodge in car load lots. Said invoice is to be made at 7 cents per lb. including commission, and one complete and accurate statement rendered and settlement made on the exact first cost, and \$1.00 per 100 lbs., commission added. It is understood that said Hodge take all of said Allen & Co.'s purchase of Haines, including about 20 hogsheads leaf which has been prized. This contract is made with the understanding that said tobacco is to be re-dried at the factory of the Robards Tobacco Company, and should the government decide that said contract cannot be carried out, then this contract is null and void; said Allen & Co. to serve notice on said Hodge within 10 days of said government decision. [Signed] G. R. Allen & Co. Thomas Hodge." Substantially the second paragraph as amended states the



following facts as the basis for the counterclaim: That under the foregoing contract they had purchased for the appellee, and delivered to him, 800,000 pounds of tobacco, and this he had accepted and paid for; that they had the right, under the contract, to purchase for him 400,000 pounds more tobacco, which was required to come up to certain stipulations in regard to character and quality, which are not necessary to be reproduced here; that appellants were in negotiation with Nicholson and Houseman for the purchase of 150,500 pounds of tobacco, which they intended to purchase on account of the contract between them and appellee; that Nicholson & Houseman agreed to sell the tobacco, and it conformed to the requirements of the contract between appellants and appellee, but appellee fraudulently and wrongfully objected to the tobacco, and insisted that it did not conform to the requirements of the contract between him and appellants, and then secretly, and without the knowledge of appellants, went to Nicholson & Houseman, and purchased the tobacco from them on his own account, thereby depriving appellants of the commission which they would have made had the tobacco passed through their hands. By reason of which alleged wrongful conduct on the part of appellee, appellants claimed to have been damaged in the sum of \$1,354.50.

In order that the facts stated in the second paragraph of the answer may be used as a counterclaim against the cause of action set up in the petition, it is necessary, under section 96 of the Code, that they shall constitute a cause of action in favor of the defendants against the plaintiff, which shall either arise out of the contract or transaction stated in the petition as a foundation of the plaintiff's claim, or it must be a cause of action which is connected with the subject of plaintiff's cause of action. The contract set up in the petition is the consignment by the plaintiff to the defendants of certain hogsheads of tobacco to be sold on commission; its sale by them, and their failure to account for the proceeds. The cause of action (assuming for the present that it is such) stated in the answer is the alleged fraudulent conduct of the plaintiff with reference to an entirely separate and distinct contract, made long before, for the purchase of tobacco. Therefore it is obvious that the counterclaim does not arise out of the contract or transaction stated in the petition; nor do we think it has any connection with the subject-matter of the cause of action set up in the petition. There is no sort of connection that we can see between the contract for the sale of the tobacco and the contract for the purchase of tobacco. It is not material that some of the tobacco sold under the contract stated in the petition was also purchased under the contract stated in the counterclaim. This is a mere coincidence, which cannot affect the matter one way or

another. The tobacco actually purchased under the contract stated in the counterclaim had been received and paid for by the plaintiff. It was wholly his; and, so far as the contract of purchase with reference to this tobacco was concerned, it was entirely closed. Now, afterwards the plaintiff made another contract with the defendants, entirely separate and distinct from the one of purchase, by which he employed them to sell 16 hogsheads of tobacco on commission. It is obvious that this was entirely separate and distinct from the other; and, as said before, the mere coincidence that some of the 16 hogsheads had been purchased under the first contract does not furnish that actual connection between the two transactions required by the Code in order to enable the defendants to set up the alleged wrongful acts of the plaintiff in regard to tobacco other than that involved in the contract of sale. It seems to us clear, therefore, that the alleged injury contained in the second paragraph of the answer, even if it constituted a cause of action, could not be used as a counterclaim for the reason that it was in no wise connected with the contract or transaction stated in the petition.

Nor do we think that the acts complained of in the second paragraph of the answer constitute a good cause of action against the appellee. There is nothing in the contract for the purchase of tobacco which forbade the appellee from becoming a purchaser himself of any tobacco that he saw fit to buy, and the fact that the appellants were negotiating with Nicholson & Houseman for 150,000 pounds of tobacco did not prevent the appellee from buying this tobacco if he could. Nor can the defendants complain of the alleged fraudulent acts of the plaintiff in objecting that the tobacco did not come up to the standard contained in the contract between him and the appellants for its purchase. Assuming that his objections were wrongful, they did not bind the appellants. They had positive rights under the contract between them and the appellee. After they furnished him tobacco which complied with the requirements of the contract, it was not for him to say whether or not he would accept it. The law would have compelled him to accept it; Therefore the appellants cannot complain of his objections to the tobacco; because these in no wise altered their rights in reference to the proposed trade between them and Nicholson and Houseman. If the tobacco filled the requirements of the contract between the defendants and plaintiff, they could have purchased it despite his objections, and tendered it to him, and he would have been compelled to accept it, or answer to them in such damages as they received by reason of his breach of the contract. Moreover, there is nothing in the contract between the appellants and appellee which limited their purchase of tobacco to fill the contract to the tobacco of Nicholson

& Houseman, and they state no reason why they might not, after failing to get the tobacco of Nicholson & Houseman, have purchased other tobacco and tendered it to the plaintiff under the provisions of the contract between them, and thus earned the commission they complain of having lost.

We conclude that the alleged counterclaim neither has the necessary connection with the subject-matter of the cause of action stated in the petition required by the Code, in order that it might be used as a counterclaim, nor did the facts set up constitute a cause of action at all.

We are of opinion that the trial court correctly sustained the general demurrer to the second paragraph of the answer, and his judgment therefore is affirmed.

DESKINS et al. v. WILLIAMSON et al.  
(Court of Appeals of Kentucky. Dec. 20, 1907.)

1. WILLS—CONSTRUCTION—ESTATE DEVISED—  
DEFERABLE FEE.

Testator devised certain property to his widow for life, or widowhood, and then made specific devises to his children by his second wife, who were minors at the date the will was executed, providing that the land should be held intact until such children became of age, or married, when the portion allotted to each should be turned over to him, but that, should any of such children die without heirs, the portion of those so dying should be equally divided between the others. *Held*, that the period of distribution having been postponed until after the devisees reached majority, the devises did not create in them a defeasible fee, but that such of the devisees as survived the testator and became of age took an absolute fee in the land devised to them, though they subsequently died without issue.

2. SAME.

In the construction of a will, the instrument must be read as a whole, and each part so construed as to give effect to every other part, when this can be done without violating the plain expressed intent of the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 962-967.]

3. SAME—PERIOD OF DISTRIBUTION.

Where the distribution of an estate is not to take effect until some time after testator's death, words of survivorship, in the absence of a contrary intention, will be construed as referring to the period of distribution.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Eva Deskins and others against W. J. Williamson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

James M. Roberson and John F. Butler, for appellants. Hager & Stewart, for appellees.

LASSING, J. This litigation involves the construction of the following clauses of the will of Benjamin Williamson, deceased:

"I give to my wife Susanah the farm I now live on from a certain line made between myself and son Benjamin Williamson, down the river by a large elm standing on the bank of the river at the lower end of the

bottom, thence from the elm to a small buckeye at the foot of the ridge thence strait with that course to the top of the point to my back line, during her natural life in widowhood, and if she shall intermarry with any person then her right to the above-named land to cease and that she be turned out of possession and the right to be vested in my son Freeman.

"Further, my son Freeman is to have the management of said farm with his mother, further, that my wife Susanah and her son Freeman has the management of all my land until my other heirs shall become of lawful age or shall marry, then for each one to have possession of his own part, and that the family all remain on the land and that they shall be maintained from the proceeds of said land by their working to make them support.

"I also give my wife Susanah, one horse, four cows, twenty head of hogs, ten head of sheep and all farming tools and all my household furniture during her natural life in widowhood, at the end of that then for it to belong to my son Freeman and also the land hereuntofore named.

"Next. I give to my son Hammond my lands bounded as follows to wit: Beginning on a large elm on the bank of the river heretofore mentioned in the first lot. Thence to a buckeye on the foot of the ridge thence the same course to the top of the ridge to my back line. Thence running up James Branch with my line to the head of the first left-hand fork of said branch, thence around the head of same to the top of the fork ridge, thence down said ridge until opposite a spring that is on Marion James Branch. Thence running said branch to a beech and sugar tree close the spring across said branch. Thence up the fork ridge, below right-hand fork, to the first cliff of rocks. Thence with the top of ridge to my back line. Thence running down the river with my line to the lower end of my lands. Thence down the ridge to the river. Thence up the river to the beginning. Also one horse, saddle and bridle, one rifle gun.

"Next. I give to my son Julius all my lands lying on James branch that I have not given my son Hammond. Also one horse, bridle and saddle and one rifle gun.

"Next. I give my daughter Eva the sum of three hundred dollars cash instead of any lands, and one horse, saddle and bridle to be raised out of my personal estate if there should be a sufficiency to make it, if not my executors is to take from the lands divided between the other heirs an equal proportion of timber to make the money from each share until the three hundred dollars is raised and if there should be any more personal property left after paying this three hundred dollars my executor is to sell it and that portion of my estate, equally divided between my son Freeman, son Hammond, son Julius and daughter Eva.

"Next. I will in case should either, my son Freeman, or son Hammond, or son Julius or daughter Eva should die without any heirs their part or portion is to be equally divided between the others of the four named youngest children by my wife Susanah."

Appellant, Eva Deskins, filed suit in the Pike circuit court wherein she alleged that her brothers Hammond and Julius had died leaving no child or children surviving them, and that under the provisions of the will of her father, as above set out, they each took only a defeasible fee in the lands willed to them, and that as they each died childless their title to said lands reverted to and vested in herself and her brother Freeman; that the lands in question were in the possession of the defendants W. J. and Ben. Williamson, who were claiming same under a sheriff's deed. She further alleged that through fraud and deceit practiced upon her by her brother Julius Williamson and others she had been induced to execute a deed divesting herself of title to said lands. She sought a cancellation of this deed, and also asked that the sheriff's deed, under which the defendants claimed title to said land be adjudged of no binding force and effect; that she and her brother Freeman be adjudged the joint owners of the land in question. Freeman Williamson answered, adopting the allegations of the petition, and asked that his answer be made a cross-petition against his codefendants, and that he be adjudged the owner of one-half of the land in question. The defendants, W. J. and Ben. Williamson, joined issue with plaintiff and her brother Freeman on each material allegation in the pleading, and pleaded affirmatively that they were owners, by purchase, of the land in question, and set out their title at some length. They also pleaded that at the date of the execution of the will in question the four children of decedent, Benjamin Williamson, deceased, by his second wife, were all infants, the youngest being 14 years of age; that the lands were held intact, as the will provided they should be, until the children became of age, when the portion allotted to each was turned over to him; and that each of the children having outlived the testator, and lived to reach his majority, and became possessed of his land, the title to each became absolute, and was not subject to be defeated by any further contingency. The material allegations of the answer were traversed by reply, and the case was submitted for judgment on demurrer filed by defendants. The court, evidently being of opinion that the verdict "dying without any heirs" meant dying during the life of the testator, or before devisees reached their majority, which was the period fixed for distribution, and Hammond and Julius each having outlived their father, and each having lived until he became 21 years of age, his title to said land became perfect in him and was not subject to be defeated

by his dying thereafter without leaving a child or children surviving him, sustained the demurrer, and dismissed the petition, with judgment for costs. Plaintiff and her brother Freeman appeal.

As no two wills are apt to be alike in all respects, no hard and fast rule for their construction can be adopted. However, certain principles have been established in the construction of wills which serve as a guide or aid in arriving at the intention of the testator. The first of these principles is that the will must be read as a whole, and each part so construed as to uphold and give effect to every other part, when this can be done without violating the plain intention of the testator as expressed in the language of the will. In interpreting and determining what the testator meant when using the language which he did in the latter part of his will, to wit, if either of them "should die without any heirs," we must consider any and all other parts of the will that will throw any light upon and aid in determining just what the testator meant by the use of these words. From the other clauses of the will quoted, it is clear that the testator desired and intended that all of his land should go to his four children by his last wife, evidently having theretofore made provision for his children by his first wife. His wife was to have the use, during her life or widowhood, of this land, the family was to be kept intact on the farm, and, although he set apart certain property for each of his said four children by his last wife, he expressly provided that they were not to have possession of this property until they arrived at the age of 21 years or married. At the time of the execution of the will all of these children were under age. He evidently desired that they keep together at the home under the influence of their mother, during their minority, or until they married, and he postponed the period of division until that date. Reading these clauses together, it is plain that when the testator used the words, "should die without any heirs," he had reference to their dying before he died, or before they reached their majority or married, if they should marry before reaching their majority or before he died, and left no child or children surviving them. He was not intending to limit the estate which he gave them. He was merely limiting the division of his landed estate to such of the four children as should be living when the period fixed for distribution should arrive. This is the only fair construction that can be placed upon the language of the will; but, if there was a doubt upon this point, then, since the law favors vested, rather than contingent, estates, this doubt should be resolved against the contention of appellants and in favor of that of appellees.

Appellants insist that they are supported by the fourth rule of construction laid down by this court in the case of *Harvey v. Bell*, 118 Ky. 512, 81 S. W. 671, which is as fol-

lows: "Where there is no intervening estate, and no other period to which the words, 'dying without issue,' can be reasonably referred, they are held in the absence of something in the will evidencing a contrary intent to create a defeasible fee, which is defeated by the death of the devisee at any time without issue then living." It will be observed that in the will under consideration the period of distribution is postponed until the legatees reach their majority, or marry, so that the will itself provides a settled and distinct period of time to which the words "dying without any heirs" are referable, and, this being true, the authority of *Harvey v. Bell*, relied upon, does not apply. This case is very much like the case of *Ferguson v. Thomson*, 87 Ky. 519, 9 S. W. 714, in which this court held that: "Where, however, the gift is not to take effect until the termination of a particular estate, or the distribution of the estate is to take place at some time subsequent to the testator's death, then the most natural meaning is that the words of survivorship relate to the period of distribution." In that case the court held that at the period of distribution the devisees took a fee simple title to the property. So, in the case under consideration, we are of opinion that when Hammond Williamson and Julius Williamson reached their majority and came in possession of the lands which their father had willed to them, they took a fee simple title to same.

From the conclusion which we have reached in the construction of the will, it becomes unnecessary to consider the other issues raised by the pleading, and before us on this appeal.

Judgment affirmed.

#### EASTERN KENTUCKY COAL LANDS CORP. v. COMMONWEALTH (four cases).

(Court of Appeals of Kentucky. Dec. 20, 1907.)

#### 1. APPEAL—JURISDICTION—DECISION OF INTERMEDIATE COURT—CONCLUSIVENESS.

Acts 1906, p. 115, c. 22, art. 3, § 1, makes it the duty of an owner or claimant of land to pay all the taxes which have been or should have been assessed against him as of the years 1901-1905, inclusive, and provides that failure to list for assessment or failure to pay the taxes charged for any three of the years shall be cause for forfeiture to the commonwealth of his title, which cause of forfeiture shall be extinguished if the owner shall cause the land to be assessed for taxation before March 1, 1907. Section 2 provides that the ascertainment of the amount of taxes unpaid and assessments required by the preceding section shall be made by the county court on the application of the owner, that either the petitioner or the commonwealth may appeal to the circuit court, and that the finding of the circuit court shall be conclusive and not subject to appeal. Ky. St. 1903, § 950, allows appeals to the Court of Appeals where the title to land is involved or the amount in controversy is not less than \$200, and from all other final orders and judgments. *Held*, that the Court of Appeals had jurisdiction of an appeal from a

judgment of the circuit court, on appeal from the county court, refusing to list lands on petition under section 2, in that the petition was not sufficient under the statute; the word "finding" relating to the fixing of the value of the property assessed alone.

#### 2. TAXATION—ASSESSMENT—CONSTITUTIONAL OFFICERS—POWERS—STATUTORY PROVISIONS.

Acts 1906, p. 115, c. 22, art. 3, § 1, makes it the duty of an owner or claimant of land to pay all taxes which have been or should have been assessed against him as of the years 1901-1905, inclusive, and provides that failure to list the land for assessment or to pay the taxes charged as of any three of those years shall be cause of forfeiture of his title to the commonwealth, which cause of forfeiture shall be extinguished if the owner shall cause the land to be assessed before March 1, 1907. Section 2 provides for the ascertainment of the amount of taxes unpaid and assessments required by the preceding section by the county court on application of the owner. Section 3 provides that, if the owner shall fail to have the land assessed, the commonwealth's attorney shall institute a proceeding to forfeit the same to the commonwealth. Section 4 provides for a purchase back by the owner of the title so forfeited on ascertainment by the county court of the amount of unpaid taxes. Const. § 227, creates the office of assessor, but does not define his duties. Section 172 provides for punishing "any officer or other person authorized to assess values for taxation" who shall willfully commit any error. *Held*, that the act is not unconstitutional, on the ground that it takes from the assessor, a constitutional officer, the power conferred on him alone by the Constitution to assess real estate; the Constitution seeming to imply that the Legislature may provide other persons to assess property.

#### 3. STATUTES—SPECIAL LEGISLATION—CLASSIFICATION OF SUBJECT—TAXATION.

The act is not in violation of Const. § 59, prohibiting local and special legislation, though it may not apply to every county in the state; the classification of the subject, lands which have been omitted from taxation for a great many years, being a legitimate exercise of legislative discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 105, 106.]

#### 4. TAXATION—CONSTITUTIONAL REQUIREMENTS—PUBLIC PURPOSES.

Acts 1906, p. 124, c. 22, § 6, provides that all title proceeded against and forfeited to the commonwealth, and not purchased by the owner under section 4, is thereby vested in any person who has had adverse possession for five years and paid the taxes. Section 7 provides that all title vested in the commonwealth, and not purchased back under section 4, nor vested in the occupant under section 6, shall be sold to the highest bidder, and out of the money so realized shall be paid the commissioner's fee and a reasonable attorney's fee. *Held*, that the act was not in violation of Const. § 171, that taxes shall be levied for public purposes only, on the ground that investing the occupant with the forfeited title shows that he is the intended recipient of the tax, and that the payment of a part of the proceeds to the officers representing the state is also a provision for their private purposes; such contention confusing the tax levied on the lands and the disposition thereof after forfeiture.

#### 5. STATUTES—EXPRESSION IN TITLE OF SUBJECT OF ACT.

The revenue law of 1906, the title of which is "An act relating to revenue and taxation," is not, as to page 115, c. 22, art. 3, in violation of Const. § 51, requiring an act to relate to but one subject, which shall be expressed in its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 127, 173, 174.]

**6. STATES — COMPACTS BETWEEN — VIOLATION OF VIRGINIA COMPACT — TAXATION.**

The Virginia Compact provides that all private rights and interests in lands over which Virginia surrendered sovereignty, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state of Kentucky. *Held*, that Acts 1906, p. 115, c. 22, relating to taxation of lands in the state, was not in violation of the Compact; patents to land issued by Virginia being subject to the right and power of the sovereign to compel the payment of taxes on the land in the future and to the correlative power to forfeit the title as a penalty for nonpayment.

**7. TAXATION — CONSTITUTIONAL REQUIREMENTS — UNIFORMITY — DOUBLE TAXATION.**

Acts 1906, p. 115, c. 22, art. 3, § 1, providing that an owner or claimant of land shall pay all taxes which have been or should have been assessed against him for the years 1901-1905, inclusive, and that the fact that the land has been listed for taxation or the taxes have been paid thereon by another claimant shall not relieve him, is not in violation of the constitutional requirement that taxation shall be uniform, as being double taxation.

**8. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAXATION.**

The act is not in violation of the federal and state Constitutions, as that it does not constitute due process of law.

**9. SAME — EX POST FACTO LAWS.**

The act is not an ex post facto act; the failure to list in the years 1901-1905, inclusive, not working a forfeiture, but the failure after the passage of the act in 1906 to thereafter list the property for those years.

**10. SAME — RETROSPECTIVE TAXATION.**

The act is not, because imposing retrospective taxation, in violation of either the state or federal Constitutions.

**11. STATUTES — VALIDITY — REVIEW OF POLICY OF LEGISLATURE.**

Though the objections to an act, that it is harsh, oppressive, and unjust, were well founded, they would afford no basis for declaring the act invalid, since the policy of the Legislature may be looked into by the courts for the purpose only of interpreting statutes, and not of declaring their invalidity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 46, 262; vol. 10, Constitutional Law, § 131.]

**12. TAXATION — ASSESSMENT — PROCEEDINGS TO LIST — SUFFICIENCY OF PETITION.**

Acts 1906, p. 115, c. 22, art. 3, § 1, makes it the duty of an owner or claimant of land to pay all the taxes which have been or should have been assessed against him for the years 1901-1905, inclusive; and section 2 provides that the ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court on application by the owner by verified petition, in which the land shall be described so as to be identified. A petition filed under section 2 alleged that the petitioner claimed to be the owner of the therein described tracts of land, but not of the improvements thereon nor of the surface of certain parts of each tract, following which was a description by calls and distances, and the petition then set out the patents and instruments through which petitioner derived title, and alleged that the lands had not been listed for taxation for any of the years 1901-1905, inclusive, by petitioner, but that parts had been listed by others, and the taxes paid. *Held*, that the petition was defective, in that it showed only that petitioner was "an owner," and did not show of what part or in what proportion and by whom the remaining portions were owned.

**13. SAME.**

The petition was defective, in that it did not "so describe the land proposed to be as-

essed" as that "it could be identified," since the interest of the listing owner, if he owns less than the entire tract, must be so described as that it can be identified.

**14. SAME.**

The petition was defective, in that, showing that the patent boundaries described lay only partly in the county wherein it was proposed to list the land, it did not show in what part of the county the parts to be assessed lay, nor where the excluded parts, which it was admitted did not belong to the petitioner, lay.

**15. SAME.**

It is not an answer to the defects in the petition that the taxpayer did not know his property or its description, nor that it would be too expensive for him to make the necessary investigation.

Appeals from Circuit Court, Pike, Floyd, Knott, and Letcher Counties.

"To be officially reported."

Separate proceedings by the Eastern Kentucky Coal Lands Corporation, in the county courts of the four above-named counties, against the commonwealth, to list for taxation certain lands under Acts 1906, p. 115, c. 22, art. 3. The county courts refused to list the lands on the ground that the petitions were not sufficient, and on appeal to the circuit courts the same conclusion was reached, and the Coal Lands Corporation appeals. The appeals were heard together, and judgment in each proceeding affirmed.

Wm. J. Hendrick, Hopplin & Berard, Hazelrigg, Chenault & Hazelrigg, John Harris Hendrick, and Robert L. Miller, for appellant. N. B. Hays, Atty. Gen., Chas. H. Morris, Hager & Stewart, T. H. Paynter, W. H. Wadsworth, David Baird, Z. T. Vinson, Edward W. Hines, and C. C. McChord, for the Commonwealth.

O'REAR, C. J. These four appeals, presenting a common question, are heard together. They involve the constitutionality and construction of article 3 of the revenue law passed by the General Assembly of 1906. Laws 1906, p. 115, c. 22. For a full study and understanding of that article, it is set out complete, and is as follows:.

"Section 1. It shall be the duty of every owner or claimant of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if the said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided. The fact that said land has been listed for taxation, or the taxes have

been paid thereon by another claimant, shall not relieve against the duty herein imposed. If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were or should have been made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall be cause for the forfeiture and transfer to the commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall, within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes.

"Sec. 2. The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition verified by himself or his agents, filed in said court on or before January 1, 1907, in which the land, sought to be charged shall be described, so as to be identified, and the years for which it was not listed and the years in which the taxes were not paid shall be stated, and in which also shall be stated the grant under which he claims, if he derives title from a grant, and the instrument through or the manner in which the title devolved upon him. Said application shall be set for hearing upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, of which he shall give at least ten days' written notice to the county attorney, whose duty it shall be to attend said hearing and represent the state and county; for which service he shall receive as compensation ten per centum of the amount ultimately collected by sale or otherwise, by virtue of such delinquency. It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered, having due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said

years, whether assessments were originally made as of said dates or not. Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and state purposes at the rates fixed by law for such years; and shall cause a record of the findings to be made on the order book of the court, and certified to the Auditor of the State and county clerk. Should the court find that the land had been assessed against such owner or claimant, or those under whom he claims, as of any of said dates, it shall accept such assessments as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made. Either the petitioner or the commonwealth, feeling aggrieved by the finding of the county court, shall have the right to take an appeal, within thirty days after the entry of the finding of the county court, to the circuit court for said county, in the manner that other appeals are taken, except that no bond shall be required of the commonwealth. It shall be the duty of the circuit court to hear and determine said application de novo, and to give it precedence over all other civil business in said court. The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State and to the clerk of the county court. As soon as the time for appealing from the finding of the county court has expired, if no appeal is taken, or as soon as the final order of the circuit court is entered, if an appeal is taken, the obligation of said owner or claimant to pay the taxes therein called for, with interest and penalties, as provided by law for the redemption of land sold for the nonpayment of taxes, shall be complete; and the same shall be paid to the sheriff of the county within thirty days thereafter. Provided, however, that if in a proceeding hereunder begun within the time allowed, the amount payable by the delinquent shall not be finally determined until within less than thirty days before March 1st, 1907, or until after said date, then the right of forfeiture as set out in section 1 of this article shall not be complete in the commonwealth, unless and until said delinquent shall have failed to pay said amount, interest and penalties, for thirty days after the entry of said order. Upon collecting said taxes, interest and penalties, the sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the Auditor of the State and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. Out of the amount so paid, there shall be paid to the county attorney ten per centum thereof and an additional ten per centum to the commonwealth's attorney, should an appeal have been prosecuted to the circuit court.

"Sec. 3. If any such owner or claimant

shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in section 1 and 2 of this article, together with the penalties and interest as provided by law, then it shall be the duty of the commonwealth's attorney to institute in the circuit court of the county in which said land or any part thereof, lies, a proceeding in equity, in the name of the commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them; if their names are unknown to him, designating them as the unknown owners and claimants thereof for the purpose of declaring the title or claim of said defendants forfeited to this commonwealth and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable. In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object. The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner be affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described. The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title there-to vested in the commonwealth. Such judgment shall operate as a transfer to and vesting in, the commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff. Judgments

rendered by the circuit court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subjected to the provisions of sections 391, 410, 414 or 574 of the Civil Code of Practice. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions. Either party may prosecute an appeal from such judgment to the Court of Appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the Court of Appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other commonwealth cases. No bond on appeal shall be required of the commonwealth.

"Sec. 4. If, before or during the term of the circuit court next succeeding the term at which a judgment of forfeiture may have been entered, as authorized by section 3 of this article, any of the said defendants in privity with the title so forfeited to, and vested in the commonwealth, file his counterclaim in said action, accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform, the judgment that the court may enter upon such counterclaim, and in said counterclaim offer to purchase back from the commonwealth the title and claim in said action so forfeited to, and vested in, the commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon proper pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged and that ought to have been charged against the defendant and those under whom he claims, as the owner or claimant of said land, for fifty years immediately preceding the filing of such counterclaim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the commonwealth, to enter a judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of said land, for said fifty years, together with interest thereupon at the rate of 15 per cent. per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings, includ-



ing a reasonable attorney fee for the commonwealth's attorney, to be fixed by the court: Provided, that no person except a defendant, and no defendant, except as herein provided, shall be allowed to purchase back from the commonwealth the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment. If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter judgment retransferring to such defendant the title and claim so forfeited to, and vested in, the commonwealth; and said judgment shall have the effect of retransferring and vesting same in said defendant without the execution of a deed or other instrument. Should such defendant not thereupon pay said judgment, the court shall thereupon enter an order directing the sale of the said title and claim as in section 7 of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions hereunder; and the remainder, if any, shall be paid to the state and county as provided in this article, and the counterclaim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fee for the commonwealth and county attorney, to be fixed by the court. If at any time during the pendency of said action it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk as insufficient, additional security shall be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counterclaim shall be dismissed. Appeal may be prosecuted to the Court of Appeals from the judgment of the circuit court under this section within the time and in the manner and subject to all the conditions provided for appeals in section 3 of this article, except that the judgment of the circuit court as to the amount thereof shall be final and not subject to appeal. All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the Auditor of the State and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of taxes collected by him: Provided, that fees required by law to be paid to the Auditor shall be paid to him by the sheriff, and by the Auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the commonwealth's attorney in all proceedings under this article for which he shall be allowed the per centum as herein provided.

Certified copies of the judgments of the circuit court, under sections 3 and 4 hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies, and indexed as deeds are required to be indexed.

"Sec. 5. Any owner or claimant who instituted a proceeding allowed by section 2 of this article, and who did not, within the time herein limited, pay the amount herein ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of said land, shall not be allowed the right to purchase back, under the proceedings authorized by section 4 of this article, such title or claim so forfeited to, and vested in, the commonwealth.

"Sec. 6. All title and claim proceeded against under this article and forfeited to, and vested in, the commonwealth and not purchased back by the owner or claimant thereof, as authorized in section 4 hereof, whether such forfeiture be for the past delinquencies or for future delinquencies as authorized under section 10 hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment or forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereupon for five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

"Sec. 7. All title and claim to land transferred to, and vested in, the commonwealth under the provisions of this article and not purchased back by the owner or claimant as provided by section 4, and not vested in the occupant, as provided in section 6, shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the court house on the first day of some regular term of the circuit court, after notice of sale shall have been advertised in the manner required by law in the case of sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commissioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and claim to the land so forfeited and transferred to, and vested in the commonwealth as remains in it and after the operation of section 6 of this article, and shall so recite. The money realized from the sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including commissioner's fee as fixed by law and a reasonable attorney's fee, to



be fixed by the court and paid in the manner provided by law; second, to the county and state the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns.

"Sec. 8. No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto.

"Sec. 9. No owner or claimant of any land in this commonwealth shall be allowed to prevent the operation of this article by the payment, after January 1st, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged, and that should have been charged against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates, first mentioned in section 1 hereof; and where such payment is made after the passage of this act, the amount to be paid shall be ascertained and payment made, as in this article provided.

"Sec. 10. When, for any successive five years after the first day of August, 1906, any owner or claimant of or to any land in this commonwealth shall fail to list same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to, and vesting it in, the commonwealth of Kentucky. And wherever such failure exists, it shall be the duty of the commonwealth's attorney to institute an equitable action in the circuit court of the county wherein the said land, or a part thereof, lies, for the purpose of declaring said forfeiture and vesting said title and claim thereto in the commonwealth of Kentucky, and for the sale of such parts thereof as, under the provisions of this article, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as the same may be applicable."

It is also proper, and perhaps necessary, to set out here so much history of the state as will disclose the evil sought to be remedied by this act, in order that the legislative purpose may be more surely divined. While prior to 1779 a considerable quantity of the wild lands of Virginia west of the Alleghany mountains had been appropriated by patents under the stimulus of enterprising adventurers and the policy of the colony to encourage emigration and the settlement of the vast wilderness territory then inhabited almost exclusively by savages, it was after the War of the Revolution, when the returning soldiers from the Continental army were to be compensated in a measure by such favor as the state could bestow, that the real tide of emigration to the West set in. In 1779 Virginia

established a land office, and created the office of Register of the Land Office. Most liberal inducements were offered settlers of "waste and unappropriated lands." There was no limit to the quantity any person might appropriate. Surveyors were appointed for the western territory upon the nomination of the president and professors of William and Mary College. They were required to make records of entries and surveys under them. Their peripatetic offices were widely scattered. The territory opened up for settlement under this act was that part of Virginia south of the Ohio river, east of Green river, west of the Cumberland mountains and north of the Carolina line, excepting certain Indian reservations. In other words, it comprised all of the eastern and most of the central part of what is now the state of Kentucky. The surveyors so appointed could appoint any number of deputies, and did appoint a great many. Aside from the lack of roads and the difficulties of travel in a region of unbroken forests, with great rivers and mountains to be traversed, the dangers from bands of roving savages and wild beasts that infested that vast region made intercommunication between these officers both difficult and dangerous. 2 Collins' Hist. Ky. 552, 563. There was a constantly growing tide of immigration into the newly opened territory. Many of the immigrants, probably the most of them, were intending settlers. But, as might have been expected, speculators and adventurers not a few were attracted thither by the glowing accounts which were carried back to the older settlements in the east. Large tracts, some of them for many hundred thousand acres, were entered, located, and surveyed, while many thousand smaller tracts, designed for immediate or present actual settlement, were taken up at the same time. So rapid was the growth of population that in 1790 the white population of that territory which later became the state of Kentucky, was 61,000. 1 Marshall, Hist. Ky. 441. These people, so far removed from their seat of government, and so imperfectly protected, as was inevitable under the existing conditions, were clamorous for a separate and independent state government. On the 18th day of December, 1789, Virginia indicated by an act of her assembly the terms on which she would consent to part with her sovereignty over the new territory. This was agreed to, and is what is known as the "Virginia Compact." It was even then foreseen that conflicts would arise concerning the grants of land already made, or the initial steps of which had been begun. Perhaps the delay experienced by the Kentucky pioneers in obtaining the consent of the mother state for a separation was due to the influence of those who had taken up large boundaries of land in Kentucky for speculative purposes. At any rate the Compact abounds with evidence of the fact that con-

troversies among claimants and settlers concerning the validity and location of these entries had already arisen in considerable numbers, and were then also foreseen as future problems. The Compact, in so far as material in this investigation, reads:

"Sec. 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

"Sec. 9. Fifth, that no grant of land or land warrant to be issued by the proposed state shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, one thousand seven hundred and ninety-one.

"Sec. 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals, or description of individuals, by the laws of this commonwealth, for military or other services, shall be exempted from the disposition of the proposed state, and shall remain subject to be disposed of by the commonwealth of Virginia, according to such appropriation, until the first day of May, one thousand seven hundred and ninety-two, and no longer; thereafter the residue of all lands remaining within the limits of the said district, shall be subject to the disposition of the proposed state."

"Sec. 14. And be it further enacted, that if the said convention shall approve of the erection of the said district into an independent state on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed state, and the said articles become a solemn compact mutually binding on the parties, and unalterable by either without the consent of the other."

At a convention called for the purpose of considering the proposal, the Compact was accepted by the district of Kentucky, as the new territory was then called, on July 20, 1790. An act of Congress (Act Feb. 4, 1791, c. 4, 1 Stat. 189) provided for admitting the new state into the Union, which was consummated in June, 1792. The early records of this court, and of its predecessor, the Supreme Court of the District of Kentucky (Hughes' Reports), abound in evidence of the confusion into which the land titles of the young commonwealth had fallen, even before it was launched as a state. It is easy to gather from these records that not the least of the difficulties with which the new state had to deal was the tangled condition of one of the most important features of its society, namely, the status and validity of the titles

to its lands. The handicap was serious, and has been persistent. The system was loose and uncertain, admitting not only of honest mistakes, but of easy opportunities for frauds and oppression. It was peculiarly adapted to the purposes of mere speculation. The system of entering and surveying unappropriated lands was, unhappily, though not unnaturally, brought over into the new state and continued. Indeed, in the first Constitution, adopted April 16, 1792, it was provided (section 6, art. 8): "All laws now in force in the state of Virginia, not inconsistent with this Constitution, which are of a general nature, and not local to the eastern part of that state, shall be in force in this state until they shall be altered or repealed by the Legislature." And the book of the statute laws of Kentucky for years thereafter was Littell's Statutes, compiled from the Virginia statutes and the first legislative enactments of the new state.

Provision was at once made for transferring from the records of Virginia the evidence of grants and conveyances of lands in the old district of Kentucky. They were required to be deposited as part of the records of the office of the clerk of this court at the seat of the state government, removed a week's travel at that time from the state's eastern domain. Under the existing system, and for the supposed convenience of proposed settlers, the records of new entries and surveys were kept by the county surveyors, although it does not appear that they were required to maintain public or permanent offices at the various county seats. Many, maybe most, of the pioneer settlers of this state, were unlearned "backwoodsmen." Perhaps many of the local surveyors were but little advanced in education. Vacant lands were supposed to be plentiful. Consequently land was then the cheapest of commodities, if it might be so called. Many a noble estate, as it is now, passed then in exchange for a rifle gun or a powder flask. As new counties came to be formed, as they were rapidly enough, new county seats, with new offices and new records (without provision for transcribing the old in so far as they affected the new counties), were created, and were doubtless most generally supposed to contain all necessary data for the guidance of the settlers in taking up and conveying land. It resulted that new patents were issued for lands already appropriated by previous grants. In many instances several patents overlapped the same land. This went on with little change for nearly a hundred years. The recent and present occupants were innocent enough of knowledge or purpose, it may be safely assumed, to do ought than follow the course of the law, buying from the state in confidence, and selling among themselves with assurance that which they had bought, paid for, and at great sacrifice of labor, means, and care erected into permanent homes. It now develops, and has been known for some time, that all or most

of the vast territory lying to the northwest of the Cumberland mountains, and west of the Tug Fork of Big Sandy river, to a point west of the main Kentucky river, was appropriated under entries and surveys made by virtue of the laws of Virginia before the separation in 1792. Few of those entries were ever settled upon. So far as the new settlers knew in fact, in every probability, the lands were unappropriated. The generations of a century have thus increased, and by actual occupancy, by personal industry and thrift, and by all the means by which Americans create a commonwealth, they have fastened themselves to the soil in the belief that they have inherited it from their fathers, or purchased it honestly from their neighbors, and that it is theirs.

Notwithstanding that millions of acres have thus been reduced to that kind of actual possession and for such a period as to ripen into a perfect title in spite of its original state, and that the population of this territory is now more than 300,000, there are many hundred thousand acres of these lands unfenced, whose stores of mineral and mantles of forest have remained in their natural state until the present hour. Commercial necessity and enterprise in recent years are opening this region to the markets, and what was once of small value has become enormously important and valuable. The holders of these old grants during all these years have taken no part in the development of the section where these lands lie, nor done ought to add to the state's strength and stability in peace or in war. They have contributed nothing in clearing the lands for settlement. They have not tenanted them. They have not worked them. Every incentive of the government (save the pittance paid into the treasury for the warrants) which entered into the grant by the state has been withheld or disappointed by the grantees and those claiming under them. The state was then and is yet concerned in the subject of actual settlement, of homesteaders tied by interest and patriotism to the state's welfare. It was from the first and is yet a proper subject of public concern that these lands be seated by settlers, to the end, at least, if no greater, that the state might derive taxes from them for its support. While the people in that section may have been unmindful of the underlying insecurity of their titles, the subject has been one of constant concern to the state. The situation was one of practical difficulties. On the one side was the legal right of the original patentees. On the other was the moral right of those who had, in ignorance of the truth, bought and settled upon some parts of these same lands. Besides it all was the Compact with Virginia, an international agreement in its nature, the legal effect of which, from environment and circumstances, was title understood in the state. There was the purpose to live up to the spirit of the Compact in good faith, and fear of its letter. Let us now fol-

low in a brief review the course of legislative and judicial cognizance of the situation.

On June 26, 1792, the General Assembly of this state (1 Litt. Laws Ky. p. 63, c. 10) enacted a statute, by the fourteenth section (page 71) of which it was provided that all lands of which a list shall not be given in by the owner or proprietor to the commissioner on or before February 4, 1795, and on which taxes, with interest, should not be paid, should be considered as, and actually be, forfeited to the state, and should be disposed of in such manner as should be directed by law. In 1801 the Legislature, extending the time to save forfeiture, re-enacted the forfeiture clause. 2 Morehead & B. Ky. St. p. 1072. This court, construing that statute in 1822, held that the act did not, properly construed, dispense with an inquisition of office found, and that forfeiture was not worked by the mere operation of the statute. *Barbour v. Nelson*, 1 Litt. 60. In 1812 the act known as the "Occupying Claimants Law" was adopted, which in 1823 was held unconstitutional by the Supreme Court of the United States in *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547, though by a divided court. In 1824 the act known as the "Seating and Improvement Bill" was adopted, requiring the fencing of a certain portion of each tract of 1,000 acres or more, under penalty of forfeiture. 2 Morehead & B. Ky. St. p. 1074. This act was held unconstitutional in *Gaines v. Buford*, 1 Dana, 481; the Chief Justice not sitting, and the two remaining judges writing divergent opinions as to the reasons upon which the court's action was based. These opinions, and that of the Supreme Court in *Green v. Biddle*, as well as certain resolutions of the General Assembly of Kentucky, adopted January 11, 1825 (vide Acts 1824, pp. 275-278) all indicate an unsettled state of judicial and legislative opinion as to the precise effect of the Compact as limiting the power of Kentucky in passing laws upon these subjects. On January 12, 1825, the forfeiture laws, on account of nonlisting of lands for taxation, were re-enacted, with the additional provision (doubtless moved by the court's language in *Barbour v. Nelson*, supra) that the forfeited title should be transferred to the commonwealth without office found. In February, 1828 (2 Morehead & B. Ky. St. p. 1081) it was enacted that all title forfeited to the commonwealth for failure to list property for taxation should inure to the benefit of the occupant in possession.

These latter acts were carried forward into the general revision of 1860 (2 Rev. St. pp. 103-106, cc. 58, 59), and by the act of 1860, (2 Rev. St. p. 757) it was enacted that land forfeited prior to 1834 should remain unredeemable. It was evidently thought by the Legislature that the provisions of the act of 1825 were valid, as they had not been questioned judicially up to that time. In the revision of 1878 (section 1, art. 17, c. 92, Ky. St.) the same provision was made for the for-

feiture of lands not listed and tax-paid. In 1878 a case came before this court in which was involved the constitutionality of the provisions above cited relating to forfeitures without office found. *Marshall v. McDaniel*, 12 Bush, 378. It was there held by this court that such attempt to forfeit was unconstitutional; that the landowner must first have his day in court.

Thus the matter stood when the convention of 1890 met to revise the Constitution. This subject was deemed of enough importance to justify the creation of a special committee on "Land Titles." Various proposals were made to the convention, among others one by the member from Wolfe, Powell, Menifee, and Montgomery, embodying substantially the same provision as is contained in the act which is the subject of this opinion. The result of the deliberations of the convention was section 251 of the present Constitution. The debates show that the delegates were alive to the very evil which is herein set forth, and which we will see was presented to the Legislature in 1906 for its consideration. Section 251 of the Constitution as finally adopted reads: "No action shall be maintained for possession of any lands lying within this state, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the commonwealth of Virginia, or by the commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any person claiming such lands by possession to a well defined boundary, under a title of record, unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession; but nothing herein shall be construed to affect any right, title or interest in lands acquired by virtue of adverse possession under the laws of this Commonwealth." Doubtless the moving cause of the adoption of this provision, one of limitation, instead of the one proposed by the delegate from Wolfe, Menifee, Powell, and Montgomery, was that the Supreme Court of the United States had held that this state could legally enact a shorter limitation than existed under the laws of Virginia in 1790 (*Hawkins v. Barney*, 5 Pet. [U. S.] 457, 8 L. Ed. 190—this court holding the same way in *Beard v. Smith*, 6 T. B. Mon. 430); whereas, neither court had up to that time passed upon the validity of a statute such as is now being considered. The first Legislature after the new Constitution of 1891 also attempted to help out the situation along the same line. It enacted section 2377, Ky. St. 1903, providing that no one should maintain an action in ejectment upon a patent issued prior to 1820 who had not paid 20 years taxes on his title. But this court in 1901, in *Shaw v. Robinson*, 111 Ky. 715, 64 S. W. 620, construed the language "title of record," of section 251, Const., to mean a title from the commonwealth upon a valid patent, and de-

nounced section 2377, Ky. St. 1903, *supra*, as unconstitutional upon the ground stated in *Marshall v. McDaniel*. Thus we see that from the beginning this state has been endeavoring to rid itself of the incubus caused by the dormant titles and inactive owners (or claimants, who refused, or at least persistently failed, to do anything toward supporting the state government, or allowing the property which they claimed to do so. We also see that, notwithstanding the public insistence and the important question of governmental policy involved, this court has from the start adhered to the strictest construction of the terms of the Compact and of the constitutional rights of the delinquents, so as to afford them every chance to come forward and save whatever title or claim they had. And yet they did nothing.

It will be remembered that in Virginia there was substantially the same state of affairs as in parts of Kentucky, for that region lying between the Allegheny mountains and the borders of Kentucky was of the same character of land, and had been appropriated by the same methods and under the same system, and at or about the same time, as had the lands in Kentucky. Naturally the same result ensued. In 1790 the commonwealth of Virginia enacted a statute (13 Hen. St. at Large, p. 116, c. 5, § 5) by which title to lands not tax-paid for three years were "forfeited and vested in the commonwealth." The act was extended and re-enacted in increasing vigor in 1792, 1803, and 1810. In 1835 a still more drastic act was adopted (*Hutchinson on Land Titles of Virginia and West Virginia*, p. 62), the salient features of which are incorporated in the act of Kentucky now being investigated, except that in the Virginia act there is no provision for an inquisition of office, or its equivalent, as there is in the Kentucky statute. This act has been before the Supreme Court of Appeals of Virginia a number of times, and has always been upheld as constitutional. *Wild's Lessee v. Serpell*, 10 Grat. 408; *Staats v. Board* 10 Grat. 400; *Smith v. Chapman*, 10 Grat. 445, and *Hale v. Branscum*, 10 Grat. 418. West Virginia was erected into a state in 1863. All of her territory was carved out of old Virginia, and was wholly within the zone affected by the system of grants above discussed. In her Constitution is a provision in every feature or principle the same as the Kentucky statute of 1906, except that in the West Virginia Constitution there is not a provision for a trial in court concerning the proposed forfeiture. Article 18, §§ 1-6, Const. W. Va. [Code 1906, pp. lxxxiv, lxxxv]. The Supreme Court of West Virginia has also upheld the forfeiture provisions as not depriving the landowner of his property without due process of law, and as being not only just, but wise and politic legislation. *McClure v. Maitland*, 24 W. Va. 561; *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761; *Twiggs v. Schovaille*, 4 W. Va. 463; *Smith*

v. *Tharp*, 17 W. Va. 221; *Hays v. Camden's Heirs*, 38 W. Va. 109, 18 S. E. 461; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82; *State v. Sponaugle*, 45 W. Va. 420, 32 S. E. 283, 43 L. R. A. 727. The question arose in a case which was before the Supreme Court of the United States in 1898 (*Kling v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214) whether the West Virginia provision was repugnant to the federal Constitution as depriving one of his property without due process of law. The court recognized that the term "due process of law," as used in the federal Constitution, must mean the same thing throughout the Union. It also held that the term might be satisfied with a different provision for a hearing as concerned tax matters from what would be required in a controversy between individuals. The court refused to say that the provisions of the West Virginia Constitution and of the statutes of Virginia forfeiting the title to land without office found for the nonlisting and nonpayment of taxes by their claimants was repugnant to the "due process of law" guaranty of the federal Constitution. But the court did say, as being all that was necessary to a decision of the case in hand, that inasmuch as there was a provision in the statute of West Virginia by which the lands forfeited under the Constitution of that state were sold under a decree of a court, in an action to which the former owner was made a party and in which he was allowed to redeem on certain contingencies, it was in every sense a sufficient compliance with the requirement that the owner be given a day in which to contest the proposed forfeiture. The West Virginia provision was therefore upheld.

Thus we see that in 1906 the Legislature was confronted with this situation: Every evil that had existed from the beginning, threatening the stability of the land titles of a large and important section of the state, was still unalleviated; that every legislative measure adopted during the past 115 years had been unavailing; that in spite of their public duty, and of the imperative command of the law and needs of the state, these claimants refused to respond, and were beyond the reach of the law then in existence; that the reason of the failure of the previous legislation upon the subject was those constitutional obstacles which had been pointed out in various opinions of this court and of the Supreme Court of the United States; that similar conditions produced by the same cause had existed in two of our sister states; that they had gone further than Kentucky had in an attempt to relieve the situation; and that their efforts had been successful, and were without legal exception. The idea was not new to the Legislature that the duty of the commonwealth was to protect herself from a continuation of that thrall that was paralyzing the energies of a large section of the state, disturbing its peace, and robbing

the state treasury of its revenues. Thereupon article 3, p. 115, c. 22, of the Acts of 1906, was most deliberately adopted. The revenue laws of Kentucky, in the opinion of the previous Legislature, needed radical revision. A commission was raised to study the question, to hear complaints and suggestions, and to bring in at the next session a new bill covering the entire subject. Two years were allowed for the work. The committee did as directed. The whole system of the state's revenue laws was revised, and an entirely new, complete measure introduced and enacted. Acts 1906, pp. 88-248, c. 22. Article 3, as quoted above, was in this deliberate manner proposed and adopted. There can be no doubt that the Legislature determined to outlaw these dormant titles, and thereby protect the treasury and increase the state's revenues. Nor can there be doubt that the legislative purpose was to proceed carefully and in that manner that would satisfy the requirements of the Constitutions of this state and of the United States. The Legislature did not intend to deal tenderly with a situation that had been aggravating in its merits. It realized that sometimes sternness is justice, and further leniency injustice. The Legislature has squarely faced the problems of the situation. The court has no disposition to look at it otherwise than it is—to pass upon the questions of law presented, grim and bare as they may be.

Proceeding under article 3 of the act of 1906, appellant, claiming to be an owner of certain patents issued upon Virginia warrants prior to 1789, petitioned the county courts of Pike, Floyd, Knott, and Letcher to list for taxation against it 275,235 acres of land in Pike county, 88,215 acres in Floyd, 55,020 acres in Letcher, and 29,058 acres in Knott, aggregating 447,528 acres. The county courts refused to list the lands upon the ground that the petitions were not sufficient under the statute. This feature will be noticed particularly further along. On appeal to the circuit courts of those counties, the same conclusion was reached, and the appellant's applications were refused, whereupon these appeals are prosecuted to this court.

The first question presented is, has the court jurisdiction of the appeals? The appellate jurisdiction of this court is regulated by statute. Only such matters as the Legislature may see fit to allow to be brought here on appeal are cognizable by the court. No person has an inherent right of appeal, however natural the notion that appellate courts should be open always, as are all other courts, to a litigant who conceives that his rights have been denied. But jurisdiction, and final jurisdiction, must be lodged somewhere. It has been left to the Legislature to do that. It is exceptional, indeed, when appeals are allowed in the matter of tax assessments. The reasons are obvious. But they are sometimes allowed by legislation. The language of the statute in question must be

looked to, to see whether an appeal to this court is denied, in spite of the provision of the General Statute fixing this court's appellate jurisdiction. A clause of a section of this article provides that the county court, "upon finding the amount, \* \* \* shall cause a record of the findings to be made on the order book of the court and certified to the Auditor. Should the court find that the land has been assessed \* \* \* as of any of said dates, \* \* \* it shall accept the assessment as a basis upon which to ascertain the amount," etc. "The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State, and to the clerk of the county court." Section 2, art. 8, p. 118, c. 22, Acts 1906. Under section 4241, Ky. St. 1903, relating to proceedings by auditor's agents to have omitted property assessed, a similar provision occurs, though not in the same language. There the finding of the lower tribunals as to the value of the property assessed is not subject to appeal, but an appeal is allowed upon the question of the liability of the property to assessment. Appeals are allowed to this court from final judgments in all cases in circuit courts where the title to land is involved, or where the amount in controversy, exclusive of interest and costs, is not less than \$200. "In all other civil cases, the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts." Section 950 Ky. St. 1903. We construe the word "finding" in the act before us as relating to the fixing of the value of the property assessed. To that extent only is the appellate jurisdiction of this court, as fixed by section 950, Ky. St. 1903, supra, curtailed. We are of opinion that this court has jurisdiction of the appeals.

The constitutionality of the act is questioned by appellant. The question must be decided, as, if it is unconstitutional, appellant would have had the right to list its lands under other provisions of law relating to the assessment of omitted property. If it is constitutional, then, unless appellant has complied with its terms, the action of the lower court was right. We will take up the different grounds upon which the act is assailed:

First. It is said to be void "because it takes from the assessor, a constitutional officer, the power conferred upon him alone by the Constitution and the laws pursuant thereto to assess all real estate." Section 227 of the Constitution creates the office of assessor, but does not define his duties. Section 172 of the Constitution requires all property not exempt from taxation to be assessed at its fair cash value, and provides for punishing "any officer or other person authorized to assess values for taxation," who shall willfully commit any error in the performance of his duties. This seems to imply that the Legislature may provide other persons to

assess property. It has always been done that way under the present and preceding Constitutions. Railroads, and other public service corporations, distillers, and dealers in rectified spirits are, and for a long time bank and trust companies were, assessed by "other persons" than the county assessor. The latter cannot assess for any period than the current year. All omitted assessments are done by the county court, and have been for many years, certainly ever since the adoption of the present Constitution. This question was raised in *Commonwealth v. Taylor*, 101 Ky. 325, 41 S. W. 11, and there decided adversely to this appellant's contention.

Second. It is claimed that the act is local and special, and thereby violates section 59 of the Constitution. The only point urged in brief of counsel under this head is that "the act could not apply at the very outside to more than 20 or 25 counties in Kentucky." But that does not constitute the legislation either local or special. A statute regulating the care and use of natural gas wells might not apply in fact to more than a dozen counties in the state. Nevertheless the terms of the statute are general, and are applicable to every portion of the state where the conditions may exist or may arise in the future. The classification of the subject, lands which have been omitted from assessment for a great many years, is a legitimate exercise of legislative discretion. It finds many counterparts in the statute respecting other classes of property, such, for example, as special provisions regarding the listing of nonresidents' lands and the assessment of dealers in tobacco and liquors. The act is as general as the nature of its subject will admit. That it may not apply to every county would be because the general condition treated of did not happen to exist in that county. Nevertheless the act is not thereby made local. Nor is its subject special legislation in any legal sense.

Third. It is claimed that the act violates section 171 of the Constitution, which requires that taxes shall be levied for public purposes only. The grounds of this objection are (1) that the provision for investing the occupying claimant with the forfeited title shows that he is the intended recipient of the tax; and (2) that the provisions for the sale of the other forfeited lands, and the payment of some part of the proceeds to the officers who represent the state in the prosecutions, is also a provision for their private purposes. Counsel confuse the tax levied upon the lands and the disposition of the lands by the state after they shall have become forfeited. There is no pretense, and there can be no ground for any, that the act provides any other use of the taxes that may be derived from assessments under the act than is made of all other taxes imposed on all other property of the state and its coun-

ties. But if the assessments are not made because of the contumacy of the property holder or claimant, and thereby a forfeiture of his title results, then it is not material to him what becomes of the title which has been vested in the state. There is nothing in the Constitution which prohibits the state's conferring the title upon whom it pleases, and of disposing of it in any manner its Legislature may elect to do. The forfeiture is not a tax. Nor is it the equivalent. It is a penalty imposed for a violation of a statute. Like other penalties, it is the subject of legislative control and disposal, without regard to the previous title or ownership of the convicted violator of the law.

Fourth. It is contended that the act violates section 51 of the Constitution, which requires that every legislative act shall relate to but one subject, which shall be expressed in its title. The title to the act is "An act relating to revenue and taxation." If this article is bad for the reason last assigned, then much, if not most, of the existing revenue law of the state must fall for the same reason. A great many analogous instances might be cited from that act. But we will confine ourselves to a few. Railroads and other public service corporations are required to report certain information upon which their assessments are to be based by the state board of valuation and assessment. Their failure is penalized by fine of from \$50 to \$1,000 and a suspension of the corporate franchise. Similar penalties were upheld, and a like act declared constitutional, in *Louisville & Jeffersonville Ferry Co. v. Commonwealth*, 104 Ky. 726, 47 S. W. 877. Distillers are required to furnish certain detailed reports, under a penalty for failure of from \$100 to \$500 a day. Acts 1906, p. 193, c. 22, art. 12, § 1, subd. 4. Liquor dealers are licensed, with elaborate procedure for obtaining license and for their revocation. In a similar statute a provision for licensing peddlers required that all notes taken by them should be indorsed, "Peddler's Note," or be void. The law was upheld as constitutional, although the question of the sufficiency of the title does not seem to have been raised. *Hays v. Commonwealth*, 107 Ky. 355, 55 S. W. 425. This same act provides for a state board of equalization, their appointment, duties, and compensation; for a county board of supervisors, their appointment, duties, and compensation; and likewise for the appointment of auditor's agents. All these matters are germane to the title "Revenue and Taxation," which is the subject of the act.

The last Constitution contained a similar provision to section 51 of the present Constitution. Under it, and, indeed, since the foundation of the commonwealth, legislation has been enacted under precisely the same or equivalent title, in which equally as wide range of treatment has been indulged as in

this act. In *Phillips v. Cin. & Cov. Bridge Co.*, 2 Metc. 219, this court, commenting on that constitutional provision, says: "It should not be so construed as to restrict legislation to such an extent as to render a different act necessary, where the whole subject-matter is connected and may be properly embraced in the same act." And further: "None of the provisions of a statute should be regarded as unconstitutional, where they all relate directly or indirectly to the same subject, have a natural connection, and not foreign to the subject expressed in its title." In *L. & O. Turnpike Co. v. Ballard*, 2 Metc. 165, it was said: "A more liberal construction of this clause of the Constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation." *Hoke v. Commonwealth*, 79 Ky. 567; *Chiles v. Drake*, 2 Metc. 146, 74 Am. Dec. 406; *Jacobs v. Louisville & Nashville R. R. Co.*, 10 Bush, 263; *Conley v. Commonwealth*, 98 Ky. 125, 82 S. W. 285; *Weber v. Commonwealth*, 72 S. W. 30, 24 Ky. Law Rep. 1728; *Hyser v. Commonwealth*, 116 Ky. 415, 76 S. W. 174; *Sutherland's Stat. Constr.* § 93; *Cooley's Constitutional Limitations*, § 145. Not only is every feature of article 8 above logically connected, but the whole naturally pertains primarily to the subject of revenue and taxation. Besides, the subject has from the beginning in this state, and prior and since in Virginia, been treated as embracing the identical features now brought forward, so that if any one concerned in such legislation, whether a member of the assembly or a landowner looking out for his interests, would naturally have expected to find such legislation under that title, and reasonably all that was germane to the subject treated under the one head.

One complaint is that the measure is really not one of revenue, but of police, and that, therefore, it is not germane to the title. There will be found in this general act many features which partake of police regulation, as well as of revenue. This is particularly true of the most of the article devoted to license, such as liquor licenses, peddlers, pawnbrokers, billiard tables, pool rooms, exhibitions of circuses, and the like. Such measures might without any impropriety have been classed under either head, as they truly pertain to each as they are treated of. On this subject Judge Cooley (*Cooley on Taxation* [2d Ed.] § 587) says: "It has been seen that other considerations than those which regard the production of a revenue are admissible, and that regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect neither is nor can be disputed. The government has the general authority to raise revenue, and to choose the methods of doing so. It has also general authority over the regulation of relative rights, privileges,

and duties, and there is no rule of reason or policy in government which can require the Legislature, when making laws with one object in view, to exclude carefully from its attention the other." The primary purpose of article 3 is to raise revenue. Its incidental purpose is to regulate other rights. Also incident is the disposal of that which, in default of the revenue sought, shall come to the state by way of penalties. As they will in such event belong to the state, to dispose of them in that way that will most redound to the public welfare, as the Legislature shall judge, is a logical continuation of the same general subject of legislation. That the Legislature has the power to so dispose of what may be forfeited to it we have no manner of doubt, nor has there been cited to us any case or advanced any reason to the contrary.

Fifth. The act is claimed to be void, as violative of the Compact with Virginia. The Compact, so far as here involved, has already been set out in the foregoing part of this opinion. As may be naturally expected, that instrument has been before this court a number of times, as well as before the Supreme Court of the United States, for construction. It is conceded to be as obligatory upon this state to its fair intent as fully as if ingrafted in the Constitution of the state. Nay, more so, in that, while the state might alter or abrogate provisions of its own Constitution, it is without power to either alter or ignore the Compact. *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Lessee of Joseph Marlatt v. Silk*, 11 Pet. (U. S.) 1, 9 L. Ed. 609; *Polindexter v. Greenhow*, 114 U. S. 271, 5 Sup. Ct. 903, 29 L. Ed. 185. Among the first authoritative attempts on the part of this court to construe the Compact was *Boone v. Helm*, 4 Dana, 408, although it had been discussed, indicating the views of certain of the judges, in *Hoys' Heirs v. McMurry*, 1 Litt. 365, and in *Beard v. Smith*, 6 T. B. Mon. 430.

In *Boone v. Helm*, this court, speaking through Chief Justice Robertson, respecting the clauses of the Compact now in question, said: "All these expressions, taken together, mean, even according to their literal import, this, and only this: That, as to the validity and effect of such claims to land as then existed under the Virginia land system for the district of Kentucky, the rights of the claimants, as then existing, whether perfect or inchoate, should be tested by the laws under which they had been acquired, and that Kentucky should not abolish those laws, or enact and enforce any statute destructive of the validity of such of those claims as were, according to the laws existing when they were acquired, valid and available. Then, if any such claimant had a good entry, it—that is, the entry—should ever remain good as a valid and legal location. If he had a survey, good according to the law under which it was made, it—that is, the survey—should continue to be held as having been, when made, legal and valid. If he had obtained a

patent, it—that is, the patent—should be deemed, in the courts of Kentucky, to have vested in the patentee all the rights which were guaranteed by the laws of Virginia existing when it was issued. And if, at the time of the separation, one claimant had a perfect and another an imperfect title to the same land, each according to its degree valid and legal, both shall ever be held, in the like manner, to have been then good, and neither of them shall ever be invalidated by Kentucky. This seems to us to be the utmost latitude of the literal and intrinsic meaning of the Compact. And it does not interdict prospective legislation by Kentucky, for perfecting any imperfect title which was good, in its degree, at the date of the Compact, or of the separation, or for maintaining her own just authority as a sovereign, in procuring revenue, giving proper repose to honest occupants, preventing vexatious litigation, or in enacting and upholding, prospectively, any other just system of public economy, which Virginia herself might have adopted without rendering by retroaction, that invalid which was valid under her laws. It is admitted in argument, and could not be plausibly denied, that prospective limitation and revenue laws, by Kentucky, affecting rights to land acquired from Virginia, are not interdicted by the Compact."

In *Kendall v. Slaughter*, 1 A. K. Marsh. 378, involving the power of this state to change its limitation laws so as to give a shorter time than Virginia did at the separation for bringing actions, this court said: "But whilst the legislative enactments of this country are by the Compact not permitted to affect the validity of those rights, we are of opinion that instrument should not be construed so as to preclude the Legislature from either regulating the mode of action, or limiting the time it should be prosecuted, for the purpose of asserting those rights. That the section alluded to was not understood by the parties to that Compact, as inhibiting the Legislature from passing laws by which those rights might become forfeited is, we apprehend, apparent from other parts of that instrument; for it is furthermore in the latter clause of the eighth section provided that 'no neglect of cultivation or improvement of any land, within either the proposed state or that of Virginia, belonging to the non-resident citizens of the other, shall subject such nonresident to forfeiture or other penalty, within the term of six years,' etc. \* \* \* If, then, notwithstanding the Compact, laws of forfeiture may be enacted, no reason is perceived why the Legislature should not be allowed to regulate the limitation of actions; for, although possession may, in process of time, ripen into a perfect right to the land, it does so, under the efficacy of the laws of limitation, operating in the nature of a forfeiture upon the failure of the claimants in not asserting the right in due time."

These views are fully sustained by the Su-



preme Court of the United States in *Hawkins v. Barney*, 5 Pet. (U. S.) 457, 8 L. Ed. 190. This action also involved the validity of a 7-year statute of limitation passed by Kentucky, and applied to a claimant under a Virginia grant, whereas the period of limitation in Virginia applicable to such actions at the time of the separation was 20 years. That court commenting upon the Compact, said: "It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. \* \* \* Let the language of the Compact be literally applied, and we have the anomaly presented of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. If the seventh article of the Compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact every law applicable to real estate. \* \* \* The last member of the eighth article of this Compact distinctly recognizes the existence of the power in Kentucky to pass similar laws, notwithstanding the restriction of the seventh article, and also the probability of her resorting to the policy of such laws."

No one seems to have thought before that the power of the sovereign state of Kentucky was, or was intended to be, curtailed by the Compact with Virginia respecting the right of the former to proceed in her own way to coerce taxes from all property within her dominion for her support. The right to levy and collect taxes from the citizens or property within its jurisdiction is inherent in a state. As a part of its coercive process, it may forfeit the title of recalcitrant taxpayers, or distrain their property without judge or jury. The Compact no more prevents the state from forfeiting the title of property whose owners refuse to list it and pay taxes upon it than it denies to this state the power to levy the taxes. Nor does the Compact affect at all the question of procedure, jurisdiction of courts, the subsequent devolution of the title, requirements as to registry of subsequent conveyances, or the future duties and obligations to the state of the owners of such titles. The cases examined comment upon the fact, and lay stress upon the point, that whatever Virginia herself could have done in subsequent legislation, as affecting the titles in question, Kentucky might also do. As we have seen, Virginia, at the time of the separation, had provided a forfeiture of titles for a failure to pay the tax for three years, and has continuously since enacted such legislation. It was not a violation of the Compact for Kentucky to enact the statute in

question. It does not in the least impair or affect the validity of the patents issued by Virginia or under Virginia surveys, nor does it alter the right of any holder of such patents that was acquired under the laws of Virginia. They took the patents subject to the right and power of the sovereign to compel the payment of taxes on the land in the future, and subject to the correlative power in the sovereign to forfeit the titles to the state as a penalty for the nonpayment of the taxes.

Sixth. It is contended by appellant that the act in question is vicious because it seeks to extort an unlawful duplicate tax upon the same land. In the petitions of appellant is this paragraph: "Your petitioner is advised by counsel learned in the law, and believes, that in all of said years, and now, under the laws of the commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any of said tracts have paid the taxes thereon, which those under whom your petitioner claims ought to have paid or ought to pay, the person so paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid." The laws of the commonwealth referred to in the foregoing statement of the petitions are as follows: "Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon, and shall be subrogated to the lien of the commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder." "Wherever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall constitute a lien on the property upon which such tax was paid." Ky. St. 1903, §§ 4032, 4033, continued in force by Act March 15, 1906, article 1, §§ 14, 15, and Acts 1906, p. 92, c. 22.

There is no such connection or privity between adverse claimants of land as entitles one to recover taxes voluntarily paid by him on the land, although he in fact did not own it, from another who did own it, but failed to list it and pay the taxes. That which the state taxes is the property of the claimant—not the land. The right to possess, the title or legal right of dominion, is the property which the law protects, and is that property which it taxes. If two persons claim the same land, each having a title, but undetermined which is superior, shall the state stand back until their dispute is settled before it can exact a tax from the owners? For if one of them can lawfully refuse to list his

claim, which is his estate in the land, then the other could also. The state creates property—that is, the right to a thing—by protecting its use and enjoyment. It maintains police to protect its security and that of its owner, courts in which his rights may be vindicated, and the whole fabric of social government, which gives all value to every kind of property. In return, the state exacts certain personal services from the citizen, and in addition a sum at certain intervals, called a "tax," with which to defray the expenses of the government which he enjoys and which protects him in his rights of property. The state, then, may tax whatever is property within its jurisdiction. If one has an imperfect title to land, that is property, and it may be taxed, although another have a more perfect claim to the same land, which is also taxed as his property. That is not double taxation. There are many instances in which the same tangible thing supports several separate properties. For example, a corporate franchise is taxed; so is the property which is used in connection with it, and without which the franchise would have no appreciable value. Lands owned by corporations may be taxed; that is, the corporation's dominion and right in them. Based upon the land, the corporation issued shares to its stockholders. These shares, mere intangible things, may also be taxed against the shareholders. Nor would that be double taxation, though it might be impolitic. A debt is taxable as the property of the creditor. That for which the debt was created, if property, is also taxed as the property of the debtor.

The act of 1906 provides: "It shall be the duty of each and every owner or claimant of land to pay all the taxes \* \* \* and to list said land \* \* \* for taxation." It also provides: "The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not relieve against the duty therein imposed." Laws 1906, pp. 115, 116, c. 22, art. 3, § 1. The provision existed under the General Statutes. Gen. St. p. 1086, c. 92, art. 1, § 8. Double taxation is not per se unconstitutional. It is only when taxes are imposed twice by the same government upon the same property as against the same owner that they are inhibited, and then only by virtue of the clause in the Constitution which requires all taxation to be uniform. It is only when there is a destruction of uniformity by virtue of the so-called double taxation that it is prohibited. The state is interested, not only in having its taxes paid to it, but in having them paid by the persons who ought to pay them. The fact that the state makes a claimant in possession, though not having the best title, pay taxes upon his property—that is, his claim—does not exhaust the state's power to compel any other claimant of a title to the same land to list his claim and pay taxes upon it. The statutes quoted above, and relied on by appellant, at the utmost would not give a claim-

ant of land who paid taxes on it a lien as against the true owner, if the latter also paid. When the Legislature requires the true owner to list and to pay taxes on his claim, it is therefore no defense under this statute that another (a stranger to the title) has listed them and paid the taxes, and would have a right of action to recover for them if the state did not collect them from the true owner. *Simpson v. Edmiston*, 28 W. Va. 675.

Seventh. The act is claimed to infringe both the federal and state Constitutions, in that it attempts, so it is argued for appellant, to deprive citizens of their property without due process of law. This proposition involves the power of the state to forfeit lands of the owner or claimant because he failed to list or pay taxes on them. The power of the state to levy the tax is not to be questioned. No more is its power to coerce its payment. As listing the property for assessment is a necessary step towards collecting the tax, the state must have as ample power to compel that step as any other in the process of collecting the tax, or its whole power in the premises is reduced to the strength of the weakest incident. It is no longer controverted that the state may distrain the delinquent's property—may sell it by the most summary proceeding. No judicial action is necessary to perfect the title. "In what important particular does this differ from the case of forfeitures," says Judge Cooley in his work on Taxation (page 464), "except that to the proceedings which are to work the forfeiture there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication. It does not stand in the place of one. Its purpose is only to bring to the public treasury the tax for which the sale is made. Incidentally in the proceedings a purpose is kept in view not to sacrifice any further than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any constitutional principle that entitles a party to have his duty coerced by a public sale of property rather than by a forfeiture of it. A sale by a ministerial officer, which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture."

That text was written before the opinion of the Supreme Court in *King v. Mullins*, supra, in which, in summing up on the West Virginia Constitution and statutes already noticed, the court said: "We hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the

representative of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the state." This court, in *Marshall v. McDaniel*, 12 Bush, at page 383, said that it was within the power of the state to provide for a forfeiture of the owner's title if he should fail to list or pay taxes on his land; but it was held in that case that before the forfeiture could become effective he must have an opportunity to be heard in the matter before some competent tribunal to try the question—not whether it was right that his title should be forfeited, but whether the facts existed which under the statute worked a forfeiture. So in *Harris v. Wood*, 6 T. B. Mon. 643, this court held that the state was not required, in collecting its taxes, to submit the question of right or of the taxpayer's liability to a judicial tribunal or to a jury; that such had never been the law of the land. Under the act here involved, the owner is given a day in court. His title does not become forfeited till it is so adjudged in an action in the circuit court, to which he is made a party, and is summoned if within the court's jurisdiction, or proceeded against regularly by publication otherwise, and a regular trial is or may be had. The inquiry would be, in the trial, did he fail to list or pay the taxes within the time and in the manner prescribed by the statute? If he did fail, then the judgment will carry into effect the legislative fiat that his title shall be forfeited to the state. If he did not fail, then the proceeding to forfeit will be dismissed, and he will be left with his title as it was before.

In this connection we will notice another objection made against the statute, which is that it is an *ex post facto* law; that it punishes an act or omission by forfeiture of property which, when the act was omitted, was not so punishable by law. But such is not the fact. It is not the failure to list in the years 1901, 1902, 1903, 1904, and 1905 that works the forfeiture; but it is the failure after the passage of the act in 1906 to thereafter list the property for the five years named, and before January 1, 1907. It was within the power of the Legislature to forfeit for even one year's omission.

Eighth. It is assumed in argument against the validity of the act that any retrospective statute is unconstitutional. But such is not the law. The Legislature may provide for retrospective assessment of property, and, if it has been omitted, ought to do so (*Levy v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480), as otherwise such property would enjoy an exemption to which it was not entitled, and thereby impose an addition-

al and unjust burden upon other taxpayers. There is nothing in our Constitution which prohibits retrospective taxation. Nor is there in the federal Constitution. *Florida Central R. R. Co. v. Reynolds*, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283. The only inquiry is, has the Legislature clearly indicated its purpose to tax the property retrospectively? *Durrett v. Davidson*, 93 S. W. 25, 8 L. R. A. (N. S.) 540, 29 Ky. Law Rep. 401. Under the language of this act there can be no doubt of such purpose.

Ninth. There are a number of other objections made to the statute by appellant, all of which may be grouped under the general complaint that it is harsh, oppressive, and unjust. Were these objections well grounded, they would afford no basis for relief at the hands of the court. The policy of the Legislature may be looked into by the courts for the purpose only of interpreting statutes. If, then, they are found to be within the power of the Legislature to enact, the business of the court is ended. That the Legislature saw proper to enact a harsher remedy than it might have done; that it allowed the minimum of grace to the taxpayer; that it imposed most onerous penalties for his defaults; that it imposed even greater penalties than it does as against other classes whose fault may be no greater; that it does not even excuse infants, or married women, or persons laboring under disability, when the general policy of legislation is to deal more indulgently with those classes—are all considerations of expediency which appeal to the good sense and the conscience of the legislators. It is not tolerable in our form of government, with its distinct separation of powers, that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges. We do not say that this act is to be regarded, in the light of the history of its enactment and the abuses it was intended to remedy, as falling within the category described. There is abundant basis for the act, in which it will appear, not only as reasonable, but as highly politic. All that we do mean to say is that, tested by precedent and principle, we are unable to find that it violates any provision of the Constitution of the United States or of this state, or in any wise transcends the power of the legislative department of the state government.

Finally. Did appellant comply with the statute, so that the county court ought to have listed the lands? The petitions in these cases contained the same averment, of which the Pike county case is selected as a sample, as follows: "Your petitioner claims to be an owner of the herein below described tracts of land, situated in the county of Pike, state of Kentucky, but not of the improvements thereon, nor of the surface of certain

parts of each tract as hereinafter stated, to wit." Then follows a description of land by calls and distances, which it may be assumed were sufficiently explicit to have located the several boundaries. The petition sets out the dates of issue and serial numbers of the patents, and the instruments through which the petitioner derived title, namely, unrecorded deeds from Charles B. Hillhouse, and that the title of Hillhouse was derived by deeds and contracts to convey made by him with "others claiming by inheritance, by divers mesne conveyances, from those to whom said tracts of land respectively were granted by letters patent." The petition then states that the lands had not been assessed for any of the years 1901 to 1905, both inclusive, either by the petitioner or by any one under whom it derived title, and that no part of the taxes for any of those years had been paid. But the petitions alleged that parts of each of said tracts had been listed for taxation for each of said years by others than the plaintiff and those under whom it claimed, and that taxes under this listing have been paid by strangers. The petition then continues: "Your petitioner does not claim to be the owner of any improvements on any of said tracts of land, nor of so much of the surface of said lands as has been adversely held by others for a period sufficient to toll your petitioner's right of entry."

The defects of these petitions are: (1) They do not disclose the names of the owners, and therefore do not show the proper persons to be assessed. They show that appellant is only "an owner." Of what part, or in what proportions, and by whom the remaining portions are owned, is not shown. (2) They do not "so describe the land proposed to be assessed" as that, in the language of the statute, "it can be identified"—the land to be assessed in not only specific tracts, so described in their entirety as to be susceptible of accurate location, but the interest of the listing owner, if he owns less than the entire tract, must be so described as that it may be identified. (3) Some of the patent boundaries described lie only partly in the county wherein it is proposed to list it. The petitions show that fact, but do not show where, in what part of the county, the parts to be assessed do lie; nor do they show where the excluded parts which it is admitted do not belong to the petitioner lie, so as that the court could with reasonable certainty and intelligence fix a valuation upon that part which is assessed. For lands which lay upon the main Big Sandy river, in Pike county, would have a much greater cash value than if they lay across a mountain range miles away from a navigable river or a railroad. If the claimant does not own the whole tract described, he must show what portion he does own or claim. A failure to so describe exclusions as that they may be identified leaves the description as indefinite

as if the original tract could not be identified.

Nor are these objections merely technical, interposed whimsically, so as to defeat the proposed listing of the land, and so as to work its forfeiture. They are each substantial, and have solid merit to support them. Only the title of the person assessed passes by a tax sale. *Johnson v. McIntyre*, 1 Bibb, 295. If lands are assessed in the name of the wrong persons, no title passes by the tax sale. *Wheeler v. Brammel*, 8 S. W. 199, 10 Ky. Law Rep. 301; *Spalding v. Thompson*, 30 S. W. 20, 16 Ky. Law Rep. 836. The listing of partnership property in the name of an individual member of the firm is invalid to pass the partnership property under tax sale. *Ferguson v. Clark*, 52 S. W. 964, 21 Ky. Law Rep. 697. A tax deed for 100 acres of 600 acres was held void in *Humphries v. Huffman*, 33 Ohio St. 395. The description in the deed must be one that identifies the land with reasonable certainty. *Cooley on Taxation*, 516; *Gooch v. Bengel*, 80 Ky. 393, 14 S. W. 375. In the last-named case it was held that the description in the sheriff's deed must be so accurate as to "enable the officer selling it and those disposed to purchase to find it and ascertain the character of it by the description given." The description in the deed and the assessment roll must agree, or the title fails to pass. *Carlisle v. Cassady*, 20 Ky. Law Rep. 562, 46 S. W. 490. A sale for taxes that have been paid is void. Therefore it is of the first consequence that the assessment should be such as that, if the lands were sold under it, the title of the taxpayer would pass; otherwise, no one would be justified in bidding at the sale, and the state would get none of its taxes in spite of its efforts. Furthermore, if the taxpayer did not pay within the time fixed in the statute, and the state or county elected to forfeit his title, if the assessment was ineffectual, the proceeding to forfeit must fail by the way. As the nonresident may not be reached otherwise for the tax than by the proceeding in rem, it is competent and necessary for the state to have in the first instance such an adequate list as will satisfy every requirement of the law as to passing a valid title if a sale or forfeiture of the land should be necessary to realize the tax. *Commonwealth v. Tobacco Company*, 107 Ky. 1, 52 S. W. 799. The purpose of the Legislature was to enforce, under the extreme penalty of forfeiture for failure, such a listing of the property as would in the future prevent its escape from taxation, as it had been enabled to do in the past because of statutes so loosely drawn as that no title would pass in case of default; and as the owner was a nonresident, or might be, a penalty of a fine would be wholly inadequate to secure the listing, as, owing to his absence from the state, jurisdiction could not be obtained to assess the fine in a criminal or penal action. An assessment under the

offer made by appellant would not have enabled the state to sell any particular piece of land, or any particular interest in any particular parcel, so as to pass the title of appellant and the others claiming with it. The petition was so vague and indefinite as to utterly fail to meet the requirements of the statute. It does not answer to say that the taxpayer did not know his property or its description. He is required to know it, and to furnish it, so as the property may be certainly identified from it; nor is it an answer to say that it would be too expensive for him to make the necessary investigation.

Wherefore we conclude that the county courts were right in refusing the lists, and the circuit courts' judgments so holding are each affirmed.

**OMAN v. AMERICAN NAT. BANK et al.**  
(Court of Appeals of Kentucky. Dec. 18, 1907.)

**1. USURY—EVIDENCE.**

Where defendant pleaded usury, which was denied, and the evidence as to whether usury was charged was conflicting, defendant, in order to sustain such defense, was required to prove, not only that usury was paid and received, but the amount thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 328, 329.]

**2. MORTGAGES—DEED OF TRUST—FORECLOSURE—ATTORNEY'S FEE.**

Where a deed of trust executed in another state provided that the grantor should pay attorney's fees incurred in the collection of any of the notes secured thereby, some of which were notes of third persons discounted for the grantor, the beneficiary in the deed was entitled to reimbursement for an attorney's fee necessarily paid in the collection of one of such discounted notes, though the payee of a note executed in Kentucky may not contract that the payer shall pay attorney's fees for collection thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1669, 1670.]

**3. APPEAL—REVIEW—CONFLICTING EVIDENCE.**

A finding of the trial court on conflicting evidence will not be set aside on appeal where the evidence is such that the Court of Appeals is in doubt as to which view of the transaction is correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Warren County.  
"Not to be officially reported."

Action by the American National Bank and another against John Oman. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

W. B. Gaines and Wright & McElroy, for appellant. J. E. Du Bose and John M. Gant, for appellees.

**CARROLL, J.** The appellee brought this suit against appellant upon four notes executed in and payable in the state of Tennessee; two of them being executed by Engelbert & Co. to appellant and by him indorsed to the bank, the other two being executed directly to the bank by appellant. To secure the payment of these and other

debts, appellant executed in the state of Tennessee to David S. Oman as trustee a mortgage upon certain real estate in Warren county, Ky. The mortgage provided that, "should it become necessary to incur any expenses in the way of attorney's fees or otherwise in enforcing the payment of any of the notes, he binds himself to pay the same." Appellant answered, setting up certain credits that he was entitled to, alleging that the notes were renewals of notes previously executed to the bank that originated in an indebtedness created several years before the date of the notes sued on; that "from said time on to the renewals in 1896 said indebtedness was, from time to time, paid in part and renewed for the balance; that on renewals on said debt he paid usurious interest at the rate of 8 per cent. per annum, when 6 per cent. was a legal rate of interest, and the amount of usury so paid on the debt of which said notes in suit are the renewals amounts to \$—— or more; that the excess over 6 per cent. so paid by defendant on said debt should have been credited upon the principal of said debt; that he cannot give exactly the amount of usury so paid by defendant on said debt. It amounts to \$—— or more, and the plaintiff bank knows and can state, and it is called upon to state, the amount of usury so paid by this defendant on said debt. He says that he believes, and he so avers, that the said usury so paid and which should be credited on the said debts will amount to as much or more than the debt sued on." Judgment was rendered in favor of the bank, and appellant complains.

On one of the Engelbert notes the bank brought suit in Tennessee, and collected from them \$900, less \$225 attorney's fee. Appellant insists that the bank should not be allowed credit for the attorney's fee paid by it. To secure the payment of another note, appellant pledged as collateral security a note of one Jackson, which was secured by five shares of bank stock. Upon this Jackson note Oman brought a suit, and the amount recovered was paid to the bank. The par value of the bank stock was \$500, but the bank became insolvent, and there was only realized on this stock \$75, although the court required it to account to Oman for \$244. In respect to the claim of usury, the indefiniteness of the plea set out in the answer has been noticed. The evidence concerning it is equally as unsatisfactory. The only evidence in behalf of Oman is his own, which upon this point is as follows: "Q. State about when your indebtedness to the American National Bank originated. A. About 1896. Q. State whether or not the notes, copies of which are filed with the suit, are not lineal descendants from the original indebtedness created in 1896 and kept alive by renewals. A. Yes, sir; the original indebtedness was \$7,500, and I gradually paid it off from time to time, and they charged

me 8 per cent. interest on the loans they gave me. Q. How long, if at all, did you pay 8 per cent. on the indebtedness, which originated in 1886, which is the original of the note sued on? A. From 1886 until the date of the trust deed. Q. What is the date of the trust deed? A. I think it was 1896. Q. You paid 8 and 10 per cent. interest upon this debt from about 1886 to 1896? A. Yes, sir; I think that is about the date of the trust deed. Q. Now, state whether or not, when you renewed these notes from time to time, you paid the interest at the time of the renewals, or was the interest charged you by the bank embraced in the notes as a part of the principal? A. The interest was always embraced in the notes. Q. At what rate did they charge you? A. A little over 8 per cent.; never less." The president of the bank testified that, so far as he knew, no usury was embraced in the notes sued on; that the banking house in which the bank carried on its business was burned, and in the fire many of its books and papers were consumed, and he was unable to trace the history of the notes, and did not know what rate of interest was charged on the old notes, but that he had never paid more than 6 per cent. interest on the notes in suit. He further stated that in no instance did he ever pay any interest on any note which may have been the antecedent of the notes in suit; that such antecedent notes were simply discounted, and the net proceeds, after deducting the discount, was placed to his credit, and checked out by him. The court under this evidence, which was all that was introduced relating to usury or interest, could not, with any degree of certainty, say how much, if any, usury was embraced in the note sued on. When the plea of usury is presented, it is incumbent upon the person making it to furnish sufficient testimony to enable the court to determine from the record the amount of usury, if any, embraced in the transaction, so that the court may correctly or approximately adjudge the rights of the parties.

Concerning the attorney's fee charged by the lawyer who collected the Engelbert note, appellant cannot require the bank to account to him for the sum paid. It is true that upon notes executed in this state it is not allowable for the parties to contract that the payor shall pay the attorney's fees expended in the collection of the note, nor can the payee recover from the payor such fees paid by him; but this contract was made in the state of Tennessee, and, in addition to this fact, the attorney's fees were incurred in collecting a note that Oman had indorsed to the bank. The agreement to pay the attorney's fee embraced in the mortgage has the same effect as if it had been made a part of the note. Nor is it denied in the answer that the bank did not have the right to charge appellant with the attorney's fee paid by the bank in the collection of this note.

*Brown v. Todd*, 29 S. W. 621, 16 Ky. Law Rep. 698.

It is insisted for appellant that he should have credit for \$500, the par value of the bank stock pledged to secure the Jackson note, in place of \$244, allowed by the lower court; while appellee contends that as the bank only received on and for this stock \$75 it should not be required to account for any larger sum. The evidence relating to this bank stock is confined to the testimony of the president of the bank upon the one side, and appellee upon the other; and we are not disposed to disturb the finding of the lower court upon this controverted question of fact, as the evidence leaves us in doubt as to which view of the transaction is correct.

Some question is made as to the parties plaintiff in this action, and the manner in which it is brought. The action is in the name of the American National Bank and A. T. Hart, as plaintiffs, and it is averred in the petition that the bank has sold, transferred, and assigned the notes to its coplaintiff Hart, and he is now the owner of the same and entitled to the proceeds thereof. This averment is denied in the answer, as is also the averment that the notes have been lost. We do not, however, regard these matters as material in the disposition of this controversy, and it would not be profitable to extend this opinion discussing the questions made by counsel concerning them.

Wherefore the judgment of the lower court is affirmed.

#### KIRBY v. HILLSIDE COAL CO. et al.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—MINING.

An employé in a coal mine, who, notwithstanding his objections to mining in a particular manner, because of his knowledge that such manner was more dangerous than another plan, proceeded with the work on being ordered to do so, cannot recover for injuries received; the employé not being inexperienced, and not relying on the superior judgment of his employer, and the employer not failing to furnish a reasonably safe place in which to work, and not being negligent otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 649.]

##### 2. SAME.

A master may order the work to be done in a particular way, and a servant may refuse to do it in that way if he believes it to be hazardous; but if, with knowledge of the hazard, he proceeds with the work as directed, he assumes the risk ordinarily incident thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 649.]

##### 3. SAME.

Where work is hazardous, the fact that an employé is ordered to do the work in the most hazardous way affords him no ground of complaint, if he knew of the danger incident to the doing of the work in that particular way, and with such knowledge proceeded therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 649.]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by L. D. Kirby against the Hillside Coal Company and others. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

M. L. Prowse and Robert Hardison, Jr., for appellant. Gordon & Gordon, for appellees.

LASSING, J. Appellees operated a coal mine and appellant was a miner in their employ. While acting under the direction of appellees in cutting and undermining a vein of coal with a miner's pick, he was struck in the eye by a spark or splinter of sulphur and injured, to recover damages for which injury he filed his suit, alleging that, while doing the work under the direction of appellees in a way more hazardous than the usual, ordinary, and customary way, he was injured, and that because of the fact that he was so compelled to do the work appellees were liable. It appears from the petition that there are two ways in which coal may be mined. One plan, and that upon which appellant wished to mine it, was to "shoot it on the solid," as it is called, without cutting beneath the vein; and the other plan, this being the one pursued at the time he was injured, is to undermine the vein of coal before blasting on the face. Appellant insists that he knew that the latter plan was more dangerous, for the reason that in the process of undermining the miner's pick was liable to strike a band of sulphur, and that, when it did so, it would emit sparks which might injure his eyes; that, knowing this, he objected to mining by this method, but upon being ordered and directed by appellees to proceed with the work in this manner, he did so, and, although he was careful and cautious, he was nevertheless injured, as above set out. The trial court held that the petition stated no cause of action, and the correctness of his ruling upon this point is the question for determination now.

It is not claimed in the pleading that appellant was inexperienced, or that he was compelled in doing the work to rely upon superior judgment and knowledge of appellees; nor is it claimed that the vein of coal was defective, or that coal through which a vein of sulphur runs is defective, or that this fact was known to appellees and unknown to appellant; nor that appellees failed to furnish appellant with a reasonably safe place in which to do his work, taking into consideration the character of his employment; nor that the pick with which he was required to work was out of repair or unsuited to the character of work which he was required to do. No act of negligence whatever is charged to appellees or their superintendent further than that appellees required of appellant that the work be done in a particular way, and that, in order to do the work in

this particular way, appellant's face was brought closer to the vein of coal than it would have been brought had he been permitted to do the work in another way, and he thereby exposed to a danger and risk greater than was necessary for him to have assumed in the process of mining the coal. That the method which appellees directed appellant to pursue was more hazardous and dangerous than the method which he desired to pursue was known to appellant is evidenced by the fact that he at first refused to mine the coal as directed, and did not do so until he had been positively commanded to so mine it. It is clear from the pleading that appellant's knowledge of the danger to which he was exposed in mining the coal as directed was as good, if not better, than that of appellees. The master has a right to order the work to be done in a particular way, and the servant has an equal right to refuse to do it in that way if he believes it to be dangerous or hazardous so to do it; but if, knowing of the danger, he proceeds with the work as directed, he assumes the risk ordinarily incident to mining in that way, and, if injured, cannot complain. The fact that the business, at best a hazardous business, is ordered to be conducted in the most hazardous way, affords appellant no ground of complaint if he knew of the danger incident to the conduct of the business in that particular way, and with this knowledge proceeded with the work.

In the case of *Lindsay v. Hollenbach & May Construction Company*, 92 S. W. 294, 4 L. R. A. (N. S.) 830, 29 Ky. Law Rep. 69, the plaintiff had been directed, over his protest and objection, to drive over a place which he believed to be too steep to be perfectly safe, but, upon being assured that it was all right and relying upon the superior knowledge of his employer, he proceeded as directed and his team was injured. He sought to recover damages therefor, and this court, in passing upon the question, said: "It is the duty of the master to furnish a reasonably safe place for his servant to work. He is not required to furnish a place that is absolutely safe. Frequently the work which the servant is employed to do is dangerous in itself, and, of course, the servant assumes the ordinary risks in performing that character of work. If a servant is ordered to do a thing that is obviously dangerous, or so much so that a prudent person would not take the risk of doing it, and the servant does so, and is injured, he is not entitled to recover. *Ross-Parls Co. v. Brown*, 90 S. W. 568, 28 Ky. Law Rep. 813." It is said in the case of *Wilson v. Chess-Wymond Company*, 117 Ky. 567, 78 S. W. 453: "The duty of the master to furnish a safe or reasonably safe place in which the laborer may do his work is frequently misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the con-

trary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him; for he has assumed it." The rule laid down in the above cases has been approved in the cases of Clifton by, etc., v. C. & O. Railroad Company, 102 S. W. 247, 81 Ky. Law Rep. 431; Duncan v. Gernert Bros., 87 S. W. 762, 27 Ky. Law Rep. 1039; McCormick Harvesting Machine Company v. Leiter, 68 S. W. 761, 23 Ky. Law Rep. 2154. We are of opinion that the court did not err in sustaining the demurrer.

Judgment affirmed.

#### TUCKER v. DENTON et al.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### 1. PAYMENT—MISTAKE OF FACT—RECOVERY BACK.

Plaintiff's parents having executed a contract for the sale of their land, which though not void was unenforceable, and desiring not to perform the same, plaintiff having no access to the contract, nor any knowledge of its provisions, but believing that the same was enforceable, paid the vendees \$800 to relieve her parents from the supposed liability. Held, that plaintiff having paid the money by mistake of fact was entitled to recover it from such vendees, they having also received it by mistake or through fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 272-281.]

##### 2. SAME—MORAL OBLIGATIONS.

The money having been paid to release the parents' land from a supposed enforceable contract, their moral obligation to perform was not a sufficient consideration for the payment of the money.

##### 3. SAME—PAYMENT BY VOLUNTEER—RECOVERY.

Where plaintiff paid defendants a sum of money to relieve her parents from a supposed enforceable contract for the sale of their land, plaintiff was not a mere volunteer in making such payment so as to preclude her recovery thereof because the land contract was unenforceable.

##### 4. VENDOR AND PURCHASER—UNENFORCEABLE CONTRACT—RESCISSION—MONEY PAID—RECOVERY.

Where a nonenforceable contract for the sale of land was rescinded, the vendees were entitled to recover any payments made thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 163, 164, 961.]

Appeal from Circuit Court, Fleming County.  
"Not to be officially reported."

Action by Lou Belle Tucker against Ed Denton and others. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

B. S. Grannis, for appellant. J. H. Power and John P. McCartney, for appellees.

LASSING, J. On the 3d of November, 1906, the appellees, Ed Denton and Thomas Todd, entered into negotiations with H. A. Tucker and Mary F. Tucker for the purpose of purchasing a farm from them consisting of about 60 acres of land, upon which they lived. The price for the farm was agreed upon, and a writing was drawn up and signed by the parties, by which H. A. Tucker and his wife thought they had sold to the said Denton and Todd their farm. Said writing is as follows: "Article of agreement made and entered into by and between H. A. Tucker and Mary F. Tucker, of the first part, and Ed. Denton and Thomas Todd, of the second part, witnesseth: That for and in the consideration three thousand one hundred and fifty dollars (\$3,150.00), one hundred cash in hand, receipt of which is hereby acknowledged, two thousand dollars in cash to be paid on or before the 10th of March, 1907 (or upon possession if given sooner), and one thousand and fifty dollars to be paid in one year from March 10, 1907 (or one year from day of possession), if sooner given, bearing interest at the rate of 6 per cent. from date until paid. This November 3, 1906. Signed: H. A. Tucker. Mary F. Tucker. Ed. Denton. Thomas Todd. Witness: B. B. Markwell." After the execution of this paper Mr. and Mrs. Tucker, who were old and infirm, became dissatisfied with the trade, and their daughter, the appellant herein, sought out Messrs. Denton and Todd for the purpose of inducing them to release her father and mother from the contract which she believed they had entered into, and she finally agreed to and did pay to them the sum of \$800 for the purpose of having the contract canceled. Thereafter she discovered that the writing which she supposed was a contract of sale was not in fact a binding contract of sale, and was in fact of no binding force and effect whatever, and she thereupon filed her suit in the Fleming circuit court against the appellees for the purpose of recovering the \$800, which she had paid to them under the mistaken idea that she was securing from them the release of her father and mother from the execution of their contract of sale. The facts as detailed are set out in the petition. A demurrer was sustained to the petition, whereupon appellant filed an amended petition, in which she stated that her father and mother had not ratified their verbal agreement to sell, and were not willing to do so; that at the time that she paid to appellees the \$800 her parents believed that they were bound to convey the land to appellees according to the terms of their agreement; that appellant likewise believed that they were bound by an enforceable contract; and that but for said mistake on her part and the part of her parents she would not have paid said money. A demurrer was sustained to the petition as amended, and the petition was dismissed.

The contract in question, while not void,



was unenforceable. Appellant alleges, and for the purposes of this case it is admitted, that she believed that they had an enforceable contract. Her parents were dissatisfied with the trade they had made, and wanted to cancel it and retain their home. Appellant, being their daughter, was naturally moved by their distress and dissatisfaction to take steps seeking to relieve them of further worry and anxiety, and in this spirit sought appellees for the purpose of knowing what sum they would take and relieve her father and mother from the binding force and effect of their contract. She thought that she was buying something, and that they had something to sell. It is admitted by the demurrer that appellant thought the contract an enforceable one, and her father and mother were of the same opinion. It is most likely true that appellees likewise regarded the writing as a good, valid, and enforceable contract for the sale of the land for which they had bargained. If this is true, then they were mistaken as to what they had, and the mistake was mutual. If, on the other hand, they knew that they did not have an enforceable contract, and concealed this fact from appellant while conducting their negotiations with her, then by reason of such concealment they practiced a fraud upon her, and knowingly took advantage of her ignorance of the true status of affairs and secured from her a profit of \$800 for releasing her parents from an unenforceable contract. Clearly appellant would not have paid appellees anything like so large a sum, if she would have been willing to pay them anything at all, but for the mistaken belief that the contract held by appellees was a binding contract of sale, and that appellees had it in their power to compel her aged parents to surrender up the farm and convey same to them according to the terms of the contract. The writing which was supposed to evidence this sale, and from the burdensome effect of which appellant sought to relieve her parents, was not in the possession of appellant, and evidently not in the possession of her parents, for she had not seen same until after she had paid to appellees the \$800. Under the facts stated, is this such a case of mistake as will entitle appellant to the relief sought? In *American & English Encyclopedia of Law*, vol. 20, p. 812, it is said that in order to entitle one to relief the mistake must be one concerning a fact which is material to the transaction. The fact must be such that it animated and controlled the conduct of the parties. It must go to the essence of the object in view, and not be merely incidental, and the court must be satisfied that but for the mistake the obligation from which relief is sought would never have been assumed. A further requisite is that the mistake must be mutual, and, third, the mistake must be concerning some existing fact. Measured by this standard, we find that the matter about which appel-

lant was mistaken was a material, existing fact, about which, if there had been no mistake, she would certainly not have entered into the contract which she did with appellees, and paid them the sum of \$800.

The petition charges that appellees, as well as appellant, thought that they had a contract for the purchase and sale of the land in question. This paper was in their possession, or, at least, not in the possession of appellant, not accessible to her. If they were mistaken in the belief that they had an enforceable contract for the sale of the land in question, and knew, as they must have known, when appellant was attempting to negotiate with them for the cancellation of this contract, that she believed that they did have in their possession such a contract, the mistake was mutual. If they knew that it was not enforceable, and concealed this fact from her, they were perpetrating a fraud upon her. In the case of *Robinson v. Bright's Ex'r*, 3 Metc. 30, suit was brought to recover the purchase price of a negro who was sick at the time of sale, on the ground that there was no consideration for the payment of the money, and in passing upon the question this court said: "Can money which has been paid for a chattel, of no value when sold, and where there is thus a total failure of the consideration upon which the payment was made, be recovered back?" And continuing: "We are unable to perceive any difference between the two cases. If it is unjust and unconscientious in the one to coerce the payment of the money, in the other case it is equally against justice and good conscience to retain the money. In either case the party is compelled to part with his money without having received any value whatever for it. And there is ample authority for the recovery back, by an independent action, of money paid upon a consideration believed at the time of the contract and payment to be valuable, but which was in fact, at the time, of no value whatever." That case is not unlike the case at bar. Appellant in this case parted with more than one-fourth of the entire estimated value of the land under the belief that she was securing the relief of her parents from a binding and enforceable contract, when, in fact, no such contract was in existence. Had she entered into an agreement to pay appellees the sum of \$800 for the surrender of the contract, believing that it was binding, and later, upon discovering that it was not a binding contract, refused to pay the money, appellees could not have enforced its payment any more than the seller of the slave could have enforced the payment of the purchase money when the slave was of no value at the time of the sale, though believed to be of sound value. Nor will the moral obligation of appellant's parents carry out their verbal agreement of sale offer a sufficient consideration to uphold the payment of the money, where the payment, as in this case, was made for the purpose of securing the release of the parents

from a supposed enforceable contract, and not for the purpose of relieving them from the discharge of a moral obligation. In the case of *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407, this court said: "If one, ignorant of a plain principle of law, shall, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, what principle of law, or dictate of justice or policy, would require him to be bound, as with a Gordian knot, which nothing but the sword could unloose? Why should he be punished in such a case for such ignorance? Why should the other party be enriched or benefited without any equivalent or merit of any kind? A mistake of fact might be sufficient to entitle to relief or exoneration, because such a mistake would show that the contract was not such as the parties, or, at least, one of them, contemplated or would have made, had there been no mistake." And in the case of *German Security Bank v. Columbia Finance & Trust Company*, 85 S. W. 761, 26 Ky. Law Rep. 581, it is said: "The general rule is that, where money is paid by mistake, although there was negligence on the part of the person making the payment, it may be recovered back for the reason that otherwise the person receiving the money would be enriched at the expense of the other." It is true, in this latter case, the relief was denied, but upon other grounds; the general doctrine being distinctly recognized.

There can be no question but that appellant would never have consented to pay to appellees this money had she known the true condition of affairs in this case. The belief that her parents were bound by an enforceable contract was the one cause which induced her to part with her money. It is insisted for appellees that appellant was a volunteer in making this payment, and has no right of action. The mistake for which she seeks relief was as to the existence of a fact about which she was negotiating with appellees. In this negotiation she was not a stranger or a volunteer, the trade was a direct transaction between herself and appellees, and the mistake under which she labored was one of fact which entered into and formed the very basis of the contract which she made with appellees, and for which she paid them the sum of \$800. If there had, in fact, existed an enforceable contract for the sale of this farm, and appellant had paid to appellees the sum of \$800 for the release of this enforceable contract and a surrender of same to her or to her parents, it could not be maintained that there was no consideration for the agreement, for there would have been a valuable consideration moving from appellees to appellant for the payment of this money.

For the reasons stated, we are of opinion that the petition clearly stated facts which would authorize a recovery on the ground of mistake, and the demurrer should therefore

have been overruled. Appellees are entitled to recover any money paid to H. A. Tucker and wife.

This cause is remanded for further proceedings consistent with this opinion.

#### HERTLE v. RIDDELL et al.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### 1. CEMETERIES—RIGHTS OF LOT OWNERS—PROPERTY IN LOTS.

While the purchaser of a cemetery lot does not acquire a fee-simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the cemetery corporation, he has a property right in the lot, which he is entitled to protect from invasion, whether by a trespasser or the unauthorized and illegal acts of the directors of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Cemeteries, §§ 16-20.]

##### 2. SAME—REMEDIES.

The owner of a cemetery lot may maintain either trespass for damages or an injunction to protect his rights from invasion either against a trespasser or the cemetery corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Cemeteries, §§ 16-20.]

##### 3. SAME—USE OF ADJOINING LOT—BURIAL OF ANIMALS.

Where lots in a cemetery controlled by a corporation were sold only in accordance with the cemetery's rules and regulations, one of which was that the cemetery was set apart for the burial of the white race, and should be used for cemetery purposes only, a lot owner was entitled to maintain a mandatory injunction to compel the removal of the carcass of a dog, which plaintiff's adjoining lot owner had permitted to be buried in her lot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Cemeteries, § 21.]

##### 4. SAME—NUISANCE.

The fact that the carcass of the dog was well interred, and was not a physical nuisance, was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Cemeteries, § 21.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Bill by Henry Hertle against Alice Riddell and others. From a judgment dismissing the petition, plaintiff appeals. Reversed, without directions.

O'Neal & O'Neal, for appellant. C. B. Seymour, for appellees.

**BARKER, J.** The appellant, Henry Hertle, instituted this action in the chancery branch of the Jefferson circuit court for the purpose of securing a mandatory injunction against Cave Hill Cemetery Company, Alice Riddell, W. G. Hansbrough, and Ada Hansbrough, requiring them to remove from the cemetery lot belonging to Hansbrough the body of a dog which was buried therein, as he alleged, in violation of the laws, rules, and regulations governing the cemetery company, and his rights as a lot owner therein. His petition sets forth that Cave Hill Cemetery Company is a corporation created by and under the laws of the state of Kentucky, with power

under its charter, among other things, to ordain and put in execution such by-laws, rules, and regulations for its government and the management of its affairs as it may see proper, not contrary to the laws of the commonwealth of Kentucky or of the United States, and that by its charter it is expressly provided that all lands acquired by the corporation shall be perpetually held and used for the purposes of a "rural cemetery"; that long prior to the actions which are complained of in the petition, and prior to the purchase of lots therein either by the plaintiff or the co-defendants of the cemetery company, the corporation adopted rules and regulations for the government of the cemetery and the management of its affairs, and among others it adopted the following, to wit: "This cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only"—which is still in full force and effect. As a succinct statement of the facts out of which grew this litigation, we copy the following excerpt from the petition: "He says that, for a valuable consideration paid by him to the defendant corporation, the defendant conveyed and transferred to him on its books, and in accordance with its charter, rules, and regulations, lot No. 104, in section 1 of the cemetery, owned by defendant corporation, and known as and called Cave Hill Cemetery, which is in the county of Jefferson, and state of Kentucky, and he has ever since been and now is the exclusive owner of said lot and has the right to bury the remains of his family and other persons in said lot, and to have his own remains after death buried in said lot; that since the purchase of his said lot as aforesaid he has buried the body of his daughter in said lot, and her body is now buried in said lot, and the residue of said lot is held by him as a place for the burial of the remains of other members of his family, and for the interment of his own remains; that he purchased said lot and caused the remains of his daughter to be buried therein long prior to the wrongs and injuries complained of herein, and relying on the charter, rules, and regulations of the defendant that the lands owned and burial lots sold by it would be used exclusively as a rural cemetery and for the exclusive burial of the remains of white persons, and that said lot and all the other lots owned by said defendant corporation would be used exclusively for said purpose. He states that the defendant Alice Riddell is now and was at the time of the wrongs and injuries herein-after complained of the owner of lot No. 106, in section 1 of said cemetery, which she purchased and held under and subject to the provisions of the charter, rules, and regulations of said defendant corporation; that the said lot of defendant Alice Riddell adjoins and binds on the lot of this plaintiff; that the said defendant Alice Riddell, without the knowledge, consent, or approval of this plaintiff, or of any of the other lot owners in said

cemetery, to the great shame, humiliation, and distress of this plaintiff and the other members of his family, permitted and authorized her codefendants W. G. Hansbrough and Ada Hansbrough to inter, and they did inter, in her said lot a dog, and the remains of said dog are now buried in said lot; that said wrongs were done without any authority from said cemetery company, and in violation of the rights of this plaintiff as a lot owner in said cemetery. He says that by said wrongful acts of said defendants which were made known and came to the knowledge of many of the citizens of Louisville and Jefferson county he and all the members of his family have been caused and will continue to suffer great mental distress, his said lot will be rendered of no value for any purpose, he will be compelled to remove from his said lot the remains of his daughter now buried therein, and will not be able to use said lot for burial or any other purposes; that the defendants in burying and permitting said dog to be buried on said lot committed and have ever since maintained a nuisance, which said nuisance by reason of its close proximity to the lot of this plaintiff caused to him peculiar and special injury and damage. He states that, as soon as he learned of the wrongs and injuries complained of herein, he demanded of the defendants and each of them that the remains of said dog should be removed from said lot, but the defendants refused to remove same, and notified this plaintiff that they intended to keep the remains of said dog perpetually in said lot. He states that the defendant corporation is willing, as he is informed, to abate said nuisance by removing the remains of said dog, but asserts that it cannot do so without the consent of its codefendants, and for that reason refuses to abate said nuisance. He states that the continuance of said nuisance would produce great and irreparable injury to the plaintiff, and its commission has produced great and irreparable injury to the plaintiff; that he has no adequate remedy at law, and the defendants and each of them are doing and suffering to be done all of said acts, all of which are in violation of plaintiff's rights." A general demurrer was filed by the defendants to the petition, and sustained by the court; whereupon the appellant (plaintiff below) refused to amend, and his petition was dismissed; and of this ruling he now complains.

The precise question involved here is stated in the briefs of learned counsel to be one of first impression, and their well-known learning and industry is a sufficient guaranty to us that the question has never been adjudicated before. The demurrer admits all of the well-pleaded allegations of the petition, and it therefore only remains to determine (1) what rights appellant as a lot owner in the cemetery possesses; (2) whether or not he can enforce by the processes of the law these rights as against an adjoining lot owner; and (3) whether the action of the defend-

ants are violative of any legal right of the plaintiff. Cave Hill Cemetery is the principal burial place for the white people of the city of Louisville. It may be conceded at the outset that the purchaser of a lot from the defendant corporation does not become its owner in fee simple; that he has in it only the property right of using it for sepulture purposes, subject to the reasonable rules and regulations governing the corporation; and it may be said that his property rights more nearly resemble that of an easement than a fee-simple title. But, whatever these rights are, they are property rights, and when violated the owner is as certainly entitled to all the remedies which the law affords, as if he owned a fee simple. The establishment and the maintenance of great cemeteries for the convenience of cities is an absolute necessity. Man naturally desires to provide a suitable place in which to bury his dead, and his reverence and love for his dead demands the establishment of a place where their bodies may repose in peace and dignity; where they will be safe and secure from trespassers, and where he may beautify their graves and mark their last resting place with suitable monuments to preserve their memory from oblivion.

It is a matter of common knowledge that in the principal cemeteries of large cities enormous sums of money are expended in adorning the grounds, in keeping the graves fresh and beautiful, and in erecting monuments upon which to record the virtues of the dead. A lot therefore in a cemetery, by whatever title it is held or denominated, is a valuable property, even when measured in money, and we will now examine some of the authorities bearing upon the subject, in order to ascertain what other jurisdictions and the text-writers have held with reference to the rights of lot owners in cemeteries to invoke the process of the law to restrain or remedy the invasion of their property rights. In the case of Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769, it was held that a purchaser of a lot in a cemetery, while he has the exclusive right to its use for the purpose of sepulture, holds it subject to the reasonable regulations and by-laws of the corporations, and that he cannot exercise that absolute dominion over it, or with regard to it, as can the owner in fee simple in regard to his property. In the case of Wright v. Hollywood Cemetery, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621, the owners of a lot in the defendant corporation were held entitled to an injunction against the corporation restraining it from preventing them from burying a member of their family upon their lot. In Hollman v. City of Platteville et al., 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899, the owners of a lot in a public cemetery were held entitled to maintain an action of trespass against the city, which owned the fee-simple title, for invading the lot and removing the dead who were

buried there. To the same effect is Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. In Gowen v. Bessey, 94 Me. 114, 46 Atl. 792, the owner of a lot in a cemetery, while not owning the fee simple, had such property rights and possession as entitled him to maintain an action of trespass against a wrongdoer. In the case of Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481, it was said that it is well settled that a court of equity will enjoin the owner of land dedicated to cemetery purposes from defacing or meddling with graves on the land, at the suit of any party having deceased relatives or friends buried therein. In the case of Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759, a judgment in damages against the superintendent of a cemetery for wrongfully removing the body of a child of the lot owner was upheld. In the case of Mt. Moriah Cemetery Ass'n v. Commonwealth, 81 Pa. 235, 22 Am. Rep. 748, the Supreme Court of Pennsylvania held that, where a lot was sold to a colored man for burial purposes, the corporation could not afterwards change its by-laws and rules so as to exclude him and his family from sepulture therein, and mandamus was upheld against the corporation requiring it to permit the burial of the family of the owners of the lot. The rights of the owners of lots in cemeteries are thus defined in 6 Cyc. title "Cemeteries," § 8, p. 720: "Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial ground or the graves therein. An action of trespass *quare clausum fregit* may be maintained for breaking and entering a burial lot. One who is in the rightful possession of a cemetery lot, or who holds title to the usufructuary interest therein, may maintain an action against one who wrongfully trespasses upon it." In the case of Burke v. Wall, 29 Am. Rep. 316, 29 Ia. Ann. 38, it was held that where the plat of the cemetery at the time the owner purchased his lot showed an avenue or walkway leading up to the lot, and which was an easement subservient thereto, the owner of the lot is entitled to an injunction restraining the closing or discontinuing of the easement by the cemetery company. In Beatty, etc., v. Kurtz et al., 2 Pet. (U. S.) 566, 7 L. Ed. 521, it was held by the Supreme Court of the United States that the owners of burial lots, to which they had title by prescription, were entitled to the equitable remedy of injunction against the owners of the fee in the land to restrain them from removing the ashes of the dead. The court, in its opinion, speaking through Mr. Justice Story, said: "The next question is as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession,

under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury to the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them, the sepulchers of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." In *People v. St. Patrick's Cathedral*, 21 Hun (N. Y.) 184, it was held that one who purchases a lot from a distinctively Roman Catholic cemetery takes it with the tacit understanding either that he is a Roman Catholic, and, as such, eligible to burial, or at least that he applies on behalf of those who are in communion with the church. And in *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903, it was held that where land was conveyed as a burial place for members of the Catholic Church, and is taken in charge by officers of that denomination and consecrated according to its laws, a lot owner has no right to inter therein a person not recognized by the church authorities as a Catholic. In the case of *McGough v. Lancaster Burial Board*, 21 Q. B. Div. 323, it was held that a lot owner had no right to erect a glass shade over the grave on his lot, which was contrary to the rules of the board. In the case of *Clark v. Rahway Cemetery et al.*, 69 N. J. Eq. 636, 61 Atl. 261, in the Court of Chancery of New Jersey, it was held that a lot owner in a cemetery where the ground was dedicated for burial purposes only could maintain an injunction against the trustees, requiring them to keep the grounds in good order and repair, and to maintain the whole as a cemetery. In the opinion it is said: "Now, what is the object of this cemetery company? That is stated in its certificate: 'The object and purpose of the corporation is to maintain and use the property acquired from the church and any property it may hereafter acquire \* \* \* for cemetery purposes.' What are these purposes? Manifestly the decent care of the departed. The company itself is not only to use the property for burial purposes, but also to maintain it for those purposes. \* \* \*

It would seem plain that under the joint operation of the certificate of incorporation, of the by-laws, and of the deed itself the purchaser is not the isolated owner of a fee-simple absolute of a lot over which he has entire control as such, but a person who has acquired a limited interest in a plot which is part of one connected whole; that whole being conducted, maintained, and managed by trustees for the benefit of himself and those similarly situated. His interest is in some degree that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice. Here the direct tendency of the acts complained of is to imperil the lots remaining undisposed of, to depreciate the value of the cemetery lots as a whole, to prevent needed improvements, and to render access to complainant's lot more difficult."

From the foregoing authorities, we deduce these principles, which we think are sound: (1) That while a purchaser of a lot in a cemetery company such as the one at bar does not acquire the fee-simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the managers of the company, yet he has a property right in his lot which the law recognizes and protects from invasion, whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. (2) That the lot owner's remedy is commensurate with his rights, and he may maintain either trespass for damages or injunction, to enforce and uphold his rights whenever those remedies may be necessary, and this either against the trespasser or the company itself. The question, then, recurs: Did the act of the adjoining lot owners in burying on their lot the body of their dead dog violate the property rights of the plaintiff? And, if so, is the wrong such an one as equity will remedy by a mandatory injunction? The answers to these questions must depend upon the contracts which arose between the parties when the lots were purchased. Into the contract of purchase of a lot in a cemetery must be read the charter and by-laws of the company, and neither the owner nor the corporation can violate the fundamental purpose for which the corporation was organized and the property dedicated. One who purchases a lot in a Catholic cemetery may not afterwards violate the rule of the church by giving sepulture to a member of the Masonic order, although the contract of purchase is silent on the subject. *People v. St. Patrick's Cathedral*; *Dwenger v. Geary*, supra. Nor may a cemetery company sell a lot to a negro, and afterwards adopt a by-law which forbids its use for burial purposes to the negro race. *Mt. Moriah Cemetery Company v. Commonwealth*, supra. When, therefore, one contemplates the purchase of a lot upon which to bury his family, in order that he may certainly obtain what he desires, he

must look to the charter and by-laws of the corporation, and, having done this, they become a part of his contract of purchase. When the plaintiff and the defendants purchased the lots they now own in Cave Hill Cemetery, its charter dedicated it as a cemetery, and its by-laws contained the guaranty that "this cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only." With these provisions in their contracts, with what grace may the defendants demand the right to turn their lot into a place for the burial of dogs? Or why shall the plaintiff be not heard to complain of this gross violation of the charter and by-laws of the cemetery company? The appellees and the chancellor answer that it was a small dog, that it was well buried, and its presence under these conditions does not create a nuisance. If the question be whether its burial creates a physical nuisance, this view may be correct. But is there not much more involved in the question than a mere physical nuisance? A member of the negro race well buried is, from the standpoint of physical nuisance, no more so than the body of one of the Caucasian race; yet no one will deny that, if the privilege of burial in it were extended to the negro race, the value of Cave Hill as a cemetery for white people would be at once entirely destroyed. A lot which is now worth in money as much as \$500 would not, after such a change in the by-laws, be worth \$50. Property which in the aggregate may now be worth millions, would then be rendered practically worthless. It does not aid the question to say that this is an unreasoning prejudice. For the purposes of the argument, this may be admitted to be true. It is none the less true, however, that the money value of this cemetery property is based upon the confidence of the white citizens of Louisville that their prejudices in this regard will be safeguarded both by the corporation and the law. If this is true in regard to members of another race, is it not true to a greater degree in regard to the bodies of the lower animals? If the body of a dog may find sepulture on the lot of its owner in Cave Hill Cemetery, why might not the owner of a horse or bull, or donkey, also bury his favorite on his lot therein, if his fancy should take this freakish direction? Where would, or could, the line be drawn, if not at the body of a dog? We believe that the average man would consider it an outrage on his rights as a lot owner in a cemetery if the owner of the adjoining lot should inter the carcass of a dog beside the lot which holds the graves of his family. It would be useless to tell him that, when the bodies were resolved back into their original elements, chemically there is no difference between them. We do not reason about the dignity of our dead either according to the laws of logic or of chemistry. Sorrow, bending over the graves of her loved ones, smiles through her tears and

accepts the assurance of Faith that they are not dead, but sleeping. It is for this reason that we beautify the grounds in which they repose, guard their graves from vandalism, and protect their dignity from desecration. This may be only sentimentality; but, if these sentiments are outraged, our pain is none the less real. The burial place of the dead has among all nations and in all times been deemed sacred, and our Anglo-Saxon forefathers called it "God's Acre." It is protected by stringent laws from violation, and its willful desecration is universally regarded as exceptionally wicked. Man does not regard the last resting place of his dead as simply a place where they may be thrust from sight and forgotten. To him their ashes are sacred; and the memory of their virtues constitutes a foundation both for inspiration and courage. It was in this spirit that a great patriot, when our country was in direst peril, appealed to the mystic chords of memory stretching from every battle field and patriot's grave to every living heart and hearthstone in the land to swell the chorus of the Union when touched by the better angels of our nature. The sentiments and prejudices of man are a part of him. He does not often control them. As a rule they control him. He has a right to protect his lawful sentiments and prejudices from violation or outrage by contracts based upon legal consideration, and, when they are thus safeguarded, no reason is perceived why these contracts may not be enforced as any other contracts may be.

When the appellant purchased his lot in Cave Hill Cemetery by a large outlay of money, it was to secure a place of sepulture for himself and family in a cemetery dedicated to the burial of white people only, and, while some may criticize this spirit of exclusiveness, surely none can successfully deny his right to that for which he paid. On the other hand, the adjoining lot owners purchased their lot subject to the charter and by-laws of the cemetery company, and they have no right to put it to any use which violates the charter and by-laws of the cemetery company. Each is entitled to what he purchased—no more, no less. The appellant not only has the right to the actual use of his lot for the purposes of which it was sold to him, but he has also in common with all the other lot owners the right to have the cemetery maintained as a whole for the purposes for which it was dedicated, and is entitled to an injunction against the trustees of the corporation and the adjoining lot owners to prevent these rights from being violated. *Clark v. Rahway Cemetery*, 69 N. J. Eq. 636, 61 Atl. 261; *Burk v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316; *Beatty v. Kurtz*, 2 Peters (U. S.) 566, 7 L. Ed. 521.

For these reasons, the judgment is reversed, with directions to overrule the demurrer to the petition, and for further procedure consistent with this opinion.

**T. HARLAN & CO. v. BENNETT, ROBBINS & THOMAS.**

(Court of Appeals of Kentucky. Dec. 17, 1907.)

**1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN FOR SERVICES—TIME WHEN LIEN ATTACHES—PRIORITIES.**

A lien for attorney's services decreed by the judgment in the action wherein the services are rendered relates back and takes effect from the time of the commencement of the services, and is superior to an attachment subsequently levied on the interest of the attorney's client in the property involved in the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 385, 388.]

**2. SAME—RIGHT TO LIEN—STATUTORY PROVISIONS.**

Ky. St. 1903, § 107, provides that, where an action is prosecuted to a recovery, the attorney shall have a lien on the judgment for money or property which may be recovered for his fee, etc. Under Civ. Code Prac. § 732, subsec. 34, the word "action" embraces a demand for a set-off or counterclaim. *Held* that, while, where defendant's attorney merely defeats a recovery by plaintiff, he is not entitled to a lien on the property involved in litigation, he is entitled to a lien if he obtains an affirmative judgment for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 404-406.]

**3. PARTNERSHIP—LIEN OF PARTNER ON ASSETS.**

A partner has a lien on the partnership assets for his portion thereof after payment of the firm debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 137.]

**4. ATTORNEY AND CLIENT—ATTORNEY'S LIEN FOR SERVICES—STATUTORY PROVISIONS.**

Ky. St. 1903, § 107, provides that, where an action is prosecuted to a recovery, the attorney shall have a lien on the judgment for money or property recovered for his fee. *Held*, that where, in a suit by partners to settle the partnership and to enforce their lien on the assets, defendant partner obtained an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership and not in himself alone, there was a recovery within the meaning of the statute, and defendant's attorney was entitled to a lien for his fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 404-406.]

Appeal from Circuit Court, Hickman County.  
"To be officially reported."

Action between T. Harlan & Co. and Bennett, Robbins & Thomas. From a judgment in favor of the latter parties, Harlan & Co. appeal. *Affirmed*.

J. M. Brummal, Jr., and Deason, Rankin & Elder, for appellant. Bennett, Robbins & Thomas, pro se.

CLAY, C. On May 15, 1904, W. F. Cowles, Geo. S. Cowles, and L. W. Cowles instituted an action in equity against Geo. S. Palmer in the Hickman circuit court, seeking a settlement of the copartnership existing between them, which was conducted under the firm name of the Diamond Cooperage Company. Appellees, Bennett, Robbins & Thomas, were employed by the defendant Palmer

as his attorneys to defend for him and assert his claim to the partnership assets. On June 13, 1904, they prepared and filed his answer and counterclaim. In the pleadings, which were voluminous, plaintiffs sought to charge Palmer with large sums of money, while he made counter charges against them, and prayed for a settlement of the partnership, and for judgment for such sum as might be found to be due him. A great deal of testimony was taken, and every point involved in the case warmly contested. On October 13, 1905, judgment was rendered fixing the rights of the parties, including the creditors of the firm, and in that judgment a lien for \$300 was decreed in favor of appellees on the money adjudged to Palmer out of the assets of the firm. Pending this litigation, the property of the firm had been sold, and the proceeds were in the custody of the court. On November 18, 1904, appellants sued Geo. S. Palmer for about \$2,000, and had an attachment issued against his property. On the following day this attachment was levied on Palmer's interest in the firm property. Subsequently John R. Kemp, the special commissioner of the court, who under proper orders sold the firm property, was summoned as garnishee. On September 27, 1905, appellants recovered judgment against Palmer for \$1,360.98, and their attachment was sustained. By judgment entered October 11, 1906, the sum adjudged to Geo. S. Palmer out of the partnership assets was fixed at \$1,313.21. Appellants were given all of this fund, except \$339.87, which was held until the issue could be tried between them and appellees. On October 10, 1906, appellants filed an amended petition, making appellees parties to the proceedings. Appellees thereupon filed a demurrer and answer. The case was submitted, and judgment rendered February 14, 1907, adjudging appellees' lien for attorney's fee superior to appellants' attachment lien. The validity of this judgment is now before us.

As appellees filed Palmer's answer and counterclaim several months prior to the time of appellants' attachment, appellees' lien, if they had any, related back and took effect from the time of the commencement of their services, and was superior to the attachment. *Robertson & Cleany v. Shutt*, 9 Bush, 659. The only question to be determined then is whether or not appellees were entitled to a lien. Section 107, Ky. St. 1903, provides: "Attorneys-at-law shall have a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or in the absence of such agreement for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee," etc. It will be observed that the statute

gives the attorney a lien where the action is prosecuted to a recovery. Under subsection 34, § 732, Civ. Code Prac., the word "action" embraces a demand for a set-off or counterclaim. Therefore the attorney for the plaintiff may not be the only attorney entitled to a lien. There may be instances where the attorney for the defendant has the same right. Of course, if the attorney for the defendant merely succeeds in defeating a recovery by the plaintiff, he is not entitled to a lien upon the property involved in the litigation. *Lytle v. Bach & Miller*, 93 S. W. 608, 29 Ky. Law Rep. 424; *Wilson v. House*, 10 Bush, 406. If, however, he succeeds in obtaining an affirmative judgment in favor of his client, we think the rule is otherwise.

In the case of *Damron v. Robertson*, etc., 80 Tenn. 372, the Supreme Court of Tennessee, where the rule is the same as in this state, that the attorney has no lien except in cases of a recovery, confirms this view. In that case a suit was instituted for the sale and distribution of the property of a decedent, and for the purpose of requiring an accounting of advancements received by the heirs. One of the heirs was a defendant in the action, and was represented by attorneys. The latter succeeded in defeating any charge against their client for advancements, and out of the proceeds of the property of the decedent, the fund being in court, their client was adjudged about \$1,000. The decedent held the defendant's notes for sums more than his distributable share of the estate, and the administrator instituted an action and attached the defendant's share of the fund in court. In the meantime the attorneys who represented the defendant in the suit for division and settlement intervened in the attachment case, and claimed a priority of lien for their services for the defendant. The lower court sustained the attachment lien, and gave the plaintiff in the attachment the fund as against the attorneys. Upon appeal, the Supreme Court, in reversing the case, said: "The fund in controversy was in custodia legis in the original cause, being money derived from the sale of property for division, and for which there was a

decree in that cause in favor of W. A. Robertson. The services were rendered by Lamb & Tillman for him in that cause. Those services gave them a lien without any order of court on the fund, which became fixed by the positive decree in favor of their client in that cause. *Cunningham v. McGrady*, 2 Baxt. (Tenn.) 141. Their services were not merely in defense of their client's title against adverse claim, but resulted in the recovery of a decree in his favor for a definite sum then in the control of the court, although nominally a defendant. In equity the position of a party is of no consequence. Their lien was, of course, superior to the lien of the complainant as a subsequent attaching creditor. *Carrigan v. Leatherwood*, 3 Leg. Rep. 137, s. c. 3 Tenn. Cas. 38. The order of this court would not prejudice that lien." Every partner has a lien on the partnership assets for his portion thereof after the payment of the firm debts. The action by the Messrs. Cowles against the defendant Palmer, in which appellees were adjudged a lien for their legal services in behalf of Palmer, was not a suit to recover an indebtedness already ascertained by a partnership settlement. It was a suit to settle the partnership, and to enforce their lien upon the assets. The defendant Palmer not only controverted their claim, but affirmatively asserted his own claim to and lien upon the assets. These assets were not in the possession of any of the partners. They were in custodia legis. By the efforts of appellees, therefore, the defendant Palmer did not succeed merely in defeating the claim of plaintiffs, or in retaining that which was already his and under his control, but in establishing his positive right to and obtaining an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership, and not in himself alone. To this extent we think there was a recovery within the meaning of the statute, and that the court properly allowed appellees a lien for their fee of \$300 which was certainly reasonable in view of the character and result of their labors.

For the reasons given, judgment is affirmed.



WHEATLY et al. v. HARDIN NAT. BANK.  
(Court of Appeals of Kentucky. Jan. 9, 1908.)

1. VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT—SALES.

Where, in an action on a purchase-money note and to enforce the vendor's lien, defendant alleged that enough of the land could be sold to pay the debt and leave him his home, and the court directed a sale only of a sufficient amount to pay the debt, the commissioner, if less than the whole of the land would pay the debt, should sell the part designated by defendant so as to leave him his home.

2. PLEADING—FACTS OR CONCLUSIONS—BILLS AND NOTES—ACTIONS BY ASSIGNEE—ANSWERS—SUFFICIENCY.

Where the petition in an action on a note averred its assignment and that the assignee was the owner, a denial that the assignee was the owner, and that he only had an interest in the note, was a mere conclusion, and not sufficient to defeat a recovery by the assignee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 12–23½.]

3. BILLS AND NOTES—DEFENSES—FRAUD—PLEADING.

An answer in an action on a note, alleging that a vendor fraudulently and falsely represented to the purchaser that the boundary described in the deed included valuable lands, without stating what land or how much was not included in the boundary, and without averring that the purchaser relied on the statements of the vendor or that he was thereby misled, does not state a defense on the ground of fraud of the vendor.

Appeal from Circuit Court, Hardin County.  
"Not to be officially reported."

Action by Rufus Morris, for the benefit of the Hardin National Bank, and the bank, against Clara Wheatly and another. From a judgment for plaintiff, defendants appeal. Affirmed.

James Montgomery, for appellants. Irwin & Irwin, for appellee.

CARROLL, J. This suit was brought by Rufus Morris for the use and benefit of the Hardin National Bank, and the Hardin National Bank, against appellants, to recover judgment on a note executed by appellants to Morris as part of the consideration for a tract of land sold and conveyed by him to them, and to enforce a lien on the land to secure the payment of the note. It is averred in the petition that Morris, for valuable consideration, assigned the note to the bank. The defendants, now appellants, filed an answer and counterclaim, in which they said that "Morris by mistake or fraud represented to them that the boundary embraced in the deed included valuable lands that they believe and allege was not included in the boundary. They deny the Hardin Bank is the owner of the note sued on. They say it only has an interest in it. A large part if not all of same is due and belonging to the estate of Morris, he being dead. They plead the want of proper and necessary parties plaintiff in this suit. They deny the land cannot be divided without materially impairing its value; and say they are poor people, with a large family, and that Clara

Wheatly has been under medical treatment for a considerable time, and enough of the land could be sold next to Chenault's land to pay the debt, and leave them their home and a large orchard. They ask that the proper parties plaintiff be made, and for a credit of \$200 for the land sold them and not conveyed; and that, if a decree to sell is made, that it be off the side next to Chenault's land." A demurrer was sustained to the answer, and an amended answer tendered, to the filing of which objection was made and sustained. The amended answer averred that "Morris, by fraud or mistake, represented the land mentioned therein as not covered by the boundary set out in the petition to be covered and included in said boundary." Whereupon judgment was rendered for the amount of the debt, and an order made directing that so much of the land be sold as might be necessary to satisfy the judgment.

In our opinion the petition stated a good cause of action, and the pleadings of defendants, now appellants, which are set out in full, did not present any defense. The order of the court only directed that a sufficient amount of the land be sold to pay the debt, and the commissioner in executing the order, if less than the whole of the land will pay the debt, should sell that part of it designated by appellants in their pleadings. The petition averred that Morris assigned to the bank the note sued on, and that it is the owner of it. The denial in the answer that the bank "is the owner of the note sued on," and that it only has an interest in it, is not a sufficient denial to defeat the right of the bank to recover. This denial is a mere conclusion of the pleader. Facts should have been stated showing why the bank was not the owner of the note. McClure v. Bigstaff, 37 S. W. 294, 38 S. W. 431, 18 Ky. Law Rep. 601; Van Buskirk v. Levy, 3 Metc. 134. So much of the answer as attempted to present the defense that Morris misrepresented the boundary of the land did not state facts sufficient to sustain a cause of action or defense. It fails to state what land or how much land was not included in the boundary; nor is there an averment that appellees relied on the statements made by Morris or that they were misled or deceived by his statements, or that they did not know the boundary or quantity of land included therein. Phillips v. Charles, 41 S. W. 297, 19 Ky. Law Rep. 574.

The judgment of the lower court is affirmed.

WHITE v. GLAZER.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

1. REFORMATION OF INSTRUMENTS—SCOPE OF RELIEF—CROSS-BILL.

Where complainant sought reformation of a deed, it was proper to reform the deed to conform to the whole contract between the parties, though defendant did not allege in his answer

that a portion of such agreement set up by him was omitted from the deed by mistake or fraud, under the rule that he who seeks equity must do equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 198; vol. 19, Equity, §§ 188-190.]

## 2. COSTS—DIVISION.

Where, in a suit to reform a deed, the decree of reformation granted relief according to the claims of both parties, it was proper that each should be required to pay his own costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 112-114.]

## 3. APPEAL—REVERSAL—NOMINAL DAMAGES.

A judgment will not be reversed because of a failure to award plaintiff nominal damages under the maxim, "*De minimis non curat lex*."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4546-4554.]

Appeal from Circuit Court, Caldwell County.

"Not to be officially reported."

Action by R. H. White against L. Glazer. From a judgment for defendant, plaintiff appeals. Affirmed.

R. W. Lisanby, for appellant. Hodge & Hodge and L. Glazer, for appellee.

CLAY, C. In the month of March, 1905, appellant, R. H. White, conveyed to appellee, L. Glazer, a certain lot situated on South Jefferson street, in Princeton, Ky. According to the description in the deed, the lot fronted 79 feet on South Jefferson street, and ran back of the same width 148 feet to a private alley. By running back the 148 feet, however, from the point of beginning, the deed included the alley in question. Appellant first instituted an action in ejectment to recover the 10-foot alley. During the course of the proceedings, however, it developed that the courses and distances set forth in the deed were incorrect, and thereupon appellant filed an amended petition, asking that the cause be transferred to equity and the deed corrected. According to the proof of appellee, appellant first sold appellee a lot fronting 85 feet. When the lot was measured, it turned out that the frontage was only 79 feet. As this frontage was 6 feet less than appellant had contracted to convey, and the lot was not therefore wide enough to construct a house thereon and at the same time give a suitable passway to the rear of the premises, appellant, in lieu of the 6 additional feet which he had contracted to convey, agreed with the appellee to open up a 10-foot alley in the rear, not only of appellant's premises, but in the rear of the lot sold to appellee, so that each would have access to the rear portions of their respective lots. At the conclusion of testimony, appellee filed an answer, setting forth the above facts. Upon submission of the case the chancellor entered judgment directing that the deed be reformed, not only in accordance with the appellant's prayer, but so as to provide that the 10-foot alley should

be opened and used by each of the parties and their assigns as a private alley, and further directing that each party should pay his own costs.

Appellant contends that, because appellee did not allege that the agreement, claimed by appellee to have been made by the parties, was omitted from the deed by a mistake or fraud, the chancellor should not have reformed the deed so as to include that agreement. If this were an original action by appellee, for the purpose of having the deed reformed, there would be no doubt of the correctness of appellant's position; but, as appellant was in court seeking a reformation of the deed, it was proper for the chancellor to reform the deed so as to conform, not merely to the prayer of the petition, but to the whole contract and agreement between the parties. The maxim, "*He who seeks equity must do equity*," applies in such cases. Having come into court and asked a reformation of the deed, appellant will not be heard to complain because the chancellor reformed the deed, so as to carry out the true intentions of the parties.

Appellant further insists that the evidence for appellee was not sufficient to justify the judgment. As the chancellor, however, knew the location of the lots and the local conditions and circumstances, and was, furthermore, acquainted with the parties to the action, and as the deed itself shows that a private alley in the rear of appellee's lot was contemplated, though the exact terms and conditions under which it was to be laid out were not prescribed, we are not inclined to interfere with his judgment.

Appellant further insists that judgment for costs should have gone in his favor. We are of the opinion, however, that as the deed was reformed, according to the claim both of appellant and appellee, there was practically a recovery by each. Under these circumstances, it was proper to direct that each party pay his own costs.

Appellant further insists that the judgment is erroneous because it failed to award him nominal damages. This court, however, will not reverse upon that ground alone. The maxim, "*De minimis non curat lex*," applies.

Judgment affirmed.

## TRAVELERS' INS. CO. OF HARTFORD. CONN. v. CRAWFORD'S ADM'R.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

### 1. INSURANCE—ACCIDENT POLICY—DEFENSES —ESTOPPEL—KNOWLEDGE OF AGENT.

In an action on an accident policy, providing that it should be void as to persons under 18 and over 65 years of age, the court properly charged that, if defendant's agent who sold the policy knew when he did so that insured was over 65 years old defendant could not plead such provision in defense, unless insured knew that the agent had no authority to issue the policy, in which event plaintiff could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 966-974.]

**2. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.**

Where, in an action on an accident policy issued to a person over 65 years of age, contrary to a provision therein, there was evidence that defendant's general agent had previously refused to issue a policy to insured because of his age, defendant was not prejudiced by the erroneous admission of evidence that, when the issuing agent paid the premium to such general agent, he received it without protest, and at that time examined a stub book evidently containing insured's name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from Circuit Court, Nelson County.  
"Not to be officially reported."

Action by A. Crawford's administrator against the Travelers' Insurance Company of Hartford, Conn. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. S. & Jno. A. Fulton, for appellant.  
John S. Kelley, for appellee.

CARROLL, J. This is the second appeal of this case. The opinion on the former appeal may be found in 99 S. W. 963, 30 Ky. Law Rep. 943, in which the facts are stated very fully. Briefly they are that Dr. Crawford, who was over the age of 65, purchased from one B. J. Hubbard an accident policy, paying him therefor the premium. The policy provided that "this ticket and the insurance thereunder shall be wholly void as to persons under 18 and over 65 years of age." In a suit by the administrator of Dr. Crawford on the policy the company resisted a recovery upon the ground that, as he was over 65 years of age, the policy was void. To avoid this defense, it was averred that the agent Hubbard, who sold the policy, knew at the time that Dr. Crawford was over the age of 65 years; and in the former opinion this court said: "We are of the opinion under these authorities that it was proper for the court to submit to the jury the question of the agent's knowledge as to the age of the insured, and, if at the time the policy was issued he knew that the insured was over the age of 65 years, that then the company was bound, unless the jury believed from the evidence that Dr. Crawford at the time knew that the agent was exceeding his authority." J. Tyler Davis was the general agent of appellant at the time Crawford bought the policy; but he had authorized Hubbard to sell policies, and in his absence Hubbard sold the one in question. Davis knew that Crawford was over 65 years of age, and had declined to sell him a policy, telling him that his company would not sell insurance to persons over that age. When Hubbard sold the policy, he had no knowledge of the conversation that had previously taken place between Davis and Crawford, nor does it appear that he had notice of the clause in the policy mentioned, or that, when Crawford purchased the policy from him, Crawford knew he was representing the company for which Tyler Davis was agent. Hubbard sold

the policy at the railroad depot, and a few minutes thereafter Crawford took the train, and left on his journey.

Counsel for appellant argue that Hubbard did not know Crawford's age when he sold him the policy, but in answer to the question, "From your knowledge of Dr. Crawford and his family, and your long intimacy with him, could you say to this jury whether at the time you sold him this policy you knew he was over 65 of age?" He answered: "Yes, sir; I knew him to be a man over 65 years of age." On the morning of the day following the sale of the policy, and before notice had been received of Crawford's death, Hubbard delivered to Davis, the general agent, the premium Crawford paid for the policy, and at the time Davis received the premium he knew to whom the policy had been issued, but did not make any objection, although some time afterwards and after Crawford's death he tendered the premium to the administrator.

The court instructed the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that B. J. Hubbard, defendant's agent, knew at the time he sold Dr. Alexander Crawford the policy of insurance sued on that said Crawford was over 65 years of age, they will find for the plaintiff, unless they further believe from the evidence that Dr. Crawford at the time knew that said agent had no authority to issue said policy, in which event they will find for the defendant. (2) Unless the jury believe from the evidence that B. J. Hubbard knew at the time he issued the policy to Dr. Crawford that said Crawford was over the age of 65 years, they should find for the defendant. (3) If the jury believe from the evidence that Dr. Crawford at the time the policy was issued to him knew that Hubbard was exceeding his authority in issuing said policy, they should find for the defendant." These instructions presented fully and accurately the law of the case as declared by this court in the former opinion, and the evidence was amply sufficient to support the verdict.

It is insisted that the court erred in permitting Hubbard to testify that he paid the premium to Davis, and that he received it without protest or objection, and in allowing another witness who was present to say that Davis at the time looked at a stub book evidently containing the name of Crawford to whom the policy had been issued. We are unable to perceive in what substantial particular this evidence was prejudicial, although it may have been technically incompetent, because the case went to the jury, not on what Davis did or said, or his knowledge of Crawford's age, but upon what transpired with Hubbard who sold the policy to Crawford.

Complaint is also made as to the refusal of the court to give certain instructions requested by counsel for appellant. These instructions were properly refused. They were

not in line with the opinion of the court upon the former appeal, and the instructions given by the court covered fully the law of the case. There was no room or place for any others.

Some objection is made to the argument of counsel for appellee; but we do not think it is well founded.

The judgment of the lower court must be affirmed.

### VAUGHAN et al. v. REDDICK.

(Court of Appeals of Kentucky. Dec. 20, 1907.)

#### 1. CONTRACTS—CONSTRUCTION.

Defendant was insured in an assessment company. The mortuary assessments having constantly increased until they reached \$123 per annum, he and the beneficiaries contracted with plaintiff to pay him \$200 per year "for paying premiums and dues on the \* \* \* policy from this date." The policy was assigned to plaintiff, and on the back of the assignment it was stated that defendant agreed to pay plaintiff \$200 per annum "so long as he shall keep in force said policy." Plaintiff continued to pay the dues and assessments until they had been increased to \$230 per annum, when defendants ceased sending him notices of assessments which they had heretofore done, although there was no agreement requiring it, and plaintiff thereupon discontinued payment and the policy lapsed. *Held*, in an action to recover the payments made by plaintiff, that under the contract plaintiff was bound to continue the payments to the maturity of the policy.

#### 2. SAME.

Defendants not being obliged to deliver the notices of assessments to plaintiff, their failure to do so was no excuse for his discontinuing the payments.

#### 3. DAMAGES—MEASURE OF DAMAGES—BREACH OF CONTRACT.

Where a person who has contracted to pay the dues and assessments on a policy of life insurance to maturity defaults and allows the policy to lapse, the measure of damages is the cash value of the policy at the time of default.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by J. T. Reddick against Solomon C. Vaughan and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Kendrick, Miller & Marble and Crice & Ross, for appellants. Wheeler, Hughes & Berry, for appellee.

CLAY, C. On November 20, 1885, Solomon C. Vaughan took out a life insurance policy in a New York company, known as the "Mutual Reserve Fund Association," on his own life, for \$5,000, naming as beneficiaries his wife, Julia D. Vaughan, and his three daughters, Bessie V. Scott, Bertie Vaughan Dabney, and Mattie D. Vaughan. His wife, Julia D. Vaughan, died several years ago. He and the other beneficiaries are still living. The company issuing the policy was an assessment company, and to keep the policy in force there had to be paid certain annual dues amounting to \$10, and, in addition thereto, a mortuary assessment every two months,

the amount of which was determined by the company and varied from time to time. In the latter part of the year 1895 Solomon C. Vaughan, having paid all annual dues and mortuary assessments to that time, became financially involved, and was unable longer to continue their payment, so for the purpose of providing for their payment he together with the beneficiaries, his wife, Julia D. Vaughan, and his three daughters, Bessie V. Scott, Bertie Vaughan Dabney, and Mattie D. Vaughan (Bessie V. Scott and Bertie Vaughan Dabney being married at the time, and Mattie D. Vaughan being then single, but now married and her name being Mattie D. Boone) executed the following obligation to the appellee, J. T. Reddick: "We the undersigned, the beneficiaries named in Policy Number 39114, issued by the Mutual Reserve Fund Life Association of New York, for the sum of five thousand dollars, agree to pay to J. T. Reddick at the rate of two hundred dollars per annum for paying premiums and dues on the above policy from this date. Said policy issued upon the life of Solomon C. Vaughan, and for said J. T. Reddick's protection, the beneficiaries hereby assign the above said policy to the said J. T. Reddick for the payment of all advancements made by him at said rate per annum. Paducah, Ky., Nov. 4th, 1895. Solomon C. Vaughan. Julia D. Vaughan. Bessie V. Scott. Mattie D. Vaughan. Bertie Vaughan Dabney." Pursuant to the above agreement, appellee, J. T. Reddick, paid all dues and mortuary assessments from that time up to and including June, 1901. The amount so paid was \$1,128.90. After that time he failed to pay any further dues or assessments, and the policy was lapsed for nonpayment thereof. This state of affairs continued without action on the part of any of the parties until August 8, 1906, when appellee brought suit in the McCracken circuit court against appellants Solomon C. Vaughan and Mattie D. Boone to recover the payments made by him, together with interest thereon from the time of each payment. Among other defenses Solomon C. Vaughan and Mattie D. Boone alleged that, by the terms of the agreement sued on, appellee contracted to pay all dues and assessments to the maturity of the policy; that by his failure to do so, they had been damaged in the sum of \$5,000, which they pleaded and relied upon as a counterclaim. At the same time they asserted that the contract in question was signed by Bessie V. Scott and Bertie Vaughan Dabney, who, if any one was bound thereon, were equally bound with the answering defendants, and asked that their answer be made a cross-petition against the said Bessie V. Scott and Bertie Vaughan Dabney. The latter filed a demurrer and an answer pleading suretyship and coverture. Subsequently they withdrew their answer to the cross-petition, and stood upon their demurrer, which was overruled. Appellee in his reply to the answer of Solomon C. Vaughan

and Mattie D. Boone first denied that he had agreed to pay all dues and assessments to the maturity of the policy, and then pleaded that all the notices of assessments and dues were sent direct by the company to Solomon C. Vaughan, and were then turned over by said Vaughan to appellee for payment; that this was done up to June 27, 1901, the time of the last payment by appellee; that the reason that appellee failed to make any further payments was due to the fact that said Vaughan failed to notify appellee of the first notice after that time, and appellee had no knowledge of the assessment next due until the same was past due and the policy had lapsed for the nonpayment thereof; and that, even if appellee was bound by the terms of the contract to continue the payments of dues and assessments to the maturity of the policy, he was released from said obligation by the failure of said Vaughan to notify him when the assessments were due and the amount thereof. There was introduced in evidence the policy of insurance, and also an assignment of the policy made about two months and a half after the execution of the original contract on one of the blanks of the company, containing the following: "Being unable financially at this time to pay the amounts necessary to keep the above-mentioned policy in force, I hereby agree to pay to J. T. Reddick at the rate of (\$200) two hundred dollars per annum from November 1, 1895, so long as he shall keep in force said policy. In witness whereof I have hereunto set my hand and seal this 22nd day of January, 1896. Solomon C. Vaughan." On the back of said assignment is the following: "Dr. J. T. Reddick is to receive \$200.00 per year in the place of what he may pay in mortuary premiums each year—and not \$200.00 additional in what he might pay in premiums. S. C. Vaughan. J. T. Reddick." "I hereby consent to the within assignment. Solomon C. Vaughan. Julia D. Vaughan. Bessie V. Scott. Mattie D. Vaughan. Bertie Vaughan Dabney." Appellee also introduced the receipts from the company showing the dues and mortuary assessments paid by him. At the time that appellee agreed to pay the assessments, they amounted to \$18.90 every two months. At the beginning of the year 1898 the amount had increased to \$32.05, or \$202.30 per annum, including the dues of \$10. On June 27, 1901, the assessment was \$41.40, or at the rate of \$258.40, including the dues; while on August 26, 1901, the assessment was \$45.15, or at the rate of \$280.90 per annum, including the dues. Appellee also introduced the following letters in evidence, which he says were mailed to Solomon C. Vaughan: "Paducah, Ky., Feb. 24th, 1898. S. C. Vaughan, Esq., Richmond, Ky.—Dear Sir: Your premium in the Mutual Reserve Fund Life Association has been increased from \$18.90 to \$32.05 bimonthly. This makes it cost \$202.30 per year, and more than I get for carrying it according to the terms of our contract.

Of course, I cannot carry it for you at that rate, and I think it would be best for you to carry it yourself, or make a new contract with me. If you will make a new contract with me, and agree to give me \$300.00 per year, and go into the same kind of an agreement as you did before, I will carry it for you until there is another increase of the premium. I would rather, however, for you to pay me what is due me, and carry it yourself, for I am afraid the insurance is not good. Please let me hear from you at once, as the premium is due the last of the month. Fraternally, J. T. Reddick." "Paducah, Ky., September 2, 1901. Solomon C. Vaughan, City—Sir: In order that I may know when and what amounts to pay to keep your policy in force in the Mutual Reserve Fund Life Association, please request the Association to send notices of call and receipts to my address. Respectfully, J. T. Reddick. [Duplicate.]" The last letter was registered, and the receipt is signed: "Solomon C. Vaughan. Mrs. A. S. Dabney." Appellant Solomon C. Vaughan denied any recollection of having received either of these letters. Upon submission of the case, the chancellor entered a judgment in favor of appellee, not only against appellants, Solomon C. Vaughan and Mattie D. Boone, but against Bessie V. Scott and Bertie Vaughan Dabney. From that judgment this appeal is prosecuted.

The following questions are involved: (1) Did appellee have the right by the terms of the contract to discontinue the payments on the policy at any time, or did he agree to continue the payments until the policy matured? (2) If the latter, did he stop paying because of the failure of Solomon C. Vaughan to send him notices of the assessments, and was he released from his obligation by said failure? (3) Was judgment against appellants Bessie V. Scott and Bertie Vaughan Dabney proper, when they were not made parties by the petition, and no judgment was asked against them?

As to the first question, it must be remembered that at the time that the contract was entered into the dues and assessments amounted to \$123.40. Therefore, if appellee's contention be correct that he had the right to discontinue the payments at any time, he could stop at the end of one year, or even at the end of two months. In that event, appellants would have bound themselves to pay \$200 for \$123.40 in case the payments were continued for a year, or \$33.33 for \$20.06 in case only one payment was made; thus making the interest rate over 60 per cent. per annum in the second instance. We confess that we do not believe it was the intention of the parties to enter into such an unreasonable and unconscionable contract. On the contrary, we are inclined to the view that both appellants and appellee, taking into consideration the fact that the mortuary assessments would increase, and the further item of Solomon C. Vaughan's natural expectancy of life, agreed upon the

sum of \$200 per annum as an amount that would cover the mean average of the dues and assessment, and at the same time give to appellee a reasonable return on the money advanced. Furthermore, the contract provided that appellants were "to pay J. T. Reddick at the rates of two hundred dollars per annum for paying premiums and dues on the above policy from this date." What premiums and dues? The premiums and dues for the next two months, or the next year? No; the premiums and dues from the date of the contract, which can mean nothing less than all the premiums and dues thereafter payable, and this would necessarily carry the policy to its maturity. Nor do we think that the subsequent assignment, even if it may be considered for that purpose, shows a different intention. By that writing Solomon C. Vaughan agreed to pay appellee at the rate of \$200 per annum "so long as he shall keep in force said policy." This language certainly does not change appellee's obligation imposed by the original contract to continue the payments to the maturity of the policy. Its manifest purpose was to show that Vaughan agreed to pay at the rate of \$200 per annum only during those years that appellee kept the policy in force, and that, if appellee failed to comply with his obligation, there was no further obligation resting upon Vaughan. We therefore conclude that by the terms of the contract appellee bound himself to make all payments necessary to carry the policy to maturity.

As to the second question, there is nothing either in the original or subsequent contract nor is there allegation or proof of any supplemental agreement that bound Solomon C. Vaughan to deliver the notices of assessments to appellee. Nor do we see why appellee should have applied to Vaughan to notify the company to send the notices to appellee. Appellee was as much interested in the policy as Vaughan, or any of the beneficiaries. The company knew of the assignment. The assessments were payable every two months. All the appellee had to know was the amount of the assessments, and, if he really desired to keep the policy in force, he could have applied to the company itself, and have secured the necessary information. Furthermore, we do not believe that appellee discontinued the payments because of a lack of notice, but for the reason that Solomon C. Vaughan had lived longer than was expected, and the assessments were in excess of \$200 per annum, the amount which appellants had agreed to pay. This may be gathered, not only from appellee's letter of February 24, 1898, set forth above, in which he told appellant Solomon C. Vaughan that he could not afford to carry the policy any longer, but also from the fact that the assessments in 1901 had materially increased over those of 1898, thus making his reasons for desiring to discontinue the payments all the stronger.

In view of these conclusions, it necessarily follows that appellee violated his agreement, and is liable to appellants for such damages as they sustained. The measure of damages is the cash value of the policy at the time appellee defaulted in the payment of the dues and assessments. Upon the return of this case the chancellor will hear proof upon this point, and give judgment accordingly.

In view of the conclusion reached by the court, it will be unnecessary to determine whether Bessie V. Scott and Bertie Vaughan Dabney, who were not made parties to the petition of appellee and against whom no judgment was sought, entered their appearance to the original action by filing a demurrer and answer to the cross-petition.

For the reasons indicated, judgment is reversed, and cause remanded for proceedings consistent with this opinion.

#### ILLINOIS CENT. R. CO. v. CURRY.

(Court of Appeals of Kentucky. Dec. 19, 1907.)

##### 1. CARRIERS—LIVE STOCK—CONNECTING CARRIERS—LIABILITY.

Where live stock is shipped to a point with or without the state, the contract of shipment made with the initial carrier is binding on all connecting carriers who receive the live stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 950.]

##### 2. SAME—ACTIONS—VENUE.

Where live stock is injured by the negligence of any of the carriers having it in charge between the points of reception and destination, an action may be brought against the initial carrier in the county where the contract of shipment was made.

##### 3. SAME—PARTIES.

In an action against an initial carrier for injuries to live stock, all the connecting carriers against whom it is sought to recover damages may be made parties defendant; and, if brought before the court by process as provided by Civ. Code Prac. § 51, a judgment may be given against any one or all of them that the evidence shows to have committed the injuries.

##### 4. SAME — LIABILITY OF CONNECTING CARRIERS.

In an action against one or several carriers for injuries to live stock, none of them will be responsible for damages occurring beyond the end of the lines controlled by them in the absence of a special contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 950.]

##### 5. SAME — TRIAL — SEPARATE VERDICTS — INSTRUCTIONS.

In an action against several carriers for injuries to live stock, in the absence of a special contract extending the liability beyond the end of their respective lines, the jury should be instructed to find a separate verdict against each carrier for the damages that occurred on its line.

##### 6. SAME—QUESTION FOR JURY.

In an action against two connecting carriers for injury to live stock, plaintiff alleged that an oral contract of shipment was made with the initial carrier; that there were mutual traffic arrangements between the two roads, and that they were connecting lines; that the contract was made with the initial carrier acting on behalf of the other road; that the stock was shipped by the initial carrier, and delivered to the connecting carrier which agreed to ship it

to its destination. The written contract under which defendant connecting carrier alleged that the shipment was made was substantially the same as the parol contract, except in respect to the limitation of each carrier's liability to injuries occurring on its line, and the evidence showed that the stock was received by the connecting road and carried to its destination. *Held*, that the refusal of the trial court to instruct peremptorily for defendant connecting carrier was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 962.]

#### 7. PLEADING—VARIANCE.

A variance exists when the evidence does not sustain the pleadings on which a recovery is sought or a defense rested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1800, 1801.]

#### 8. CARRIERS—INJURIES TO LIVE STOCK—ACTION—PLEADING—VARIANCE.

Civ. Code Prac. § 129, provides that no variance between pleadings and proof is material which does not mislead a party to his prejudice. Section 131 provides that, if the allegation to which the proof is directed be unproved in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof. *Held*, that where, in an action against connecting carriers for injury to live stock, plaintiff alleged that a verbal contract of shipment was first made and that a written contract was subsequently signed, and proved that a verbal contract was made, and defendants relied on a written contract and proved that one was entered into, there was no variance or failure of proof.

#### 9. SAME—FAILURE TO FEED AND WATER.

Under Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], providing that no railroad company shall confine live stock in cars for a longer period than 28 hours without unloading for rest, water, and feed, it is the duty of a railroad to be reasonably well prepared to care for stock at the places where it is unloaded for rest, water, and feed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 926, 927.]

#### 10. SAME — MEASURE OF DAMAGES — INSTRUCTIONS.

Where in an action against a railroad for injuries to live stock shipped under a contract, by which defendant was only liable for damages between the towns of L. and M., though the destination of the stock was A., some 200 miles beyond M., the evidence showed that the injuries were sustained between L. and M., the court properly instructed that the measure of damages was to be based on the condition of the stock on arrival at A.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 963, 964.]

Appeal from Circuit Court, Clarke County.  
"To be officially reported."

Action by C. C. Curry against the Illinois Central Railroad Company and another. Judgment for plaintiff, and the railroad appeals. Affirmed.

Trabue, Doolan & Cox, J. Smith Hays, and J. M. Dickinson, for appellant. Beckner & Jonett, for appellee.

CARROLL, J. In this action appellee recovered a judgment against the Chesapeake & Ohio Railway Company and the Illinois Central Railroad Company for damages growing out of injury to stock shipped by him from Winchester, Ky., to Arcadia, La. There was a separate verdict against each of the companies; but, the recovery against the

Chesapeake & Ohio Railway Company being less than \$200, no appeal was prosecuted by it. The contract for the shipment of the stock was made with the agent of the Chesapeake & Ohio Railway Company in Clarke county, Ky. It is averred in the petition, and testified to by appellee, that this contract was in parol, but that after the stock was loaded on the cars a written contract in the form in use by railroads generally was presented to him by the agent, and signed. Both railroad companies denied that any parol contract for shipment was entered into, and relied upon the written contract, and all of the stipulations contained therein, several of which they depended upon to relieve them from liability.

Numerous motions relating to the jurisdiction of the court, the misjoinder of actions, and other alleged defects in the pleadings were made, but we do not deem it necessary to consider any of them except the questions raised as to the jurisdiction of the court and the misjoinder of the causes of action. It is the settled law in this state, as declared by this court, that, where live stock or other freight is shipped from a point in this state to any other point within or without the state, the contract of shipment made with the initial carrier, whether it be verbal or written, is binding upon all connecting carriers, whether immediate or remote, who receive the live stock or freight. And, if the property is injured by the negligence of any of the carriers having it in charge between the point of reception and destination, an action may be brought in the county where the contract, verbal or written, was made against the initial carrier, and in such action all of the connecting carriers against whom it is sought to recover damages may be made parties defendant, and, if before the court by process executed in the manner provided in section 51 of the Civil Code of Practice, a judgment may be given against any one or all of them that the evidence shows to have committed the injuries complained of. Each connecting carrier to the point of destination receiving the freight will be considered as having constituted and appointed the initial carrier its agent for the purpose of entering into the contract of shipment, and will be liable upon the contract made with the initial carrier the same as if it had been made directly with it. *P. C. C. & St. L. Ry. Co. v. Viers*, 113 Ky. 526, 68 S. W. 469; *Nashville R. Co. v. Carico*, 95 Ky. 489, 26 S. W. 177; *L. & N. R. Co. v. Chestnut*, 72 S. W. 351, 24 Ky. Law Rep. 1846. But in an action against one or several carriers neither of them, in the absence of a special contract, will be responsible for injury or damage occurring beyond the end of the lines controlled and operated by them. *Ireland v. Mobile & Ohio R. Co.*, 105 Ky. 400, 49 S. W. 188, 453; *L. & N. R. Co. v. Chestnut*, 72 S. W. 351, 24 Ky. Law Rep. 1846; *O., N. O. & T. P. Ry. Co. v. Greening*, 100 S. W. 825, 30 Ky. Law Rep. 1180.

And in the trial of a case against several carriers, in the absence of a special contract extending the liability beyond the end of their respective lines, the jury should be instructed to find a separate verdict against each carrier for the injury or damage that occurred upon its line.

It is earnestly urged that as the contract declared on was alleged to have been in parol, and appellee in his evidence attempted to establish this fact, the peremptory instruction asked by the Illinois Central Railroad Company should have been given, as under the parol contract set up the Chesapeake & Ohio Railway Company was liable for all damages that occurred to the stock during the entire course of their transportation. The petition charged that there were mutual traffic arrangements between the Chesapeake & Ohio Railway Company and the Illinois Central Railroad Company, and that they were connecting lines one with the other, and that the contract was made with the Chesapeake & Ohio Railway Company acting for and on behalf of its codefendant, the Illinois Central Railroad Company, and that the stock were shipped from Winchester to Louisville over the Chesapeake & Ohio Railway, and there delivered to its connecting carrier, the Illinois Central Railroad Company, and that it agreed to ship them to Arcadia, via Illinois Central Railroad, and the evidence establishes that, when the car in which the stock were transported arrived at Louisville over the Chesapeake & Ohio Railway, it was there delivered to the Illinois Central Railroad, and carried to its destination.

The appellee could have sued on the written contract, and, if he had done so, no question under the evidence could have been raised about the liability of the connecting carrier who received the stock under the written contract, or as to the jurisdiction of the Clarke circuit court; nor does the fact that appellee declared on a parol contract defeat the jurisdiction of that court or effect his rights to recover against appellant. Whether there was or not a traffic arrangement between the roads that authorized the Chesapeake & Ohio Railway Company to receive the stock for transportation to Arcadia, and to send them a part of the way over the lines of the Illinois Central Railroad, it is a fact that the Illinois Central Railroad did receive the stock from the Chesapeake & Ohio Railway Company and carry them part, if not all, the way to Arcadia, and, having received them, the Clarke circuit court had jurisdiction of it. *P. C. C. & St. L. R. Co. v. Viers*, supra. Under the pleadings and evidence of appellee, the contract, although in parol, provided for the shipment of the stock from Winchester to Arcadia by the Chesapeake & Ohio Railway Company and its connecting carrier, the Illinois Central Railroad Company. The written contract also stipulated that the stock should be shipped from Winchester to Arcadia by these two carriers.

So that, except in respect to the limitation of each carrier's liability to injuries that occurred on its line, there was no substantial difference between the parol contract relied on by plaintiff and the written contract set up by the defendant. And, when the trial judge came to instruct the jury, he did not point out the character of contract under which the stock were received, but treated the written contract as the real one between the parties, and informed the jury that the Chesapeake & Ohio Railway Company was only liable for injuries sustained by the stock between Winchester and its terminal at Louisville, Ky., where they were delivered to the Illinois Central Railroad Company; and that the liability of the Illinois Central Railroad Company terminated at Memphis, Tenn., the end of its line.

Nor was there either a variance or a failure of proof within the meaning of sections 129 and 131 of the Civil Code of Practice. Under section 129a variance exists when the proof introduced by a party in support of his cause of action differs from the acts constituting the cause stated in his pleadings. For instance, if a person should charge that he was injured by a defective air brake on a railroad train, and his evidence established the fact that he was injured by a defective coupler, there would be a variance; and so, if an action was brought to recover the amount of a promissory note alleged to have been executed by the defendant, and the proof developed the fact that he had made a check in place of a note, there would be a variance. A variance exists when the evidence does not sustain the pleadings upon which a recovery is sought or a defense rested. *Tyler v. Coleman*, 97 S. W. 373, 29 Ky. Law Rep. 1270; *Gaines v. Deposit Bank of Frankfort*, 39 S. W. 438, 19 Ky. Law Rep. 171; *Henderson Brewing Company v. Folden*, 76 S. W. 520, 25 Ky. Law Rep. 969; *Simpson v. Carr*, 76 S. W. 343, 25 Ky. Law Rep. 849. There is a failure of proof when, in the language of the Code, "the allegation of a claim or defense to which the proof is directed be unproved, not in some particular or particulars only, but in its general scope and meaning"; as, for instance, if the pleader wholly fails to sustain the cause of action or defense relied on. To illustrate, if it was sought to recover the value of a horse alleged to have been sold by the plaintiff to the defendant, and the plaintiff's proof failed to show that the horse was sold, so where a covenant is sued upon and there are conditions precedent to be performed by the plaintiff, which he alleged he did perform, but wholly fails to prove them. *Newman's Pleading & Practice*, p. 726. But in the case before us the plaintiff declared on a verbal contract and proved that a verbal contract had been entered into. The defendant relied on a written contract, and proved that a written contract was entered into. Hence it was simply a question of whether the con-



tract was verbal or written—each of the parties introducing evidence to support their respective contentions. If this constituted a variance or a failure of proof, then in every case where an issue was made, although each party supported his side of it, there would be either a variance or a failure of proof. The fact that the plaintiff's proof may not be as strong or convincing as the defendant's does not affect the question. If he introduces any evidence tending to support the allegations of his pleading, he is entitled to go to the jury upon the case as he has made it out.

Among the charges of negligence alleged in the petition was the one that the stock were confined in the car for a longer period of time than 28 consecutive hours, in violation of section 4386 of the United States Statutes [U. S. Comp. St. 1901, p. 2995], and that, when unloaded, they were not properly fed and cared for. There was evidence tending to establish that on two occasions the statute was violated, and also that, when the stock were unloaded for the purpose of resting, feeding, and watering, the company was not prepared to take reasonable care of them for these purposes. The jury were instructed, in substance, that it was the duty of the railroad company to rest, feed, and water the stock as provided in the statute, and to be reasonably well prepared to care for them at the places they were unloaded for these purposes. This statute should be given such construction as will fairly carry out the object of its enactment. A carrier, when it undertakes to unload stock for the purpose of resting, feeding, and watering, should be reasonably well prepared to care for them in such manner as that they will be rested, fed, and watered; and this without reference to whether the owner is in charge of them or not. The instruction complained of imposed upon the railroad company no duty that was not fairly contemplated by the statute. *C. & T. P. Ry. Co. v. Gregg*, 80 S. W. 512, 25 Ky. Law Rep. 2329; *C. & O. Ry. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 451; *N. C. & St. L. Ry. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; *Illinois Central R. Co. v. Eblin*, 114 Ky. 817, 71 S. W. 919; *Hutchinson on Carriers*, § 634.

On the question of damage, the jury were instructed that "although the Illinois Central Railroad Company was only liable for injury to the stock between Louisville, Ky., and Memphis, Tenn., that the measure of damage against the company is what the jury may believe from the evidence was the difference, if any, between the market value of plaintiff's stock in Arcadia upon its arrival there and what would have been its market value at that point upon its arrival there but for the failure of the company in one or more of the respects indicated in this instruction." The objection made by appellant to this instruction is that it made the

condition of the stock upon their arrival at Arcadia, some 200 miles beyond Memphis, Tenn., one of the criterions of the damage appellee suffered, in place of measuring the damage by their condition at Memphis, Tenn. There was no evidence tending to show any negligence or injury between Memphis and Arcadia. All the damage and injury sustained was between Louisville and Memphis. As the carriers agree to transport the stock to Arcadia, appellee could not have recovered for damages sustained by them in transit, unless they were delivered at Arcadia in a damaged condition. Although the stock might have been injured between Louisville and Memphis, yet, if they arrived at Arcadia in a good condition, appellee would not be entitled to recover anything. The condition of the stock when they reached Arcadia, the point to which the carriers agreed to ship and deliver them in good condition, was the standard by which the rights of the parties must be measured. Any other rule would be impracticable. Suppose the stock had been injured in transit from Louisville to Paducah, Ky., which is between Louisville and Memphis, and appellee in an action against the carrier had shown the condition of the stock at Paducah, but not at Arcadia, the objection would at once be made that its liability was not to be measured by the condition of the stock at Paducah, but their condition at the place to which it agreed to transport them. Again, if stock were shipped a distance of several hundred miles, under a contract for safe delivery at the place of destination, and between half a dozen stations en route they received distinct injuries, would it be necessary to show the depreciation in value at each place the injury was sustained? And would this be sufficient to warrant a recovery against the carrier without evidence of their condition when delivered at destination? We think not. The only logical and correct method is to fix the measure of damage, as was done in the instruction, and which confined the liability of appellant to injuries occurring on its line. Of course, if the stock had been damaged or injured between Memphis and Arcadia, the Illinois Central Railroad Company would not be liable for such injury or damage, but there was none.

The amount allowed by the jury was not excessive; and the judgment must be affirmed.

#### ROBERTS et al. v. MOSS.

(Court of Appeals of Kentucky. Dec. 19, 1907.)

#### 1. ACTION — CONTRACT OR TORT — WAIVER OF TORT.

One may waive a trespass committed on his land by another by forcibly entering on it and cutting and removing timber, etc., and sue in assumpsit for the value of the timber cut and appropriated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 205-207.]

**2. JUDGMENT—RES JUDICATA.**

Where one converts to his own use the property of another, the latter may sue in trespass, or trover, or replevin, or for money had and received, but a recovery in one action after trial on the merits is a bar to another action, each being for the same act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1100, 1101.]

**3. SAME.**

A trespass on land and a conversion of goods in one continuous transaction constitutes one cause of action, and a recovery for the goods or for trespass bars an action for the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1098–1101.]

**4. ELECTION OF REMEDIES — INCONSISTENT REMEDIES.**

One who, instead of suing for a trespass on land in the circuit court where the land is located, sues for the value of the timber cut and appropriated in a court which does not have jurisdiction of the trespass, is bound by his election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, §§ 16, 17.]

**5. JUDGMENT—RES JUDICATA.**

A judgment of dismissal on the merits, whether on facts shown by evidence, or averred in the petition and admitted by demurrer, is a bar to another action for the same relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 1031–1045.]

**6. ELECTION OF REMEDIES — EFFECT — "WAIVER."**

Where one sued in assumpsit for the value of timber cut and appropriated by another, he waived the right to recover for any injury resulting from the trespass; "to waive" being to voluntarily relinquish a right one may enforce if he chooses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, §§ 12–17.

For other definitions, see Words and Phrases, vol. 8, pp. 7375–7381; pp. 7831–7832.]

**7. JUDGMENT—RES JUDICATA.**

A landowner may maintain ejectment therefor, and under Civ. Code Prac. § 83, subsec. 2, recover therein, or in an independent suit, for use and occupation, though he has sued for the value of timber cut on the land and appropriated by another, and has been defeated therein on the merits.

Appeal from Circuit Court, Whitley County.  
"To be officially reported."

Action by Milford Roberts and others against E. S. Moss and others. From a judgment of dismissal as to defendant E. S. Moss, plaintiffs appeal. Affirmed.

T. Z. Morrow, for appellants. J. N. Sharp, for appellee.

**SETTLE, J.** This is an appeal from a judgment of the Whitley circuit court sustaining appellee Moss' plea and defense of res judicata, and dismissing, as to him, appellants' action, which was one of trespass, *quare clausum fregit*. The petition particularly described two adjoining tracts of land lying in Whitley county, of which it averred appellants to be the owners, and, in substance, charged that appellee and Dennis Bros., a partnership having its chief office and place of business at Somerset, Pulaski county, in the year, 1903, unlawfully, wrongfully, with force and arms, and without the

consent of appellants, entered upon the lands described, drove wagons over the same, and cut down and destroyed much valuable timber thereon, consisting of white oak, chestnut, poplar, pine, and hemlock. For the alleged trespass and consequent injury to the lands and timber, the prayer of the petition asked judgment against appellee and his codefendants in the sum of \$3,000. Appellee, Moss, filed a separate answer to the petition, of three paragraphs; the first containing a traverse, the second a claim of title in appellee to the smaller tract of land described in the petition, and the third the defense of res judicata, which was bottomed on these substantially alleged facts: That in an action previously brought by appellants in the Pulaski circuit court against the same defendants a recovery was sought for the value of the timber, alleged in the petition of the case at bar to have been cut by appellee and his codefendants, and that in the petition of the former suit the trespass to the land for which a recovery was sought in the case at bar was expressly waived. The same paragraph of the answer contains, in substance, the further averments that appellee, by separate answer, filed in the first action, denied the conversion of the timber charged in the petition, or that appellants owned it, and also denied that they were the owners of the land; that the first action was tried in the Pulaski circuit court upon the issues thus formed and on the merits, resulting in a verdict and judgment in appellant's favor against Dennis Bros. for \$1,600, but at the same time the jury, under a peremptory instruction from the court, returned a verdict in favor of appellee upon which judgment was entered dismissing the action as to him. Certified copies of the pleadings, orders, and judgment of the Pulaski circuit court in the first action were filed with and made a part of appellee's answer in the last action. Appellants filed a demurrer to the third paragraph of appellee's answer, which was overruled, and they then filed a reply, which controverted in part the affirmative matter of the answer. A demurrer was filed to the reply by appellee and sustained by the court, because, in its opinion, the matters contained therein constituted no defense to the plea of res judicata presented by the third paragraph of appellee's answer. When the demurrer to the reply was sustained, appellants refused to plead further. Thereupon the lower court dismissed their action, thereby, in effect, sustaining appellee's plea in bar.

The facts furnished by the averments of appellee's answer and the record of the first action, many of which are not materially controverted by appellant's reply, make it fairly apparent that the timber, for the value of which appellants sued, in the first action, was the same timber, the cutting of which is included in the trespass for which the last action was brought. Therefore it would seem to follow that the forcible entry of appellee

and his codefendants upon the lands described in the petition, their cutting of the timber thereon, the value of which was sued for in the first action, hauling over the land, etc., were all acts and injuries connected with and growing out of the one trespass or successive trespasses for which the last or present action was brought. If so, appellants might have recovered in one action, brought in Whitley county where the lands lie, for the injuries resulting from the several acts of wrongdoing constituting the one trespass or series of trespasses to the lands, and such recovery would have included the value of the timber cut and converted by the defendants. But, instead of pursuing this course, they elected, as they were privileged to do, to waive the tort, i. e., the trespass, committed by appellee and his codefendants in forcibly entering upon the land, cutting and removing the timber, etc., and to sue them in assumpsit for the value of the timber cut and appropriated by them. That action being a transitory one, it was properly brought in the circuit court of Pulaski county, in which county one or more of the defendants at the time resided. Having thus waived the trespass, and sued appellee and Dennis Bros. for the value of the timber, the cutting and removal of which from their lands constituted in part, at least, the trespass complained of, appellants cannot in a subsequent action recover for the trespass. The right to waive a tort and to sue in assumpsit has long been recognized by the law. The rule broadly, yet with entire correctness, may be stated thus: If one takes and converts to his own use another's property, the latter may maintain an action for trespass, or for trover, or replevin, or for money had and received; but a recovery in one, or a failure to recover in one, after trial on the merits, is a bar to another, because each would be for the same act. This question seems to have received careful consideration from Judge Cooley, who, in his admirable work on Torts, concluded an exhaustive discussion of the subject as follows: "The decisions are quite numerous in this country that assumpsit cannot be maintained unless the property of which the plaintiff has been deprived has been converted into money. But other cases decide that if the defendant has converted the property in any manner to his own use, that is sufficient. The following are illustrations: Trading off the property for other property, turning one's cattle wrongfully into another's field and pasturing them there, employing an apprentice without the master's assent, and so on. In all these cases it will appear all the elements of an implied contract are found, and we can conceive of no sufficient reason for denying the right to bring assumpsit. If the wrongdoer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrongdoer himself, and in such event he is not charged up for money

had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrongdoer by the owner. But by all the authorities it is conceded that, where the act is a naked trespass, an action of assumpsit cannot be maintained, because the elements of an assumpsit are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it in a reasonable compensation. Suppose his cattle have invaded his neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing more and nothing less. We cannot imply a contract that one party should proceed to destroy the other's crop and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act. But where a trespass is committed, and trees or mineral is severed from the land and taken by the trespasser and converted to his own use, assumpsit will lie for the value of the material so converted." Cooley on Torts, vol. 1, §§ 109-111. In Addison, on Torts, a much briefer consideration is given this subject. The author, however, adopts the rule as stated by Cooley. "If a man [he says] has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrongdoer, and sue him for a trespass, or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrongdoer, nor can he affirm his acts in part and void them as to the rest." Addison on Torts, § 33; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. In Van Fleet, on Former Adjudication, vol. 1, § 153, we find this statement of the law: "A trespass upon land and a conversion of goods in one continuous transaction constitutes only one cause of action, so that a recovery for the goods, or for the trespass, bars an action for the other." The case of Johnson v. Smith, 8 Johns. (N. Y.) 383, is in point. The action was one of trespass, *quare clausum fregit*, and for cutting and carrying away wheat. The defendant pleaded a former suit against him for the wheat, in bar, and the plea was held good. In Savage v. French, 13 Ill. App. 17, the plaintiff brought an action of *quare domum fregit*. The defendant pleaded in bar a judgment against him in favor of plaintiff in a previous action of replevin for the taking of the same goods. The court held that the judgment in the replevin suit was a bar to the action of trespass for the taking of the same goods, the original cause of action being merged in the judgment.

While we have found no decision of this court upon the question involved, based upon the precise state of case here presented, the doctrine we announce has nevertheless received its approval. Thus, in *Hall v. Foreman*, etc., 82 Ky. 505, which was an action to recover upon an attachment bond the special damages embraced by it, it was held that a previous recovery against the principal in the bond of general damages in an action for the wrongful and malicious suing out of the attachment was a bar to the action on the bond. In the opinion, it is said: "While the two actions differ, not only in form, but as to parties, as well as to the testimony necessary to establish each, and also as to the extent of the recovery, yet the entire damage is the result of the one act of wrong, and each action is pro eadem causa, or for the wrongful suing out and levy of the attachment. \* \* \* If one trespasses upon another, and in doing so carries away the latter's horse, the owner may waive the trespass and sue for the value of the horse; but, if he do not do so, and sues for the trespass, he could not thereafter sue for and recover the value of the horse, although he may not have sought in the first action to recover for the taking of the horse." Such a splitting of a cause of action as appellants have attempted by the institution of this action the law will not tolerate. They might, as before suggested, by suing in the Whitley, instead of the Pulaski, circuit court, have recovered for the trespass to the land and also the value of the timber, but having failed to do this, and made their election to sue for the value of the timber alone in a court which had not jurisdiction of the trespass to the land, they are bound by that election. And had they first sued in the Whitley circuit court for the value of the timber alone, the effect would have been the same. In *Pilcher v. Ligon*, etc., 91 Ky. 228, 15 S. W. 513, it was held that "where one has sued for a part of an entire demand, he will not be allowed to sue for the residue in another action; and this is true, although the court in which the first suit was brought did not have jurisdiction of the full amount of plaintiff's claim, and although the judgment was for the defendant." It is not always necessary that there should be a taking of proof in order to make the judgment rendered in one case a bar in another. A judgment dismissing a petition is a bar to another action for the same relief, provided the determination has reached the merits of the case, whether the facts upon which the court acted were shown by evidence, or were averred in the petition and admitted by demurrer. *Maize v. Bowman*, 93 Ky. 205, 19 S. W. 589, 17 L. R. A. 81.

We cannot suppose appellants labored under any misapprehension as to their rights at the time of bringing the first action. That they acted understandingly, as well as voluntarily, at the time, is shown by the waiver

of the trespass expressly made in the petition in that action. The legal definition of the word "waive" is thus stated by Webster: "To throw away; to relinquish voluntarily, as a right which one may enforce if he chooses; to desert; to abandon." The same author defines the word "waiver" as "the act of waiving, or not insisting on some right, claim, or privilege." As appellants put themselves on record in the first action as waiving, and therefore surrendering, the right to recover for any injury resulting from the alleged trespass committed by appellee and Dennis Bros., except as to the value of the timber taken, and that issue on the trial of that action was determined on the merits in appellee's favor, they cannot complain of the ruling of the lower court holding the judgment in that case a bar to the recovery sought in the last action. The ruling of the court was manifestly correct.

We do not mean to be understood as holding that the question of title to the lands described in the petition was determined or involved in the first action. If appellee is wrongfully in possession of the lands, or any part thereof, appellants may maintain an action in ejectment to recover it, if they are in fact the owners of it; and in such action, if entitled to recover the land, they may also recover for its detention or use and occupation by appellee, or may by separate action recover therefor. Civ. Code Prac. § 83, subsec. 2; *Burr v. Woodrow*, 1 Bush, 602; *Shean v. Cunningham*, 6 Bush, 123; *Walker v. Mitchell*, 18 B. Mon. 541. Our decision goes no further in the case before us than to hold that upon the record as presented the lower court's judgment sustaining appellee's plea in bar was proper.

Judgment affirmed.

#### CYRUS v. HOLBROOK.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

##### 1. ADVERSE POSSESSION—HOSTILE POSSESSION.

Where a father made a deed of certain land to his son, reserving possession of the land for life, and not recording the deed, but afterwards placed the son in full possession and control, and he made many valuable improvements, the son's possession was adverse to the father, and was not that of a tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 282-314.]

##### 2. TRUSTS—CONSTRUCTIVE TRUSTS.

Where a father made a deed of certain land to his son, reserving possession for life, and not recording or delivering the deed, but afterwards placed the son in full possession, and after his death recognized the right of the son's children to the possession of the land, and allowed their guardian to control it for them, he will be considered as holding the title in trust for the children.

##### 3. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.

A trustee, holding in trust the title to land, which trust he has voluntarily undertaken, cannot be forced to specifically perform a contract to sell the land to another person who knew at the time that the cestui que trust had been in adverse possession of the land for many years.

**4. CHAMPERTY AND MAINTENANCE—GRANT OF LAND HELD ADVERSELY.**

A contract of sale of land by a trustee holding the title in trust for his grandchildren is void as being champertous, where the evidence shows that the cestui que trust was in adverse possession at the time of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, §§ 52-110.]

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Action by J. M. Cyrus against Charles R. Holbrook. From a judgment for defendant, plaintiff appeals. Affirmed.

W. D. O'Neal, Jr., J. M. Riffe, J. T. Swetman, C. E. Fugitt, and O'Neal & Carter, for appellant. E. B. Wilhoit, for appellee.

**SETTLE, J.** This action was instituted in the court below by the appellant, J. M. Cyrus, against A. M. Holbrook, for the specific performance of a contract with respect to a lot of ground in the town of Blaine, Lawrence county, which appellant claimed to have purchased of Holbrook, November 17, 1905, at the price of \$200. It was alleged in the petition that the contract was reduced to writing in the form of a title bond, which described the lot, expressed the terms of the contract, acknowledged the payment of \$100 of the purchase money, and obligated the vendor to make and deliver to appellant a deed of general warranty conveying him the property upon his paying the remaining \$100 of the consideration. It was further alleged that appellant, shortly before the institution of the action, tendered Holbrook the \$100 in question and demanded of him a deed for the lot, but that the latter declined to accept the money and refused to execute or deliver to appellant the deed. Holbrook by answer admitted the sale of the lot as charged, but averred that he was induced to enter into the contract by the fraud of appellant, who falsely represented to him that he desired the lot for a place of residence and would build upon it a dwelling house for his own use, when he was buying and did in fact buy it for two other persons to erect a storehouse upon it and engage in merchandising in competition with Holbrook, who was engaged in the same business in the town of Blaine. The answer also charged that the title bond, which was written by appellant, embraced more ground than was included in the sale, but was so read to him by appellant as to conceal that fact, and that he was not at the time aware of the fraud, but in a few hours discovered it, and immediately offered to return and tendered to appellant the \$100 which the latter had paid him, and demanded the surrender of the title bond, but that appellant refused to accept the \$100 or to surrender the bond. The answer contained the further averment that at the time of the purchase by appellant of the lot in controversy the vendor, A. M. Holbrook, did not own it, but that the title thereto was in the two infant sons

and only heirs at law of J. J. Holbrook, deceased, a son of A. M. Holbrook, to whom the lot and additional land of which it was a part had been conveyed by the latter and his wife by deed in March, 1890, and that J. J. Holbrook was in the actual adverse possession of the land so conveyed from his marriage in 1892 until his death in 1903, since which time it had been in the actual possession of his infant sons and their guardian, and was in their possession at the time of the attempted purchase of the lot in controversy by appellant. After A. M. Holbrook's answer was filed, the infant sons of J. J. Holbrook, deceased, and their guardian, by petition asked to be made parties to the action, in order that the claim and title of the infants might be asserted to the lot. The lower court by proper orders allowed the petition to be filed, made the infants and their guardians defendants to the action, and permitted the petition to be treated as their answer. The petition and answer in substance set forth the facts with respect to the infants' ownership and possession of the lot in controversy and the remainder of the tract of which it is a part contained in the answer of A. M. Holbrook, and the further facts that their father, J. J. Holbrook, after the conveyance to him of the land and during his occupancy thereof, erected a large barn on the land, added to and repaired the dwelling house, and made other valuable improvements thereon, thereby greatly improving the land and enhancing its vendible value. By a subsequent pleading the infants and their guardian alleged that the infants' and their father's ownership of the land, including the parcel in controversy, were known to appellant when he purchased the lot in question of their grandfather, and by reason thereof his purchase was null and void. Additional pleadings necessary to complete the issues were filed by the parties. After the taking of numerous depositions, and before trial, A. M. Holbrook died intestate, and the action was later revived against his administrator and heirs at law. Upon submission of the case the lower court, by the decree rendered, refused to enforce the contract of sale between appellant and A. M. Holbrook, compelled appellant to accept the return of the \$100 he had paid Holbrook on the lot, and dismissed the petition at appellant's cost; and from that judgment the latter prosecutes this appeal.

It appears from the evidence found in the record that in March, 1890, A. M. Holbrook made a division of his lands among his children and that in pursuance thereof he and his wife then made to each child a deed for the parcel of land allowed to him or her, reserving in each deed to A. M. Holbrook possession of the land for life. The deeds were shown to the children of the grantors, and each child informed of the location and quantity of the land he or she had received in the partition made by the grantors. The deeds were not, however, then or thereafter

manually delivered to the grantees by their father, but were retained in his possession and deposited in an old safe in his store, where they remained until about three months before the sale of the lot to appellant, and they were then taken from the safe by one of the grantors' sons and put to record in the office of the clerk of the Lawrence county court. So these deeds, it would seem, were of record when appellant purchased the lot in controversy; but that fact does not, from our point of view, materially affect the decision of the case. It further appears from the evidence that the deeds were put to record by the son, who removed them from the safe, to prevent complications that he feared might arise from a contemplated second marriage of his father, which marriage did soon thereafter take place. It also appears from the evidence that A. M. Holbrook was not informed of the recording of the deeds until after the sale of the lot to appellant, but that upon receiving notice of it he expressed his approval thereof, and announced his purpose to ratify what his son had done. In the division of 1890 A. M. Holbrook allotted, and by one of the deeds of that date conveyed, to his son, J. J. Holbrook, 40 acres of land lying in and near the town of Blaine, which embraced the lot in controversy. J. J. Holbrook was then informed by his father of the allotment to him of the 40 acres of land and the execution of the deed conveying it. As shown by the evidence, in 1891 or 1892, J. J. Holbrook married, and was at once placed by his father in possession of the 40 acres of land allotted in 1890; and he continued to occupy it until his death, which occurred about 1904, and subsequent to that of his wife. During his occupancy of the land he made an addition to and otherwise improved the dwelling house, erected a barn, planted fruit trees, and made and put up fencing on the land, thereby practically doubling its value. While there does not appear to have been a manual delivery of the deed to him, the testimony was to the effect that J. J. Holbrook's right to the 40 acres of land was recognized by his father from the time he moved upon it, and that since his death the father has recognized the right of his infant children to the land, and that of their guardian to control it, which the latter has done and is now doing by renting it out or cultivating it for the benefit of his wards. It is fairly evident that A. M. Holbrook did not intend to place in the hands of his children the deeds he made in 1890; but it is equally evident that by placing his son, J. J. Holbrook, in possession of the land and allowing him exclusive control over it as long as he lived, it was his intention to give him the sole use of it and surrender the right of possession retained to himself by the deed; and, this being true, the son was at no time during the occupancy of the land a tenant of his father, but his possession was adverse to the latter and all others. It does not follow, however, that because A. M. Hol-

brook did not deliver the deed conveying the 40 acres of land to his son, J. J. Holbrook, he intended to withdraw it from the latter's infant children. In *Bunnell v. Bunnell*, 110 Ky. 563, 64 S. W. 420, 65 S. W. 607, it was held that though a manual delivery of the deed be not expressly proved, if the grantor has signed and completely acknowledged the instrument and had it recorded, these facts create the presumption of its delivery as of the date of the deed, "subject to be rebutted by competent proof of either a nondelivery in fact or of a delivery at another time than the date of the instrument. Such facts, however, raise no presumption of an acceptance by the grantee (*Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078), save where a clearly beneficial interest is conferred." In the case at bar we think that by recognizing the right of J. J. Holbrook's children to retain the possession of the land since his death and enjoy its use as he had done, and in allowing their guardian to control it for them, A. M. Holbrook should be regarded as holding the deed and title intended for their father in trust for the children, and in that case both a delivery and acceptance of the instrument, in view of the beneficial interest conferred and the infancy of the beneficiaries, will be presumed, without regard to the recording of the deed, which was admittedly done without the knowledge of the grantor. If this view of the matter is accepted it is manifest that A. M. Holbrook had no right, nor will a court of equity permit him to ignore the trust with which he had clothed himself and sell a part of the land of his cestui que trust to appellant, who according to the evidence knew at the time that the latter were in possession of the land, as their father had been for many years before them, claiming it as their own adversely to all other persons.

If we lay aside this view of the case, there is still another obstacle in the way of appellant's claim to relief, which is the statute against champerty; for there can be no doubt from the evidence that the infant appellees and their guardian were in the actual adverse possession of the lot in controversy at the time of its alleged purchase by appellant. We agree with the conclusions reached by the circuit court, but think upon the return of the case to that court it would be equitable, by supplemental order, to allow appellant or his vendee to remove from the lot in controversy the storehouse they erected thereon.

Wherefore the judgment is affirmed.

#### FREEBORN COAL & COKE CO. v. PHILLIPS.

(Court of Appeals of Kentucky. Jan. 8, 1908.)

#### 1. LOGS AND LOGGING—CONTRACTS—BREACH—RIGHT TO RECOVER.

That defendant broke a contract entitling plaintiff to a fixed price for cutting and hauling all the timber owned by defendant, not reserved for mining purposes, by stopping him

before all the timber he was entitled to cut and haul had been exhausted, and that sufficient timber remained to have enabled him, if allowed to cut and haul it, to earn a certain sum under the contract, shows plaintiff's right to recover.

**2. SAME—ACTION FOR BREACH—QUESTION FOR JURY.**

In an action for breach of a contract entitling plaintiff to cut and haul timber, *held*, under the evidence, proper to refuse to direct a verdict for defendant.

**3. SAME—EVIDENCE—WEIGHT.**

In an action for breach of a contract entitling plaintiff to cut and haul timber, a verdict for plaintiff *held* not flagrantly against the evidence.

**Appeal from Circuit Court, Pike County.**

"Not to be officially reported."

Action by John F. Phillips against the Freeborn Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Butler, A. E. Auxier, and Thos. H. Harman, for appellant. Roscoe Vanover, for appellee.

SETTLE, J. This is an appeal from a judgment of the Pike circuit court entered upon a verdict for \$300 awarded appellee against appellant as damages for the alleged breach by the latter of a contract it made with appellee July 6, 1905, whereby appellee was to cut and haul to its sawmill certain timber at an agreed price. The contract is evidenced by the following writing: "Edgarton, W. Va., July 6th, 1905. Freeborn Coal and Coke Company, Edgarton, W. Va.—Gentlemen: I hereby agree to cut and haul to the mill all the timber on your property, excepting such as is reserved, or intended for mining purposes, for \$5.00, per M. Scribner measure, monthly estimates to be made and paid on regular pay days. I also bind myself to cut all the timber suitable for sawing on the Wolford tract, and agree that the company shall hold 10 per cent. of the amount of the estimates until I shall have complied with the terms of this agreement. I also agree to turn into the office of the company the time of my employes and that they shall be paid on the regular pay roll of the company and the amount deducted from the amount due me. I also agree to repay or to make good any damages to property caused by logging. It is understood that such timber as is in a place which makes it dangerous to the houses of the company to cut it and slip it down the mountain, shall be left standing unless otherwise ordered by the superintendent of the company; in which case I am released from liability for damages caused. Yours truly, John F. Phillips. Accepted. Freeborn Coal and Coke Co., by C. O. Smith." Shortly after making the above contract appellee, pursuant to its terms, entered upon the land of appellant, known as the "Wolford tract," and proceeded to cut and haul timber therefrom to its mill until November 30, 1905, when he received from

appellant the following written notice: "Edgarton, West Va., Nov. 28th, 1905. Mr. John F. Phillips.—Dear Sir: Having cut all the timber that is not reserved or intended for mining purposes on our lease, you will please discontinue cutting and hauling in timber after Nov. 30th, 1905. Yours truly, C. O. Smith, Freeborn Coal & Coke Co." Upon receiving this notice, appellee quit cutting and hauling timber for appellant, and later instituted this action against it, alleging in the petition a breach of the contract by appellant in stopping him from cutting and hauling timber before all of it he was entitled under the contract to cut and haul was exhausted, and that a sufficiency thereof remained to have enabled him, if allowed to cut and haul it to the mill, to earn at the contract price \$1,977.50, in addition to what he had been paid before he was required by appellant to quit the work, for which sum he prayed judgment. Appellant by answer denied the alleged breach of the contract, and, in substance, averred that appellee at the time of receiving the written notice requiring him to cease the cutting and hauling of timber on the land in question, November 30, 1905, had completely exhausted the supply of timber he was entitled under the contract between them to cut and haul therefrom. The jury, however, upon the evidence presented on the trial and under the instructions given by the court, reached the conclusion that appellant has violated its contract by failing to permit appellee to cut and haul to its mill a considerable part of the timber which the contract gave him the right to cut and haul, and that for cutting and hauling it he would have received under the contract \$300 over and above the cost of the work; hence they returned in his behalf a verdict for that amount.

Appellant complains that the circuit court erred in overruling its demurrer to the petition. We do not think this true. The petition is not specific in some of its averments, but, on the whole, it appears to state a cause of action; moreover, if defective in the particular complained of by counsel for appellant, they should have entered motion to require appellee to make the petition more specific instead of filing the demurrer. The real issue made by the pleadings and evidence was as to whether, at the time appellee was compelled by appellant to cease the cutting and hauling of timber, there was still a material part of it remaining on the land that his contract with appellant entitled him to cut and haul to its mill. It seems to be conceded by the parties that the cutting and hauling of timber by appellee was to be confined to what the pleadings designated as the Wolford land. The Wolford land is one of several tracts that appellant had leased for its business of mining coal. Appellant has in operation coal mines on the Wolford land, and the lease under which it acquired the possession of the land reserved to Wol-

ford a sufficiency of the timber standing thereon to maintain the fences on the land, and to keep in repair or erect such buildings as Wolford or his children may have or build on the land. It is also conceded that this reservation is one of those mentioned in the contract between appellant and appellee, and that the other reservation of timber "intended for mining purposes" therein expressed is such as is under 18 inches in diameter, and may be needed by appellant for propping its mines and ties for its railroad tracks in and about its mines on the Wolford land.

In addition to the timber thus "reserved or intended for mining purposes," there was much timber suitable for sawing into lumber which appellant had the right under its lease to cut and remove from the land, and it was this timber appellee contracted with appellant to cut and haul to the latter's sawmill at the mines, where it could be sawed into material for building purposes. It appears from the evidence found in the record that appellant has erected, and is constantly erecting, near its mines buildings for use in its business, and dwelling houses and outbuildings for the use of miners and other persons in its employ, and it was for such uses as these the timber cut and hauled by appellee to its sawmill was applied. It is not denied by appellant that appellee under its contract with it had the right to cut and haul to its mill all the timber on the Wolford land not included in the reservations expressed in the contract; but, upon the question of whether any such timber as the contract entitled appellee to remove was left uncut when his work was stopped by appellant, the evidence was very conflicting. That of appellee strongly conduced to prove that, when he ceased work on the timber by appellant's command, there still remained a large quantity of timber not reserved in the contract and of the quality he was entitled under the contract to cut and haul; that the timber left was nearer to the mill and more accessible than any he had cut or delivered at the mill, for he first cut the more remote timber by appellant's direction, and, when stopped by appellant, had cut but little of that nearer the mill from which he could have made much quicker delivery and more money than was realized on what had been cut and delivered.

Appellee's testimony further conduced to prove that the timber of which appellant deprived him (not including the trees the cutting of which might endanger the buildings at the mines and which the contract forbade his cutting except by appellant's direction) would, if he had been permitted, according to the terms of the contract, to cut and haul it to appellant's mill, have made him not less than \$1,000, after paying the cost of cutting and hauling it to the mill. The testimony of appellant was contradictory of that of

appellee at all points, as it was all to the effect that the cutting upon and hauling of timber from the land by appellee completely exhausted the timber he was entitled to remove under the contract, and that, when ordered by appellant to stop the cutting, there was no timber left of the quality the contract authorized him to cut.

Appellant's contentions are that the trial court should have given the peremptory instruction asked by it at the conclusion of appellee's testimony, and that the verdict of the jury was flagrantly against the evidence. It is manifest that the peremptory instruction would not have been proper. There was certainly not a failure of proof, or an absence of evidence, and such an instruction was not authorized by the pleadings. The second contention is also unsound, for it cannot be said that the verdict was flagrantly against the evidence, nor is it clear that it is even against the weight of the evidence. It is enough to say that the case was properly left to the decision of the jury, and that no legal ground exists for disturbing the verdict. One of the grounds for a new trial was that the lower court erred in instructing the jury. No such contention is made in this court by appellant's counsel. We have, however, examined the instructions and find no error in them.

The record furnishing no ground for a reversal, the judgment is affirmed.

LOUISVILLE, H. & ST. L. R. CO. v. DAVIS.  
(Court of Appeals of Kentucky. Jan. 8, 1908.)

**1. APPEAL—FORMER OPINION—CONCLUSIVE-NESS.**

A decision on appeal in a personal injury action that plaintiff was not a trespasser, and was not guilty of contributory negligence, is conclusive on a subsequent appeal upon the same facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4363.]

**2. EVIDENCE—DECLARATIONS—ADMISSIBILITY.**

In a personal injury action against a railway company, evidence that an hour after the accident the engineer stated he was sorry he did not see plaintiff in time to ring the bell or blow the whistle was inadmissible as part of the res gestæ, but was competent to contradict the engineer, who had testified that he did not make such statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 365.]

**3. RAILROADS—INJURY TO PERSON ON TRACK—EVIDENCE.**

In a personal injury action, an allegation that the engineer, without ringing the bell, blowing the whistle, or giving plaintiff any warning, negligently ran the engine against her, allowed her to show any negligence in operating the engine, whether in failing to give the customary signals or to keep a lookout.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1115.]

**4. SAME—LIABILITY.**

If injury to one crossing a railway track was caused by an engineer's failure to keep a



lookout, she can recover from the company therefore.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 988-1005.]

##### 5. TRIAL—INSTRUCTIONS—IGNORING EVIDENCE.

In an action against a railway company for injury to one crossing a track, it was proper to refuse an instruction limiting plaintiff's right to recover to the sole ground that the engineer was negligent in failing to give signals, where the pleading alleged, and the evidence tended to show, other negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

##### 6. APPEAL—REVIEW—VERDICT—CONCLUSIVE-NESS.

That the weight of the evidence was on the unsuccessful party's side will not authorize setting aside the judgment on appeal, since it may only be reversed as against the evidence, where there is no proof to sustain the verdict or it is flagrantly against the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3943.]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Personal injury action by Sarah Davis against the Louisville, Henderson & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Helm & Helm and Yeaman & Yeaman, for appellant. Robert D. Vance, John F. Lockett, and J. W. Johnson, for appellee.

SETTLE, J. Appellee recovered of appellant in the court below a verdict and judgment for \$1,800 for personal injuries received at Evansville, Ind., from an engine or its tender, which the engineer in charge thereof is alleged to have negligently run against her as she was attempting to cross the track upon which it was moving. This is the second appeal in the case. The first appeal, which was prosecuted by appellee (plaintiff in the court below), resulted in a reversal (see *Davis v. L. H. & St. Louis R. R. Co.*, 97 S. W. 1122, 30 Ky. Law Rep. 172); and, as the opinion on that appeal contains an elaborate statement of the facts connected with the accident whereby appellee received the injuries complained of, it will be unnecessary to here repeat them.

The first reason urged for a reversal is that the evidence of appellee did not authorize a recovery, and that the trial court should have peremptorily instructed the jury to find for appellant at the conclusion of her evidence, as requested by it. It is sufficient to say that this contention was rejected by this court in the former opinion, which upon the same facts held that appellee was not a trespasser at the time and place she received the injury, and that her testimony did not warrant the conclusion that she was guilty of such contributory negligence as would justify a nonsuit. It is a rule of this court that, on the second appeal of a case, the opinion on the first appeal is the law of the case, and must be strictly adhered to. *Bright's Ex'r v. Bright's Legatees*, 99 S. W. 901, 30 Ky. Law Rep. 834.

106 S.W.—20

It is insisted in the second place, that the lower court erred in permitting Mrs. Musgrave, Davis and others to testify as to the admission of Engineer Evans, made an hour after the accident, that he "was sorry he did not see appellee in time to ring the bell or blow the whistle." The effect of the testimony in question was to contradict Evans, who had testified on cross-examination that he did not make the above statement. The evidence was inadmissible as substantive testimony, being too remote from the accident to constitute a part of the *res gestæ*, but it was competent to contradict, and thereby affect, the credibility of Evans, and the court in apt language admonished the jury that it could be considered by them only for the latter purpose. Its admission, therefore, was not error. Counsel for appellant further contend that the lower court erred in giving to the jury as the law of the case instructions Nos. 1, 2, 3, which allowed appellee to recover if her injuries were caused by a failure on the part of the engineer to keep a look out for the protection of persons crossing appellant's track at the time and place of the accident; it being insisted that the only negligence alleged in the petition was the failure of the engineer to give any signal from the engine of its approach. The contention is based upon the rule that, if a plaintiff specifically alleges an act of negligence as causing his injury, he cannot recover upon proof of a different act of negligence. The rule in question is well recognized by the courts; but it cannot be invoked in this case, for we think the language of the petition does not, as claimed by counsel for appellant, confine the negligence resulting in appellee's injury to the mere failure of the engineer to give signals of the approach of the engine. The averment of the petition on this point is: "The said engineer negligently and carelessly, and without ringing the bell or blowing the whistle, or giving the plaintiff any warning of any kind, \* \* \* ran the engine against the plaintiff and knocked her senseless and violently to the ground, whereby she was seriously bruised and injured," etc. Thus it will be seen that the language employed is broad enough to embrace any negligence on the part of the engineer in operating the engine, whether in failing to give the customary signals or to keep a lookout in advance of the moving engine. The opinion on the former appeal placed this construction upon the language of the petition, for it is therein said: "We are of the opinion that this case should have gone to the jury under proper instructions, as it cannot be assumed that the injury would have happened if appellee had performed its duty in keeping a look out or giving warning of the approach of the train." The instructions complained of authorized the jury to find for appellee if her injuries resulted from the negligence of the engineer either in failing to keep a look out or to give signals of the approach of the engine to the

place of the accident by the blowing of its whistle or ringing of its bell. There was some testimony on the part of appellee to the effect that the engineer was guilty of negligence in each of these particulars. The court did not err, therefore, in instructing the jury.

We are also of the opinion that there was no error in the refusal of the court to give the instruction asked by appellant as it confined the right of appellee to recover to the sole ground that the engineer must have been guilty of negligence in failing to give signals of the movement of the engine.

Appellant further contends that the judgment should be reversed upon the ground that the verdict of the jury was flagrantly against the evidence. Such is not our view of the matter. There was some testimony in appellee's behalf tending to show that her injuries were caused by the negligence of the engineer in one or both of the particulars complained of, while appellant's testimony all conduced to prove that her injuries were caused solely by her own negligence in attempting to get upon the track in front of a moving engine, which she saw or could have seen by the use of ordinary care in ample time for her protection. It may be that the weight of the evidence was on the side of the appellant; but that fact will not authorize this court to disturb the verdict or judgment. We cannot reverse the judgment, unless convinced that there was no proof upon which to rest the verdict, or that it was flagrantly against the evidence.

The case having been submitted to the jury upon the facts and under proper instructions from the court, their decision must upon the record before us be permitted to stand.

Wherefore the judgment is affirmed.

#### COMMONWEALTH v. PETER, County Judge.

(Court of Appeals of Kentucky. Jan. 8, 1908.)

#### PROHIBITION—ADEQUACY OF OTHER REMEDY.

Prohibition does not lie to restrain a county judge from entering orders requiring auditor's agents to verify statements filed in proceedings against taxpayers who had omitted to list property for taxation; the remedy by appeal being adequate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 5.]

"Not to be officially reported."

Application for prohibition by the commonwealth against Arthur Peter, county judge, to restrain respondent from entering orders. Petition dismissed.

M. J. Holt, for the Commonwealth.

O'REAR, C. J. In a proceeding in the county court by an auditor's agent against a taxpayer who it is alleged had omitted to list certain of its property for taxation the county court ruled the auditor's agent to verify

the statement filed by him and which the taxpayer was required to defend. The auditor's agent declining to verify the statement, the proceeding was dismissed. Application is now made to this court for a writ of prohibition against the county judge to restrain him from entering similar orders in other cases of the same nature. The auditor's agent contends that the statement required to be filed by the statute is not a pleading required by the Code, and need not, therefore, be verified, and that the county court is exceeding its authority in ordering to the contrary. Whether the auditor's agent is correct in his contention as to the necessity for a verification of the statement, we are of opinion that the remedy is by appeal to the circuit court, and thence to this court, if the auditor's agent is not satisfied with the rulings on the practice. The county court's action in the matter is a fair exercise of judicial interpretation, and, although it may have erred, an adequate and simple remedy is afforded by appeal. There is no such urgency as would warrant this court's interfering with an inferior tribunal in such matters of practice.

The motion for preliminary writ is denied, and the petition dismissed.

#### COMMONWEALTH ex rel. TANNER, Revenue Agent, v. AMES.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

#### TAXATION—CORPORATE STOCK—ASSESSMENT.

Shares of stock of business or trading corporations required to list and pay taxes on their property are not subject to taxation in the hands of the individual owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Taxation, § 221.]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by the commonwealth, by L. P. Tanner, revenue agent, against F. A. Ames. From a judgment for defendant, plaintiff appeals. Affirmed.

L. P. Tanner, for appellant. J. D. Atchison, for appellee.

LASSING, J. This appeal involves the right of the state to tax the shares of stock in a business or trading corporation. The same question was before us in the cases of *Commonwealth v. Steele*, 104 S. W. 687, and *Commonwealth v. Hickman*, 104 S. W. 687, appealed from Daviess circuit court and recently decided. It was there held that in all corporations which are not required to report to the auditor, but which are required to list and pay taxes upon their property, the shares in the hands of their individual owners are not subject to taxation. And the lower court having, in this case, so held, the judgment is affirmed on the authority of the cases above referred to.

**EASTERN KENTUCKY TELEPHONE & TELEGRAPH CO. v. HARDWICK et al.**

(Court of Appeals of Kentucky. Jan. 8, 1908.)

**1. TELEPHONES — CONSTRUCTION AND MAINTENANCE—COMPANY'S DUTY.**

A telephone subscriber is presumed to know that his telephone is apt to get out of order, and that a line running through the country may sometimes get down, and, though a telephone company must use ordinary care in constructing and maintaining its line, it is not liable for interruptions not preventable by ordinary care.

**2. SAME.**

Plaintiffs advanced the cost of extending a telephone line, guaranteeing the company a certain number of subscribers. The company agreed to deliver service receipts to plaintiffs, the face value thereof to be credited on the company's debt for the money advanced. *Held*, that the company was bound to plaintiffs to use ordinary care to maintain its line in order, and, if it failed to do so, it is liable to plaintiffs for damages in the amount that the rents were reduced through the company's negligence, to be credited on the company's debt to them.

**3. SAME—DEDUCTIONS.**

A telephone subscriber is only entitled to a deduction from his bill on account of interrupted service for interruption after the expiration of a reasonable time after the company has notice of the trouble.

Appeal from Circuit Court, Powell County.  
"Not to be officially reported."

Action by J. H. Hardwick and another against the Eastern Kentucky Telephone & Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

John D. Atkinson and Henry Watson, for appellant. C. F. Spencer, for appellees.

**HOBSON, J.** On March 24, 1906, J. H. Hardwick and E. H. Fuller of Staunton, Ky., made a contract with the Eastern Kentucky Telephone & Telegraph Company, by which it agreed to construct a telephone line of at least 10 wires from its exchange in Clay City to the town of Staunton and a little beyond, for the purpose of supplying the citizens of Staunton and the vicinity with telephone connections, and to maintain same during the life of the contract. Hardwick and Fuller guaranteed that the company would have as many as 20 regular subscribers, who would pay \$1.50 a month for a residence and \$2.50 a month for a business house. They also agreed to furnish a sufficient sum of money to pay the actual expenses of building and equipping the line, and on this they were to have interest at 6 per cent. The company was to make out the receipts for the use of the telephones and deliver them to Hardwick, and, upon delivery of the receipts, it was to be credited on the debt for the money advanced. This was to continue until the debt and interest was thus paid. Hardwick and Fuller furnished something over \$1,200. The line was built and put in operation about September 1, 1906. The company about November 1st made out receipts and delivered them to Hardwick. The receipts amounted to something over

\$400, and were for a year's rent of the telephones. In February, 1907, Hardwick and Fuller brought this suit against the company to recover the money they had advanced, on the ground that the company had failed properly to maintain the telephone line, and had permitted the line and the boxes to be out of repair to such an extent as to destroy the value of the telephones. An answer was filed, and the case was heard before a jury who found for the plaintiffs; and, the court having entered judgment on the verdict, the defendant appeals.

The evidence is not sufficient to support the judgment. It shows substantially that there was little or no trouble until after bad weather came in winter, and that the trouble then was incidental to the fact that it was a new line, a part of which ran through lands where the poles settled and the wires got wrong. The company had its headquarters at Mt. Sterling, and, while there was delay in some cases in remedying defects, it was due to the situation of things, and there was nothing to indicate fraud or bad faith. A subscriber to a telephone must know that it is liable to get out of order and that a line running through the country must in winter be expected sometimes to get down. The company is bound to use ordinary care in constructing and maintaining its line, but it is not responsible for those interruptions which may not be prevented by ordinary care. The proof shows conclusively that the subscribers should all pay for their telephones, except when the service was interrupted, and the company had failed to remedy the trouble within a reasonable time after it had notice of the trouble. Most of the subscribers seem willing to settle if a reasonable credit is given them; but notwithstanding this Hardwick collected nothing.

The company was bound to Hardwick and Fuller to use ordinary care to keep and maintain its telephones and lines in order, and, if it failed to exercise such care, it is liable to Hardwick and Fuller for the damages they thereby sustained. The measure of damages is the amount that the rents were reduced by reason of the negligence of the company. As this will necessitate an accounting with each customer, the case should be transferred to equity and referred to the commissioner to ascertain what reductions the several customers were entitled to under the principles we have indicated; and judgment should be rendered against the company in favor of Hardwick and Fuller for the amount of the deductions. But no deduction will be allowed except where the company failed to remedy the defect in a reasonable time after it had notice of the trouble. If a defect existed and it had notice of it and failed in a reasonable time thereafter to remedy it, then from the end of such reasonable time the deduction should be computed. The sum recovered herein by

plaintiffs must stand as a credit on their debt and interest.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

### BROOKS v. EBLEN et al.

(Court of Appeals of Kentucky. Jan. 8, 1908.)

#### 1. BANKRUPTCY—EXEMPTIONS.

The court of bankruptcy has no jurisdiction of exempt property, except to set it aside to the bankrupt, and the rights of creditors to subject the same to their debts must be determined in the state court.

#### 2. SAME—DISCHARGE IN BANKRUPTCY—EFFECT.

A creditor having no lien at the time of the debtor's discharge in bankruptcy cannot subject to his debt land acquired by the debtor after the creation of the debt, occupied by him as his residence, and set aside by the bankruptcy court as exempt.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by A. Brooks against Rufus Eblen and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Robt. D. Vance and Jno. F. Lockett, for appellant. Lockett & Worsham, for appellees.

**HOBSON, J.** On February 6, 1896, Rufus Eblen executed to A. Brooks his promissory note. On October 20, 1902, Eblen purchased a tract of land upon which he resided with his family. On September 6, 1904, he was adjudged a bankrupt, and on November 12, 1904, he received a discharge in bankruptcy from all his debts. The tract of land referred to was set apart in the bankruptcy proceeding as his homestead. On November 14, 1905, Brooks filed this suit in the Henderson circuit court against Eblen, in which he set up the foregoing facts and sought to subject the tract of land to his debt on the ground that it was purchased after his debt was created. Eblen relied upon his discharge in bankruptcy, the circuit court sustained the defense, and Brooks appeals.

As Brooks' debt was created before the purchase of the homestead, he may subject it to his debt in this proceeding, unless he is barred of that right by the discharge of the debtor in bankruptcy. Exempt property is never in the court of bankruptcy. The title to it remains in the bankrupt. The court of bankruptcy has no jurisdiction of it, except to set it aside to the bankrupt. All questions as to the rights of creditors to subject such property must be determined in the state courts of competent jurisdiction. *Brandenburg on Bankruptcy*, § 185. In the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, it was held by the United States Supreme Court that a creditor holding a note which waived the homestead could not subject the homestead in the bankruptcy proceedings, but that the

bankruptcy court should postpone the discharge of the bankrupt for a reasonable time to allow the creditor to institute in the state court such proceedings as were necessary to make effective the creditor's rights; and in that case the judgment of the Circuit Court was reversed, with directions to it to confirm the assignment of the homestead and to withhold the discharge of the bankrupt until a reasonable time had elapsed for the excepting creditor to assert his rights in a state tribunal. We regard that case as conclusive here, as we cannot assume that the Supreme Court would have directed the discharge of the bankrupt to be withheld unless in its opinion the discharge of the bankrupt would have been a bar to the creditor's proceeding in the state court.

In *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, before the bankrupt was discharged, and after the proceeding in bankruptcy was begun, the creditor took out an attachment, which was levied upon exempt property. It was held that the subsequent discharge of the debtor did not discharge the lien created by the attachment, and that the property might be thereafter subjected, although the debtor had been afterwards discharged in bankruptcy. In *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433, the creditor had a judgment lien upon the property, and the debtor was adjudged a bankrupt; in *Bell v. Dawson Co.*, 120 Ga. 628, 48 S. E. 150, the creditor began his suit in the state court and had the property placed in the hands of a receiver, while the bankruptcy court had held up the debtor's discharge in bankruptcy. In *Flint v. Chaloupka* (Neb.) 111 N. W. 465, the creditor had brought his suit to set aside a fraudulent conveyance a year before the debtor was adjudged a bankrupt. Adjudication in bankruptcy and the discharge of the debtor from his debts by the bankruptcy court do not affect the liens of creditors, except as provided by the bankrupt act. But here the creditor had no lien when the debtor was discharged. He simply had a debt as to which certain property was not exempt which was exempt as to other debts created after its purchase. The question of exemptions was necessarily incidental to the existence of the debt, and, when the debt was discharged before any lien had been acquired on the property, the right to enforce the debt was lost.

Judgment affirmed.

### JACQUES v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Jan. 8, 1908.)

#### 1. MUNICIPAL CORPORATIONS—CONTRACTS—COUNCILMEN INTERESTED—SUIT TO ENJOIN PAYMENT—EVIDENCE—WEIGHT.

Evidence in a suit to enjoin payment by a city for printing held to show the company with which it contracted therefor was merely a device in an attempt to evade Ky. St. 1903, § 2768, making void contracts between a city and a corporation where a member of the council is an officer or employé of such corporation.

## 2. SAME.

Ky. St. 1903, § 2768, making void contracts between a city and a corporation where a member of the council is an officer or employé of such corporation, must be reasonably construed to prevent its evasion by a mere device.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 657-664.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Suit by Charles N. Jacques against the city of Louisville. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

C. R. Dinwiddle, for appellant. Edward G. Hill, for appellee.

HOBSON, J. Section 2768, Ky. St. 1903, which is a part of the act for the government of cities of the first class, is as follows: "Members of the general council shall hold their office for two years after the election. They shall be at least twenty five years of age, and shall be housekeepers or owners of real estate in the city. They shall hold no other civil office. They shall not be directly or indirectly interested in any contract with said city, or in any application therefor, or a candidate for or hold any office or employment for pay in any company or corporation which holds or is an applicant for any contract with the city. Stock holders in corporations may be eligible, but shall not vote on or interfere, directly or indirectly, with any matters or questions affecting a contract between such company and the city, or its right or duty under the same. No person while in arrears to the city for money collected shall be a member of the general council. Before any member-elect shall take his seat in either board, he shall make an oath or affirmation that he has the qualifications and is free from the disqualifications prescribed herein." In *Nunemacher v. City of Louisville*, 98 Ky. 334, 32 S. W. 1091, the validity of a contract between the city of Louisville and the *Courier Journal Job Printing Company* was assailed because a member of the general council of the city held an office for pay in the printing company at the time the contract was made. The court held the contract void. Construing the section above quoted, it said: "In our opinion the effect of this section is to render void contracts between the city and any person who is a member of the council, or between the city and any corporation which has a member of the council for one of its officers or paid employés. When so construed it becomes, in fact, merely declaratory of common-law principles on this subject."

Previous to May 12, 1906, the *Bradley & Gilbert Company* was doing printing for the city of Louisville under a contract made with the general council. George B. Coder was a member of the general council and chairman of the printing committee. He was also the salaried bookkeeper of the *Bradley & Gil-*

*bert Company*. Chas. N. Jacques, a citizen and taxpayer of the city of Louisville, brought a suit to restrain the city and its officers from paying the *Bradley & Gilbert Company* for supplies furnished the city, upon the ground that the contract was void under the statute. On May 12, 1906, the chancellor in an elaborate opinion gave judgment as prayed in the petition. Thereupon a contract was made by the city with *Theodore W. Powell & Co.* for certain printing, and Jacques filed this suit to enjoin payment under the contract, on the ground that *Theodore W. Powell & Co.* was but another name for the *Bradley & Gilbert Company*. On a preliminary hearing before a special judge an injunction was granted as prayed; but, on final hearing before another special judge, the injunction was dissolved and the petition dismissed. The plaintiff appeals.

*Theodore W. Powell* is the superintendent of the *Bradley & Gilbert Company*. He is also a stockholder in that company. He is *Theodore W. Powell & Co.* Under the contract between the city and *Theodore W. Powell & Co.*, the printing has been done by the *Bradley & Gilbert Company* as before. The work has been delivered to the city sometimes in the wagon of the *Bradley & Gilbert Company* and sometimes in a push cart owned by *Theodore W. Powell & Co.* *Powell* undertook to show that he had a printing office and was prepared to do work; but the proof on the whole satisfies us that this establishment was only a device to evade the statute. The presses and type there were brought there from the *Bradley & Gilbert Company*. *Powell* was pressed to tell who worked for him, and, being so pressed, named several people who turned out to be employed by the *Bradley & Gilbert Company*. The office of *Theodore W. Powell* was moved several times, but at none of its locations was there in good faith a printing establishment or printing business carried on. At one place the boy in charge said he was there merely to keep up a fire, at another the rooms were upstairs, and were kept locked during the day; the entrance being through a carpenter shop. While we do not doubt that a person who makes a contract with the city for printing may sublet his contract to another or have the work done by another, we do not think that is this case. *Powell* was superintendent of the *Bradley & Gilbert Company*. A man named *Pfau* was foreman. *Powell* testified that he made his contract with *Pfau* for the printing. But, as he was superintendent and *Pfau* was foreman under him, we have the case of the superintendent having his work done by his foreman under a contract with the foreman; and, if the arrangement was not a device to evade the statute, there was no need for the printing office to be established in name which was not a printing office in fact. Two witnesses testified that they were in the employment of the *Bradley & Gilbert*

Company, and while so employed were sent over to the establishment of Theodore W. Powell & Co. to be at work there while the place was being inspected by a committee of the council; and, while Powell denies this, he produced as part of his examination some cards and letter heads of Theodore W. Powell & Co. The proof clearly showed that these were printed by the Bradley & Gilbert Company. The statute must receive a reasonable construction. To permit it to be evaded by a mere device is to destroy it. The business of Theodore W. Powell & Co. was begun after the chancellor held in the first action that contracts could not be made by the Bradley & Gilbert Company with the city, and it was so begun for the purpose of avoiding the effects of that opinion.

George Coder was a member of the general council and chairman of the printing committee. He was the bookkeeper and vice president of the Bradley & Gilbert Company. As vice president he is the superior of Powell, the superintendent; and as bookkeeper he knows what the books show as to what his company is doing. Coder and Powell are both stockholders in the company. Powell testifies that he had a boy 14 years old, named Routh, in his employ, and Routh testifies that he went for his pay to Bradley & Gilbert Company. Telephone messages in regard to the work were sent from the city hall to their office. Powell testifies he had in his employ a boy named Schmidt, but the boy testifies that he was paid by Bradley & Gilbert Company. Powell testifies that Louis Pfau worked for him, but Pfau says he worked only for the Bradley & Gilbert Company. To sum the evidence up, the presses, type, men, messages, letter heads, cards, etc., came from the Bradley & Gilbert Company. The weight of the evidence and the circumstances sustain the plaintiff, and the court should have perpetuated the injunction.

Judgment reversed, and cause remanded for a judgment as indicated.

#### RENICK v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

(Court of Appeals of Kentucky. Dec. 18, 1907.)

##### INSURANCE—RIGHT TO PROCEEDS—CHANGE OF BENEFICIARY—PAYMENT IN GOOD FAITH.

Insured, as permitted by his policy, changed the beneficiary, substituting his uncle, who had no insurable interest, for his son; the company indorsing the change upon the policy. Upon insured's death, the uncle collected the amount of the policy, the company paying in good faith, without notice that he was not insured's creditor; and though plaintiff, the son's guardian, who was also insured's administrator, claimed the right to collect the proceeds, and also claimed an interest in the policy for his ward, he made no demand upon the company, either as administrator or guardian, nor did he notify it that he claimed any part of the policy, nor that he objected to the payment to the named beneficiary, who he knew was taking steps to collect it; but after payment had been made as guardian he sued the company for the amount of the policy. *Held*, that he could not recover.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by G. T. Renick, guardian of Henry Howard Simpson, against the Mutual Life Insurance Company of New York, on a policy of life insurance. By an amended petition it was alleged that the policy was issued by the Equitable Life Assurance Society. From a judgment of dismissal, plaintiff appeals. Affirmed.

Taylor & Lucas, for appellant. Humphrey & Humphrey and L. R. Yeaman, for appellees.

LASSING, J. The Equitable Life Assurance Society issued a policy for \$1,000 upon the life of Thomas E. Simpson. In this policy his son, Henry Howard Simpson, was named as beneficiary. The policy contains the following clause: "This policy is issued with the express understanding that the assured may from time to time during its continuance change the beneficiary or beneficiaries by filing with the society a written request, duly acknowledged, accompanied by this policy, such change to take effect upon the indorsement of the same upon the policy by the society, provided this policy has not been assigned and notice of such assignment recorded on the books of the society, or, if assigned, that all assignments shall have been duly canceled or released on the books of the society." Some two years after this policy was issued the assurance society received the following request from the insured: "I now elect, in accordance with said policy, to change the beneficiary to Dr. Frank N. Simpson, my uncle, Milburn, Ky., and I hereby request you to indorse this change on the policy and return same to Dr. Frank N. Simpson, Milburn, Ky." In compliance with the said written request the society made the following indorsement upon the policy: "In compliance with the written request of the assured duly acknowledged, it is hereby declared that the amount due at the death of the assured shall be payable, not as originally provided (other conditions and requirements remaining unchanged), but to his uncle, Frank N. Simpson, if living; if not, then to the assured's executors, administrators, or assigns. New York, May 28, 1904." The policy was returned to Dr. Frank N. Simpson, the new beneficiary, who held it until the death of the assured, which occurred some time during the same year.

Appellant, a brother-in-law of the assured, qualified as his administrator; also as guardian of Henry Howard Simpson, his son. Shortly after his qualification appellant learned that Dr. Frank N. Simpson was holding the policy and claiming the right to collect the proceeds. He thereupon called him and learned that the policy had not yet been collected, but that proof of death was being secured preparatory to collecting it. Appellant thereupon said to Dr. Frank N. Simpson that

he believed that insured's son, Henry Howard Simpson, was entitled to some of the proceeds, but told him to go ahead and collect the policy, stating that he was satisfied that he would do what was right, and the doctor told appellant that he would. The proof of the death of the assured was completed and presented to the company, whereupon the full amount of the policy was paid over to Dr. Frank N. Simpson, the beneficiary therein as per indorsement. Dr. Simpson paid no part of this sum to appellant as guardian or as administrator. Appellant made no demand upon the society, as guardian or as administrator of the insured, for the value of the policy or any part thereof; nor did he notify the society that he was making any claim, as guardian or otherwise, to any part of the policy, nor that he objected to the payment of the policy to Dr. Frank N. Simpson. Some time after the payment of this money by the society to Dr. Frank N. Simpson, appellant, as guardian for Henry Howard Simpson, brought suit against the society for the full amount of the policy. The company answered that it had paid the full amount of the policy to the beneficiary named therein, without notice of any claim on the part of appellant, as guardian or otherwise, and, having paid same according to the terms of the policy, it was discharged from further liability. The trial court upon the state of facts above enumerated rendered the following judgment: "Upon the foregoing findings of fact the court concluded, as matters of law, that Dr. Frank N. Simpson acquired no interest in the policy of insurance sued on in this proceeding, because he had no insurable interest in the life of Edward Simpson; but the court further concludes that, by the act of Edward Simpson in changing the beneficiary named in said policy from Henry Howard Simpson to Frank N. Simpson, the said Henry Howard Simpson was divested of all interest as the named beneficiary in said policy, and concludes that whatever right of action there may be upon said policy is in the personal representative of the deceased assured. Therefore the court directs that this action of G. T. Renick, guardian of Henry Howard Simpson, against the Equitable Life Assurance Company of the United States, be, and the same is, hereby dismissed."

The question for determination here is the correctness of the finding and judgment of the lower court as to the right of appellant, as guardian, to recover of the company the money in question. Dr. Frank N. Simpson was the beneficiary named in the policy, and the insurance company, having required and received the necessary proofs of death, in good faith paid over to him the full amount of the policy. But it is insisted for appellant that, inasmuch as Dr. Frank N. Simpson had no insurable interest in the life of the deceased, therefore the assignment was void, and did not divest Henry Howard

Simpson of his right as beneficiary under said policy. This contention amounts to a denial of the right of assured to change the beneficiary, unless the new beneficiary has an insurable interest. In the case of *Hopkins v. Hopkins' Adm'r*, 92 Ky. 324, 17 S. W. 864, this court held that, in the absence of a provision in the contract of insurance giving to the insured the right to change the beneficiary, it could not be done, but that the person named as beneficiary in the policy had a vested right of which he could not be deprived, but that, where the policy of insurance contained a provision giving to the assured the right to change the beneficiary, then in that event the right of the beneficiary is not vested, but is subject to that provision in the policy. And in the case of *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937, in speaking of the right of the beneficiary in a policy which contained a provision permitting the insured to change the name of the beneficiary, this court said that the named beneficiary did not have a vested right, but had a right which vests "conditionally only." \* \* \* The right of the one named in the policy is, then, subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is, therefore, subject to it."

But it is insisted by appellant that, as the request for a change of beneficiaries designated the new beneficiary as the "uncle" of the assured, it brought home to the company knowledge that he had no insurable interest in the life of the assured, and that the designation of him as beneficiary was, therefore, void, and, if void, that the original designation of his son, Henry Howard Simpson, as beneficiary was left unaffected. Many cases, some from our own and some from other courts, are cited in support of this contention. Many of these cases arose under contracts of insurance issued by mutual benefit associations or companies whose charters expressly designated the names of those who might become beneficiaries under the policy, and in the others the controversies were between rival claimants over the proceeds of policies which had been paid into court, and all are readily distinguishable from the case at bar. This court has never held that, where an insurance company in good faith has paid the money to the beneficiary designated in the policy by the assured, such payment did not absolve the company from further liability under the policy; but, on the contrary, in the case of *Griffin's Adm'r v. Equitable Life Assurance Society*, 119 Ky. 856, 84 S. W. 1164, it was expressly held that: "If the evidence had shown that the transactions were not purely speculative, or the circumstances were not such as to make the policies absolutely void, as wagering policies, as, according to the evidence, the appellee in good faith settled the insurance

with the persons named in the policies as beneficiaries, who would be treated by a court of equity as having received the same as assignees or appointees for those entitled thereto, and this settlement was made without knowledge on its part that they were no creditors of the insured, and without notice of the claim of the latter's administrator, we know of no principle of law or equity that would compel it at the suit of the administrator to pay the second time the amount of the policies. If the administrator has a cause of action against any one for the proceeds of the policies, it is against the beneficiaries named in them, who received such proceeds, and not appellee." The principle laid down in the foregoing opinion conclusively settles the claim and contention of appellant in this case. The company, in the case at bar, paid over to the beneficiary named in the policy the full amount thereof, without notice of any claim on the part of appellant to the policy or to any part thereof, and without notice that the beneficiary was not a creditor of the insured, and it would be grossly inequitable to require it to pay a second time the amount of the policy. The facts in the case at bar make out even a stronger case against appellant, for he knew that the beneficiary was taking steps to collect the amount of the policy, and in the possession of this knowledge failed and neglected to notify the company that he was contemplating making claim to the proceeds of the policy or any part thereof, and, having in silence waited until the named beneficiary has collected from the company the full value of the policy, he cannot now be heard to complain because it has done so; nor can he in conscience and good faith ask that they be again required to pay the amount of this policy to his ward or to himself as guardian.

We do not deem it necessary for the purposes of this case to go into a consideration of the question as to whether or not the changing of the beneficiary by the assured from his son, Henry Howard Simpson, to his uncle, Dr. Frank N. Simpson, divested his son of any interest in the policy, for the reason that any cause of action he might have would be against Dr. Frank N. Simpson, who received the proceeds of the policy, and not against the appellee company herein. The personal representative of the assured was not a party to the suit, and no question was made or raised as to whether or not the insured's estate had an interest in the policy in question; and, as that question is not before us, we do not pass upon it further than to state that under the authority of the case of *Griffin's Adm'r v. Equitable Life Assurance Society*, supra, any claim of the administrator would necessarily be against Dr. Frank N. Simpson, and not against the appellee company.

For the reasons given, the judgment of the lower court is affirmed.

# EARLE, Mayor, et al. v. LATONIA AGRICULTURAL ASS'N.

(Court of Appeals of Kentucky. Dec. 17, 1907.)

## INTOXICATING LIQUORS—MUNICIPAL REGULATION—DELEGATION OF POWER—LOCALITY OF OFFENSE.

Const. § 143, authorizes the establishment of a police court in each city and town in the state, with jurisdiction over violations of municipal ordinances and by-laws within the corporate limits of the city or town in which it is established. Ky. St. 1903, § 3490, subsec. 27, authorizes the council of a city of the fourth class to pass ordinances licensing, permitting, and regulating or restraining the sale of intoxicating liquors within the limits of a city, or restraining or prohibiting the sale thereof within one mile of the limits of such city. *Held*, that an ordinance of a municipal corporation prohibiting the sale of intoxicating liquors within a half mile of the corporate limits, and further providing that any person violating the provisions of the ordinance should, on conviction in the police court in the city, be fined, etc., and making it the duty of the police to enforce the ordinance, and to arrest all persons violating the same, and to take them before the police judge of such city to be dealt with according to the ordinance, was void, as in conflict with the constitutional provision.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by J. T. Earle, mayor of Latonia and others, against the Latonia Agricultural Association. From a judgment for defendant, plaintiffs appeal. Affirmed.

Orlando P. Schmidt, for appellants. Harvey Myers, for appellee.

NUNN, J. It appears that appellee is the owner of about 100 acres of land near the city of Latonia, a fourth-class city, but not within its corporate limits; that it has constructed a race course and erected valuable building thereon, consisting of a clubhouse, paddock, stables, etc., at a cost of many thousands of dollars; and that, in connection with its races and exhibitions, it is required to and does accommodate large concourses of people, who gather there to witness trials and tests of speed of horses and to see other exhibitions held by it upon the grounds; that for the accommodation of those there assembled it sells refreshments and liquors under a license granted it by the state of Kentucky and by the federal government. On March 6, 1906, the city council of Latonia enacted an ordinance, the three material sections of which read as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to sell vinous, spirituous or malt liquors or any kind of such liquors, within one-half mile of the corporate limits of the city of Latonia, Kentucky, provided, however, that this section shall not apply to any territory embraced within the corporate limits of the town of Central Covington, or any territory in Campbell county, Kentucky.

"Sec. 2. That any person, firm or corpo-



ration who shall be guilty of violating any provision of section 1 of this ordinance, shall, upon conviction in the police court of said city, be fined in any sum not less than twenty dollars nor more than one hundred dollars, and the cost of prosecution, in the discretion of the court.

"Sec. 8. That it is made the duty of the chief of police and several policemen, of said city, to see that this ordinance is strictly enforced, and to immediately apprehend any and all persons who may be found violating the provisions of section 1 hereof and take them before the police judge of said city to be dealt with according to this ordinance."

Appellee further alleged that at the time the above ordinance was enacted the city of Latonia did license and permit the sale of such liquors within the corporate limits of the city, and that its grounds and many of its buildings are situated within one-half mile of the corporate limits of the city of Latonia; that appellant, on May 31, 1906, had arrested four employes of appellee engaged in selling liquors for appellee to those congregated upon its grounds, and had taken them before appellant Z. T. Carlton, police judge of the city of Latonia; that he had set their cases for trial on June 2, 1906; and that he would try the cases and enforce the ordinance. It was also alleged that the ordinance is contrary to the Constitution and laws of the state of Kentucky and is void, and that Z. T. Carlton, police judge of the city of Latonia, has not the authority or right to hear, try, or determine the cases or the case of any person arrested for violating the ordinance outside of the corporate limits of the city of Latonia, and charged that, unless appellants were enjoined and restrained from further proceeding under the alleged ordinance to arrest and punish the employes of appellee, they will proceed thereto daily, or with more frequent arrests, trials, and convictions, to the great and irreparable injury and damage to appellee, which would not be susceptible of approximate ascertainment in money. It asked for a writ of prohibition against the police judge and the other appellants, enjoining and restraining them from proceeding further in the enforcement of the alleged void ordinance. Appellants answered, to which appellee filed a reply.

The real issue formed by the pleadings involves the validity of the ordinance passed by the city council and whether or not the police judge has the legal authority to enforce the ordinance by punishing those who violate it. It will be seen that the ordinance attempted to prohibit the sale of liquor within one-half mile of the corporate limits of the city of Latonia, excepting, however, from its provisions, a part of another municipality and a territory in Campbell county, and attempted to confer upon the police court of the city exclusive jurisdiction to try persons arrested for the violation of

the ordinance. If this ordinance is valid, and the police judge of the city of Latonia has jurisdiction to try persons violating it, this court cannot interfere to restrain or prohibit the enforcement of it.

The third Constitution of Kentucky, the one in existence when the present Constitution was adopted, contained this provision: "The General Assembly may vest judicial powers, for police purposes, in mayors of cities, police judges, and trustees of towns." It will be seen by this provision that there was no limitation on their jurisdiction. It was left to the General Assembly, without any limitation, to fix the jurisdiction of the officials named. Nor did the third Constitution place any limitation upon the General Assembly to prevent it from passing special acts. It then had, as now, power to pass any law not prohibited by the Constitution. The General Assembly, under the third Constitution, by special acts, had given police judges in some cities greater jurisdiction than had been given justices of the peace. Their jurisdiction was not the same throughout the state, and some of them were not limited by the boundary of the city. Under these circumstances, and to correct the inequalities and errors mentioned, section 143 of the Constitution was adopted. It provides: "A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have." This section confers jurisdiction upon police courts of cities and towns in cases of violation of ordinances occurring within the corporate limits of the cities or towns.

The ordinance in question deals exclusively with offenses committed outside of the corporate limits of Latonia, and is based on subsection 27 of section 3490 of the Kentucky Statutes of 1903. It appears that the city licenses the sale of liquors within the limits of the city, and that liquors are sold within a mile of the limits of the city by others than appellee. Appellee claims that the ordinance is void because it (appellee) is discriminated against by so drafting it as to include its property within the prohibited territory and excluding favored ones engaged in a like business. In view of the conclusion we have reached with reference to the validity of the ordinance and statute upon which it is based, we deem it unnecessary to pass upon this question. Section 143 of the Constitution has been construed by this court in the case of *Ingram v. Fuson*, 118 Ky. 882, 82 S. W. 606. It was there held that the General Assembly had no power, under this section of the Constitution, to confer jurisdiction upon police courts to try offenses committed outside of the city or town limits.

Appellants contend that the General As-

sembly has the right to make one boundary of a city for taxation and other general purposes and another boundary for police purposes, and that this is what the General Assembly did by the enactment of subsection 27 of section 3490, and refers to the case of *Falmouth v. Watson*, 5 Bush, 680, to sustain the proposition. To this we cannot agree. Section 143 of the Constitution recognizes but one boundary of a city or town, and the jurisdiction of police courts is expressly confined within that boundary. The section deals exclusively with the jurisdiction of police courts in regard to police regulations, and will not permit of another boundary for that purpose. The opinion in the case referred to was delivered in 1868, long before the present Constitution was adopted. At that time the General Assembly was not limited or prohibited from passing such special laws, and the opinion was right under the then existing laws. In our opinion it was the enactment of this class of special legislation that caused the incorporation in the present Constitution of sections 59, against special legislation, and 143, limiting the power of the General Assembly in conferring jurisdiction upon police courts of cities and towns.

It is claimed that this construction of section 143 is unfortunate, and it ought to be construed so that a separate boundary might be fixed for police purposes; otherwise around the city limits proper all sorts of crimes will be committed, which will annoy the people residing therein, and they should be permitted to protect themselves in the way provided in the statute referred to. This may be true; but with that we have nothing to do. Our duty is to see that the Constitution is not violated, and to construe and enforce it as it is written, and we should not bend it to suit what might happen to be the circumstances of the hour. Chief Justice Bronson, in an opinion in the case of *Oakley v. Aspinwall*, 3 N. Y. 547, 568, expressed in admirable words the respect the judicial and legislative departments of government should have for the Constitution, as follows: "It is highly probable that inconveniences will result from following the Constitution as it is written; but that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the Legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid ad-

herence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided or some good to be attained by pushing the power of the government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But, if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Notwithstanding the construction this court has given section 143 of the Constitution, the people of cities and towns will not be without police protection, and subjected to the annoyance of those who commit nuisances without the limits thereof. By an inspection of the present Constitution it will be observed that the General Assembly is not prohibited from giving police officers of cities and towns authority to make arrest and police territory beyond the limits thereof; and it has given them such authority under section 3495 of the statutes, and this court has construed that section, or one like it, and declared it legal, in the cases of *Heather v. Thompson*, 78 S. W. 194, 25 Ky. Law Rep. 1554, and *Riley v. Grace*, 33 S. W. 207, 17 Ky. Law Rep. 1008. Under these authorities the police of cities and towns are not confined in their duties to the boundary of the cities and towns. They, as well as constables and sheriffs, can arrest persons guilty of offenses and take them before justices of the peace or county judges for their trial and punishment, or they can be brought to justice by information filed or indictment and tried in the circuit court. If appellee is committing the offense indicated, let the officials and citizens of the city see to it that it is prosecuted and punished as indicated, and in that way relieve themselves from the annoyance complained of. It is better to do this than to bend the Constitution to suit their conveniences and desires.

In our opinion the court did not err in granting to appellee the relief sought; hence the judgment is affirmed.

## ALLEN v. CAMP et al.

(Supreme Court of Texas. Jan. 8, 1908.)

## 1. ASSIGNMENT—CONTRACTS—ASSIGNABILITY.

Where personal trust is reposed in a party to a contract, it is nonassignable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 28-31.]

## 2. TRIAL—DIRECTED VERDICT—PROPRIETY.

Where, in an action for money, there was evidence tending to sustain defendant's claim for the value of services rendered, and advancements made for plaintiff's benefit, and at his special instance and request, made either in person or by an authorized agent, it was improper to direct a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332, 333, 381-389.]

Error to Court of Civil Appeals of First Judicial District.

Action by Berry W. Camp against W. K. Morrow, J. Y. Allen, and others. From a judgment of the Court of Civil Appeals (101 S. W. 819), affirming a judgment for plaintiff, defendant Allen brings error. Reversed and remanded, with instructions.

Bryan & McRae, for plaintiff in error. Ewing & Ring and Lane, Jackson, Higgins & Wolters, for defendants in error.

**WILLIAMS, J.** The nature of this litigation fully appears in the opinion of the Court of Civil Appeals, reported in *Morrow v. Camp*, 101 S. W. 819, 18 Tex. Ct. Rep. 153. As that report shows, the judgment of the district court in favor of Camp against Morrow was reversed, and the cause was remanded for a new trial between those litigants, but the action of the trial court in instructing a verdict against Allen was affirmed. This writ of error is therefore prosecuted by Allen alone. It appears that, by his plea in reconvention, Allen sought to recover damages from Camp upon a contract between him and Morrow, which the latter had undertaken to assign to Allen. The Court of Civil Appeals held that Allen could maintain no action upon, or for the breach of, that contract, for the reason that, because of the personal trust therein reposed by Camp in Morrow, it was nonassignable. We think this conclusion, the reasons for which are sufficiently stated in the opinion referred to, was correct. But Allen also asserted the right to recover of Camp the value of services rendered and advancements made for his benefit and at his special instance and request, made either in person or by an authorized agent. There was evidence tending to sustain this claim, as to some of the items thus sued for sufficient to require a submission of those matters to the jury. The peremptory instruction was therefore erroneous. The judgment of the district court and that of the Court of Civil Appeals will be reversed, and the cause will be remanded to the district court, with instruction to try this issue, restricting it to the question of Camp's liability upon the ground stated for the items claimed in the 6th paragraph of Al-

len's plea in reconvention upon that ground. This, of course, does not disturb the judgment of the Court of Civil Appeals as to Camp and Morrow.

Reversed and remanded with instructions.

## WESTERN UNION TELEGRAPH CO. v. TRUE et al.

(Supreme Court of Texas. Jan. 8, 1908.)

## 1. TELEGRAPHS AND TELEPHONES—DELIVERY OF MESSAGES.

It is the duty of a telegraph company to transmit and deliver promptly every message that is delivered to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 25-32.]

## 2. SAME—FAILURE TO PROMPTLY DELIVER MESSAGE—DAMAGES.

A telegram from the owner of cattle to plaintiff reading: "Parties failed arrange deal. If you want cattle, come here"—did not indicate to defendant telegraph company that an agreement had theretofore been entered into between the sender of the message and plaintiff whereby the latter should be entitled to purchase the cattle on the failure of other parties to do so, so as to entitle plaintiff to recover damages accruing from the loss of the option to buy the cattle, as the result of defendant's negligence in failing to send and deliver the message with reasonable promptness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 65.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. R. True and others against the Western Union Telegraph Company. Judgment for plaintiffs (103 S. W. 1180), and defendant brings error. Reversed.

Spoons, Thompson & Barwise, Geo. H. Fearons, and H. D. Estabrooke, for plaintiff in error. J. A. Templeton, for defendants in error.

**BROWN, J.** J. R. True, representing himself, E. C. True, and S. P. Strong, applied to Sam Davidson of Ft. Worth, Tex., at that city, to purchase some steer cattle from him, and was informed by Mr. Davidson that he had already given J. W. Martin and A. H. Burns an option on the cattle, which they had a right to exercise at any time on or before the morning of the 31st day of October, 1904. It was agreed between Davidson and True that, in case Martin and Burns should not take the cattle, Davidson would send a telegraphic message to True at Ryan, Ind. T., informing him of the fact, and give him an opportunity to buy the cattle on terms then agreed upon, which were, in substance, that True should have the privilege of selecting from the herd of steer cattle 2,000 head, then three years old and upwards, at the price of \$27.75 per head, and that he should have the further privilege of selecting from the remainder of the herd 1,000 head of steer cattle, two years old past, at the price of \$22.50 per head, and True was to have 60 days in which to make the selection and ship the cat-

tle. True resided at Ryan, Ind. T., and had a ranch within eight miles of that place. The defendant telegraph company had a station at Ryan. On the morning of the 31st day of October, 1904, True went to the telegraph station, and informed the operator that he was expecting an important message from Ft. Worth that day, at the time inquiring if there was a message there for him. Receiving no message, he returned again in the afternoon, and at several different times, and, being under the necessity of going to his ranch, he went to the office at 6 o'clock p. m. on that day, and informed the telegraph agent that he had arranged with Jackson & Bird, merchants of that town, to send the message to him at his ranch at once if it should be received, and directed the agent, in case the message should be received, to deliver it at once to Jackson & Bird, which the agent promised to do. Jackson & Bird agreed to receive and forward the message to True. True then departed for his ranch, and did not return until the next day, and, having occasion to be at the telegraph office at about 9 o'clock p. m., was informed by the operator that a message was there for him. The message was marked as having been received at 7:35 p. m. on October 31, 1904, and reads as follows: "Fort Worth, Texas, Oct. 31, 1904. To J. R. True, Ryan, I. T., via Sta. Parties failed arrange deal. If you want cattle come here. [Signed] Sam Davidson." Martin & Burns having failed to exercise their option to purchase the cattle, on the afternoon of October 31, 1904, at 3 o'clock p. m., Sam Davidson delivered the above message to the operator of the Western Union Telegraph Company at the stockyards at Ft. Worth to be transmitted to Ryan, Ind. T. If the message had been promptly sent, it would have been received at Ryan by 4 o'clock p. m. of that day. If the message had been promptly delivered to Jackson & Bird when received at Ryan, they would have sent it at once to True at his ranch, and True could and would have returned to Ryan in time to have taken a train which would have put him in Ft. Worth at about 7 o'clock a. m. November 1st, in time to have exercised his option of buying the cattle from Davidson, but, when he arrived on the 1st of November from his ranch, it was too late for the train which would have carried him to Ft. Worth. He took the first train available, arriving at Ft. Worth about 5 o'clock a. m. on November 2d, when he found that Davidson had concluded that he did not wish to buy the cattle, and had sold them to Martin & Burns. The telegraph company was negligent in failing to transmit the message promptly from Ft. Worth to Ryan, and was negligent in failing to deliver the message to Jackson & Bird according to the directions of True. If True had gotten to Ft. Worth on the morning of the 1st of November, he would have purchased the cattle, and would have realized a profit on the transac-

tion equal to the amount of the verdict of the jury.

The facts establish beyond controversy the liability of the telegraph company to the defendants in error for such damages as they can establish by proper evidence; and the only question which is presented to this court for decision is: Did the message, with the attending circumstances, charge the telegraph company with notice of the transaction between Davidson and True? "The telegraph company is chargeable with notice \* \* \* of such purposes as may be reasonably inferred from the language used, in connection with the subject-matter of the communication, taking into consideration the usual manner of expressing messages sent by this means." W. U. Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826. The only fact in evidence which tended to furnish an interpretation of the terms of the message is the statement made by True to the operator at Ryan that he was expecting an important message that day. It is the duty of the telegraph company to transmit and deliver promptly every message that is delivered to it, and the statement made in this case by True that the message he expected was "important" gave no aid in arriving at the meaning of the telegram. The fact that the wire was used was enough to convey that information, and it was the defendant's duty without instruction to send the message with all reasonable dispatch. *Telegraph Co. v. Davidson & Hardeman*, 15 Tex. Civ. App. 334, 39 S. W. 605.

In seeking the meaning of the message to the telegraph company, we must view it from the standpoint of the agents who handled it. They were not in possession of the facts which served to explain the matter to those who were familiar with the antecedent transactions. True understood from this message that Davidson was extending to him the privilege under a previous agreement to buy the cattle on terms agreed upon; but the agent who received and he who transmitted the message, not having the benefit of the facts, could only pass upon the language in which it was expressed. Thus looking at the message, it reasonably appeared to the operators from its terms that Davidson had theretofore had on hand with other parties a deal for the cattle which the parties had failed to consummate, and that True knew of this transaction between Davidson and the unnamed parties. It is reasonably apparent that the purpose of the message was to inform True of the failure of the parties, not named, to carry out some transaction, and to offer to True the opportunity to buy the cattle if he desired to do so. But there is nothing in the language from which either operator, or any other person reading it from his standpoint, could learn that there had theretofore been an agreement entered into between Davidson and True whereby the latter should be entitled, upon the failure of other parties,

to purchase the cattle. The language, "if you want the cattle come here," would justify the conclusion that the matter was then open for True to buy, and that Davidson was giving him this information in order to induce him to make the purchase. Beyond this the telegraph operators could not have understood that there was a pending transaction or any specific terms or agreement about which these parties were conducting this correspondence by wire. It follows that, the message being so indefinite as not to give any information to the telegraph company of the right to be protected by a prompt delivery of it or of the damages which might ensue from a failure to deliver promptly, no recovery of damages accruing from the loss of the option to buy the cattle can be had by the defendants in error for the negligence of the company's agents in failing to send and deliver the message with reasonable promptness.

The facts stated do not sustain the judgment of the court as rendered, nor do they disclose any facts upon which the defendants in error would be entitled to recover more than nominal damages.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that the cause be remanded.

#### HIX et al. v. ARMSTRONG.

(Supreme Court of Texas. Jan. 8, 1908.)

#### GUARDIAN AND WARD—PURCHASE BY GUARDIAN—TRUSTS.

Where a guardian purchased land in her own name at an execution sale under a judgment belonging to her and her wards, based on the fact that the judgment was for the price of personalty owned by her and her wards jointly, and credited the amount of her bid on the judgment, the law vested in the wards an interest in the land, and the guardian held the same in trust for them in the proportion of their interest in the judgment, and they were entitled to sue for the land notwithstanding orders approving the guardian's account of the sale of the personalty in which she charged herself with the proceeds thereof remained in force; the orders not adjudicating the rights of the wards in the land.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by William Hix and others against J. W. Armstrong. There was a judgment for plaintiffs, and defendant appeals to the Court of Civil Appeals, which certifies questions to the Supreme Court. Questions answered.

Geo. D. Green, for appellant. O. T. Plummer and S. C. Padelford, for appellees.

BROWN, J. This is a certified question from the Court of Civil Appeals of the Fifth District. The statement and questions are as follows:

"This action was brought by J. S., W. H., and Ernest Hix, plaintiffs in error, against J. W. Armstrong, defendant in error, to recover an undivided one-half interest in and

to a certain tract of land in Johnson county, Tex., and for rents. Defendant answered, disclaiming any interest in 100 acres of the land, describing the 100 acres by field notes, not guilty as to the remainder, and adverse possession of three and five years, and vouched in Mary F. Duncan as warrantor. Plaintiffs by supplemental petition denied the pleas of defendant, and specially that they were minors when Armstrong took possession; that Mary F. Duncan became their guardian, and, while acting as such, she sold a certain lot of cattle, the property of herself and these plaintiffs, to one Hix Duncan, taking his note for the purchase price thereof; that said note was not paid, suit was brought thereon, and judgment was recovered by her against Hix Duncan; that execution was issued and levied on said land, said land sold thereunder, Mrs. Duncan becoming the purchaser, and the price bid at said sale, \$500, credited on said judgment; that, Mary F. Duncan having acquired the said land in that manner, she held the same in trust for said plaintiffs, and that said defendant was aware of said facts when he purchased from Mrs. Duncan. Defendant replied, and alleged that Mrs. Duncan as guardian had accounted to the probate court of Johnson county for the sale of said cattle, which account was duly approved by said court, and that said plaintiffs had ratified the same, more than two years having elapsed since they arrived at age, and no action having been brought by them to set aside or amend said judgment in the probate court. A trial was had before a jury, and the court instructed a verdict for defendant. A judgment was rendered for defendant, and the plaintiffs prosecute this writ of error.

"The evidence shows that in 1883 Elzie Hix died, leaving surviving him a widow, Mary F. Hix, and four children, Lena, Ernest, William, and John Hix. Lena died, leaving as heirs her mother and three brothers. Elzie Hix at his death owned certain property, among which was a lot of cattle, the community property of himself and Mary F. Hix, his surviving widow. Mary F. Hix subsequently married one Duncan, and on June 4, 1885, was appointed guardian of the estate of said children. She qualified under said appointment, and returned an inventory of the children's property into court, which included the children's interest in the lot of cattle, which was one-half. She sold her and her wards' interest in the cattle to one Hix Duncan, for which she received Duncan's note for \$850; the note being made payable to her individually. Thereafter, Duncan having defaulted in the payment of said note, Mary F. Duncan brought suit thereon, and recovered judgment in her name for the sum of \$980. Execution was issued and levied on 239 acres of land, the property of Hix Duncan. The land was sold, Mary F. Duncan bidding in the same for \$500, which amount was credited on the judgment, and

the land deeded to her. Mrs. Duncan in September, 1894, deeded the land to J. W. Armstrong in consideration of \$3,600, \$50 of which was paid in cash and two notes executed, one for \$750, payable the following December, and the other one for \$800, payable November, 1895, and the assumption by Armstrong of a \$2,000 mortgage that had been given on the land by Hix Duncan. Subsequently, in 1898, Armstrong not having paid all that was due on his notes, Mrs. Duncan sued him to recover the balance due, and to settle the same Armstrong conveyed to her 100 acres of said land, she assuming \$900 of said mortgage. On March 16, 1894, Mrs. Duncan filed with the probate court of Johnson county annual account as guardian of said children, charging herself, among other things, with \$425, one-half of the proceeds of sale of said cattle, and showing expenditures for said minors, consisting of taxes on real property, physicians' bills, for clothing, schooling, boarding of said minors, and burial expenses and tombstone for Lena Hix, the account of each ward being stated separately and showing each ward indebted to her, but remitting the surplus above what she had received. This account was duly approved by the court, which was entered of record, and at the same time the court decreed the sale of a certain tract of land for the support and maintenance of said wards. There was no further action had by the probate court in the guardianship matter shown by the record. No action was ever brought by plaintiffs to set aside and annul the decree of the probate court allowing and approving Mrs. Duncan's annual account, and this suit was brought after the youngest had become of legal age. They claim that said order of the probate court is null and void on its face, as the court had no authority to allow the guardian for the amount expended for the maintenance of said wards; the court prior to said order never having, by a decree regularly made, authorized such expenditures to be made out of the corpus of their estate.

"Mrs. Mary Duncan had obtained the judgment against Hix Duncan, had the land levied on and sold, and bid in by her, and the bid credited on the judgment before the filing and approving of her annual account with the probate court. That no final account was ever filed and approved and the guardianship never closed by the probate court. That in her annual account mentioned in original statement she included the amounts of debits and credits as to Willie Hix, but in entering her account on the minutes that part relating to the debits and credits as to Willie Hix was not entered, but omitted from the record.

"Question 1. Under the foregoing facts, were the children authorized to bring this suit for the land, the order approving the guardian's account of the sale of said cattle, and charging herself with the proceeds thereof, never having been set aside or annulled,

or did the wards acquire such an interest in the land by reason of the guardian's purchase and crediting the bid on the judgment as authorized them to bring a direct suit to recover it?

"Question 2. Is the approval of a guardian's annual account by the probate court such a judgment that it cannot be attacked in a collateral proceeding, as is attempted in this case; or, in other words, is it binding on the plaintiffs until set aside by a direct proceeding for that purpose?"

We answer the first question in the affirmative. When Mrs. Duncan purchased the land in question, crediting the amount of the bid on the judgment, which belonged jointly to her and her children, the law at once vested in the children a one-half interest in the land, and Mrs. Duncan held the land in trust for the benefit of her wards in the proportion of their interest in the judgment upon which the purchase was credited. *McCoy v. Crawford*, 9 Tex. 353; *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746. In the first case cited above, Crawford, the administrator, caused land to be sold under an execution issued upon a judgment in favor of his intestate's estate, and at the sale purchased the land, taking a deed in his own name. Crawford reported to the court the amount of the judgment as a charge against himself, thereby accounting to the estate for the debt which was satisfied by the sale. It was claimed in that case, as in this, that the fact that the administrator accounted for the debt vested the title in him, but Judge Wheeler, speaking for the court, said: "Moreover, the administrator, Crawford, purchased with the funds of the estate; and, if the judgment against Grisby had been valid and the sale legal, still the purchase would have inured to the benefit of the estate. It is well settled that, where one buys land with the money of another and takes the deed in his own name, a trust results in favor of the person whose money was employed in making the purchase. The latter is the equitable owner of the land, and the purchaser is a mere trustee, and holds for the benefit of him who paid the purchase money." The order approving the annual account of Mrs. Duncan does not purport to adjudicate the rights of the heirs in the land. Indeed, the county court had no jurisdiction to divest them of their title if it had attempted to do so; neither could the act of Mrs. Duncan, the guardian, in accounting for the debt, discharge the trust which the law had fixed upon her by the act of purchase in her capacity as guardian with the funds which belonged to her wards. There was no necessity for the wards to have the order set aside in order to give them a right to maintain this action.

It is unnecessary for us to answer the second question, because in no event could the order approving the annual account in any way affect the rights of the wards in the land in question.

## Ex parte TESTARD.

(Supreme Court of Texas. Jan. 8, 1908.)

## 1. INJUNCTION—WRIT—DEFECTS—CLERICAL ERRORS—VIOLATION—CONTEMPT.

Where a writ of injunction issued on November 9, 1907, which recited that a petition for injunction and the order of the court granting it had been filed November 8, 1907, and enjoined defendant from doing the forbidden acts until further order of the court, to be held on the first Monday in January, 1907, was served on defendant November 11, 1907, it informed him of the order of the judge, filing of the petition, and issuance of the writ all at dates prior to the service, and that knowledge was sufficient to make it his duty to obey the writ, and to render him guilty of contempt of court for disregarding it, even though, through an obvious clerical error, the writ was made returnable on the first Monday in January, 1907, instead of 1908.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 441.]

## 2. CONTEMPT—PROCEEDINGS—NOTICE OF MOTION—SUFFICIENCY.

Where a notice of a motion made against a person for contempt of court brings him into court, where a hearing is had on the charge contained in the motion, an error in the notice as to the time the act of contempt was alleged to have been done does not affect the validity of a conviction.

## 3. HABEAS CORPUS—PROCEEDINGS—SCOPE OF INQUIRY—VALIDITY OF JUDGMENT.

In habeas corpus proceedings by a person imprisoned for violating an injunction, the question is, not whether the injunction was erroneously issued, but whether it was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 24, 25.]

## 4. CONTEMPT—PROCEEDINGS—JURISDICTION OF COURT.

Where, in a contempt proceeding, a charge stating under oath the violation of a writ of injunction was filed, and notice was issued to and served upon the contemnor, who appeared and excepted to and answered the charge, and a hearing was had, judgment of conviction pronounced, and a commitment issued, the court acquired jurisdiction of the cause and of contemnor's person.

## 5. HABEAS CORPUS—PROCEEDINGS—SCOPE OF INQUIRY—RECORD.

Even if the court on habeas corpus has authority to go behind the judgment, to inquire whether there was such a hearing as would support it, such inquiry cannot be had where the entire proceedings upon the hearing are not before the court; but in such case it must be presumed that there was a hearing that opportunity was allowed to adduce evidence, and that there was evidence tending to support the judgment.

Habeas corpus by Seth Testard against John W. Tobin, sheriff. Relator remanded.

Tarleton & Camp, for relator. R. V. Davidson, Atty. Gen., Jas. D. Walthall, Asst. Atty. Gen., and C. A. Davies, for respondent.

WILLIAMS, J. This writ was issued on the application of relator, Testard, complaining that he was restrained of his liberty by the sheriff of Bexar county by virtue of a commitment issued out of the district court of that county upon a judgment thereof convicting relator of contempt of court in disobeying a writ of injunction previously issued and served. It is unnecessary to cite au-

thorities to the proposition that this court is restricted to the inquiry whether or not the commitment is void.

Its nullity is asserted on several grounds, the first of which is that the writ of injunction for disobedience of which relator is held was void and insufficient to support a charge of contempt consisting in the violation of it. The writ was issued on the 9th day of November, 1907, reciting that the petition for injunction and the order of the district judge granting it had been filed November 8, 1907, and enjoining the defendant from doing the forbidden acts until the further order of said court to be held on the first Monday in January, 1907. It is thus seen that by its terms the writ was returnable at a time antecedent to its issuance. The clerical error is apparent, and could have misled no one. When served on the relator on November 11, 1907, the writ informed him of the order of the judge, the filing of the petition, and the issuance of the writ all at dates prior to such service. This knowledge was sufficient to make it his duty to obey the writ, and to bring him in contempt of the court when he disregarded it. 22 Cyc. 1013, and cases cited.

It is next objected that the notice of the motion made against him for the alleged contempt varied from that motion, in that it stated that the motion charged the act of violation to have been committed on the 11th, when in truth the allegation was that the act was committed on the 22d, of November, 1907. But this cannot affect the validity of the conviction. The notice brought the relator before the court, and according to the record a hearing was had upon the charge contained in the motion, and it was of that he was convicted. We must assume that the hearing was full and fair, and that ample opportunity was given him to meet the charge actually made. If so, the mere error in the notice as to the time the act was alleged to have been done became immaterial, even if in any case such an irregularity could be held material to the validity of the judgment of conviction.

The injunction forbade the purchase and sale by relator and others, as ticket brokers or "scalpers," of nontransferable coupon tickets of kinds designated in the writ and in the petition of the plaintiffs, who were several railroad companies engaged in the carriage of passengers. The case was much like that of *Lytle v. G., H. & S. A. Ry. Co. et al.* (Tex. Sup.) 99 S. W. 396, 10 L. R. A. (N. S.) 437, and need not be more fully stated. It is objected to the proceeding that there was a misjoinder of parties; that the writ prayed for and granted applied to tickets to be issued thereafter, as was the one sold by relator in the sale whereof he is charged to have been guilty of contempt; that the writ also applied to tickets for transportation between points within and points without the state; and that this was a regulation of,

or an interference with, interstate commerce. All of these objections might be disposed of by saying that they present nothing that can be urged in justification or excuse of a disregard of the injunction. Any merit they may have can receive proper recognition when properly presented in the progress of the cause in which the injunction issued, but not in this proceeding. The question here is, not whether the writ was erroneously issued, but whether or not it was void. If it were admitted that all of these objections would be sound if urged at the proper time and place, this would not establish the proposition asserting the nullity of the injunction, nor that it was not the duty of the parties enjoined to obey it while in force. But we think it proper to say that this court did not hold in the Lytle Case, as seems to be supposed, that tickets must have been issued in order to entitle the railroad companies to obtain an injunction to protect their right to issue and sell them from unlawful interference. On the contrary, we expressly held that the right to issue them in the future could be thus protected, subject to the limitations laid down in the opinion.

The petition and the writ in this case undoubtedly stated a case in which, under the decision referred to, the right to the injunction existed, and the ticket which relator is charged with selling fell within the class thus protected. If the petition and writ went further, and if it were conceded that it was to that extent invalid, the concession would not help the relator. He sold a ticket the sale of which, under any view, was properly enjoined. But we cannot admit the proposition that he had the right to disregard any part of the writ. We think it proper to say further that, if it were conceded that the courts of the state are without power to protect carriers of passengers in their interstate as well as in their intrastate transportation, this could not avail. The injunction applied also to intrastate tickets, and that in question belonged to that class. But we are unable to see that the power of the courts of the state to protect the business of carriers of passengers from unlawful interference is at all affected by the character of the business, as interstate or intrastate.

The other objections to the conviction are based upon affidavits filed in this court for the purpose of showing either that the district court did not give relator a full hearing upon the charge of contempt or that he was not guilty as charged. The record shows that a charge stating under oath the violation of the writ was filed; that notice was issued to and served upon relator; that he appeared and excepted to and answered the charge; that a hearing was had, judgment of conviction was pronounced, and a commitment was issued. No irregularity sufficient to invalidate the proceeding appears upon their face. The court undoubtedly acquired

jurisdiction of the cause and of the person of the relator. It is a serious question under the authorities whether or not this court may, in hearing this application, go behind a judgment thus reached for the purpose of ascertaining whether or not the facts before the district court justified it. Certainly the inquiry, if made at all, must be confined to the question of the power of the district court to render the particular judgment of conviction. *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111; *Ex parte Cash* (Tex. Cr. App.) 99 S. W. 1118, 9 L. R. A. (N. S.) 304.

As the relator, upon the charge of a contempt not committed in the presence of the court, was entitled to a hearing, it may be that, if it were made to appear that that which the proceedings treat as a hearing was not such in substance and in fact, but was really a condemnation without hearing, this would invalidate the conviction and entitle relator to a discharge. It may be that if it conclusively appeared that opportunity was denied to relator to adduce evidence in his defense, or that the court convicted him without any evidence whatever of his guilt, this would justify the conclusion that there was not such a hearing as was essential to the validity of the judgment. The determination of questions like this, which might be made in cases that might be supposed, is unnecessary here, for the reason that they could only be determined from the proceedings—all of the proceedings—before the trial court, and no effort has been made to reproduce before us those had in the present case beyond the written record already stated. This is not an appeal from the judgment of the district court, but an application for the release of the relator, which can be sustained only by making it appear that the judgment is void. An attack based upon the charge that a hearing was denied, or that a conviction was adjudged without any evidence, necessarily depends for its success upon what was done in the trial court, and must be supported by a showing of all that occurred there. No attempt at such a showing has been made, and we must presume that there was a hearing, that opportunity to adduce evidence was allowed, and that there was evidence tending to support the conclusion of the court expressed in the judgment. The judgment, therefore, is valid against collateral attack, and no amount of evidence offered before this court, tending to show that the relator was in fact innocent of the charge, can now avail him. The question of his guilt or innocence was for the trial court, and was concluded by its judgment pronounced after a hearing. Nothing is made to appear which would justify this court in enlarging the relator, and he is therefore remanded to the custody of the sheriff of Bexar county to undergo the punishment adjudged by the district court.

Relator remanded.



Ex parte HOWARD.

(Supreme Court of Texas. Jan. 8, 1906.)

Habeas corpus by Robert H. Howard against John W. Tobin, sheriff. Relator remanded.

Tarleton & Camp, for relator. Jas. D. Walthall, Asst. Atty. Gen., and C. A. Davies, for respondent.

WILLIAMS, J. This cause is controlled by the opinion in that of Ex parte Seth Testard, 106 S. W. 319; and the same order is made as in that case.

Relator remanded.

# MISSOURI, K. & T. RY. CO. OF TEXAS v. SAUNDERS.

(Supreme Court of Texas. Jan. 8, 1906.)

## RAILROADS—FAILURE TO SIGNAL AT CROSSINGS—NEGLIGENCE.

The statute requiring that the whistle on a locomotive shall be sounded 80 rods from a public crossing, or the railroad shall be liable for damages sustained by reason of such neglect, provides for the protection of those who use railroad crossings, in which case the omission to give the signal is negligence per se, and an instruction that the absence of signals would be negligence as to one on the track near a crossing was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1257-1261.]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by H. T. Saunders against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment of the Court of Civil Appeals (103 S. W. 457) affirming a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Coke, Miller & Coke and Head, Dillard & Head, for plaintiff in error. McGrady & McMahon, for defendant in error.

WILLIAMS, J. Defendant in error, who was plaintiff below, was struck by an engine of the plaintiff in error at the town of Trenton, and recovered the judgment now before us for the injuries thereby inflicted. Two dirt roads cross the track of the defendant, one 150 or 200 yards south, and the other some distance north of the station. On the morning when he was hurt the plaintiff drove some cattle out of a field southeast of the crossing to the south of the station. The animals passed the track going west, and went north upon the right of way and plaintiff, when he reached the crossing, also turned north, but followed the track, intending to drive the cattle westward, towards his home. He moved in a run or rapid walk along the end of the ties until he reached the gravel passenger platform of defendant, and then passed along its edge nearest the track. When he was 150 or 175 yards from the southern crossing, he was overtaken and struck by an engine drawing a passenger train which

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came rapidly from the south. Defendant had three whistling posts south of its depot, the farthest for the station signal, the next for the southern crossing, and the third for the northern crossing. Some of the evidence tended to show that only the station signal was given and that plaintiff did not hear it, while probably he would have heard signals for the crossings if they had been given. The trial court gave in its charge the provision of the statute requiring the giving of signals for crossings, and instructed that a failure to give them would be negligence, for which plaintiff would be entitled to recover if he was hurt as the proximate result of such omission, and was not himself guilty of negligence. The giving of this instruction was the reason for the granting of this writ of error.

The question as to the correctness of the charge depends upon the further question whether or not the failure to give crossing signals was negligence per se as to one situated as plaintiff was. The decisions of this court leave no doubt that such a failure is by law made negligence with respect to those for whose protection the statute was designed. As to others the omission may or may not constitute negligence; in fact, the question depending on the circumstances of the particular case, and being one for the jury, and not for the court, to determine. The charge under consideration took from the jury the question whether or not the omission to give the signals was, with reference to the plaintiff, a negligent one, and it can be justified only if it be found that the statute imposed the duty for the protection of one in a position such as that of plaintiff. There are many decisions in other states based upon statutes like ours which would sustain the charge and the opinion of the Court of Civil Appeals approving it, and there are quite as many, if not more, that hold to the contrary. They are cited in Elliott on Railroads, §§ 1150, 1158, 1264; 2 Thompson on Negligence, §§ 1560, 1561. The decisions of this court hold with the latter view. I. & G. N. R. R. Co. v. Gray, 65 Tex. 32; M., K. & T. Ry. Co. v. Thomas, 87 Tex. 282, 28 S. W. 343; T. & P. Ry. Co. v. Shoemaker, 98 Tex. 455, 84 S. W. 1049. The statute requires the blowing of the whistle and the ringing of the bell at least 80 rods "from the place where the railroad shall cross any public road or street," and the continued ringing of the bell until the engine shall have crossed the street or stopped. It imposes a penalty upon any engineer neglecting to comply, and makes the company "liable for all damages which shall be sustained by any person by reason of such neglect." These signals are required because of the nature of the place, a crossing of the railroad by a road or street which others have the right to occupy and use with their persons and property. The deduction seems plain that the protection is given to those who are exercising their right with respect

to the road or street. The requirement is not adapted to the protection of others; the warning being required only at a certain distance from the highway and until it has been passed. The existence of the crossing fixes the relation to the railway of the road or street and of those exercising the right to use it, and the provision is a definite protection to them; but, if we attempt to apply it to others, to persons or property whose position is not influenced by the existence of the crossing, or any right they have to use it, we have no definite guide. We can see a cogent reason why this protection should be given to persons or property passing along the road or street, but it would be difficult to find a reason for giving such a protection to one person near a crossing and withholding it from another farther away, when the crossing has no influence whatever over the situation of either.

The rights of those using the road or street crossing the railway should not be narrowly restricted as is sometimes attempted. It is not at all necessary to hold that they must be at the point of intersection. Perils are encountered in the use of roads which cross railways other than those of collisions with passing cars; but they result from the situation of the highway in relation to the railway, and this relation moved the Legislature to make the provision in question, and clearly indicates the classes for whose benefit it was intended. In *Railway v. Gray*, supra, Chief Justice Willie thus accurately states the true doctrine: "Whilst the statutory signals to be given at road crossings are intended as warnings to persons upon the road or near the crossing, the failure to give them may be taken into consideration, together with other facts, to show want of reasonable care on the part of the company as to other parties lawfully upon the railway. *W. & A. Ry. Co. v. Jones*, 8 Am. & Eng. Ry. Cas. 267. In the one case the omission of the signals is negligence per se, and may be so declared by the court. In the other it may or may not be negligence under the circumstances, and the jury must pass upon the question. In the case above cited the law required that the whistle should be blown, and the speed of the train checked, upon approaching a public crossing. It was held that, whilst these provisions were intended to protect life and property at such crossings, yet, when an accident occurred just beyond a crossing, the fact that these requirements were disregarded might be considered by the jury in determining the question of negligence on the part of the railroad company." In *Railway v. Shoemaker*, supra, this language was used: "No one can say from the evidence that the boys were at the crossing or that the failure to give the signals had anything to do with the deaths. So far as any inference can be drawn from the appearances stated, it is that they were upon the track and away from the crossing.

The specific duty to give the signals was to those using the crossings, and not to persons at other places. The absence of such signals may sometimes affect the conduct of persons on the track at other places than crossings, and so it might, if all the facts were known, affect the question of contributory negligence here; but by itself it constitutes no breach of any duty to the boys, so far as can be seen from the evidence." While nothing is said as to the particular question before us in *Railway v. Thomas*, the construction there put upon the statute and the conclusion announced that it applies only to crossings at grade, and is not intended for the benefit of those passing with teams under overhead crossings, are wholly irreconcilable in principle with the decisions of the class first above referred to, which, in effect, so construe the statute as to make it include among those towards whom it is made the duty to give these signals all who are so situated as to hear and be benefited by them when given. Plainly, if this be the purpose of the statute, such a duty could not be held to depend upon the character of the crossing, whether at grade or otherwise, and so it is held in some of the decisions of the kind followed by the Court of Civil Appeals. If the duty to give the signals is made a statutory duty towards all who may happen to be near enough to a crossing to hear them and be governed in their conduct by them, certainly that duty existed towards the plaintiff in the *Thomas* Case, and the fact that the road passed under the railway could not have affected it. Therefore, when the court decided that the statute did not apply to such a crossing, it necessarily negated the construction contended for by defendant in error.

The doctrine laid down by Chief Justice Willie in *Railway v. Gray* admits allegation and proof of the failure to give such signals as a fact to be considered by the jury in determining whether or not under the facts of a particular case there was, in fact, negligence on the part of a railway company in the conduct of its business; and, in order to explain the bearing of such evidence, the court may inform the jury of the statutory provision, provided it leaves to them the decision from all of the evidence of the ultimate question of negligence vel non. No more than this was done in the case of *H. & T. C. Ry. Co. v. O'Donnell* (Tex. Civ. App.) 90 S. W. 886; s. c. (Tex. Sup.) 92 S. W. 409. Persons on or about railroad tracks, whether at crossings or not, are likely to take notice of the manner in which trains are required to be run and in which they are, in fact, run and to be misled by the absence of those things which usually indicate their approach. Hence the propriety of inquiring into such matters in determining questions of negligence on the part, not only of such persons, but of those operating the trains. A striking instance of this kind of an inquiry is found in the case of *Murphy v. G. H. & N. Ry. Co.*,

101 S. W. 439, 18 Tex. Ct. Rep. 220, 9 L. R. A. (N. S.) 762. But the purpose of such an investigation is to so inform the jury as to enable them intelligently to pass upon the question of negligence. The statute in question imposes a duty the nonobservance of which constitutes negligence with respect to those for whose benefit the duty is imposed, viz., users of the road or street. Others must rely upon the common-law duty of railroad companies to exercise ordinary care for their protection, and whether or not such care was exercised is a question for the jury, and not for the court.

We are cited to several opinions by the Court of Civil Appeals which lay down the doctrine relied on by defendant in error. It is well stated in the opinions of Mr. Justice Stephens in *Railway v. Taff*, 31 Tex. Civ. App. 657, 74 S. W. 89, and of Mr. Justice Bookout in *Railway v. Kilman* (Tex. Civ. App.) 86 S. W. 1050. The latter case was never passed upon by this court. In the former a writ of error was applied for and refused. But, as will appear from Judge Stephens' opinion, the view expressed of the statute was not essential to the decision, for the reason that it appeared beyond controversy that there was negligence, in fact, in the operation of the train which ran upon the hand car upon which plaintiff was traveling. The case was one of those in which the trial court could have instructed that the defendant's servants conclusively appeared from the evidence to have been guilty of negligence, without reference to the statute. The refusal of the writ of error, therefore, did not approve the views expressed as to the effect of the statute. The question was different in *Railway v. Matthews*, 34 Tex. Civ. App. 302, 79 S. W. 71. There the contention of the defendant was that the requirement that the trains of one railroad shall stop before crossing another is intended, not for the protection of pedestrians at such crossings, but to prevent collisions of trains upon the two roads. This was the contention that was not upheld. The deceased in that case was upon the track of the defendant, and for all practical purposes at the crossing. In the case of *Railway v. Nixon*, 52 Tex. 19, the accident occurred at the crossing of the railway and a street. While the opinion of the Court of Civil Appeals in the O'Donnell Case, before referred to, cites with approval the Taff and Kilman Cases, the charge passed upon contained no such feature as that now under review, but left to the jury the question of negligence under all the facts.

It is evident from the facts stated that the danger to which plaintiff in this case was subjected arose from no use he was making, had made, or was intending to make, of the road or the crossing. His situation was not different from that of any other person on or near a railroad between crossings. We are therefore of the opinion that the charge

was error; and, since it cannot be said that the facts conclusively show that the omission to give the crossing signal was negligence towards him, the judgment must be reversed.

Reversed and remanded.

#### COLVIN et al. v. BLANCHARD.

(Supreme Court of Texas. Jan. 8, 1908.)

##### 1. BROKERS—AUTHORITY TO EXECUTE CONTRACT OF SALE.

Where the owner of lots wrote real estate agents, who had previously been authorized to sell the property: "I will sell the lots for \$19,000, and pay you five per cent. commission plus \$50, or \$1,000 com. in all for making the sale. In other words I want \$18,000 net for my lots. Terms \$3,000 cash, bal. long time"—the agents had authority to execute a contract of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 12, 13.]

##### 2. SAME.

Where the owner of lots wrote real estate agents that he would sell the lots for a given price, so much cash and the balance on long time, the agents were not authorized to sell on terms whereby notes given by the purchaser for the balance were payable "on or before certain dates."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 12, 13.]

##### 3. SAME—RATIFICATION.

The owner of land did not ratify the acts of his agents in making an unauthorized sale of his land by remaining silent and ignoring the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 147.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by G. H. Colvin and another against J. T. Blanchard. From a judgment of the Court of Civil Appeals (103 S. W. 1118) affirming a judgment of the district court in favor of defendant, plaintiffs bring error. Affirmed.

Orrick & Terrell, for plaintiffs in error.  
W. B. Paddock, for defendant in error.

BROWN, J. The honorable Court of Civil Appeals made a meager statement of this case, and we are under the necessity of looking to the undisputed facts, from which we make the following statement: For a number of years Blanchard had owned the property in controversy, and for at least one year prior to the transaction in question Gilliland & Harwood had been authorized by Blanchard to sell the lots. It seems from the evidence that the property had been advanced in price from time to time, but no sale was made, and on the 7th day of July, 1905, Gilliland & Harwood wrote a letter to Blanchard, which, however, was not in evidence, nor was its contents proved on the trial. On the 10th day of July, 1905, Blanchard replied as follows: "Milwaukee, July 10, 1905. Gilliland & Harwood, Fort Worth, Texas—Gents: Replying to yours of 7th inst., I beg to say that

I will rent the building now occupied by L. G. Gilbert for \$100.00 per month. I will sell the lots for \$19,000 and pay you 5% com. plus \$50, or \$1,000 com. in all, for making the sale. In other words, I want \$18,000 net for my lots. Terms, \$3,000 cash, bal. long time. I hope you will find a renter for the building. Let me hear from you. Yours truly, J. T. Blanchard." After receiving the above letter, Gilliland & Harwood sold the lots to the plaintiffs in error for \$23,500, \$4,500 of which was to be paid to other parties for the house, which did not belong to Blanchard, and \$19,000 was to be the price of the lots, \$3,000 being paid in cash and the remainder secured by five notes payable in one, two, three, four, and five years; the first four notes being for the sum of \$3,000 each and the fifth note for the sum of \$4,000. Each note was payable "on or before" the date stated therein. On the 17th day of July, 1905, Gilliland & Harwood reported by letter the sale made to the plaintiffs in error, but no answer was received, and Gilliland & Harwood was informed by Blanchard's wife that he was absent from home. The deed for his signature was sent by express to Blanchard at his home, also a copy of the contract was sent by mail, but no answer was received by Gilliland & Harwood to their communication at any time. On October 24, 1905, Blanchard wrote this letter: "Milwaukee, Wis., Oct. 24, 1905. Mr. G. H. Colvin, Fort Worth, Texas—Dear Sir: I have before me a letter from Gilliland & Harwood of your city, in which they say they sold my Main street lots to you for \$19,000; \$3,000 cash, the balance, \$16,000, to be evidenced by five notes in the sums of \$3,000 the first year, \$3,000 in two years, \$3,000 in three years, \$3,000 in four years and \$4,000 in five years; notes bearing five per cent. interest payable annually, and notes to state 'on or before.' Please inform me if this is correct, and oblige, yours very truly, J. T. Blanchard." G. H. Colvin replied October 27, 1905, as follows: "Fort Worth, Texas, Oct. 27, 1905. Mr. J. T. Blanchard, Milwaukee, Wis.—Dear Sir: Your letter of the 24th at hand and noted. It is a fact that I purchased your two Main street lots from your agents, Gilliland & Harwood, for \$19,000 in accordance with the contract, a copy of which was forwarded you by them per express. Said contract was duly filed for record here in the county clerk's office. Yours truly, G. H. Colvin." Nothing more was heard from Blanchard about the matter until about January, 1906, when, being in the city of Ft. Worth, Gilliland met him and took him to Colvin's office to talk over the matter of the contract for sale. Colvin asked Blanchard what objection he had to the contract, but he testified that Blanchard only said "the interest is a little low," or something to that effect. Colvin offered to pay 6 per cent. on the notes, according to the terms of the contract, and

give his notes at that rate, and he offered to pay the money in cash, but Blanchard ignored the contract, and made no answer. Suit was brought by G. H. & O. V. Colvin in the district court of Tarrant county for a specific performance of the contract, or, in the alternative, for damages for breach thereof.

The honorable Court of Civil Appeals erred in holding that Gilliland & Harwood had no authority under the letter of Blanchard to make sale of the lots to Colvin. The letter from Blanchard to Gilliland & Harwood, dated July 10, 1905, used this language: "I will sell the lots for \$19,000 and pay you 5% com. plus \$50; or \$1,000 com. in all, for making the sale." In connection with this the fact that Gilliland & Harwood had previously been authorized to sell the same property necessarily gives to the meaning of this language that the said Gilliland & Harwood were authorized to make sale of the land; otherwise how could Blanchard pay them a commission "for making the sale"? The honorable Court of Civil Appeals refers to *Watkins Land & Mortgage Co. v. Campbell* (Tex. Sup.) 101 S. W. 1078, as authority for the construction that court placed upon the language of Blanchard's letter. But an examination of the facts of that case, as stated in the opinion, will show that this court rested its decision upon the proposition which was manifest by the correspondence, that the land agents in that case were making a proposition to the land and mortgage company on behalf of another party whom they represented as "our purchaser"; and that the land and mortgage company so regarded it is evident from this reply: "We have yours of the 14th submitting an offer of \$1,800.00; \$300.00 cash and the balance on time. \* \* \* If you could get the amount of your cash payment increased to \$600 we would be willing to accept the offer," etc. This clearly shows the proposition coming from Wilson & Lightfoot was not made as agents of the Watkins Land & Mortgage Company, and that the reply did not authorize them to accept the proposition; but states distinctly, "we would be willing to accept the offer." Subsequent correspondence supported the construction by this court. This case is clearly distinguishable from the case of *Watkins Land & Mortgage Company v. Campbell*.

However, we must affirm the judgment of the court below in this case, because the agents in making the sale did not observe the limitation of their authority expressly stated in the letter which conferred that power. Mr. Pomeroy expresses the rule applicable to this case as follows: "Where the delegation of authority is express and special, and the other party dealing with the agent cannot fall back on any larger implied powers, the limitations may relate to the manner and form of executing the contract, as well as the substantial terms which it shall

contain; and in such a case the agent must keep within the restricted authority conferred upon him, and strictly pursue the method prescribed by his instructions." *Pomeroy, Specific Performance*, 114, § 77; *Thomas v. Joslin*, 30 Minn. 388, 15 N. W. 675; *Holbrook v. McCarthy*, 61 Cal. 216. In the letter of authority in this case Blanchard prescribed the terms on which the sale should be made; that is, \$3,000 in cash and the remainder on long-time notes. Possibly the notes running from one to five years might be considered long-time notes; but the words "on or before" placed in each of the said notes gave the maker the privilege of paying them at any time he might choose and they did not comply with the terms of the authority because they were not long-time notes so far as Blanchard was concerned. The maker could make them long-time or short-time at his option; but the payee of the notes had no option but to accept the money on any day that it might be tendered to him; or, at the option of the maker, the payee must wait until the last day named. The purposes which prompted Blanchard to make "long-time notes" one of the terms of sale would be unimportant in this case, except that it serves to explain what was intended by him in the use of the phrase, "long-time notes." It was consistent with good business policy for Blanchard to desire that the property which he was converting into negotiable paper should bring him an income secured by the lien for a term of years, rather than to have it paid in cash with the uncertainty of re-investment. For purposes of use as commercial paper such notes would be less desirable than those he specified. Whatever may have been his purpose, the terms of the authority are plain and unmistakable, and the failure to comply with them is equally plain.

There are no acts on the part of Blanchard which could be construed into a ratification. As he had a right to do, and as was prudent for him under the circumstances, he refrained from expressing himself with regard to the matter. He was not called upon to take any action in the premises. He simply ignored the transaction after he received the information which he sought from Colvin. Under the circumstances of this case, his silence could not be construed into a ratification of the contract, and it was not so understood by the parties as is shown by the testimony of Colvin himself, who stated that, when Blanchard was in Ft. Worth in January following, he had a conversation with him in which Blanchard declined in every way to discuss the matter, or to express any opinion of preference one way or the other. Because *Gilliland & Harwood* failed to pursue the authority given them, no valid sale was made, and the plaintiffs in error showed no right to the relief sought.

The judgments of the district court and Court of Civil Appeals are affirmed.

# TEXAS & P. R. CO. v. WILLSON et al.

(Supreme Court of Texas. Jan. 8, 1906.)

## 1. COURTS—INTERMEDIATE COURTS OF APPEAL—CONFLICT OF DECISION—CERTIFICATION OF QUESTIONS—STATUTES.

Laws 1899, p. 170, c. 98, provides that if any Court of Civil Appeals arrives at an opinion on a question of law in conflict with the opinion of some other Court of Civil Appeals, it shall transmit the question of law duly certified to the Supreme Court for adjudication. *Held*, that such act was merely to settle a conflict of decision between two or more Courts of Civil Appeals, and that an alleged conflict between a decision and a case which had been certified to the Supreme Court, and in which the Court of Civil Appeals thereafter, in deciding, merely followed the decision of the Supreme Court, was not within the statute.

## 2. SAME—CONFLICTING DECISIONS.

A decision of the Court of Civil Appeals that a railroad company must keep its cattle guards in good condition is not in conflict with another decision that where a railroad track is fenced, and a private crossing is protected by gates in the right of way fences, the railroad company owes no duty with respect thereto, except to the adjoining landowner, nor with a decision that the owner of land not bordering on a railroad track has no right of action for the killing of his animals, which escaped from his land to that of another adjoining the railroad and were killed by reason of the bad condition of the latter's private crossing.

Motion to file a petition for mandamus on relation of the Texas & Pacific Railroad Company against Sam P. Willson and others. Motion denied.

W. L. Hall and Kennedy & Robbins, for applicant.

GAINES, C. J. This is a motion to file a petition for the writ of mandamus to compel the judges of the Court of Civil Appeals for the Sixth Supreme Judicial District to certify to this court a question arising in the case of *Texas & Pacific Railway Co. v. Sproles* (recently decided in that court) 105 S. W. 521, upon the ground that there is a conflict in the decision of the court in that case with decisions of other Courts of Civil Appeals in cases cited.

By an act of the Legislature approved May 9, 1899, it is provided that "in any cause that is now pending or may hereafter be pending in any of the Courts of Civil Appeals of the several supreme judicial districts of the state of Texas, any one of said courts may arrive at an opinion in the decision of any of said causes that may be in conflict with the opinion heretofore rendered, or hereafter rendered, by some other Court of Civil Appeals in this state on any question of law, and said Court of Civil Appeals refuses to concur with the opinion so rendered by the said other Court of Civil Appeals, it shall be the duty of said court failing to concur with the opinion in conflict with the opinion so arrived at by said court, through its clerk, to transmit the question of law, duly certified to, involved in the cause wherein said conflict of opinion has arisen, together with the record or transcript in said cause to the Supreme

Court of the state of Texas for adjudication by said Supreme Court." Laws 1899, p. 170, c. 98. The conflict which makes it the duty of a Court of Civil Appeals to certify a question is with the decision of some other Court of Civil Appeals, and not with the decision of the Supreme Court.

The case principally relied upon to show a conflict is that of *Missouri, Kansas & Texas Ry. Co. v. Hanack*, 23 Tex. Civ. App. 394, 56 S. W. 938. It will be noted that in that case the question had been certified to the Supreme Court by the Court of Civil Appeals, and in deciding the case the latter court merely followed the decision of this court. The purpose of the law was merely to settle a conflict of decision between two or more Courts of Civil Appeals. We think the decision in that case should be treated as the decision of the Supreme Court, and not that of the Court of Civil Appeals. But, should we be mistaken about this, we find no such conflict between the decision of the Court of Civil Appeals in the present case and that of the Court of Civil Appeals for the First Supreme Judicial District in the *Hanack* Case as makes it the duty of the former court to certify the question. In the *Hanack* Case it is held that where there is a crossing of a railroad track which is fenced, and the crossing is protected by gates in the right of way fences, the railroad company owes no duty with respect thereto, except to the owner. The present case involved the duty of the railroad company, across whose track there is an open crossing protected by cattle guards, with wing fences, to keep its cattle guards in good condition. It is obvious that the questions are quite different, and that there is no conflict between the decisions.

The other two cases relied upon as showing a conflict are the case of *Houston & Texas Central Ry. Co. v. Hollingsworth*, 29 Tex. Civ. App. 306, 68 S. W. 724, and that of *Texas & Pacific Ry. Co. v. Huffman* (Tex. Civ. App.) 71 S. W. 779. It is merely asserted in the petition that the decisions in these cases conflict in principle with the decision in the instant case. Waiving the question whether a conflict in principle is sufficient to make it the duty of the Court of Civil Appeals to certify a question, we find no such conflict in either of the cases relied upon to show it. It is sufficient to say in reference to the *Huffman* Case, 71 S. W. 779, that the question there was, as in the *Hanack* Case, as to the duty of a railroad company in reference to the gates in a right of way fence for the purpose of affording a farm crossing, while in the present case the question is as to the duty to keep the cattle guards in efficient condition, where the crossing is open and protected by cattle guards and wing fences. These, in our opinion, are very different questions. So in the *Hollingsworth* Case, 29 Tex. Civ. App. 306, 68 S. W. 724, the plaintiff, whose mules were killed, was not a tenant of the owner

of the land, while in the instant case it appears that *Sproles* was not only the tenant of *Baker*, for whose benefit the crossing was made, but had *Baker's* permission to use the pasture for the protection of the stock in which the cattle guard was constructed. It is certainly a question whether the rights of a tenant under such circumstances are not different from those who have no rights in the land on which the cattle guards are placed.

Since the petition in our opinion shows no conflict, we overrule the motion to file it.

#### WATERS-PIERCE OIL CO. v. STATE.

(Supreme Court of Texas. Dec. 23, 1907.)

##### 1. APPEAL—APPEALABLE ORDERS—MORE THAN ONE APPEAL IN SAME CASE.

There may be more than one appeal in the same case, where orders made at different times finally dispose of the subject-matter of each particular order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 60.]

##### 2. SAME.

An order appointing a receiver of a corporation, entered at the same term, but subsequent to the rendition of a judgment against it, may be reviewed either on appeal from the judgment or on a separate appeal, and the fact that it is reviewed on a separate appeal in the Court of Civil Appeals does not deprive the Supreme Court of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 60.]

##### 3. SAME—"FINAL JUDGMENT"—"INTERLOCUTORY JUDGMENT."

An order appointing a receiver of a corporation, entered at the same term, but subsequent to the rendition of a judgment against it, is not an interlocutory judgment, defined as one made pending the cause and before the hearing on the merits, but is a final judgment, defined as one disposing of the cause either by sending it out of court before a hearing on the merits, or after a hearing on the merits, and the order is, after affirmance by the Court of Civil Appeals, reviewable in the Supreme Court under Rev. St. 1895, art. 1383, authorizing appeals from final judgments, etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 4, pp. 3712-3715; vol. 8, pp. 7663, 7692.]

##### 4. SAME—MANDATES TO TRIAL COURT—ISSUANCE—RECALL.

Where the clerk of the Court of Civil Appeals issued a mandate on the court affirming a judgment of the trial court, before the expiration of the time allowed for the filing of an application to the Supreme Court for a writ of error, the Supreme Court, on the presentation of an application for writ of error, will grant a motion to direct the clerk to recall the mandate and to direct the judge of the trial court to set aside an order made by him based on the mandate.

##### 5. SAME—BONDS—AUTHORITY OF COURT TO FIX AMOUNT.

An order appointing a receiver of a corporation, entered at the same term, but subsequent to the rendition of a judgment against it, is appealable, under Rev. St. 1895, art. 1383, authorizing appeals; and the court, granting an appeal, may fix the amount of the appeal bond, in the absence of a statute on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2038.]

#### 4. SAME—FAILURE TO GIVE APPEAL BOND—EFFECT.

Failure to give an appeal bond in a sufficient amount does not make the appeal void, because the bond, on objection in the Court of Civil Appeals, may be amended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2064-2070.]

#### 7. SAME—OBJECTIONS—FAILURE TO MAKE—EFFECT.

Where no objection, based on the insufficiency of an appeal bond on appeal from an order appointing a receiver of a corporation, was made in the Court of Civil Appeals, an objection made in the Supreme Court, on motion for the appointment by it of a receiver, comes too late.

#### 8. SAME—STAY OF PROCEEDINGS.

Under Rev. St. 1895, art. 1404, authorizing appellant or plaintiff in error to give bond to suspend the execution of the judgment, a judgment cannot be enforced, pending an appeal, on appellant's executing a sufficient bond; and the statute applies to an appeal from an order appointing a receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2279.]

#### 9. SAME.

Where an order of the court appointing a receiver of a corporation stipulates that, on the approval by the court and the filing with the clerk by the corporation of a sufficient appeal bond, proceedings shall be suspended pending appeal, the order, pending an appeal, on the corporation giving bond approved by the court, is not enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2279.]

#### 10. SAME—"APPELLATE JURISDICTION."

Appellate jurisdiction of a court is the power and authority conferred on a superior court to rehear and determine causes tried in inferior courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 61.]

For other definitions, see Words and Phrases, vol. 1, pp. 452-454.]

#### 11. COURTS—ORIGINAL JURISDICTION—APPELLATE JURISDICTION.

Under Const. art. 5, § 3, conferring on the Supreme Court appellate jurisdiction and original jurisdiction to issue prerogative writs in cases specified by law, and the statute, giving the Supreme Court appellate jurisdiction, the Supreme Court has not original nor appellate jurisdiction to appoint a receiver of a corporation against which a judgment for violating the anti-trust laws has been rendered, pending a review of an order appointing a receiver; the act not being within the Constitution defining original jurisdiction, nor within the appellate jurisdiction under the authority to revise orders entered by the trial court or Court of Civil Appeals, and it not being claimed that any error in the appointment of a receiver was committed either by the trial court or by the Court of Civil Appeals nor within the court's inherent power to do things reasonably necessary for the administration of justice within the scope of its jurisdiction.

Action by the state against the Waters-Pierce Oil Company. There was a judgment of the Court of Civil Appeals (105 S. W. 851) affirming an order appointing a receiver of the corporation, and it brings error. Heard on motion by the state for the appointment of a receiver, and on motion by the Waters-Pierce Oil Company for a recall of the mandate issued by the clerk of Court of Civil Appeals. Motion of the state

overruled, and motion of the company granted.

N. A. Stedman, Cochran & Penn, Clark & Bollinger, and D. W. Odell, for plaintiff in error. R. V. Davidson, Atty. Gen., Jewel P. Lightfoot, Asst. Atty. Gen., Jno. W. Brady, Co. Atty., Allen & Hart, and Gregory & Batts, for the State.

BROWN, J. In this opinion we will give our reasons for the disposition made on a former day of this term of a motion presented by the Waters-Pierce Oil Company on substantially the following statement of facts:

The Waters-Pierce Oil Company is a corporation created under the laws of the state of Missouri, which had been admitted by the authorities of this state to transact business in Texas under a permit duly issued. The state instituted suit in the district court of Travis county against the said oil company to forfeit its permit to do business in this state, and also to recover from it penalties for the violation of the anti-trust statutes of the state of Texas. Upon a trial in the district court the state recovered judgment for \$1,623,000 as penalties, and declared the permit of the company to do business in this state forfeited. On a subsequent day to the judgment, and during the term, the judge of the district court, upon motion of the state, appointed Robert J. Eckhardt receiver for the said corporation. After a motion for new trial had been overruled in that proceeding, and also in the main case, the oil company gave notice of appeal in the original case, as well as in the proceedings for appointment of receiver, and executed a bond in the main case according to law in double the amount of the judgment, and in the proceedings under the motion of the state for appointment of receiver a bond was given in the amount prescribed by the judge of the district court, conditioned as required by law for a superseas bond. Two records were filed in the Court of Civil Appeals—one embracing both the main case and the motion for the appointment of a receiver, and the other embracing only the proceedings upon the motion of the state for the appointment of a receiver. In the Court of Civil Appeals the Waters-Pierce Oil Company moved to consolidate the cases, which motion was by that court denied, and the judgment of the district court, appointing a receiver, was affirmed. Motion for rehearing of that judgment in the Court of Civil Appeals was filed in due time and by the court overruled. On the same day a mandate was issued by the clerk of the Court of Civil Appeals and transmitted to the clerk of the district court of Travis county, Tex. The judge of the district court entered an order directing Eckhardt to proceed as receiver to discharge his duties. The Waters-Pierce Oil Company

filed in the Court of Civil Appeals and presented to this court within the time prescribed by law a petition for writ of error, which is now pending before this court. The Waters-Pierce Oil Company filed in this court a motion setting up the facts before stated and praying that this court enter an order directing the clerk of the Court of Civil Appeals to recall the mandate sent by him to the clerk of the district court, and also directing the judge of the district court to vacate an order which he had entered upon receipt of that mandate directing the receiver to take charge of the property. At a former day of this term, on hearing the motion, this court directed the clerk of the Court of Civil Appeals to recall the mandate sent down by him to the district court, and also directed the honorable judge of the district court to set aside the order made by him upon receipt of the said mandate.

After this court granted the motion to recall the mandate issued by the Court of Civil Appeals to the district court, the state of Texas, by her Attorney General, filed in this court a motion reciting the facts before stated and added the following grounds upon which the motion rested: (1) That it was adjudged by the district court that the Waters-Pierce Oil Company was conducting its business in violation of the law, and that the said judgment canceled the permit of the company to do business in this state. (2) That judgment had been entered in favor of the state of Texas against the said company for \$1,623,000. (3) That the state has a lien upon all of the property of the said company within this state to secure payment of the said judgment. (4) That conducting the business of the Waters-Pierce Oil Company by that company or its agents in the state would be in violation of the penal laws of this state. (5) That in a proceeding in the United States Circuit Court, wherein Bradley W. Palmer, one of the stockholders of the company, was the plaintiff, C. B. Dorchester was appointed receiver for the said company and took possession of the property, and that upon appeal by the state the Circuit Court of Appeals of the United States decided that the Circuit Court did not have jurisdiction and ordered the Circuit Court to discharge the receiver. (6) The motion sets out the facts of the proceeding of the Circuit Court of the United States, which are not necessary to this statement. It is alleged in the said motion that the property, while in the hands of Dorchester and under the orders of the Circuit Court of the United States, was applied to the payment of the expenses of that administration and the debts contracted by the receiver, and the other property or proceeds thereof would be hereafter so applied, to the detriment of the state and the impairment of its lien; that in case the property should be returned to the possession of the Waters-Pierce Oil Company it would be liable to be wasted or removed from the

state. The motion also set up that the judge of the Circuit Court of the United States had declared that he would discharge the receiver in accordance with the mandate of the Circuit Court of Appeals of the United States, and that in case he should do so there is no person to receive the property and take control of it and transact the business, as the operation of the business by the Waters-Pierce Oil Company in this state would be unlawful. The motion concludes then in the following language: "That it is necessary, for the preservation of the property of the Waters-Pierce Oil Company, for the preservation of the security of the state of Texas, for the prevention of the violation of the laws of the state of Texas, for the safety of the persons in charge of the property of the Waters-Pierce Oil Company, and for the prevention of the conduct of a business in violation of the laws of the state, that the property and business of said Waters-Pierce Oil Company be taken into actual control of this court. Wherefore the state of Texas prays that this court revoke the order recalling the mandate of the Court of Civil Appeals, or direct that Robert J. Eckhardt take actual and physical possession of the property of the Waters-Pierce Oil Company and conduct the business of said corporation under such orders as this court may make pending the final disposition of this cause in this court, and for general relief."

On the hearing of the motion of the Waters-Pierce Oil Company to recall the mandate of the Court of Civil Appeals from the district court it was objected by counsel for the state that if the Waters-Pierce Oil Company be correct in its contention that this was not an independent suit but only an incident of the main controversy, a writ of error could not be separately prosecuted, and therefore the case was not properly before this court. It is sometimes the case that there may be more than one appeal in the same case, when orders are made at different times which finally dispose of the subject-matter of that particular order. A familiar instance is a case of partition, wherein there may be a decree which determines the rights of the parties in the property and is a final judgment upon the merits of the case. From this an appeal may be taken, leaving the case before the court for the purpose of actual division of the property among the claimants according to the decree entered. When the partition shall have been made and the decree of partition entered, there is another final judgment or order, from which an appeal may likewise be taken. *White v. Mitchell*, 60 Tex. 164; *Moor v. Moor* (Tex. Civ. App.) 63 S. W. 347. The order appointing the receiver, although made subsequently to the date of the judgment, but at the same term, might have been reviewed in the appeal of the principal case. The parties have treated this as a separate proceeding, presenting separate records to the Court of Civil



Appeals, and that court has passed upon it as a separate and distinct case from the main suit; but the separation of the two cannot deprive appellant of the benefit of a review of the order. This court has jurisdiction of the case as it is presented.

It is also objected by the state's counsel that this court has no jurisdiction of this branch of the proceeding, because the order appointing the receiver is an interlocutory order, and this court has jurisdiction only of final judgments of the Court of Civil Appeals. If this be an interlocutory order, then the objection is well taken; for this court has no jurisdiction to review such an order of the district court and of the Court of Civil Appeals. Mr. Freeman defines an interlocutory judgment in the following language: "An interlocutory decree is one made pending the cause and before the hearing on the merits." Freeman on Judgments, § 29. This definition has been approved by this court in the case of Linn v. Arambould, 55 Tex. 611. Mr. Freeman defines a final decree as follows: "A final decree is one which disposes of the cause either by sending it out of the court before a hearing is had on the merits, or, after a hearing on the merits, decreeing either in favor of or against the prayer of the bill." The order clearly comes within the definition of a final decree or order; for, so far as the defendant was concerned, it finally disposed of the matter then before the court, which was the appointment of a receiver to take the property into his custody as a consequence of the complete determination of the controversy. If the contention were sustained, the defendant would be deprived of the right to have that order reviewed by this court. Article 1383, Rev. St. 1895; Renn v. Samos, 42 Tex. 104; Schulte v. Hoffman, 18 Tex. 678; Fitts v. Fitts, 14 Tex. 443; Watson v. McKinnon, 73 Tex. 215, 11 S. W. 197; Carter v. Hightower, 79 Tex. 135, 15 S. W. 223. In each of the cases just cited a receiver had been appointed in the trial court, and this court entertained jurisdiction of the matter and passed upon the questions raised as follows: In Fitts v. Fitts the appointment was made in the final decree, and, for the purpose of enforcing it, objection was made to the appointment of the receiver, but the court affirmed that judgment. In Schulte v. Hoffman the appointment of a receiver was made to carry out the final judgment of the court, and, upon objection being made, the Supreme Court affirmed the judgment of the district court making the appointment. In Watson v. McKinnon the trial court refused to make the appointment of a receiver and, upon appeal, complaint was made of that refusal, which action the Supreme Court reviewed and reversed. If the order of the court refusing the appointment of a receiver was subject to review by the Supreme Court, certainly an order by which a receiver was appointed would be likewise subject to review. In Carter Bros. v. High-

tower a receiver was appointed by the trial court, of which complaint was made upon appeal. This court reviewed the action of the trial court in making the appointment and affirmed the order. At the time those cases were passed upon by the Supreme Court it had no authority to review an interlocutory order of any kind, and, while the question was not made in either of the cases, the action of the Supreme Court necessarily involved the proposition that the court regarded the order as being final, else it would not have had jurisdiction to enter the orders concerning the appointment that were made in that court. We regard these cases as strongly supporting our ruling in maintaining jurisdiction of this court over the order of the district court in making the appointment of a receiver in this court.

The affirmance of that order being a final judgment of the Court of Civil Appeals, this court had jurisdiction by writ of error to review the proceedings of the courts in that matter, and, the appellant in the Court of Civil Appeals having a right to present to this court an application for writ of error, the clerk of that court had no authority to issue the mandate on the judgment of the Court of Civil Appeals until the expiration of the time allowed by law for the filing of an application for writ of error in that court. The application for writ of error having been presented in this court, it was necessary that the mandate of the Court of Civil Appeals, which was prematurely issued, should be returned to that court to await the action and judgment of the Supreme Court. We therefore held that the appellant was entitled under its motion to have an order directing the clerk of the Court of Civil Appeals to recall the mandate and also directing the judge of the district court to set aside the order which he had made based upon that mandate. In passing upon that motion we have confined ourselves strictly to the question of the right of this court to entertain jurisdiction of the application filed with it and the power of the court to direct the recall of the mandate. That decision in no wise interferes with any authority that the district court or the receiver could lawfully exercise over the property of the oil company during the pendency of that appeal.

Upon the motion of the Attorney General, requesting this court to appoint a receiver in this case, it is insisted by counsel that this court has jurisdiction of the matter, because the appeal which was taken from the order appointing the receiver is void; the bond not having been given in double the amount in controversy. It is also claimed that there is no bond prescribed by the statute which will apply to an appeal from this order. Article 1383, Rev. St. 1895, provides: "An appeal or writ of error may be taken to the Court of Civil Appeals from every final judgment of the district court in civil cases." The order in question is a final judgment of

the district court, from which an appeal might be taken under the provisions of the above-quoted article. If the statute prescribes no bond, then we are of the opinion that the court granting an appeal under this provision of the law might fix the amount of the bond adequate for the protection of the rights of the parties, which the court here did. However, if it were held that this case must rest upon the bond given therein, and that it should be for a sum double the amount of the judgment, the appeal would not be void, because the bond could have been amended upon objection made in the Court of Civil Appeals. The objection not having been made in the Court of Civil Appeals as to the amount of the bond, nor any effort made to dismiss the appeal on that account, the objection comes too late in this proceeding. The effect of the appeal, when perfected, is prescribed by article 1404, Rev. St. 1895, in these words: "Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof, mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgment, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him." This is plain language that cannot be construed, because its meaning is as definite as could be expressed to the effect that, when the appellant or plaintiff in error complies with the law, the judgment cannot be enforced during the pendency of the appeal. It only needs to be said that the law applies to this case, and the enforcement of the order appointing the receiver was suspended by the appeal. *Williams v. Pouns*, 48 Tex. 141; *Street Ry. Co. v. Street Ry. Co.*, 68 Tex. 163, 7 S. W. 381; *G. C. & S. F. Ry. Co. v. Ft. W. & N. O. Ry. Co.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; *Griffin v. Wakelee*, 42 Tex. 513; *Stone v. Spillman's Adm'r*, 16 Tex. 432; *Beach on Receivers*, § 117.

This court has no power to direct or authorize Eckhardt to take charge of the property of the defendant company, when the statute expressly provides that the giving of the appeal bond shall suspend the action of the court in that regard. If the appeal did not have the effect to suspend the execution of the order, the judge had authority to limit the appointment, as he did by his order, in which it is thus expressed: "And now, on this the 15th day of June, 1907, in open court it is ordered by the court in the above cause

that \$100,000 be and the same is hereby fixed as the amount of bond which the defendant shall be required to give in order to supersede the judgment of the court placing defendant's property in the hands of a receiver; and it is further ordered that, upon the approval by the court and the filing with the clerk by defendant of a good and sufficient bond conditioned as required by law for said amount, further proceedings herein be suspended pending appeal. But this order shall not affect or rescind the order heretofore entered prohibiting and enjoining the defendant, its servants, officers, agents, and attorneys, from removing any of its property or assets beyond the limits of the state of Texas; but said injunction shall remain in full force and effect pending the appeal from the order appointing a receiver herein." We do not, however, intimate a doubt upon the proposition, which we have asserted, that the appeal, by the filing of the bonds by the defendant in that court, suspended the operation of the order appointing the receiver until the final decision of the case.

The state, by her Attorney General, moves this court to appoint a receiver to take actual possession of the property of the Waters-Pierce Oil Company. This involves an inquiry into the scope of the powers which the Constitution has granted to this court, and an inquiry as to whether the act which is requested of this court would constitute the exercise of appellate or of original jurisdiction. Section 3 of article 5 of the Constitution defines the powers of the Supreme Court in the following terms: "The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be coextensive with the limits of the state. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe. \* \* \* The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the state." In pursuance of the authority granted by the Constitution the Legislature has defined the appellate jurisdiction of the Supreme Court in this language: "The Supreme Court shall have appellate jurisdiction coextensive with the limits of the state which shall extend to questions of law arising in civil cases in which the Courts of Civil Appeals have appellate but not final jurisdiction." It is unnecessary for us to enumerate the different provisions of the statutes which limit and further define the jurisdiction of this court within the general terms hereinbefore copied. The Legislature has defined the original jurisdiction of this court as follows: "The Supreme Court or any justice thereof shall have power in term time or vacation to issue the writs of quo warranto

or mandamus against any district judge or officer of the state government, except the Governor of the state." The Legislature has also specified the cases in which the Supreme Court may issue writs of habeas corpus, but it is unnecessary to quote or cite the statute. In *Brownsville v. Basse*, 43 Tex. 449, this court defined appellate jurisdiction as follows: "Appellate jurisdiction, with which alone this court is invested in passing upon civil causes, is defined to be the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts."

By the application of this definition of appellate jurisdiction, and the statutory provisions as to the original jurisdiction of this court, we must ascertain whether the act of making the requested appointment is embraced in either the appellate or original jurisdiction of this court. It is manifest that the act of appointing a receiver to take charge of the property of the Waters-Pierce Oil Company would not come within the terms of the statute which confer upon this court original jurisdiction in the use of the writs of quo warranto and mandamus; for by neither of these writs could the appointment be made. The conclusion is absolute that, if the original jurisdiction of this court must be invoked to make the appointment sought, then the court is without power to grant the motion. It would be a waste of words and time to argue a proposition so self-evident. Can the prayer of the motion be granted by the exercise of the appellate jurisdiction of this court? Looking to the clear definition of our powers by the Constitution, by the statute law, and by the decision of the court above quoted, this court has no authority over this matter, unless it be in the exercise of its revisory authority, whereby some ruling made, or an order or judgment entered by the trial court or by the Court of Civil Appeals in its proceedings in this case, is brought under review. It is not claimed that the trial court committed any error in the appointment of a receiver for the Waters-Pierce Oil Company, nor that the Court of Civil Appeals erred in the affirmation of that judgment; and the state does not seek to revise, reverse, or set aside any order, judgment, or decree rendered by the district court or any action taken therein by the Court of Civil Appeals. It is therefore certain to the point of demonstration that the power to make the appointment does not come within the appellate jurisdiction and authority of this court over the case, unless it is brought within the rule which is well expressed in these terms: "Every regularly constituted court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction and to prevent any abuse of its process." 8 Am. & Eng. Ency. Law, 23.

The powers of the receiver being suspended by the appeal taken by the Waters-Pierce Oil Company, we must inquire in what manner that company is interfering with the exercise by this court of its lawful powers in the revision of the proceedings in that case. If it were made to appear that a receiver in the active discharge of his duties was necessary to enable this court to exercise its authority over the case and to revise the action and ruling of the inferior courts, we do not doubt that this court would have the power to appoint a receiver in order to enable it to perform its duties of revising and correcting whatever errors might be made to appear in the proceedings of the lower courts. Nor would this court hesitate to exercise the implied or inherent power arising from its constitutional authority, if the facts presented made such a case. Accepting as true the allegations of the motion made in this case that the Waters-Pierce Oil Company, if permitted to use the property, will violate the laws of the state of Texas, and that the safety of the persons in charge of the property of the Waters-Pierce Oil Company would be endangered by conducting the business in violation of the laws, we must inquire if either of those acts would in any manner interfere with this court in discharging its duty of revision as an appellate court. We are not able to see wherein the action of the Supreme Court would be affected by such conditions. If in the use of its property the Waters-Pierce Oil Company should violate the laws of the state during the pendency of its appeal, it would be liable to prosecution and punishment in the same manner as for acts done before the trial of this case; and if the safety of the persons in charge of the property is endangered in any manner the courts are open to them to seek their protection where the jurisdiction has been lodged by the Constitution of this state for such purposes. The trial court has no less power now to prevent a violation of the laws of this state by the conducting of the business of the Waters-Pierce Oil Company than it had before the trial. As none of these things would in any way interfere with this court in the discharge of its duty, they do not fall within the scope of its appellate jurisdiction, and therefore do not come within the scope of the jurisdiction of this court. It is also said that it is necessary, in order to preserve the security that the state of Texas has for the collection of its judgment, to have a receiver in custody of the property; but no facts are stated which show that there is any threatened invasion of the jurisdiction of this court by which that security would be impaired. The law provides for a bond as security for the state in the collection of its judgment, and we are authorized to presume that a solvent bond has been taken by the trial court, and, the law having prescribed a sum double the

amount of the judgment rendered, we must conclude that it would afford security to the state in the enforcement of its judgment. This court will presume that all of these things have been properly done, and, indeed, if they were not, they are not matters over which this court has appellate jurisdiction.

In argument counsel appealed to this court to interfere, because it was asserted that, in case this court or the Supreme Court of the United States should reverse the judgment which the state obtained in the district court, then the Waters-Pierce Oil Company would be enabled to dispose of its property and evade the collection of the penalties and fines which the state has a right to recover against it. This court cannot indulge the presumption that the law will be violated, or that either this court or the Supreme Court of the United States will reverse a judgment which comes to this court with the presumption in favor of its correctness. Such a condition of things, if it should ever exist, must arise necessarily after the time when the jurisdiction of this court over the subject-matter will have ceased. The Supreme Court is not called upon by this motion to preserve the status of the case as it existed after the proceedings in the trial court and Court of Civil Appeals, but to change that status and put the affairs of this company and this litigation in an entirely different attitude from that in which by the lawful proceedings of the courts we find it. The questions decided by the Circuit Court of Appeals of the United States are not involved in this proceeding, and nothing in this opinion is intended to antagonize the conclusions reached by that court. The purpose of this motion is to have this court create new conditions—to change the status fixed by the trial court—which this court has no power to do. *Laredo v. Martin*, 52 Tex. 554. In the case cited an injunction had been refused by the trial court, and application was made to the Supreme Court for an injunction, which the court refused, saying: "The issuance of an injunction for such a purpose would be the exercise of original, and not appellate, jurisdiction in the case. It would be doing that which, it is contended, the district court should have done before the trial. \* \* \* It could not, then have been contemplated to give this court power to issue an injunction, in the first instance, to prevent damage to the parties during the pendency of the suit." If the receiver had been in possession of the property when the appeal was taken, this court would have power to maintain that possession during the pendency of the case in this court. *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *G. & C. & S. F. Ry. Co. v. Ft. W. & N. O. Ry. Co.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564.

Without further discussion of the question, it is sufficient for us to say that this court has not been intrusted with any such un-

limited authority, and cannot and will not exercise authority which has not been delegated to it by the people of this state.

The motion is overruled.

#### TABER et al. v. DALLAS COUNTY.

(Supreme Court of Texas. Jan. 8, 1908.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS—SCHOOL LANDS—APPLICATION TO SCHOOL PURPOSES—SALE BY COUNTY COMMISSIONERS AS TRUSTEES—VALIDITY OF SALE.

The rule that, if a trustee so contracts in disposing of trust property as to derive to himself a benefit, his self-interest renders the transaction voidable at the election of the beneficiary, regardless of the question of injury to the beneficiary or benefit to the trustee, does not apply where a county commissioners' court, who are trustees of land granted to the county for free school purposes and also trustees for the free school fund, with no personal interest in the transaction, sell the land; but the validity of the sale, if made in good faith for the full market value of the land, depends upon whether, in performing the contract of sale, they have applied all the proceeds to the school fund, as required by Const. 1876, art. 7, § 6, providing that the proceeds of lands granted to counties for school purposes shall be held by the counties alone in trust for the public schools therein.

#### 2. SAME.

If the commissioners in good faith sold the land for what it was worth in the market in its condition at the time of sale, the fact that the purchaser in addition released a claim for damages against the county, sustained by reason of its failure to give him possession of the land under a former lease to him, and also agreed to recover possession at his own expense, did not invalidate the contract.

#### 3. SAME.

If it should be subsequently found that the land was in fact worth more at the time of sale than it was sold for, that fact would not avoid the sale fairly made.

#### 4. APPEAL AND ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE—DISPOSITION OF CAUSE.

While the Court of Civil Appeals may reject a finding of fact of the trial court, and find the fact differently, it cannot enter judgment contrary to a finding of fact on conflicting evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

#### 5. VENDOR AND PURCHASER—MUTUALITY OF CONTRACT.

Where a county promises to convey land to a purchaser upon payment of a specified sum and interest, and the purchaser promises to pay the agreed price, mutuality is created, which is not destroyed because under the terms of the contract the purchaser could terminate it by refusing to pay the interest for 60 days, since it is simply an option which the parties contracted for, and which may or may not be exercised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 17.]

#### 6. SAME—EFFECT OF PERFORMANCE OF STIPULATIONS.

Where a contract for the sale of unimproved land provided that upon the failure of the purchaser to pay interest for 60 days he would surrender possession of the land, forfeiting to the vendor all improvements made thereon, the contract implied that improvements were to be made thereon by the purchaser; and hence, after he had made the improvements and paid interest for several years, the vendor could not assert that there was a want of mutuality in the

contract, since the performance by the purchaser of that upon which the mutuality depended related back and made the contract good from the beginning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 17.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Dallas county against Ben C. Taber and another. From a judgment of the Court of Civil Appeals,<sup>1</sup> reversing a judgment for defendants, they bring error. Reversed and remanded.

K. R. Craig, for plaintiffs in error. Cockrell & Gray, for defendant in error.

BROWN, J. The state granted to Dallas county three leagues of land in Archer county for free school purposes. Dallas county leased the land to one Carver. Upon the expiration of his lease the county leased the land to Ben C. Taber for the term of 10 years, but Carver refused to surrender possession of the land, and, after several months' effort to get possession, Taber brought a suit against Dallas county for damages caused by the failure to give him possession. Dallas county had conveyed 711 acres of the three leagues of land to John Henry Brown as compensation for having the school lands surveyed, and that land had been conveyed to the Club Land & Cattle Company. A suit was then pending in the district court of Archer county by Dallas county against the Club Land & Cattle Company for recovery of the 711 acres of land. When the suit by Taber against the county for damages had been pending for some time, Taber submitted to the commissioners' court of Dallas county this proposition: "Friday, Nov. 23, 1900. To the Honorable Commissioners' Court, Dallas County, State of Texas—Gentlemen: In view of the prospects of our not getting an early and final decision from the courts and possession of the Dallas county school land, which you leased to me September 19, 1899, and prompted by a desire to settle the matter without further loss to myself and the county, I will submit to you the following proposition: I will agree to purchase the land at \$2 per acre on contract for deed on or before 20 years from January 1, 1901, will pay interest at the rate of (3½) three and one-half per cent. per annum, payable semiannually in advance. I will further agree to obtain possession at my own expense of all the land, and will release the county from the damages I have sustained by reason of their inability to comply with the terms of our contract. No deed to be made until the entire amount of principal and interest has been fully paid, and all money that I have heretofore paid to be credited on the interest account. In making you the above proposition, I desire to call your attention to the fact that you stop all further loss to the county school fund and damages to me; also that the income is larger than you can realize by the sale of this

land for cash, as you must invest the principal in direct competition with the state school fund, which now has over \$1,000,000 of idle money at 3 per cent., and with every prospect of it being lower in the near future. Yours respectfully, Ben C. Taber."

After due consideration of the matter, the commissioners' court entered the following order: "It is ordered by the court that the proposition of Ben C. Taber for the purchase of the Dallas county school land situated in Archer county be and the same is hereby accepted, and it is further ordered by the court that the county judge be authorized and directed, in behalf of Dallas county, to sign a contract in compliance with said proposition." In pursuance of that order the county judge of Dallas county executed the following contract with Ben C. Taber: "State of Texas, County of Dallas. Know all men by these presents, that this contract of sale, made and entered into this the 23d day of November, A. D. 1900, by and between the county of Dallas, state of Texas, acting by and through her county judge, Kenneth Foree, and by virtue of an order of the commissioners' court of said Dallas county, made at a special term of said court held at Dallas, Texas, on the 23d day of November, A. D. 1900, hereinafter styled 'party of the first part,' and Ben C. Taber, of Dallas county, state of Texas, hereinafter styled 'party of the second part,' witnesseth: That for the consideration herein-after named the party of the first part by the terms hereof contracts the sale of the lands belonging to the school fund of said Dallas county to the party of the second part. Said lands are situated in Archer county, state of Texas, and known and described as follows: \* \* \* —for the sum of \$24,568, same to be paid on or before twenty (20) years after date of this contract, with interest at the rate of 3½ % per annum, payable semiannually in advance on or before the 1st day of January, 1901, in the sum of \$429.94, on or before the 1st day of July, 1901, in the sum of \$429.94, and the same amount on or before each succeeding January and July thereafter. Said interest shall be paid in full on dates aforesaid unless the party of the second part has paid part of said principal as herein contracted, in which event 3½ % shall be calculated upon the amount remaining unpaid. The party of the first part agrees to accept any part of said principal in the sum of \$1,000, or multiples thereof, at any interest-paying date named in this contract. And it is specially provided that, should the said party of the second part, or his legal heirs or assigns, fail or refuse for 60 days after any one of the semiannual interest payments become due to pay the same, then this obligation is to become null and void and of no binding effect on either party hereto, and in that event all the appurtenances and improvements situated thereon shall become the property of the said Dallas county, or her legal assigns; and the party of the second

<sup>1</sup> Stephens, J., dissenting.

part hereby agrees and binds himself, his heirs and assigns, to quit and surrender said premises, together with all the appurtenances and improvements thereon situated, and the party of the first part may re-enter and take possession of said premises, and hold as in her former estate, and thereupon this contract of sale and everything herein contained shall cease and shall become null and void, and all claim for damages by reason of such re-entry is hereby expressly waived, and the party of the first part shall have no right hereunder for a specific performance hereof.

\* \* \* It is further agreed and understood that the party of the second part is to pay all court costs and attorney's fees incurred in the suit now pending to recover the 711 acres, and in the event of recovery the amount of \$1,411 to be added to the amount of principal heretofore named in this contract, and to pay interest on same at the rate of  $3\frac{1}{2}$  per cent. per annum from date of recovery."

Taber went into possession of the land and sold a half interest to J. B. Wilson. Dallas county filed a suit against Taber and Wilson in the district court of Dallas county for recovery of this land, which was dismissed upon a plea of privilege. Subsequently this suit was filed in the district court of Archer county, in the name of Dallas county, for the benefit of the public free school fund, to recover the land and for the value of the use of it during the time that Taber had been in possession. The case was tried in the district court before Hon. A. H. Corrigan, district judge, who filed conclusions of fact which we summarize in part and copy in part as follows: Taber paid promptly the installments of interest as they became due, and before the institution of this suit paid to the county clerk of Dallas county the sum of \$362.80 and interest from the date that the county paid the same in settlement of the agreement to pay the costs and attorney's fees in the case against the Club Land & Cattle Company. Both Taber and the county commissioners had been advised before the making of the contract that the claim of Taber against the county for damages on account of the failure to deliver possession of the land under the lease was without merit and that Taber could not recover anything from the county, and in making the sale of the land to Taber the release of the claim for damages was not considered as any part of the consideration. The agreement of Taber to recover possession of the land at his own expense referred to the 711 acres which was then in controversy in the court, and the expense contemplated was the payment of the attorney's fees and the costs of court in the suit against the Club Land & Cattle Company, then pending. At the time of the sale to Taber there was doubt as to how many acres were contained in the tract, but it was estimated at 12,284 acres, exclusive of the 711 acres in controversy with the

Club Land & Cattle Company, and it was agreed that, when the land was surveyed, any excess that was found over the estimated amount should be included at the same price under the contract, and that when the 711 acres should be recovered by the county it should be embraced upon the same terms, and Taber had the land surveyed out in order to ascertain the boundaries and quantity. We copy the following findings of the trial court: "(8) I find that the purchase price at which the land was sold, viz., \$2 per acre, was the fair market value of the land at that time, and that the terms of sale and rate of interest were fair and reasonable at that time. (9) I find that there was no fraud practiced on the commissioners' court by Taber, and there was no collusion between them and Taber, that neither party had any intent to divert any part of the consideration from the school fund, and that no part has been diverted. (10) I find that defendants have made the semiannual interest payments provided in the contract as they matured, and no default in that respect has ever been claimed by the county. (11) I find that the purpose of Taber in making the purchase of the land was to convert it into a stock ranch for breeding and raising cattle and other stock thereon, and that the commissioners' court was informed of that purpose at the time, and were also informed that it would require the expenditure of large sums of money in fitting the land for that purpose. (12) I find that the rental or lease value of the land in 1900, was about six cents per acre, and that Dallas county had been for several years prior thereto receiving six cents per acre, and the abandoned lease to Taber was for  $6\frac{1}{2}$  cents per acre. (13) I find that the present lease or rental value of the land without the improvements is 10 cents per acre, and with the improvements is 15 cents per acre, and that the present market value of the land without the improvements is \$4 per acre, and with the improvements is \$6 per acre."

If we give effect to the finding of the trial court that \$2 per acre was the fair market value of the land at the time Taber made the purchase, and that the commissioners' court agreed to sell it to Taber for that price, then the best statement which can be made for Dallas county is: (1) Taber had a claim for damages on the breach of his contract for the lease of the land and for the return of money which he advanced for rent of the land for one year, for which claim the county was legally liable; (2) that Dallas county was legally liable for the costs and attorney's fees in the case against the Club Land & Cattle Company, a suit then pending for the recovery of a portion of the land sold; (3) that the possession of the land was in dispute, being adversely held by one Carver; (4) that in addition to paying the fair market value for the land,

\$2 per acre, Taber agreed to and did release the county from liability for his claim for damages, and agreed to and did pay the costs and attorney's fees in the Club Land & Cattle Company Case. Taber also undertook to get possession of the land at his own cost. The judge before whom the case was tried in the district court found that those items constituted no part of the price of the land, still it is apparent that Dallas county derived a benefit to itself by the sale to Taber, and, if it were a case of an individual acting as trustee, that fact would make the sale voidable. *Nabours v. McCord*, 97 Tex. 528, 80 S. W. 595; *Ferguson v. Getzendaner*, 83 S. W. 1106, 11 Tex. Ct. Rep. 710. In the case cited above this court held that, where a trustee in the disposition of property in his hands so contracted as to derive to himself a benefit from the transaction, a court would not inquire as to whether there was injury to the beneficiary or benefit to the trustee. The self-interest of the trustee rendered the transaction voidable at the election of the beneficiary.

We think that rule does not apply in this case, for the reason that the same officials represented the county as a municipal corporation and as trustee for the free school fund. The county owned the land, and the people were alike interested in the preservation of the school fund intact and in protecting the county from an indebtedness which must be paid by taxation. The officers, the members of the county court of Dallas county, had no personal interest to serve in the transaction; and it is simply a question whether, in performing the act of sale to Taber, they have violated the law by diverting a part of the school fund to the payment of the indebtedness of the county. The Constitution and the statute imposed the trust upon the county, and imposed the duty of making sale of the lands upon the commissioners' court; and, by imposing that duty, it required the commissioners' court to preserve the gross proceeds of the land to be held "alone as a trust for the benefit of public schools" of the county. *Dallas Co. v. Club Land & Cattle Co.*, 95 Tex. 200, 66 S. W. 294; Const. 1876, art. 7, § 6. In the case cited Chief Justice Gaines said: "But, in any event, the word 'proceeds,' in the section we are considering, is not restricted by any other words which qualify its meaning, and should, therefore, be applied in its broadest sense, unless the context or the reason of the provision should show that it was used in a less enlarged sense. The dim light of the context in this case tends rather to show that it was intended to mean the gross proceeds; that is, the entire purchase money. As to the reason of the provision, it may be urged that, since the county is made a mere trustee, it is unreasonable to suppose that it was intended to charge it in its individual capacity with the expense of administering the trust fund. The answer is that while, in

legal contemplation, the county is but a trustee, and the school fund the beneficiary, the county has an important interest in the maintenance of public schools within its limits, and that it is not unreasonable that the framers of the Constitution should have deemed it politic to make the expense of administering a fund set apart for the support of public schools in the county a charge upon its general revenues. Since the lands are the gift of the state for the special benefit of the educational interests of the county, it is not a hardship to require the county administration to bear the expense of converting the land into money." In support of this cogent reasoning, we call attention to the use of the word "alone" in the Constitution, by which the proceeds of the land is devoted exclusively to the trust for the schools. Therefore it becomes material to inquire whether or not the \$2 per acre, which Taber agreed to pay for the land, constituted the whole price. If, in fact, the release from damages to the county or the payment of the costs and attorney's fees in the Club Land & Cattle Company Case, either or both, took a part of the proceeds of the land from the school fund and appropriated it to the satisfaction of the municipal indebtedness or liability of the county, then it was a violation of the provisions of the Constitution, and would render the contract void. If, however, the school fund lost nothing, the fact that Taber released his claim for damages and paid the costs and attorney's fees in addition will not affect the validity of the contract. The commissioners' court were authorized to sell the land, and they had the right to sell for what the land was worth in the market in its then condition, and if, without fraud, they sold the land to Taber for \$2 per acre, the fact that Taber undertook to recover possession at his own expense would not invalidate the transaction. If it should be found now that the land was in fact then worth more, it would not avoid the sale fairly made.

The honorable Court of Civil Appeals found that the release of damages and the payment of the costs and attorney's fees constituted a part of the purchase price of the land. This was contrary to the finding of the trial court on that question; but the Court of Civil Appeals had authority to reject the finding of the trial court upon the question, and to find the fact differently from the finding of the honorable district judge. But, there being a conflict in the evidence, the Court of Civil Appeals could not enter a judgment in favor of Dallas county. It will, therefore, be necessary to reverse the judgment of the Court of Civil Appeals and remand the case for another trial.

Counsel for the county claim that the contract with Taber is void for want of mutuality. The promise to convey the land to Taber upon the payment of the specified sum and interest and Taber's promise to pay the agreed price are mutual promises, the one

a valuable consideration for the other, and mutuality is thereby created. *Cherry v. Smith*, 8 Humph. (Tenn.) 19, 39 Am. Dec. 150; 9 Cyc. 333, par. V, note 35. But it is said that by the terms of the contract Taber could terminate it at his option by failing to pay interest for 60 days; hence his promise to pay is not a valuable consideration. We are not prepared to hold that Taber could terminate the contract by refusing to pay the interest. The question is not before us; but, admitting that to be a correct interpretation of the terms used, it does not destroy the mutuality of the contract, but is simply an option which the parties contracted for, and which may or may not be exercised by Taber. 9 Cyc. 333; *Waterman v. Waterman* (C. C.) 27 Fed. 829; *Storm v. U. S.*, 94 U. S. 88, 24 L. Ed. 42.

Again, by the terms of the contract Taber agreed that, should Dallas county demand possession of the land upon his failure to pay the interest for 60 days, he would surrender the possession of the land, forfeiting to the county all improvements made thereon. Improvements could not be surrendered unless they should be placed on the land by Taber. It was unimproved. Therefore the agreement to surrender improvements implied that Taber would place them on the land. *Ferguson v. Getzendaner*, 83 S. W. 1108, 11 Tex. Ct. Rep. 710. Taber having made improvements upon the land to the value of about \$25,000 and paid interest for a number of years, Dallas county cannot assert that there was want of mutuality in the contract, because the performance by one party of that upon which the mutuality depended relates back and makes the contract good from the beginning. 9 Cyc. VI, p. 334; *Waterman v. Waterman* (C. C.) 27 Fed. 829.

The Court of Civil Appeals erred in entering judgment in this case against Taber for the land, for which error the judgment of that court is reversed, and the cause is remanded to the district court.

#### LOPEZ v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### CRIMINAL LAW—CONTINUANCE—MATERIALITY OF EVIDENCE.

The homicide for which defendant was indicted was committed some time after midnight on a public road, and the body of decedent dragged into a field. During the night decedent, defendant, his codefendant, and a fourth person were together in a saloon, more or less under the influence of liquor. The homicide was within about a half mile of the saloon. The state's theory was that decedent, defendant, and his codefendant left the saloon together, and that en route home defendant and his codefendant killed decedent. The fact that there was blood on defendant's shirt when he returned to the saloon and notified the sheriff that decedent was dead was accounted for by evidence that defendant inquired of witnesses for decedent and his codefendant, stating that they had left the saloon ahead of him, and that witnesses ac-

companied defendant in search of the two, and found decedent's body, and that defendant got the blood on his shirt in handling the same. Defendant denied having had anything to do with the homicide, or being present. *Held*, that evidence by such fourth person that decedent and the codefendant left the saloon together on foot at about 11 o'clock, going in the direction of where decedent's body was found, and that he and defendant left about a half hour later and rode together for about 50 or 100 yards, when they separated, was of sufficient materiality to require a continuance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1323-1327.]

Appeal from District Court, Gillespie County; Clarence Martin, Judge.

Sebastian Lopez was convicted of homicide, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant filed an application for a continuance for the testimony of Trevino. The diligence is complete. The question is whether the testimony is of sufficient materiality to require the granting of a continuance. In brief, the facts show that the homicide for which appellant was indicted was committed some time after midnight; that the killing occurred on the public road, and the body of deceased was dragged a short distance into a pasture or field. The parties connected with the homicide were Mexicans, two of whom were charged with the homicide; one being the appellant. The absent witness was also a Mexican. During the night, and preceding the homicide, these parties were at the little town of Cherry Springs, and were more or less under the influence of beer. The state's theory was that appellant and his codefendant, Vasquez, and the deceased, De Leon, left the beer saloon together, going in the direction of their respective residences, which were not far apart; that en route home, in perhaps a half mile of the beer saloon, Vasquez and appellant killed De Leon. Some circumstances were introduced which tend with more or less cogency to incriminate appellant. Among other things, at the time he returned to the saloon and notified the sheriff that De Leon was dead, there was blood on the right side of his shirt in front. This is accounted for by one or more of the state's witnesses, whom appellant had notified prior to informing the deputy sheriff. These boys stated that appellant came on to the residences where they lived, and inquired for the deceased and Vasquez, stating that they had left the beer saloon ahead of him and were drunk. The boys accompanied appellant back in search of the two missing parties. It is shown that during their investigation they found the dead body, and while there appellant got the blood on his shirt in handling the body. Being a little more specific, it is stated that appellant put his arm under the prostrate form of the deceased and raised him up. These were some of the circumstances in the



case. Appellant denied having anything to do with the homicide or being present.

The above statement is only made in order to test the materiality of the absent testimony. By the absent witness, Trevino, it was expected to prove that, on the evening and night before the homicide, defendant and the codefendant, Vasquez, and deceased, De Leon, and Trevino were at Cherry Springs, at Marschall's saloon; that at about 11 o'clock at night deceased and Vasquez left said place on foot together, going in the direction of where deceased's body was subsequently found; and that Trevino and defendant left the same about a half an hour later, and rode together for about 50 or 100 yards, when they separated. We believe this testimony was of a material character. One of the main facts relied upon by the prosecution was that, under the evidence for the state, the appellant left in company with the deceased and Vasquez. If this fact was true, it was a strong circumstance for the state. If they did not leave together, but appellant left a half an hour later with Trevino, it would be a strong circumstance in favor of his innocence, and would tend strongly to show that he was not present at the time and place of the homicide. The homicide was within perhaps about a half mile of the saloon, and, if Trevino and appellant left a half an hour later, it would be a strong circumstance to show that the homicide had been committed before appellant left the saloon.

Because the motion for a new trial was overruled, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### CASON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907. On Rehearing, Dec. 18, 1907.)

#### 1. HOMICIDE — MURDER — INSTRUCTIONS — ACCOMPLICES.

One accused of murder may not complain of the court's failure to instruct on the law of accomplices and principals, where the charge required acquittal if another than accused killed decedent, or if the jury had reasonable doubt thereof, since the charge was more favorable than the law of accomplices and principals allowed, because he might have aided and abetted another in the offense, and thus been guilty of murder in the first degree, and yet, under the charge, the jury were required to acquit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 717.]

#### 2. CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS—NECESSITY FOR.

A ruling refusing a continuance cannot be reviewed, where no bill of exceptions thereto is preserved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Criminal Law, § 2659.]

#### 3. SAME—VENUE—CHANGE.

One accused of murder is not entitled to change of venue on the ground of local prejudice, where he and deceased were strangers in the county, and the various jurors testified they

knew nothing as to accused's guilt, had never heard of him, and would give him an impartial trial, though they stated they believed the guilty person deserved the death penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 243.]

#### 4. JURY—DISQUALIFICATIONS—PREJUDICE.

In a murder trial, jurors were not disqualified for prejudice because they believed decedent was murdered and had formed an opinion as to what punishment should be inflicted, where they had no opinion as to accused's guilt and could give him an impartial trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 461-479.]

#### 5. CRIMINAL LAW—TRIAL—ABSENCE OF DEFENDANT.

In a murder trial, the taking of testimony, in accused's absence from the courtroom, that two books bearing decedent's name were found in a manger where accused evidently placed them, was not reversible error, where the court did not know of his absence until attention was called thereto by state's counsel, where the testimony was then stopped until his return, and the testimony taken in his absence was withdrawn, and the jury admonished to disregard it, and the same testimony was then given in accused's presence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1478.]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

J. B. Cason was convicted of murder in the first degree, and he appeals. Affirmed.

Preston Martin and Sam Shadle, for appellant. F. J. McCord, Asst. Atty. Gen., and J. C. Wilson, Co. Atty., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

Appellant and deceased, L. F. McLemore, who resided in Kaufman county, left said county in January of this year in a two-horse wagon. Deceased had on his person something between \$500 and \$1,000 when he left. Deceased and appellant were seen by different parties on the day preceding the night of the death of McLemore, and appellant was fully identified as being the party accompanying the deceased. Appellant and deceased camped about six miles west of Weatherford. Nothing further was seen of deceased until about two weeks thereafter, when his body was found, very badly decomposed, showing clear evidences of death by violence. The record does not show that any one ever saw the wagon and team, or the deceased, in Parker county, in same, after the encampment, until his body was found as suggested; but the appellant was seen in Ft. Worth, Tarrant county, about two days after he and deceased were seen camped in Parker county. At the time appellant was in Ft. Worth he had in his possession the wagon and team of deceased and some other articles which he disposed of. The body of deceased, as well as the wagon sold by appellant in Ft. Worth, were thoroughly identified. Under proper warning appellant made the following confessions, in substance: That he and deceased camped at a place where

the dead body of the deceased was found. That a man who gave his name as one Charlie Bolington got in company with them that evening and went with them to the camp, and that after they had pitched the camp that night the deceased stepped off a little piece from the camp and that Bolington following him out there. He heard shots fired, and that Bolington killed the deceased, came back to the camp, threw down a wad of money, and told appellant there was his part, for him to take the team off and sell it, and if he ever told it he would be killed. The state never discovered any witness who saw a third party accompanying deceased. The court in his charge to the jury submitted two degrees of murder, charged the law of circumstantial evidence, and further instructed the jury that if they found deceased was killed by Charlie Bolington, or by some one giving that name, or if they had a reasonable doubt from the evidence as to whether or not the deceased was killed by the said Bolington they would find the defendant not guilty.

Appellant, in his motion for a new trial, complains that the court erred in failing to charge the law of accomplices and principals, and should also have told the jury that a man's presence while the felony is committed, if he takes no part in the commission of the crime, cannot make him a principal in the commission of the crime; and appellant further insists that the court erred in not charging on defendant's confession—appellant insisting that, the state having introduced the confession and the same containing exculpatory statements, the state should have introduced testimony to disprove the exculpatory statements. In view of the charge of the court telling the jury that if another than the defendant killed the deceased, or if the jury had a reasonable doubt thereof that another than appellant killed the deceased, or if they had a reasonable doubt thereof, to acquit appellant, we think this was a more favorable charge to appellant than the charge on the law of principals and accomplices would have been, since under said charge appellant may have been a principal, being present, aiding and abetting the said Bolington in the commission of the crime. Under this statement of the law of principals, appellant would be guilty of murder in the first degree, yet the court tells the jury that if Bolington killed the deceased appellant would not be guilty of anything. This certainly was a more favorable charge to appellant than he was entitled to under the evidence in this case.

Appellant has no bill of exceptions to the overruling of the application for continuance; hence same cannot be considered.

Appellant filed a motion, which was accompanied by a bill of exceptions, for change of venue, predicated the motion on the ground that there exists against appellant so great a prejudice in Parker county that he

cannot obtain a fair and impartial trial. The proof introduced on the motion for change of venue shows that appellant and deceased were both entire strangers casually passing through the county in a wagon. Whoever killed the deceased, as evidenced by this record, committed a cowardly murder for money. The proof introduced shows that the various jurors testified that they believed whoever did so ought to be hung or deserved the death penalty; but they did not know anything about whether appellant was guilty, and never heard of him. This, in substance, is the testimony introduced on this application for a change of venue. They all conceded that they could give defendant a fair and impartial trial, since they knew nothing about the question whether he was connected with it or not—never heard any one say that appellant was connected with it. If appellant's insistence in this case be correct, then every atrocious crime perpetrated in the country would authorize a change of venue. There must be some prejudice against the defendant—that is, there must be a prejudgment of the fact that he (the defendant) is guilty—before there can be evidence legally sufficient for a change of venue. At any rate, the jurors in this case, after a close reading of same, show that they had no bias or prejudice in favor of or against appellant, such as would influence their action in finding a verdict; but each and all swear that they could give defendant a fair and impartial trial under the evidence that might be introduced in the course thereof. We accordingly hold the court did not err in refusing the change of venue.

Appellant complained that the court erred in not sustaining the challenge for cause on the following jurors on the ground that they were disqualified, to wit: Cox, Collins, Turner, and Johnson. These jurors testified on their voir dire that they had formed an opinion that deceased had been murdered, and that they had formed an opinion as to the punishment that should be inflicted, and may so have expressed such an opinion; but they stated positively that they had no opinion as to the guilt or innocence of the defendant, and that they could give the defendant a fair and impartial trial. This is a restatement, in substance, of what has heretofore been stated; that is, that mere prejudice or mere conclusion that an atrocious crime should be punished with the severest penalty of the law would not be a basis or reason for change of venue, nor would it be a legal reason for supposing that a juror was disqualified. Furthermore, the bill fails to show that these jurors sat upon appellant's jury; therefore the bill itself is defective. But, be this as it may, we hold that said jurors were not disqualified.

The only other bill in the record complains of the following matter: During the trial of the case the state introduced one

Chitister. This witness had testified that he resided in Ft. Worth; saw the defendant at his wagon yard on the 1st and 2d days of February, 1907; that defendant was there with his wagon, camping outfit, and plunder; that the defendant had sold same, and had left, and shortly after the defendant left he (the witness) found some papers and books in the different stalls in said yard. The county attorney asked the said witness what was on the said books and papers. Counsel for appellant objected, on the ground that the books and papers were the best evidence. The court sustained the objection, whereupon the county attorney went to his office to get the books and papers. When the county attorney started to the office the defendant, in company with the sheriff, left the courtroom, and his absence was not noticed by the court, or known to the prosecuting attorney, nor to defendant's counsel; and when the county attorney returned the following testimony, in the absence of appellant, was introduced from the witness Chitister: "Q. I will ask you if you remember this? A. Yes, sir. Q. What is it? A. It is a dictionary. Q. I will ask you what is on the inside of the leaf here? A. L. F. McLemore. Q. What is this on here? A. It is the same, I believe. Q. L. F. McLemore? A. Yes, sir. Q. Where was that? A. It was under the manger in the stall in my wagon yard in Ft. Worth. Q. It was under the manger? A. Yes, sir." Mr. Baldwin, one of the state's counsel, at this juncture stated to the court that defendant was not in the courtroom. "The Court: Gentlemen of the jury, you will disregard everything that was said, all the testimony that was introduced, in the absence of the defendant. Defendant's Counsel: I want to reserve a bill of exceptions, because of the testimony introduced in the absence of appellant. The Court: All right; gentlemen of the jury, everything that was done and said here after Mr. Wilson came in with this sack of papers, and everything that was said, I will ask you to totally disregard. The defendant was out of the courtroom, and the court did not know it, or the court would not have permitted the testimony to be introduced in his absence. The defendant's counsel, or the sheriff, or some one, should have called the court's attention to it. Did the defendant's counsel know the defendant was out? Mr. Shadle: I did not know it. The Court: Did you, Mr. Martin? Mr. Martin: I saw him rise up, but did not know he left the courtroom; knew he was not in his seat. I thought he went to get a drink. County Attorney: I did not notice that he was out." After appellant returned to the courtroom the court again admonished the jury to totally disregard said testimony. The bill is approved, with the following statement: "Neither the sheriff, the defendant, nor his counsel requested or called attention of the court to the fact that the defendant wished to retire from the courtroom at the time the sher-

iff took him out at his request, and the court did not notice or know of his absence until Mr. Baldwin, one of the attorneys for the state, called attention to the fact, and immediately the evidence was stopped until the defendant returned, when all of the evidence offered in the absence of the defendant was withdrawn from the jury, and the jury were admonished to disregard all evidence so offered in the absence of the defendant. The state then and there offered in the presence and hearing of the defendant the same evidence that was offered in his absence as hereinbefore set out; that, while the defendant excepted to the taking and offering evidence in the absence of defendant after it was made known that he was absent, he did not by himself or counsel request that the same be withdrawn from the jury, continued, or tried before another jury; that while Mr. Martin, one of defendant's attorneys, knew defendant was not at the time in his assigned seat, he did not know that he was out of the courtroom; that neither of the attorneys for the state knew of the defendant's absence until one of the state's counsel called attention to that fact."

Under the explanation of the court, and the character of testimony introduced, we do not think there was such error as authorized a reversal of this case. In the case of *Bell v. State*, 32 Tex. Cr. R. 436, 24 S. W. 418, a man was on trial for murder, and after the examination in chief of the last state's witness was concluded, and cross-examination was begun, it was discovered that the accused was absent from the courtroom, having been taken by the sheriff to the jail, whereupon further proceedings were suspended, and the testimony of said witness withdrawn from the jury, and the court then adjourned. We held in that case that, notwithstanding the withdrawal of the evidence, the facts being important to which the witness testified, the conviction could not stand, because in contravention of section 10, art. 1, of the Constitution, and articles 25 and 596 of the Code of Criminal Procedure. In that case, however, appears this statement: "But the witness was not again recalled to testify at the trial." Appellant cites a Florida case and *Underhill on Criminal Evidence*, pp. 232 and 244, to support his insistence that the error was a basis for a new trial. We do not think, under our law, that every error of this character would authorize this court to reverse a case. There is no specific declaration in the Constitution that guarantees the defendant's presence at the trial. However, we concede it is a clear inference from another provision of the Constitution, which says he shall be confronted with the witnesses. He cannot be confronted, of course, unless he is present, and in this sense the Constitution guarantees his personal presence during the progress of his trial. The testimony introduced, as above stated, was record testimony. A couple of little books, with the name

of the deceased in the fly-leaf thereof, were found in a manger in the town of Ft. Worth, evidently placed there by appellant. The fact of the deceased's name being in the two books alone was introduced during appellant's absence. When he returned the same fact was reintroduced in his presence and not controverted nor questioned; nor is there anything in the record to in the least throw a doubt upon the fact that the names were in said books. This being true, it would be dallying with justice to say that appellant would be entitled to voluntarily get up and leave a courtroom, and, because a little isolated fact was proven, which was entirely undisputed during the entire progress of the trial, it should operate a reversal of the case. There is no possible injury that could have accrued to appellant by the conduct complained of. While, of course, we heartily indorse the opinion in the Bell Case above cited, yet we do not think the facts in this case come within the decision of the Bell Case. There important testimony was introduced during the absence of appellant, and it is never attempted to be reintroduced during his presence; but here the exact facts that were proved in his absence were proved in his presence, thereby guaranteeing to him the beneficent benefit guaranteed to him under the Constitution of this state. Having been guaranteed every right under the Constitution, having been confronted with every witness and every fact, we do not think we would be warranted in reversing this case for a matter of this character. If there could be any cavil as to whether testimony was introduced in appellant's absence that was not reintroduced, or if testimony to any extent was introduced out of which a cavil could arise that the same testimony was not introduced in his presence, we would not hesitate to reverse the case therefor; but here, as several times stated, the exact testimony was reintroduced, just the sole isolated fact of deceased's name being in a couple of books. There the books were before appellant, and yet there is no cavil or contention that the names were not in the books. This being so, we think appellant is in error in asking this court to reverse the case on this proposition.

This record shows a cruel murder, with no justification or excuse—a murder of a companion in order to secure his money; and the law of this state has inflicted thereupon the death penalty, and we think the jury were amply warranted in applying the law to the facts against appellant and so finding in this case. The judgment is in all things affirmed.

HENDERSON, J., absent.

On Rehearing.

BROOKS, J. This case was affirmed by us at a former sitting of this court, and now comes before us on motion for rehearing.

We held that the jurors who sat in the case as disclosed by the bill of exceptions were all qualified jurors. Appellant, in his motion for rehearing, however, complains of an inaccuracy in the former opinion, wherein we stated, to wit: "The bill fails to show the jurors sat upon appellant's jury. Therefore the bill itself was defective." Appellant attaches to his motion for a rehearing a certified copy of the bill presenting the matter, and we cheerfully concede that we were in error in holding that the bill is defective in the particular complained of, since the bill does show that said jurors sat upon the trial of the case, and appellant had exhausted his peremptory challenges. This does not change, however, the disposition of the case, since we held in the former opinion, and we think correctly, that all of said jurors who did sit in the trial of the case were qualified jurors under the Constitution and laws of this state.

We have again reviewed appellant's insistence in reference to the qualification of the jurors, and feel constrained to overrule the motion for new trial; and it is so ordered.

HENDERSON, J., absent.

#### ROSS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907. On Rehearing, Dec. 18, 1907.)

#### 1. CRIMINAL LAW—APPEAL—RECORD—STATEMENT OF FACTS.

Where the record on appeal in a criminal case shows that the statement of facts was filed after the adjournment of court, but does not show any order of court allowing it to be so filed, the statement cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2876, 2877.]

#### 2. SAME—NECESSITY FOR BILL OF EXCEPTIONS.

Where there is no bill of exceptions, matters complained of in a motion for a new trial cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2946-2948.]

On Rehearing.

#### 3. CRIMINAL LAW—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where an information charged accused with an assault on a certain person on July 12, 1907, an instruction that if accused committed an assault on that person on or about July 12, 1907, he should be found guilty, was not misleading because accused had previously been convicted in another court of another assault on the same person on July 6, 1907.

#### 4. SAME—JURISDICTION OF COURT—COMPLAINT.

If there is no original complaint in a criminal case upon which an information can be based, the court has no jurisdiction, but, if a complaint had been on file, the court's jurisdiction is not affected by the fact that it was lost at the time a transcript was made, but was subsequently found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 415.]

Appeal from Van Zandt County Court; John S. Spinks, Judge.

Dock Ross was convicted of assault, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The court adjourned on the 28th of September, and the statement of facts does not show when it was approved; but it was filed on October 15th. We have been unable to find any order in the transcript allowing the statement of facts to be filed after the adjournment of the court. We therefore cannot consider this portion of the record.

The matters complained of in the motion for a new trial, there being no bills of exceptions, cannot be reviewed without the evidence.

As the record is presented, the judgment is affirmed.

HENDERSON, J., absent.

On Motion for Rehearing.

DAVIDSON, P. J. At a former day of the term the judgment in this case was affirmed. Appellant files a motion for rehearing, setting up the fact that he had received no notice of any kind or character of the day and time when the cause would be heard by this court on appeal; that neither appellant nor his attorney had any notice or intimation of any kind or character, either personal, by mail or otherwise, of the filing of the transcript in said cause in this court, nor of the assignment of the same upon the docket of this court for a hearing, or the day or time when the same would be considered by the court and would be submitted for a hearing; by reason of the failure of the clerk of this court to notify appellant of the time when and the day upon which this cause would be submitted to this court for a hearing appellant has been prevented from presenting his case to this court; and that by reason thereof due regard has not been had to the rights of this appellant as is guaranteed to him by the laws.

Whenever a party appeals his case to this court, of course, he is aware of the fact that his case will be sent here for final disposition. He cites us to no authority requiring the clerk of this court to notify him as to what day his case will be submitted. The rules of this court in regard to submission of cases are not as in the Courts of Civil Appeals. It has been the history of this court that the docket is divided into five assignments, and that the clerks of the respective branches of the court make out these assignments under the order and direction of the court, assigning the different counties as the court directs; and it is the duty of parties appealing to this court, and their attorneys, to keep in touch with their appealed case if they desire to be present at the submission or to file a brief. The assignment to which this case belonged was on call on the 20th of November, and this case, among others, was submitted for decision. On the 28th of No-

vember, appellant, through his attorney, filed what perhaps was intended as a brief, calling this court's attention to the fact that appellant considered that there was error in the trial court's charge, as follows: "Defendant desires specially to call the attention of the court to that paragraph of the charge of the lower court wherein said court tells the jury that if they find that defendant did, as charged in the information, commit an assault on Emma Ross on or about the 12th day of July, 1907, you will find the defendant guilty, etc. The information in the case charged defendant with an assault on Emma Ross on the 12th day of July, 1907. The defendant had previously pleaded guilty to a complaint in justice court charging him with an assault on Emma Ross on the 6th day of July, 1907. As you will see by reference to the statement of facts filed in the case, there was evidence adduced in the case under consideration of the assault of July 6, 1907, which we believe misled the jury under the charge of the court as referred to above." The above is a quotation from this document filed on the 28th of November. The opinion was delivered on the 4th of December, with this brief of appellant in the hands of the court prior to its decision. This was the only contention of appellant in this document, which we suppose was intended as his brief. We were of opinion then, and have seen no reason to change it, that there was no error in this charge of the court.

Appellant filed what he terms a plea of former conviction in the county court in bar of this prosecution. In this connection it is shown that appellant had been previously convicted in the justice court on the transaction occurring on the 6th of July, mentioned in appellant's brief. The transaction charged and upon which this conviction is based occurred on or about the 12th of July, subsequent to the other transaction. Appellant testified in this case, and he stated that he had been previously convicted for the other offense in the justice court. The court in the charge limited the consideration of the jury to the transaction occurring on or about the 12th of July. We do not see how this would have misled the jury. There were two assaults—one on the 6th and one on the 12th of July. The jury were instructed in this case to convict if they found that appellant made the assault on his wife on or about the 12th of July. We are of opinion that the jury were not misled by the charge.

The third ground of the motion for rehearing states that the court below had no jurisdiction to try this case, for the reason that the transcript shows that there is and was no complaint filed against appellant, and there is no complaint of any kind against him, and nothing upon which the information could be based, and therefore the court below and this court has no jurisdiction to try this case and hear and determine the same. If there was no complaint in the case as a

predicate for the information, appellant's contention would be eminently correct. There is, however, on file in this court a certified copy of the original complaint upon which the information was based, and a further certificate from the clerk that at the time the transcript was made out the complaint had been lost, but had been subsequently found. This disposes of that ground of the motion.

Finding no reason why the motion for rehearing should be granted, it is overruled.

HENDERSON, J., absent.

#### MCKINLEY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. INTOXICATING LIQUORS—UNLAWFUL SALE—TRIAL—EVIDENCE—ADMISSIBILITY.

In a trial for unlawfully selling whisky, the state could not show by defendant that for some time he was a whisky drummer, that he had taken whisky orders for five or six years, and that his house furnished him free samples with which he would treat his customers at his discretion; the amount thus furnished him depending on his success in obtaining orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 287.]

#### 2. CRIMINAL LAW—ARGUMENT OF COUNSEL—MATTER NOT IN EVIDENCE.

It is erroneous for counsel in his argument to state facts not in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1669.]

#### 3. SAME.

In a trial for violating the local option law, it was reversible error for the county attorney to state in argument that defendant had been previously convicted for violating the law, and that he had "boot-legged" whisky over the country, where there was no evidence thereof, and defendant had not placed his character in issue; the prejudice not being removed by the court's direction to the jury not to consider the remarks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1618, 1693.]

#### 4. INTOXICATING LIQUORS—UNLAWFUL SALE—TRIAL—NECESSITY FOR DEFINING SALE.

In a trial for violating the local option law, failure to define a sale was not reversible error, where there was no question under the state's theory that defendant made a sale, and defendant denied the entire transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 343.]

Appeal from Hopkins County Court; T. J. Russell, Judge.

Bill McKinley was convicted of violating the local option law, and he appeals. Reversed and remanded.

D. Thornton, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law. The state's case was made by the testimony of a negro witness testifying positively to the fact that he bought a bottle of whisky from appellant; that he paid appellant the money and appellant told him to go into the back room of the

house where they were and he would find it setting on the table; that he went as directed, and got the whisky. Appellant testified in his own behalf positively that no such transaction occurred. Over appellant's objection he was required to answer that for quite a while he was a whisky drummer, that he had been engaged in taking orders for whisky some five or six years, and that the house for which he took orders furnished him free sample whisky, which he would treat out among his customers at his discretion. The amount of whisky furnished depended upon the amount of business appellant did for his house. When he would send in a good number of orders, he would get more samples than when his business was dull. Various objections were urged to the introduction of this testimony, which we think were well taken. See *Bell v. State* (Tex. Cr. App.) 56 S. W. 913, *Harris v. State*, 98 S. W. 842, 17 Tex. Ct. Rep. 815, and *Harris v. State*, 97 S. W. 704, 17 Tex. Ct. Rep. 270.

In making his closing speech the county attorney used the following language: "Gentlemen of the jury, I want you to convict this defendant on the evidence in this case. It is true he testifies in his own behalf that he did not sell whisky to the prosecuting witness, but the prosecuting witness says that he did; and it is true the prosecuting witness is a negro, but I would believe the negro before I would believe a man like the defendant, who has time and again paid the penalty for the violation of the people's local option law, and goes manifestly without any principle around over the country boot-legging whisky in open violation of our local option law; and that is the kind of a man that is being tried before you." The bill recites these remarks were not supported by the evidence in the case, and that they were immaterial and irrelevant, outside of the record, and were erroneously recited by the county attorney. Exception was reserved. It is further shown that the court instructed the jury not to consider such remarks; but it is claimed that such instructions did not withdraw the prejudice created thereby from the minds of the jury. There was no evidence in the record that appellant had been previously convicted for violations of the local option law, nor to the effect that he had been boot-legging whisky over the country. Appellant had not put his character at issue. Permitting attorneys for the prosecution to dwell in argument on the character of a defendant, when not in issue, in a way calculated to prejudice him before the jury, is error. See *Turner v. State*, 39 Tex. Cr. R. 322, 45 S. W. 1020; *Pollard v. State*, 33 Tex. Cr. R. 197, 26 S. W. 70. Nor is vituperative and abusive argument permissible, and a conviction obtained in this manner is unlawful; and, where the record on appeal shows such was permitted to prejudice the accused before the jury, the ap-

pellate court should not hesitate to set it aside. See *Crawford v. State*, 15 Tex. App. 501, and *Parks v. State*, 35 Tex. Cr. R., 378, 33 S. W. 872. And it is error for counsel in argument to state facts not in evidence. See *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Orman v. State*, 24 Tex. App. 495, 6 S. W. 544; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115; *Robbins v. State*, 83 S. W. 690, 11 Tex. Ct. Rep. 560; *Bell v. State* (Tex. Cr. App.) 56 S. W. 913; *Harris v. State*, 98 S. W. 842, 17 Tex. Ct. Rep. 815; *Harris v. State*, 97 S. W. 704, 17 Tex. Ct. Rep. 270; *Bradshaw v. State*, 44 Tex. Cr. R. 222, 70 S. W. 216; *Bearden v. State*, 79 S. W. 37, 9 Tex. Ct. Rep. 813, and *White's Ann. Code of Criminal Procedure*, pp. 498, 500, 501, for collation of authorities.

In our opinion the statements in the argument of the closing speech for the state were of such character that the conviction ought not to be permitted to stand. Usually the instruction of the court to the jury to disregard unwarranted remarks by counsel will be regarded sufficient to prevent a reversal; but where they are of a very damaging character, and in cases that inflame or have a tendency to inflame the public mind, a different rule obtains. Not only was the character assailed, but statements of fact made which, if in existence, were not permitted to go before the jury. We wish to emphasize our condemnation of the practice of permitting matters of this sort to occur and then seeking to withdraw them from the jury by charges, and we want to emphasize again that it is wholly unnecessary to jeopardize convictions by this line of conduct. The Constitution and the laws of the state guarantee a man a trial and a fair trial on the facts and the law of his case, and it is not legal that matters and facts of this character can be introduced in the argument to the jury or by counsel in the argument, even when, if offered through witnesses, they would have been admissible. The damage, therefore, would be the greater where the facts were not introducible at all. It is a dangerous practice even for the court to admit testimony that is illegal and then undertake to withdraw it in his charge, and this court has had occasion to reverse judgments on account of this practice. We make all due allowance, and in fact the writer would rather commend attorneys' diligence in representing their side of the case, but not to the extent of going outside of the record and introducing matters of fact in an argument not testified before a jury, and especially facts which would not be admissible if offered.

Under the facts of this case, we hardly think it was error of sufficient importance to reverse the case because the court did not define a sale. There is no question, under the state's view of the record, that appellant made the sale by taking the money in exchange for the whisky. Under appellant's view of it the entire transaction was denied.

The facts in a case sometimes require a court to define to the jury what it takes to constitute a sale, but we think that rule does not apply in a case where the facts are as detailed in this record.

The matter of continuance is not discussed. The witness can be obtained on another trial.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### PERKINS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### CRIMINAL LAW—APPEAL—RECORD—ABSENCE OF STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

The grounds of a motion for a new trial cannot be considered on appeal, in the absence of a statement of facts or bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2822.]

Appeal from Criminal District Court, Galveston County; J. K. P. Gillaspie, Judge.

Sullivan Perkins was convicted of a crime, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without a statement of facts or bills of exceptions. The two grounds of the motion for a new trial cannot be considered in the absence of the evidence.

There being no question for revision, the judgment is affirmed.

HENDERSON, J., absent.

#### CALDWELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. WITNESSES — IMPEACHMENT — FORMER CHARGE.

In a trial for carrying a pistol, defendant could not be impeached by proof that he had been previously charged with carrying a pistol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1131, 1132.]

#### 2. CRIMINAL LAW — BILL OF EXCEPTIONS — SUFFICIENCY.

Since evidence that one has been previously charged with assault to murder or other grave offense is usually admissible to impeach him, if the occurrence is not too remote, a bill of exceptions under complaint against the admission of such testimony should show the date of the occurrence.

#### 3. SAME—SELF-SERVING ACTS AND DECLARATIONS—ADMISSIBILITY.

In a trial for carrying a pistol, evidence that the day after the alleged offense defendant delivered a pistol to another and made certain statements was inadmissible for him, as relating to self-serving acts and declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 928-935.]

**4. WEAPONS—CARRYING PISTOL—DEFENSE.**

It is no defense to a charge of carrying a pistol that it was unloaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, § 7.]

Appeal from Henderson County Court; J. R. Blades, Judge.

B. Caldwell was convicted of carrying a pistol, and he appeals. Reversed and remanded.

Miller & Royall, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for carrying a pistol.

On cross-examination of appellant, and over his objection, the state was permitted to elicit from him, for the purpose of impeaching him, that, among other things, he had been guilty of or charged with carrying a pistol on previous occasions to the one alleged in the information. Appellant could not be impeached by proof that he had been previously charged with carrying or, having carried a pistol. This does not come within the rule authorizing the introduction of evidence which would impugn his testimony. See *Bain v. State*, 38 Tex. Cr. R. 635, 44 S. W. 518. It was an issue in this case as to whether or not the weapon exhibited was a pistol within the contemplation of the law. The state's case showed very clearly that it was a complete pistol and a new one. The defendant's evidence was that it was an old pistol without a cylinder, and in fact was not a pistol at all within the contemplation of the law. The introduction of the impeaching evidence above mentioned may have had some bearing upon the minds of the jury, as they resolved the reasonable doubt against him. With reference to the offense to which he was required to testify, we would say the bill of exceptions is rather indefinite and hardly requires a discussion. Usually the fact that a party was previously charged with assault to murder, arson, and graver offenses of that character, and even gaming, has been admitted for the purpose of impeaching, provided their occurrence was not too remote. The bill just recites the fact that they were introduced over his objection. As to when they should have occurred, or at what time he went to the penitentiary for the assault to murder, is not stated in the bill. For the introduction of the impeaching testimony this judgment must be reversed.

Appellant offered to prove that, the day following that on which the state claimed he carried a pistol, he turned over a pistol to a certain proffered witness, and offered to prove by the witness the fact that he did so turn over a pistol, and also to prove by the same witness the statements he made to him at the time of giving him the broken pistol. This was rejected, and properly. This is in the nature of self-serving acts and declarations.

It is contended that the charge does not sufficiently present appellant's side of the case. The court informed the jury that, if appellant carried a pistol which did not have a cylinder, he would not be guilty. Appellant asked a charge covering a little broader ground, to the effect that, if the pistol was out of repair, he would not be guilty. We think the court's charge sufficiently presented this theory. We are further of the opinion that the court did not err in refusing to instruct the jury that, if the pistol was unloaded, they should acquit. It is not a defense to carrying a pistol that it is unloaded at the time it is carried.

For the reason indicated in regard to the introduction of evidence, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

**BIRCH v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

**CRIMINAL LAW — BRIBERY — EVIDENCE — ACCOMPLICES — CORROBORATION.**

In a prosecution for bribing a witness to remain away from the trial of a case, accomplices of defendant who testified that defendant and others gave the witness money to remain away was not sufficiently corroborated under the statute by the mere fact of the flight of the witness and his failure to appear and testify.

Appeal from District Court, Angelina County; James I. Perkins, Judge.

Robert Birch was convicted of bribery, and appeals. Reversed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with bribing a witness in a gambling case to remain away from the trial of said case, and he did remain away.

There are some questions suggested for review which, as we understand the case, are not necessary to be discussed. Three witnesses testified who were accomplices, and made it appear that the witness was bribed to stay away; that he not only remained away from the trial, but that he left Angelina county, where the trial was to be held, and went to Nacogdoches county, and was subsequently found and brought back under attachment. This evidence shows that appellant and one or two others against whom the bribed party was a witness, through the brother-in-law of said witness, gave him (witness) the money that induced him to remain away; that the witness accepted it and left, going, as before stated, to Nacogdoches county. Under the testimony of these accomplices the state would have a case, provided they were corroborated. We have examined this statement of facts with care in regard to the ground, insisted upon here, that the evidence is not sufficient, in that there



was no corroboration, and as we understand the testimony this contention is correct. The only evidence, independent of these three accomplices, in regard to the alleged bribed witness, was that at the time he should have appeared against the parties as a witness he was in Nacogdoches county. He was in Angelina county a short time prior to when the gambling case should have been called for trial, and left and remained away for some time. We are of opinion that the mere fact of the flight of a witness or his failure to appear at court and testify in a case does not of itself corroborate the charge that money was paid to that witness to not appear. The corroboration must be sufficient to show that the offense was committed and that appellant was connected with it. As before stated, the only evidence that we have in regard to corroboration is the flight of the witness. This is not sufficient under our statute.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### LIGHTFOOT v. STATE

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

##### 1. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

In a prosecution for burglary, evidence that defendant had committed another burglary entirely independent of that with which he was charged, which formed no part of the *res gestæ* and neither showed intent nor served to identify accused, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822-832.]

##### 2. SAME—TRIAL—ARGUMENT OF COUNSEL.

Comments of counsel should be founded on the evidence introduced against accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1669.]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Lem Lightfoot was convicted of burglary, and he appeals. Reversed and remanded.

McDowell & Duffie, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is a conviction for burglary; the punishment being assessed at five years' confinement in the penitentiary.

Bills of exceptions Nos. 1 and 2, in this record, show that evidence of the extraneous crime, to wit, burglary, was admitted in the trial of this case. The bills show that, if said other burglaries were committed, they were entirely disassociated from and independent of the burglary for which appellant was on trial in this case. They do not in any sense form any part of the *res gestæ*, or throw any light upon the intent, or serve to identify appellant under any of the rules laid down by this court authorizing the introduction of such extraneous crimes. This being

true, it was highly prejudicial to appellant, and reversible error, to introduce same in this case. For a discussion of this question see *Hill v. State*, 44 Tex. Cr. R. 603, 73 S. W. 9; *Barnett v. State*, 99 S. W. 556, 17 Tex. Ct. Rep. 971; *Hendron v. State*, 99 S. W. 558, 17 Tex. Ct. Rep. 973.

Appellant also urges various errors and complaints to the argument of the county attorney. We hope this will not occur upon another trial. Trials in this state should be in consonance with the rules of evidence, and the comments of counsel should be confined to the evidence introduced upon the trial.

For the errors pointed out above, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

#### JONES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. On Rehearing, Dec. 18, 1907.)

##### 1. HOMICIDE—MURDER—EVIDENCE.

Evidence held sufficient to sustain a conviction of murder.

##### 2. SAME—DYING DECLARATIONS.

At the time decedent was shot his wife was sick in bed. After about an hour she went out to see what had happened and got him into the room, when she asked him who it was that had shot him, and he said accused had done it. In about 15 minutes after making the statement he remarked, "I allow to die," and died during the night. As he was wounded in the head, as well as in the body, his mind was not in condition to manufacture a story, and he had had no opportunity to make a statement to anybody else, unless he had talked to his wife in another portion of the house. Held, that the statement was admissible as evidence in the trial of accused for his murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Homicide, §§ 430-437.]

On Rehearing.

##### 3. JURY—RIGHT TO JURY TRIAL—DENIAL—NUMBER OF JURORS.

Const. art. 5, § 13, provides that a petit jury shall be composed of 12 men; but if, pending trial, 1 or more jurors, not exceeding 3, die or be disabled from sitting, the remainder shall have power to render the verdict. Pending a murder trial a brother of a juror was killed, the juror was excused by agreement of the parties, and a verdict was returned by the remaining 11 jurors. Held, that, the excused juror not having died or become disabled from sitting, the remaining 11 jurors could not render a legal verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 223.]

##### 4. SAME—JURY TRIAL—IMPARTIAL JURY.

The trial by an impartial jury, guaranteed an accused by Const. art. 1, § 10, was a trial by 12 men as required by Const. art. 5, § 13, providing that a petit jury shall be composed of 12 men.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 221-225.]

##### 5. SAME—WAIVER OF RIGHT TO TRIAL BY JURY.

The Bill of Rights (Const. art. 1, § 15), as well as Code Cr. Proc. 1895, art. 10, provides that the trial by jury shall remain inviolate. Code Cr. Proc. 1895, art. 21, provides that no person can be convicted of a felony, except upon

the verdict of the jury, etc. Article 22 provides that an accused may waive any right secured to him by law, except the right of trial by jury, in a felony case. *Held*, that a person on trial for murder cannot waive his right to trial by 12 jurors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 197–203.]

Appeal from District Court, San Augustine County; W. B. Powell, Judge.

Ivory Jones was convicted of murder, and appeals. Reversed and remanded.

Davis & Davis, for appellant. F. J. McCord, Asst. Atty Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder and given a life sentence. The evidence of this case is not as cogent as some cases of this character passed upon on appeal, yet there is in our opinion enough to warrant us in concluding that the jury were correct in their finding.

Appellant was in the neighborhood of the homicide, and had made threats against the deceased. Deceased was a witness against him in a hog-stealing case. Appellant was seen the night of the homicide, and after the killing should have occurred, with a shotgun at what the witnesses term an "infair." This gun was handed to a named party to be kept until after the festive occasion had terminated. The deceased came to his death by means of a shotgun, both barrels of which were discharged into his body. About an hour after he was shot, his wife, who was in bed, managed to reach him, and in answer to a question by her appellant stated that deceased had shot him. This is the substance of the state's case. The defendant introduced evidence to the effect that he was in that neighborhood, and accounted for his presence there by showing that he was securing the signatures of certain parties to some appearance bonds that he was required by the sheriff to give under some criminal charges. He denied having a shotgun, and the party to whom the state's witness stated that appellant handed the gun at the "infair" denied receiving it. Appellant showed by some of his counsel, perhaps all of them, defending him in the hog-stealing case, that the deceased was sufficiently favorable to appellant in that case, for the district attorney to continue said case in order to secure other testimony. They also attack the widow of deceased by showing she had, on the day after the homicide, stated that deceased said nothing in regard to who killed him, and that she further so testified before the grand jury. They also introduced the constable, who stated that he saw tracks in a certain corner of the fence near the residence of the deceased made by a party who wore a larger size shoe than appellant. This was practically appellant's side of the case. Without going into a discussion of this testimony, we are of opinion that it was sufficient, if the jury believed the

state's side of the case; and this they did.

A bill of exceptions was reserved to the action of the court in permitting the widow of the deceased to detail before the jury the statement of the deceased that appellant was the party who shot him on the grounds, first, that it was not res gestæ and was too remote; and, second, that it was not brought within the rule of dying declarations. The facts show in this connection, as set out in the bill, that the wife was in bed at the time the shots were fired, having three days previously given birth to a child; that deceased was on the gallery with an older child at the time the shots were fired; that she lay there in bed about an hour, fearing to get up on account of her condition from childbirth; that her husband said nothing; that at about the expiration of an hour she went out to see what was the matter, succeeded in getting him in the room, and then asked him who it was that shot him. He said, "Boy Polk." She asked again, and he said, "Ivory Jones." It is further stated that Boy Polk was a name that Ivory Jones, appellant, was also known by, or called. One of the loads of shot took effect in the head; the other, in the body. In about 15 minutes, or such a matter, after he made the above statement, he remarked, "I allow to die," and during the night did die. Under the conditions above stated we are of opinion that the evidence was admissible. See *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720. Here there was about an hour intervening between the shot and the statement. His suffering was rather acute from the wound in the head, as well as that in the body, and evidently his mind was not in such condition as to manufacture and narrate a story. He had no opportunity to make a statement to anybody else, unless he had talked with his wife in another portion of the house. In *Lewis' Case*, supra, the time extended over possibly an hour and a half, and the deceased in that case was not in position to make a statement earlier, and her mind was also in a condition not to have manufactured the statement—at least, such was the theory upon which the testimony was held admissible. Under the *Lewis Case* we are of opinion that the alleged statement of the deceased was admissible.

Appellant attacked the charge on circumstantial evidence. We do not think there is any merit in that (see *Smith v. State*, 35 Tex. Cr. R. 618, 33 S. W. 339, 34 S. W. 960); and, besides, the giving of the charge on circumstantial evidence was more favorable to appellant's rights than the facts justify. The statement of the deceased places the case possibly beyond the pale of circumstantial evidence into one of positive testimony.

We think the charge in every way is free from such criticism as requires a reversal of the judgment. It is therefore affirmed.

HENDERSON, J., absent.

## On Rehearing.

DAVIDSON, P. J. On a former day of this term the judgment herein was affirmed. There were two questions discussed in the opinion. Appellant files a motion for rehearing, setting up the fact that he was tried by only 11 jurors. This was not mentioned in the motion for a new trial; therefore, was overlooked. An inspection of the record discloses that a jury of 12 men was impaneled and the trial proceeded. Pending the trial information was conveyed to the court, to the attorneys, and appellant that a brother of one of the jurors had been killed. It was thereupon agreed in open court by the parties, appellant, of course, being present, that the juror should be excused on account of this homicide of his brother. He was excused and participated no further in the trial. The verdict was returned by the remaining 11 jurors. The motion for a rehearing calls our attention to these matters, and urges that we set aside the prior affirmance and reverse the judgment, because the verdict was returned by only 11 jurors. It may be further stated that the verdict was signed by each of the 11 jurors. In other words, it is conclusively shown that after the twelfth man was excused the case was tried by only 11 jurors.

We are of opinion that appellant's motion for a rehearing should be granted. Article 5, § 13, of our state Constitution, reads as follows: "Grand and petit juries in the district courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the district courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When pending the trial of any case, one or more jurors, not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict." It will be observed, from the reading of this section of the Constitution, that a petit jury in the district court shall be composed of 12 men. This, being a felony case, is not brought within the provision of the Constitution which authorizes 9 members of the jury, concurring, to render a verdict. Nor was the juror excused brought within that provision of said section which authorizes a jury to render a verdict where not exceeding 3 of them died or were disabled from sitting. Then we have a jury originally composed of 12 men, 1 excused by agreement of the parties, and a verdict rendered by 11, which is prohibited by the above section of the Constitution.

Section 10, art. 1, guarantees to the accus-

ed a trial by an impartial jury and that, as was seen in the section quoted above, means 12 jurors. Section 15 of the Bill of Rights is as follows: "The right of trial by jury shall remain inviolate." Article 10 of the Code of Criminal Procedure of 1895 reiterates this provision of the Bill of Rights in precisely the same language. Article 21 of said Code of Criminal Procedure of 1895 provides: "No person can be convicted of a felony except upon the verdict of the jury duly rendered and recorded." Article 22 of the same Code enacts: "The defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case." It would seem that the constitutional provisions cited, as well as the acts of the Legislature in obedience thereto, place the right of trial by 12 jurors in a felony case even beyond the reach of the accused party waiving such right. These provisions have been the subject of adjudication in many opinions in this state, all of them holding as sacred the right of trial by jury, even in the face of a waiver by the accused, where the prosecution is for a felony. See Lott's Case, 18 Tex. App. 627; Stell's Case, 14 Tex. App. 59; Jester's Case, 26 Tex. Cr. R. 369, 9 S. W. 616; Huebner's Case, 3 Tex. App. 459; McCampbell's Case, 37 Tex. Cr. R. 607, 40 S. W. 496; Ogle's Case, 43 Tex. Cr. R. 219, 63 S. W. 1009, 96 Am. St. Rep. 860. There are many other supporting cases which we deem unnecessary to collate.

The motion for rehearing is granted, and the former affirmance set aside; and, because appellant was tried without a constitutional jury, the judgment is now reversed, and the cause remanded.

HENDERSON, J., absent.

## TINSLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1907. Rehearing Denied Dec. 18, 1907.)

## 1. CRIMINAL LAW — APPEAL — OBJECTIONS — REVIEW.

Where accused waived a special venire, and made only a general objection to the court's method of impaneling the jury, he could not on appeal complain that the names were not written on separate slips, nor placed in a box and mixed and drawn therefrom.

## 2. HOMICIDE — HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where, on a trial for homicide, the evidence for the state showed that decedent, while going to and about 200 yards from his home, was shot, and that he stated that accused shot him, the admission of evidence of the finding of an empty cartridge shell 500 yards from the place of the homicide, without showing that the cartridge was of the same size as the bullet in the body of decedent, or connecting the cartridge with the killing, though erroneous, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 709-713.]

## 3. CRIMINAL LAW — APPEAL — HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The admission of improper evidence in a criminal case, which will require a reversal,

must tend to strengthen the state's case; and where by no process of reasoning the evidence can be so construed its admission is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

#### 4. HOMICIDE—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in a homicide case, there was no dispute as to the location of the fatal bullet wound in decedent's body, the error in admitting in evidence the clothing worn by him at the time of the killing, which showed where the bullet had entered, was harmless; the clothing having been washed, and there being no attempt to inflame the mind of the jury by referring to it.

#### 5. CRIMINAL LAW—ARGUMENT OF COUNSEL—REVIEW—BILL OF EXCEPTIONS.

Where the bill of exceptions complaining of comments by the prosecuting attorney does not show what the comments were, the comments cannot be passed on by the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2928-2930.]

#### 6. HOMICIDE—EVIDENCE—COMPETENCY.

In a homicide case, evidence that, two days before the killing of decedent by shooting with a pistol, accused displayed a pistol, was competent, though the weight thereof was slight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 341-350.]

#### 7. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

In a homicide case, evidence that within 10 minutes of the fatal shooting decedent, in reply to questions, stated to several persons that accused shot him, was admissible as a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 819.]

#### 8. SAME—DEFENSES—ALIBI—INSTRUCTIONS.

A charge on alibi that if the jury entertain a reasonable doubt of the presence of accused at the place and time of the offense, and if they entertain a reasonable doubt that at that time he may not have been elsewhere, he is entitled to the benefit of such doubt, and entitled to an acquittal, is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1833-1837.]

#### 9. SAME—INSTRUCTIONS—DEFINITION OF TECHNICAL TERMS.

It is the better practice not to attempt to define technical terms in the instructions in a criminal case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1803-1810.]

#### 10. SAME—EVIDENCE—INSTRUCTIONS.

Where, in a homicide case, the res gestæ declarations of decedent that accused shot him were received in evidence, the refusal to charge on circumstantial evidence was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883-1888.]

#### 11. SAME—CHARGE ON WEIGHT OF EVIDENCE.

A charge, in a homicide case, that if the jury are satisfied beyond a reasonable doubt that accused is guilty of murder, but have a reasonable doubt as to the degree, they will give him the benefit of the doubt and convict of murder in the second degree, is not on the weight of the evidence, or an indication that the court believes that accused is guilty of murder in the second degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

#### 12. SAME—INSTRUCTIONS—REASONABLE DOUBT.

It is proper for the court, in a homicide case, to charge the jury that if they have a rea-

sonable doubt as to the degree they must find accused guilty of murder in the second degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1925, 1926.]

#### 13. SAME—VERDICT—AMENDMENT.

On a trial for homicide, the court charged only on murder in the first and second degree. The jury rendered a verdict: "We, the jury, find the defendant guilty and assess his punishment at confinement in the state penitentiary for a term of five years." In reply to a question by the court as to the offense of which he was found guilty, the foreman replied that it was murder in the second degree or manslaughter, and, on being told that manslaughter was not open to them, said: "Of murder in the second degree, then." Held, that the court properly amended the verdict by inserting therein that accused was guilty of murder in the second degree, especially where the jury assented to the amended verdict when it was read to them and they were asked if that was their verdict.

#### 14. SAME—DYING DECLARATIONS—WEIGHT AS EVIDENCE.

The res gestæ statement of decedent that accused shot him, inflicting a fatal wound, has the same force in law as dying declarations, and is in some respects a stronger criminative statement.

#### 15. SAME—MURDER IN THE SECOND DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction of murder in the second degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 518-538.]

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Columbus Tinsley was convicted of murder in the second degree, and he appeals. Affirmed.

Daviss & Williford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for five years.

Appellant's bill of exceptions No. 1 shows the following: The defendant waived a special venire. The clerk wrote the names of the regular jurors on a slip of paper and handed said slip to the defendant's attorneys to pass on, and the talesmen summoned to complete said panel were impaneled in the same way. Neither names of the regular jurors nor the names of the talesmen were written on separate slips of paper, nor were said names put into a box or any other receptacle and mixed, nor were they drawn from a box or any other receptacle, and the entire impaneling and organizing of the jury was completed without the defendant being present. To the method of impaneling the jury the appellant objected in open court, because the method pursued was not in accordance with the requirements of the statute. The court approved the bill with this qualification: "The case was set on September 3d for trial on the 12th of September, 1907. The defendant's counsel waived a special venire. When the time came to organize the jury, defendant being present in the courtroom, the jurors for the week were called in, when counsel said they ob-

jected to the manner of impaneling the jury. The court, not understanding what counsel meant, remarked that if they demanded a special venire they might have it. Counsel replied that they had waived a special venire and did not ask for it. The court then said: "You may take your choice—take a list as usual, or examine the jurors one by one as though they were special venire. Counsel made no reply, and without further indication what they meant by the objection took the list furnished by the clerk, and after some question to the jurors retired and made their peremptory challenges by the erasure of certain names from the list. Only six jurors were obtained, and the sheriff under order of court summoned talesmen, and a list of those found qualified was given defendant's counsel, who took the same without objection, and from the list the other six jurors were taken. At no time did counsel intimate that they desired the jurors drawn, and the court was not aware till after the trial that they intended to be understood as objecting on that ground, and the court was wholly ignorant of the reason that counsel had in mind for objecting to the method of choosing or impaneling the jury. If the defendant was absent from the courtroom at any time, his absence was voluntary and unknown to the court; and if he failed to assist in selecting his jury it was of his own free will." Clearly, under the explanation and modification of the bill by the court, there could be no serious criticism of its action. Appellant had waived a special venire and failed to indicate any objection to court, such as they urged in the bill of exceptions. We accordingly hold there was no error in the impanelment of the jury.

Bill of exceptions No. 2 shows that the state's witness Harrison Gambol, a brother-in-law of the deceased, was permitted to produce as evidence before the jury an empty cartridge shell of the caliber 38-40 U. M. C., and to testify that he found said empty cartridge shell in his cotton patch 400 or 500 yards west of where deceased was shot, and in the opposite direction from defendant's home; that there were no tracks leading from said empty cartridge shell toward the place where deceased was shot, nor toward defendant's home, nor any tracks leading from where deceased was shot to where said shell was found, to which testimony defendant's attorneys objected, and asked that it be excluded from the jury, because there was no evidence that deceased was shot with a ball or bullet of this caliber, nor was there any evidence which identified or in any manner sought to establish that defendant, or any other person, ever owned or had or saw a pistol or rifle or gun of this caliber; because the testimony was too remote, and said shell was found too far removed from the scene of the shooting to shed any light upon it, or serve as a circumstance to explain it, or identify the person who did the shooting; that said testimony could and did serve no other

purpose except to prejudice the minds of the jury against the defendant—all of which objections were overruled by the court and the bill was signed with the following qualification: "The witness stated that he found the shell as he was crossing the field and did not trace the tracks." We hold that said testimony was not admissible. It could not shed any possible light upon the perpetrator of this homicide, nor could it possibly show any connection of appellant therewith. The evidence for the state in substance shows that deceased was shot while going from Harrison Gambol's home, about 200 yards away from his home, to the home of the deceased; the shooting taking place very close to deceased's home. Upon being shot, the deceased holloed: "Oh, Lordy! I am shot!" His brother-in-law came out on his gallery, upon hearing the shooting and holloing. The deceased called witness and told him to come there. Witness told deceased to come to him. Deceased again holloed: "Oh, Lordy! I am shot!" Witness went to meet him about 30 or 35 yards from witness' house. Deceased was staggering. Witness caught hold of him and laid him down. "He said: 'I am gone.' I carried him to my house, and laid him on a pallet my wife made down on the floor for him. I then asked him who shot him, and he said: 'Columbus Tinsley shot me.' Deceased said appellant came from behind the corner of the house and shot him. When deceased called me, he was coming towards my house. He called Mr. Drake, and also called Nancy Jackson." When the constable arrested appellant on the morning after the killing, he was in his father's field plowing. The constable told him that John Waters got shot last night, and that he had a warrant for his arrest, charging him with the shooting. Appellant said: "All right; but I did not do it. I did not leave home last night." The constable further stated that appellant did not appear disturbed or frightened or in any way out of the ordinary bearing when he arrested him. This testimony was only controverted in part by three or four witnesses and appellant, as far as the declaration of the deceased was concerned. Several witnesses for appellant swore: That they heard the shot, heard deceased hollo: "Oh, Lordy! I am shot! Harrison, run here!" That Harrison Gambol replied: "No, you come here." That deceased said: "No; I am shot. I can't come there." Harrison replied: "Who shot you?" Deceased said: "I don't know." Appellant, as stated, introduced several witnesses who swore that this was the res gestae statement made by the deceased. Now the question recurs, in the light of this record and the above statement of the facts: Did this testimony about the cartridge, which was found 400 or 500 yards away from the deceased's house, where he was shot, in any way injure the rights of the appellant? We say, "No." If the testimony had shown that a track had been traced from deceased's house

to where the cartridge was found, without in some way identifying the track with the track of appellant, it could not help the state's case; and the bill of exceptions shows, with the qualification of the court thereon, that no effort was made to trace the tracks, or any tracks, or to ascertain the size of any tracks, around the place where the cartridge was found, and the testimony, as appellant insists, is too remote and throws no light upon the transaction. Then, if it does not, in the light of the above statement of facts, how could it injure appellant? In other words, the bill merely shows that the witness swore that he found a cartridge 400 or 500 yards from the scene of the shooting. There is no effort to identify it with any cartridge appellant had, no effort to show that the cartridge was the same size of the bullet in the body of deceased, nor in any way to connect, as far as this bill shows, the cartridge with the killing. It is not all evidence that will reverse a case, but it must be of such a character that it would have a tendency to prejudice appellant. One of the safe rules in ascertaining whether it prejudiced appellant is the question: Did the evidence in any sense tend to strengthen the state's case? By no process of reasoning can it be so construed. Then, how could it hurt appellant, if it did not help the state? It is an isolated incident, disconnected from and disassociated from and in no sense connected with anything pertaining to this case; and, while it is clearly inadmissible, its introduction was entirely harmless. We accordingly hold that, while inadmissible, it was not such error as would authorize a reversal of this case.

Bill of exceptions No. 3 shows that the state introduced the clothing of deceased in evidence, and one of the attorneys for the state shook said clothing around before the jury and commented on same. Such introduction of said clothing, and the display and commenting on same, was all objected to by the defendant at the time, upon the following grounds: (1) There was no question or controversy as to the character, condition or location of the wound; (2) there was no question or controversy that it was a fatal wound and was the cause of deceased's death; (3) there was no question or controversy as to the direction of the ball or the extent to which it penetrated; that said testimony did not tend to illustrate any point, or make manifest or throw any light on any issue in the case; and, lastly, that it did tend to prejudice the defendant before the jury. The court overruled said objections and admitted said clothing in evidence, with said display of same and the comment thereon. This bill is approved with this modification: "Appellant objected to showing the clothes to the jury, as they were being used by the state's witness to locate the point of entering of the bullet. The clothes had been washed, and showed only a small hole where the witness said the bullet entered. The court thought

the garment was admissible for that purpose. No one attempted to inflame the mind of the jury by referring to them. The state's attorney merely showed the jury where the ball entered the clothes and laid them on a chair or table before the jury." This evidence is very much like the evidence above complained of—inadmissible. As appellant insists, there was no question but what the bullet killed the deceased. There was no question as to where it entered his body. While the bill complains of comments upon the clothing, it does not show what the comments were, and hence said comments cannot be passed upon by this court. The court, however, says there was no attempt to inflame the minds of the jury by referring to them; that the state's attorney merely showed the jury where the ball entered the clothing. These clothes ought not to have been admitted. They did not illustrate or make manifest any issue in the case, or demonstrate any controverted fact; but this would not call for a reversal of the case. How or in what way could the sheer fact of bringing the clothes and showing where the bullet entered them injure appellant? Appellant had never controverted the fact as to where the bullet entered the clothing. Then to prove by the clothes themselves where the bullet entered could not prejudice him in the trial of this case. The court says the clothes had been washed. This would eliminate any gruesome appearance and prejudicial effect they might have had, if they had been bloody. We have repeatedly and repeatedly held that this character of evidence should not be introduced, unless the clothes were pertinent on some controverted issue in the case. We have never held, however, that we would reverse a case where our attention has been called to the sheer fact that clothes were introduced. Their introduction in this case is rendered entirely harmless in the light of this bill. In other words, the clothes merely show, as shown by the bill, where the bullet entered. This was not controverted. Then to prove a fact that was not controverted, by the clothes or any other method or means, could not be a basis for reversing a case. We hope trial courts, however, in the future will not permit clothes introduced, unless they do bear on some pertinent relation to the trial of the issue then being passed upon. We accordingly hold that the error was harmless in the light of this record.

Bill of exceptions No. 4 shows that the state's witness Sam Thomas testified that he was at the house of the defendant's father on the second Sunday in November, A. D. 1906, before the alleged shooting on February 8, 1907; that defendant lived with his father and mother; that defendant had just stepped outside of the house, and came back into the room where he (witness) was, and took a pistol out of his pocket and put it on the table; and that he did not know what was the size or caliber of the pistol, nor to whom it be-

longed. To the introduction of this testimony appellant objected on the ground that it was irrelevant, immaterial, and too remote to shed any light upon the transaction under investigation, or to be considered even as a circumstance in connection therewith, and because said testimony was evidence of another and different and distinct and separate offense—if evidence of anything—which was in no way connected with or served to explain the matter under investigation. The testimony is neither irrelevant, immaterial, or too remote. It is true it sheds very little light upon the transaction under investigation; but to prove that the appellant, a short while before, was seen carrying a pistol, as the circumstances of this case show with reasonable certainty that the shot that killed deceased was from a pistol, is a small circumstance or criminative fact going to connect appellant with this homicide. The fact that it proved very little against him did not preclude its admissibility. The weight of the testimony is for the jury, and the sheer fact that it had very little criminative effect, if any, would not exclude it, and the fact that he was seen with a pistol, being another offense, would not exclude the proof of the fact in the subsequent trial of appellant for homicide. We can readily see one or two cases where the evidence could be used as stated. For instance, the jury may say it shows a familiarity with the use of firearms. The fact of carrying it would carry with it the suggestion that he knew how to use it, and to this extent would be criminative, though perhaps a small criminative fact, against appellant. A great many people know how to use firearms. This fact could be used by appellant against the probative force of the testimony, but it would not preclude its admissibility in the trial of appellant for homicide. The testimony was admissible.

Bill of exceptions No. 5, shows the following: The state introduced Harrison Gambol, Missouri Gambol, Nancy Jackson, and M. M. Drake, who testified to the following: "That after the deceased had gone to Harrison Gambol's house, and had been carried into Gambol's house and laid on a pallet, Harrison Gambol asked him, 'Who shot you?' and the deceased replied, 'Duke Tinsley.' Still later, in reply to the same question from Nancy Jackson, he answered, 'Duke Tinsley'; and still later, in reply to the same question from M. M. Drake, he answered, 'Duke Tinsley.'" Appellant objected to same because it was not the facts talking through the witness, but the witness talking about the transaction, which had been over 10 minutes or longer. It was not the first statement he made, and, being made after he had become composed and had time for reflection, was not admissible as *res gestæ*; that it was hearsay, and too remote to bring it within the exception. This bill is approved with the following modification: "The testimony of Drake shows that it could not have been 10 minutes from

the shooting till all these statements were made, and they were admitted as *res gestæ*." The statement of facts shows that the appellant was known by the name of "Duke Tinsley." The explanation of the court shows clearly that the testimony was *res gestæ*, and therefore clearly admissible. *Mahoney v. State*, 98 S. W. 854, 17 Tex. Ct. Rep. 818.

In his motion for a new trial appellant complains that the court erred in refusing to give the following charge: "Gentlemen of the jury, the defendant in this case has introduced evidence that at the time the deceased was shot, if he was shot, he (the defendant) was not at the place where the shooting occurred. This in law is termed an 'alibi,' which is defined thus: When a person charged with a crime proves that he was, at the time alleged, in a different place from that in which it was committed. Therefore you are instructed that if you entertain from the evidence in this case a reasonable doubt of the presence of the defendant at the place where deceased was killed at the time of the killing, and if from the evidence you entertain a reasonable doubt that at that time he may not have been elsewhere, he is entitled to the benefit of such doubt, and you will acquit him." This charge has been approved by this court. See *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122; *Hill v. State*, 37 Tex. Cr. R. 415, 35 S. W. 660; *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404. It is the better practice not to attempt to define technical terms, such as "alibi," as appellant insists. Often it is unintelligible to the jury.

Appellant complains that the court failed to charge the jury on the law of circumstantial evidence. In this there was no error, since the *res gestæ* declaration of the deceased takes the case out of the rule of circumstantial evidence.

Appellant complains of the following charge of the court in bill No. 10: "In case you are satisfied beyond reasonable doubt that defendant is guilty of murder, but have a reasonable doubt as to the degree, you will give him the benefit of the doubt and convict of murder in the second degree." Appellant objects to this charge on the ground that the same is on the weight of the evidence, and is an intimation to the jury that the court thought the defendant guilty of murder in some degree. We cannot see how or in what way it was a charge on the weight of the evidence, or an intimation to the jury that the court thought appellant guilty of murder in some degree. It is always proper for the court to charge the jury, if they have a reasonable doubt as to the degree, to find the defendant guilty of murder in the second degree.

Bill No. 11 complains of the following: After the jury had retired for a day and a half and a night, they came into the court, and the court asked them if they had agreed on a verdict. The foreman said they had. The verdict was handed to the court, and

same read as follows: "We, the jury, find the defendant guilty, and assess his punishment at confinement in the state penitentiary for a term of five years. G. W. Williamson, Foreman." Whereupon the court remarked: "You have not said what you find him guilty of." The foreman replied: "Manslaughter, or murder in the second degree." The court at once wrote a line in the verdict, so as to make it read as follows: "We, the jury, find the defendant guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for a term of five (5) years. G. W. Williamson, Foreman." The court then read the verdict as he had revised it, and asked: "Is that your verdict?" Some of said jurors said "yes," some nodded their heads, and some said nothing. Appellant complains that this action of the court was without authority of law, was an invasion of the province of the jury, was without the sphere of the court's duty, and wholly beyond its power and authority. This bill is approved with the following modification: "The jury was organized on the 12th, and the trial was concluded about 6 p. m. the 13th, and the jury came in with verdict about 5 p. m. on the 14th. Verdict was as above quoted, and did not designate the offense, and the court then asked the jurors of what offense they had found the defendant guilty, and one of them (the foreman, as now remembered) said, 'Of murder in the second degree or manslaughter,' to which the court replied that they could not convict of manslaughter, but of murder only, and then the juror replied, 'Of murder in the second degree, then,' or words to that effect, and the court wrote in the words 'of murder in the second degree,' and read the verdict as so amended to the jurors, and asked them if that was their verdict, and they all signified their assent by words or nods. The defendant and his attorneys were present, but did not object to the proceedings, and only after the jury had been discharged did one of the defendant's counsel suggest to the court that there might be error in the matter." The court in this case did not charge upon manslaughter, but only charged upon murder in the first and second degrees. The jury brought in a verdict of five years, which merely meant murder in the second degree. Therefore the action of the court could not have been prejudicial to the rights of appellant in making the verdict formal as is required by law, and especially so with the jury acquiescing and consenting thereto.

The appellant further insists that the evidence is insufficient to support this verdict. The facts show that defendant and deceased had one or more difficulties a few months prior to the difficulty in which deceased lost his life, in one of which previous difficulties deceased shot at the appellant, thus showing the bitterest character of feeling from the state's standpoint. It is true that appellant denies the latter statement, and says that

he and deceased had made friends. The state's evidence further shows that deceased was approaching his home about 8 o'clock at night, as above stated, when appellant stepped from behind the house and shot him. This statement was made by deceased to three or four parties within 10 minutes after the shooting. This *res gestæ* statement has the same force and potency in law as dying declarations, and in some respects is perhaps a stronger criminative statement. Many cases in the books report a conviction upon dying declarations of the deceased alone. We therefore accordingly hold that, the jury having passed upon the credibility of the witness, the evidence in this case warranted their finding him guilty. It may be that in sheer deference to the evidence the jury gave him the minimum punishment for murder in the second degree; but this would not be an argument in favor of the proposition that the evidence would not support a conviction for murder in the first degree.

So believing, we hold that the evidence in this case is sufficient to support this verdict; and, finding no error in the trial thereof, the judgment is in all things affirmed.

HENDERSON, J., absent.

#### HARDIN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. CRIMINAL LAW—CONTINUANCE—CUMULATIVE EVIDENCE.

In a criminal prosecution, the rule with regard to cumulative testimony does not apply to the first application for a continuance because of absent witnesses, especially where defendant himself is practically the only witness in his behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1328, 1329.]

#### 2. SAME—ABSENCE OF WITNESS OR EVIDENCE IN GENERAL.

Defendant was prosecuted under Pen. Code 1895, art. 645, for the killing of a child during parturition of the mother. He testified that he was not cruel to the mother, his wife; that shortly before the time of the alleged offense she fell over a tub and hurt herself; and that several witnesses were then present—and then filed an application for a continuance showing that such witnesses would testify that he was kind to his family, that his wife was seriously injured by the fall, and that after the injury she was insensible at times until her death. The indictment was presented March 7th. Defendant was then in jail, was not notified of the action till March 9th, and his attorney was more than 150 miles away. He was unable to employ local counsel, and relied upon the sheriff to subpoena the witnesses, and so instructed him. Process was issued and returned for but one of the witnesses. Defendant was convicted March 13th. *Held*, that a continuance should have been granted to secure the attendance of the absent witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1321.]

#### 3. HOMICIDE—EVIDENCE—SUFFICIENCY.

In a prosecution under Pen. Code 1895, art. 645, which provides that "if any person shall, during parturition of the mother, destroy the



vitality or the life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished," etc., evidence examined, and held not to support a verdict of guilty.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Tom Hardin was convicted of a crime, and he appeals. Reversed and remanded.

J. W. Scott, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted under article 645, Pen. Code 1895, which reads as follows: "If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished by confinement in the penitentiary for life, or any period not less than five years, at the discretion of the jury." A few of the preceding articles deal with the question of abortion, the ingredients of which offense is somewhat different from the one above quoted. It is not necessary for abortion that the child should be in a condition of being born alive. In this offense it is a prerequisite, and, further, that but for the act of the accused the child would have been born alive; and this offense differs also from that of infanticide, for in the latter case the child must be born alive in order that its death may be brought within the definition of that offense.

The evidence, without going into detail, in substance shows that on Wednesday before this offense should have occurred on Friday appellant left the camp where he and his wife and little child were, and had gone to the town of Mineral Wells and become intoxicated, and remained in Mineral Wells until Friday. During his absence from his camp his wife was taken violently ill, and a message sent to him to come at once; that his wife was dying. This message was sent Wednesday or Thursday. He came home in a drunken condition on Friday. The state's case is to the effect that when he returned, being informed of the condition of his wife, he immediately got in the wagon where she was, and, among other things, sat down upon her stomach. A state's witness testified, in substance, that the wife had had some labor symptoms, and after he sat on her stomach these all ceased; that she was seriously ill, and died on Saturday evening. One of the state's witnesses, an old lady, testified that she had noticed the movement of an unborn child, indicating that in her judgment it was alive just prior to the time appellant sat on his wife. On Saturday evening a physician reached the scene after the death of appellant's wife, and took from her a dead child of seven or eight months' advance in gestation. He did not observe any bruises, or anything that indicated that the child had been injured. The examination of the two physi-

cians who testified was very unsatisfactory. One of them testified that in his judgment a child of eight months' gestation would not live; but on the crucial point in the case there is a wonderful scarcity of testimony from the two physicians, and practically the only testimony in regard to the possibility of the child being born alive was from the old lady whose testimony is above mentioned, to the effect that she had noticed two movements about the stomach of the mother, indicating to the witness' mind that she was in child labor. The physicians indicate that this was practically worthless testimony, or that such movement was not a criterion by any means indicating child labor, or that the child was alive. It might occur from contraction of the muscles and other matters they mention. Defendant introduced some testimony to the effect that he did not sit down on his wife; that when he reached the place and found out the condition of his wife he became very much excited, and was drinking and got in the wagon, and laid down by her, and kissed her, and threw one leg over her, and in order to relieve the situation they took him out of the wagon and actually tied him so he could not come where she was, as she was totally unconscious; and the testimony showed that she was unconscious, if not entirely insane, from the time she was taken ill at the beginning of her troubles, which ended in her death. Appellant testified, also in his behalf to the effect that he and a family or two were in company with each other going to Palo Pinto county, and in their travels passed through Parker county and camped on one occasion, and that while getting their meal he fed the horses in a tub, and that while the horses were eating one of them kicked the other. His wife happened to be near them at the time, and it frightened her very much, and she fell over the tub and hurt herself. This was a week or such matter before her death, and from that time on she would have something like fits or convulsions, and seemed to be irrational at times, and that these convulsions grew worse as they occurred. Appellant sought a continuance on account of these witnesses, several in number—Bob Berry and wife, Charles Cross, Jake Worsham, and Will Hay and wife—who were present when appellant's wife fell over the tub, and some of whom, if present, would have denied any cruel treatment of defendant towards his wife, and by the witnesses Will Hay and wife he would have proved that they had been together several months with his wife; that his wife was in very bad health, and that more than a month before her death she had been having chills; that on Saturday before her death she had a severe fall, and complained all the time, and would have slight convulsions every night. This is the recitation in the bill of exceptions. In the application itself, it is stated that he would prove by Berry and wife that he left them to go to Palo Pinto county, that his wife and child

were sick, and that he was always kind and attentive to his family; by the witness Hay and wife he expected to prove that they traveled together for more than a month, and that during said time, on Saturday before she died, she received an injury from which she suffered continually, and was insensible at times after receiving said injury, and until she died.

The indictment was presented against appellant on the 7th of March. Process was issued on the 8th of March for Cross, and returned on the 11th. Process for Worsham was issued on the 9th of March. Process was not issued at all for Hay and wife, because defendant was in jail, and his attorney lived more than 150 miles away, and was not notified of the action of the grand jury until the evening of March 9th, and the defendant, not being able to employ local counsel, relied on the sheriff to subpoena all the witnesses in the examining trial, and so instructed him. The judgment was rendered on the 13th of March. This was the first application. We believe under the circumstances that this continuance should have been granted, and there was error in refusing it. While, perhaps, the diligence was not of the strictest character, yet it is not so important in the first application for a continuance. Appellant testified to the facts himself; but the rule with regard to cumulative testimony does not apply to the first continuance, especially where the defendant himself is practically the only witness in his own behalf. This case evidently excited considerable commotion, as is developed by this record, as appellant was indicted for the murder of his wife, and we judge from the state of the record that the testimony in both cases would be the same. The diligence as to some of the witnesses we think ample; perhaps not as to Hay and wife, but appellant was in jail, without counsel, and his statement in the application is that he requested the sheriff to have process issued for all the witnesses who were at the examining trial, his attorney being 150 miles away. So we are of opinion that, under the circumstances detailed here, and the importance of absent testimony, appellant should have had the continuance to secure the attendance of the absent witnesses.

Without going over and restating the facts, or going further into detail, we do not believe the state has shown a case under the statute under which this indictment was framed. Before a conviction can be had under this statute, the vitality or life of the child must be shown, that it was in a state of being born at the time of the destruction of its life, and that during parturition of the mother and before actual birth the life of the child must be destroyed, and but for the destruction of its life the child would have been born alive. The testimony does not, in our judgment, meet the requirements of the statute. The sitting down by appellant upon his wife, if that be conceded, was an out-

rageous piece of conduct on the part of a drunken husband; but that of itself does not prove the fact that the child was alive at the time, or that the mother was in the act of giving birth to a live child, or that it would have been born alive but for that act on his part, or that he intended to destroy his unborn child. It is a circumstance or a fact to be considered along with other facts. The two facts relied upon by the state are the one just stated, and the other was that one of the witnesses, a lady, testified that she saw two convulsive actions in the abdomen of the mother, indicating the movement of a child, which, in her judgment, indicated labor pains, or that she was in the act of being delivered of a child. These were facts upon which the state's case is predicated. The physicians' testimony rather excludes any theory of harm to the child and shows that the testimony of the lady was too uncertain to be relied upon at all as evidence of child labor, and there is no other fact in this record that we have been able to find that the child was alive at the time, or that it would have been born alive, and there is no evidence about the child, when taken from its mother the next day by the physician, of any bruise or any indication that harm had come to it. As this case is presented, we are of opinion that it is not made out within the purview of this statute.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### HALE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### BREACH OF THE PEACE—EVIDENCE—SUFFICIENCY.

One is not guilty of disturbing the peace because while traveling along a public road he holloed loud enough for several people to hear him, where they were not disturbed, and it was not unusual in that community for persons to act as he did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of the Peace, § 1.]

Appeal from Wood County Court; J. O. Rouse, Judge.

Mat Hale was convicted of disturbing the peace, and he appeals. Reversed and remanded.

Mounts & Jones and W. P. Jones, for appellant. F. J. McCoord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. There are several questions presented for revision, none of which are discussed, except that which sets up the insufficiency of the evidence. This, we think, is well taken.

Appellant was charged with going into and near a public place, to wit, a public road, and did then and there unlawfully and will-

fully use loud, vociferous, obscene, vulgar, and indecent language, and yell, curse, and shriek in a manner calculated to disturb the inhabitants residing along and upon said public road. The evidence shows with perhaps sufficient certainty that appellant was traveling along the road and hollered loud enough for several people to hear him. None of them testified they were disturbed, and, in fact, all of them testified that his hollering was not out of the usual, and about such as is often heard, and customary for people traveling along the road. One witness says that it is not an unusual thing to hear people around there hollering. "I hear such hollering as I heard this day every day and Sunday too. It is a country town, and people do not pay much attention to hollering like that done by the defendant. The hollering I hear around Hainsville is done by the boys around their own premises. Often they are hollering around the dwelling houses there." This was the testimony of the first state's witness, Burckett. Frank Hains testified that he heard the hollering. "It was not very loud. I hear such hollering at Hainsville every day. It is no uncommon thing to hear the boys holler just as I heard this hollering that day. The boys sometimes holler at me when I am closing up, to tease me, and make me keep open until they get to my store. When they do this, it is about such hollering as I heard on this occasion. The noise that I heard is not out of the ordinary." All the other evidence is practically the same as the above. Appellant's hollering, other than while going along the road, was not out of the ordinary. Nobody seems to have been disturbed by it, and paid no attention to it. We do not believe this comes within the statute.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### PURVIS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### CRIMINAL LAW—CONTINUANCE—ABSENT TESTIMONY.

In a trial for keeping a disorderly house, it was improper to refuse defendant a continuance for the absence of a witness who would testify that a woman, charged to be a prostitute in defendant's employment and to be a lewd woman, whose reputation was bad, was the witness' wife, that they boarded with defendant, and that she was not in defendant's employ, and for the absence of a witness who would testify that he knew all the inmates and employees of the house, and that defendant did not employ prostitutes or women of bad reputation, nor permit them to resort to the house, where the county attorney admitted the witnesses would so testify, but refused to admit that their testimony would be true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1343, 1344.]

Appeal from Hardin County Court; H. N. Vickers, Judge.

G. W. Purvis was convicted of keeping a disorderly house, and he appeals. Reversed and remanded.

R. L. Durham and Tallafiero & Nail, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for keeping a disorderly house. The complaint and information charges that appellant was the owner, lessee, and person in charge of a certain house in which malt liquors were kept for sale, and that he permitted prostitutes, lewd women, and women of bad reputation for chastity to display and conduct themselves in said house in a lewd, lascivious, and indecent manner, and that he was the owner, lessee, and person in control of a certain house in which malt liquors were kept for sale, and that he did unlawfully and knowingly employ and have in his service in said house one Mary, a lewd woman and a woman of bad reputation for chastity.

Appellant applied for a continuance for the testimony of two witnesses, Kirk and Garvin. By Garvin appellant expected to prove that one Mary, whose name is set out in the indictment as being a prostitute in the employment of appellant, and as a lewd woman whose reputation for chastity was bad, was the wife of the witness, and that the witness and his wife were boarding with defendant, and that she was not then employed in the house where appellant kept malt liquors for sale. By the witness Kirk he expected to prove that he (the witness) was employed in said house, and knew all the inmates of said house and parties employed therein, and that appellant did not have in his employment any women who were prostitutes, or lewd women, or women of bad reputation for chastity, and that during the entire time of his employment there were no prostitutes, lewd women, or women of bad reputation for chastity permitted to resort to said house, or permitted to display and conduct themselves in a lewd, lascivious, and indecent manner; that his employment was prior to and subsequent to the 15th day of September, the date alleged in the complaint and information at which appellant should have so carried on the disorderly house. The testimony of these witnesses was material. The county attorney, in order to defeat this motion, in open court stated to the court that if he would overrule the continuance he (the county attorney) in behalf of the state would admit that if the witnesses named were present they would testify under oath to the facts set out in the motion for a continuance as expected to be shown by them, but would not admit that such facts as they would testify were true. Whereupon the court overruled the application. In order to avoid an application for a continuance by such admission, the facts being material, the state must admit the truthfulness of the evidence of the absent witnesses. The case was a closely contested

one, and the evidence is on rather close lines as to whether this was a disorderly house. In view of this condition of the record, we are of opinion the court erred in refusing to continue the case.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### CAGLE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. LARCENY—POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS.

On trial for cattle theft, where defendant's explanation of his possession of the cow alleged to have been stolen was that he bought it from a negro, an instruction that if accused, when his possession was first questioned, explained that he bought the cow from the negro, then, if such explanation "accounted for defendant's innocence," the jury should consider such explanation as true, and acquit the defendant, *held* erroneous; accused not being required to account for his innocence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 199-204.]

#### 2. CRIMINAL LAW — APPEAL—EXCLUSION OF EVIDENCE.

An objection to the exclusion of evidence cannot be considered, where the proposed answer of the witness is not stated in the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2932.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Jim Cagle was convicted of cattle theft, and appeals. Reversed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft. His explanation of his possession of the cow alleged to have been stolen was that he had bought it from a negro. He gave a description of the horse the negro was riding, as well as the negro from whom he testifies he purchased the animal, and his statement of his right of possession at the time it was first challenged.

The court charged the jury in regard to this explanation, as follows: "If you believe from the evidence that the cow had been stolen from the witness, Henry Colvin, and that recently thereafter the defendant was found in possession thereof, and when his possession was first questioned he explained that he had bought the cow from a negro, and related the circumstances under which he bought it, then, if such explanation accounted for defendant's innocence, and further believe such explanation is reasonable and probably true, you will consider such explanation as true, and acquit the defendant," etc. Exception is urged to that portion of the charge which informs the jury, if they found the explanation accounted for appel-

lant's innocence to be reasonable and probably true, they would acquit. We think this exception is well taken. Appellant is not required to account for his innocence. The law presumes him innocent, and before he can be convicted this presumption of innocence must be overcome by evidence to the exclusion of the reasonable doubt. The state must overcome this presumption of innocence and the reasonable doubt in order to obtain a conviction. An accused party is not required to account for his innocence. The burden of proof is on the state. The law accounts for appellant's innocence against the charge contained in the indictment. In another portion of his charge, the court gave a correct charge; but the two charges are absolutely inconsistent with each other and the rule in this state has been that where charges are inconsistent—the one correct and the other detrimentally incorrect—the case will be reversed, for it leaves the jury with no proper legal criterion.

While appellant was en route to town in possession of the cow, he drove along the public road, passing the residence of Epperson. At Epperson's appellant stopped, and requested him to assist him (appellant) in catching the cow, and Epperson complied with the request, and held the cow in the lane until appellant threw a rope on her. Epperson got his horse and hitched him to a post, and asked appellant into his house. This was declined for want of time. Epperson then asked appellant where he got the cow. Appellant proposed to repeat the statement before the jury that he made to Epperson. Objection was made to this as self-serving. The court ruled it out, stating that his explanation is admissible when his right is challenged. Witness' answer or proposed answer is not stated in the bill. Therefore it cannot be considered. Upon another trial, however, we are of opinion, if this matter is urged, his answer is admissible. This was the first inquiry made of appellant as to his right of possession after he had taken charge of the animal. Shortly afterward he overtook the alleged owner, while he (appellant) had the cow in possession, and they had a conversation about it. It was during this conversation that appellant informed the alleged owner that he purchased it, and the alleged owner stated that it belonged to Mr. Weaver, but it was in his (the alleged owner's) possession. Whether Epperson had directly challenged appellant's right to possession of the cow or not, he qualifiedly called upon appellant to state his right of possession. If appellant had made a false statement to Epperson, the state certainly would have insisted that it was admissible; or if he had remained silent, or had given an evasive answer, it would have been admissible. At least, the state would have been urging it, and correctly. What the answer was is not shown. Therefore, as presented, the bill cannot be entertained, and we call attention to

this because upon another trial we think this evidence should go before the jury.

Appellant requested some charges seeking to correct the error in the charge in regard to the erroneous charge given by the court, which were refused. These we think, should have been given, and the erroneous charge withdrawn or corrected.

For the errors indicated, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### SCHILLING v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### CRIMINAL LAW — ACCOMPLICE — CORROBORATION.

A witness, who testified that she accompanied the party who committed the theft and as to everything that was seen, said, and done during the night of the theft, and that she had received money, the proceeds of the theft, from one of the alleged thieves, is an accomplice, whose evidence, if uncorroborated, is insufficient to sustain conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1082-1098.]

Appeal from District Court, Lavaca County; M. Kennon, Judge.

George Schilling was convicted of horse theft, and appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for horse theft. We have examined this record with a good deal of care, as the turning point in it is the want of sufficient evidence.

The state made out a case, as far as this could be done, by the testimony of accomplices. It is admitted by the state that, if the witness Coffey is an accomplice, then there is a want of corroboration. The evidence clearly makes this witness an accomplice. She accompanied the parties whom she testified committed the theft of this and another horse or two the same night. One of the alleged thieves was her paramour. She testifies to practically everything that was seen, said, and done during the night when the different animals were taken, saw them taken, accompanied them from Yoakum to Hallettsville, during which time the several animals were taken, and she testified that she received money from her paramour, or at least one of the parties, after the disposition of one or more of the stolen horses, and reasonably makes it appear that it was some of the proceeds of one of the stolen horses. We are of opinion that, eliminating her testimony, there is no corroborating evidence to show that appellant was connected with the taking of the horse in this connection, or any others that were taken that night. He was never seen in possession of any of them, nor is his presence shown at the time of the taking, except by the accomplice.

For want of sufficient evidence to sustain the conviction, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### RILES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### HOMICIDE — MURDER — EVIDENCE — SUFFICIENCY.

Evidence in a homicide trial held insufficient to show murder in the second degree or an offense greater than manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 523-532.]

Appeal from District Court, Walker County; Gordon Boone, Judge.

Robert Riles was convicted of murder in the second degree, and he appeals. Reversed and remanded.

See 98 S. W. 1101.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 15 years' confinement in the penitentiary. When this case was before us on a former appeal, the verdict at that time against appellant was murder in the second degree with 12 years' confinement in the State Penitentiary. We reversed the case at that time upon the sole fact that there was no evidence authorizing the judgment against appellant for murder in the second degree. See 98 S. W. 1101. In contemplation of law and legal effect there is no difference in the record before us on this trial and the evidence upon the former.

The facts, in substance, show that deceased and his son-in-law, after taking two or more drinks of whisky, went to the home of appellant's mother and father, where appellant, a boy under 21 years of age, lived. Deceased and his son-in-law both got out of their wagon, in which wagon they had a couple of collars that they had borrowed from appellant's father to work on their horses to town, where they purchased a couple of new collars. The other facts show that, at the time deceased and his son-in-law, Powell, arrived at Jim Riles' home, appellant's father (Scott, deceased) asked if Jim Riles was at home. His wife, Josephine, informed him (deceased) that he (Jim Riles) was, and if they wished to see her husband they would have to come in the house, as he was in bed, having a crippled foot. They both, deceased and Powell, got out of the wagon and went into the house. At this time the defendant, Robert Riles, was at the barn unloading some corn. The evidence for the state, from the only state's eyewitness, is to the effect that Jim Riles began to curse, and the deceased asked the ques-

tion as to whether or not he (Riles) had fixed a water gap. The testimony of Jim Riles and his wife, for the appellant, shows that the deceased and his son-in-law began to curse Riles, which he begged them not to do. At any rate, appellant did not know, nor is there any evidence in this record to show that he did know, who began the quarrel, or who caused it; but, rushing into the house from the barn, from the state's standpoint, he exclaimed: "By God, this is my house; get out of here." The witness Powell said: "Robert, stand back. Mr. Scott ain't going to hurt your pa.' And he kept going onto Mr. Scott, and I picked up a bottle and struck him on the head with it, and he run onto Mr. Scott and grabbed him, and they went outdoors together, and I picked up a broom as I went out of the door, and the negro started towards me, and I hit the negro over the head with the broom, and the negro run around the house and come back with a hoe, and he come nearer to me than to Mr. Scott, and he reached over that way (indicating) and hit Mr. Scott, and I started off, and Jim Riles, appellant's father, had come out in the yard by that time, and Jim said, 'Get Powell; he is the one,' and he started towards me—Robert did—and I said, 'Don't hit me,' and he kept coming, and I said, 'Don't hit me,' and he brought up the hoe, and I dodged, and it come down and struck me across the arm." The corner of the hoe struck the deceased in the head, from which wound he died some hours thereafter.

Now the law of this state is that a blow that causes pain or bloodshed is adequate cause to reduce a killing from murder to manslaughter. Here, from the state's own evidence, appellant believed these parties had made an intrusion into his father's home. Of course, the defense's evidence contravenes what is said. Appellant's father and mother say that when appellant rushed in he remarked: "What are you cursing papa for? He did not do anything to you"—and from that the row started, and Powell struck appellant with a bottle, and appellant, deceased, and Powell got into a scuffle, and in this condition went out of the house; Powell beating appellant over the head with a broom. There is nothing in the record suggesting any antecedent malice or former grudges; but, as stated above, the whole record conclusively establishes the fact that the parties were perfectly friendly up to the time of this trouble. The record conclusively establishes that deceased lost his life on account of his drunkenness, or on account of his drunken intolerance and imposition upon appellant's father, or at least the evidence, from the defendant's standpoint, shows this was the reason of his interfering in the trouble. There is no difference in the evidence of this trial from the former trial. It makes no difference in this court whether a man be rich or poor, high or low, he is entitled to a trial in consonance with the laws

of this state. Appellant has not received this privilege.

This being the second time this case must be reversed because the court permitted a verdict in the second degree to stand, we demand that murder in the second degree be not presented, if the evidence is the same upon another trial, to the jury for consideration. The utmost that the evidence in this case shows appellant could be guilty of is manslaughter.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### MOORE et al. v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

##### 1. BAIL—ACTION ON BOND—DEFENSES.

Sureties on a bail bond cannot avoid responsibility by showing that the principal is out of the state, or had been taken in custody by the state's authority, unless at the time of forfeiture he was under arrest, or had been taken away from the sureties, and was being held by authority of the state.

##### 2: SAME — APPEAL — TRANSFER OF CAUSE — TIME OF FILING RECORD.

Under the statute, the record on appeal from a judgment of forfeiture of a bail bond must be filed as in civil cases; the limit being 90 days.

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Action by the state against H. W. Moore and others on a bail bond. Judgment for the state, and defendants appeal. Appeal dismissed.

Moore & Sallas, for appellants. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellants became surety on a bail bond. Their principal fled the state and went to Mississippi. A requisition was obtained and sent to that state in order to return him to Texas. He was arrested, and before taking the train for Texas made his escape, and was never recaptured. The Governor of that state subsequently revoked the authority to arrest the principal under the requisition from Texas.

Without going into a detailed statement, this constitutes about the substance of the answers of appellants to the forfeiture. Exception was presented by the state and sustained by the court to the answer setting up those facts. Error is assigned to the ruling of the court sustaining the demurrers. We are of opinion that the trial court was correct. Where a party is released on bail, the sureties become responsible for his presence, and they cannot show an avoidance of responsibility by showing he is out of the state, or had subsequently been taken in custody by the state's authority, unless at the time of the forfeiture he was under arrest, or had been taken away from the sureties,

and was being held by authority of the state.

This much we have to say in regard to the merits of the question, even if the jurisdiction of this court had attached. An inspection of the record, however, shows that it was filed in this court more than 90 days after the adjournment of the court at which the judgment was rendered. The statute requires that it be filed as in civil cases; the limit being 90 days. We would further state that there was no reason shown why the record was not filed at an earlier date.

At the suggestion of the state, this appeal is dismissed.

HENDERSON, J., absent.

#### SCHOOLER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. PERJURY—ELEMENTS—JUDICIAL PROCEEDINGS.

One giving false testimony on his trial for crime is guilty of perjury, though the jury were not sworn.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 28.]

#### 2. CRIMINAL LAW—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

On a prosecution for perjury committed by accused while testifying on a trial for unlawfully carrying a pistol, a charge presenting the issue to the jury in the disjunctive, instead of in the conjunctive, in the charge "did carry on or about his person a pistol," was not misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1961-1968.]

Appeal from District Court, Jackson County; J. C. Willson, Judge.

Eugene Schooler was convicted of perjury, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of perjury, and his punishment assessed at five years' confinement in the penitentiary.

The facts show, in substance, that appellant was tried in the county court, on proper information, with unlawfully carrying on and about his person a pistol in the county of Jackson, state of Texas. On trial of the case appellant in his own behalf swore that he did not have a pistol at the time and place alleged in the information. The grand jury returned an indictment against appellant, charging him with swearing falsely to the last statement. The indictment is in proper form. The evidence abundantly supports the verdict of the jury.

Bill of exceptions No. 1 shows that appellant requested the court to charge the jury that, before they can convict the defendant for the offense of perjury, they must believe beyond a reasonable doubt that the jury which was impaneled in the county court of Jackson county, Tex., to, and did, try the de-

fendant, was duly sworn to try that particular case, and if they do not so believe beyond a reasonable doubt to acquit appellant. This question has been decided against appellant in the case of *Smith v. State*, 31 Tex. Cr. R. 315, 20 S. W. 707. There is no question but what appellant took the oath in the course of a judicial proceeding which oath was necessary to a due administration of the laws of the state. The sheer fact that the jury were not sworn would not entitle appellant to a verdict of not guilty in a subsequent trial for perjury. See *Anderson v. State*, 20 Tex. App. 312, *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 670, and *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40.

The only remaining insistence is that the court used the disjunctive "or" in presenting the issue to the jury instead of the conjunctive "and," in the following: "Did carry on or about his person a pistol." This criticism is hypercritical.

There is no error in this record, and the judgment is affirmed.

HENDERSON, J., absent.

#### GREER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. CRIMINAL LAW—INSTRUCTIONS—BURDEN OF PROOF.

An instruction, on the trial of a teacher for assaulting a scholar, that the teacher had the right to the exercise of moderate restraint over the scholar, and that if the teacher chastised the scholar, and used no more force than was necessary in the exercise of such restraint, he would not be guilty, was erroneous, as placing the burden on the teacher to prove his innocence beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1846-1849.]

#### 2. ASSAULT AND BATTERY—EVIDENCE—ADMISSIBILITY.

On the trial of a teacher for assaulting a scholar, alleged by the teacher to have consisted in chastising the pupil for misconduct in the school, evidence that the scholar was obedient during preceding years while another person was the teacher was inadmissible.

#### 3. SAME—INTENT.

The jury, in determining whether a teacher, who punished a scholar, was guilty of assault, must consider his acts and the acts of the scholar, and the teacher's guilt must not be measured alone by the severity of the punishment, but by his intention in inflicting it; and if the punishment was inflicted in good faith, without intention to injure the scholar, but only to enforce the rules of the school, the teacher was not guilty, though he used more force than was necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 69.]

#### 4. SAME—PUNISHMENT OF PUPILS—CORPORAL PUNISHMENT.

Where a teacher corrects a scholar and inflicts corporal punishment, the presumption is that the same is done in the exercise of lawful authority, and it does not devolve on the teacher to show his innocent intention; and, if the punishment is inflicted without any intent to injure the scholar, the teacher is not guilty

of assault, though the punishment is more severe than necessary.

**5. SAME—ELEMENTS—INTENT TO INJURE.**

To constitute assault and battery, the violence used must have been inflicted with the intent of inflicting an injury; and when the injury is caused by violence the law presumes it is done with intent to injure, which presumption may be rebutted by accused's showing his intention by proof of his acts and declarations at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 69.]

Appeal from Van Zandt County Court; W. L. Haynes, Judge.

J. V. Greer was convicted of aggravated assault, and he appeals. Reversed and remanded.

Wynne & Collins, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25.

The facts show that Marvin Tisdale, a child 11 years of age, was going to school to appellant, an adult male, and that on the 9th of January, 1907, defendant was teaching school in Van Zandt county, and on that date appellant chastised said child with a hickory switch. The testimony shows that the whipping was severe, leaving stripes upon the pupil; the teacher, however, insisting that the pupil had violated the rules in school and was impudent and insulting at the time of the whipping, and the teacher further contending that he chastised the pupil without malice and without intention to injure the pupil.

Appellant complains of the following charge of the court: "Should you find and believe from the evidence in this case that the said Marvin Tisdale was a scholar of the defendant at the time of the alleged assault, then you are charged that the defendant would have a right to exercise the right of moderate restraint of the said Marvin Tisdale; and should you find and believe from the evidence beyond a reasonable doubt that the defendant chastised the said Marvin Tisdale, but that he used no more force than was necessary in the exercise of such restraint, the defendant would not be guilty, and you should acquit him." Appellant insists this charge placed the burden upon appellant to prove his innocence beyond a reasonable doubt. We think the criticism of the charge is correct. The burden of proof of innocence is never shifted to the defendant.

Appellant further complains that the court erred in permitting B. B. Rushing to testify for the state that he had taught school in the community before the defendant taught there, and that the assaulted child was a pupil of his, and that said child was kind and obedient. This testimony is highly prejudicial, and should not have been admitted. The fact that the child is a good pupil one year, or even three, does not prove that he

might not become both an impudent and a bad boy and breach all the rules of the school subsequently.

Appellant asked the court to give the following special charges:

"Gentlemen of the jury, you are further charged, as a part of the law of this case, that the defendant is not presumed to be guilty from the commission of the offense; but the law presumes that he had the right to inflict the punishment, and you will judge of the defendant's guilt by his acts, conduct, and statements made at the time the child was whipped, taking into consideration the acts and conduct of the pupil at the time of said whipping; and the defendant's guilt is not measured alone by the severity of the punishment, but by the intention of the defendant in inflicting it; and although you may find that the punishment was more severe than it should have been, yet, if it was done in good faith by the defendant without intention to injure, but only to enforce the rules of the school, then you must find the defendant not guilty."

"Gentlemen of the jury, you are further charged, as part of the law of this case, if you find from the evidence that the defendant did chastise Marvin Tisdale by whipping him with a switch, but that the defendant was a school teacher and Tisdale was his pupil, and that the chastisement was administered to him by the defendant because the said Tisdale had violated the rules of his school, and that the said chastisement was inflicted upon him by the defendant for the purpose of correcting him, and in good faith, and without any intention on the part of the defendant to injure him, the said Tisdale, and without spite or ill will toward the said Tisdale, then you will acquit the defendant, and find him not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary."

"Gentlemen of the jury, you are further charged, as part of the law of this case, when the teacher corrects his scholar, the presumption is that it is in the exercise and within the bounds of his lawful authority, and it does not devolve upon him to show accident or his innocent intention. Neither is it any criterion of his act or his intention that bodily pain results from said chastisement; but the question for you to determine is the purpose that actuated the defendant at the time that the offense was committed, if any, and, if you find that the chastisement was given without any intention to injure the boy, then you will find defendant not guilty, though you find that the punishment was severe."

"Gentlemen of the jury, you are further charged in this case that if you believe from the evidence that the defendant was a school teacher and the said Marvin Tisdale was his pupil, and if you further find that the said Marvin Tisdale had violated the rules of the



school and that the chastisement was administered for the purpose of correction, and without malice, and in a good humor, and without any intention to injure the boy, but only to correct him, notwithstanding you may find that he used more force than was necessary to accomplish his purpose, you will judge his acts by the facts and circumstances surrounding the transaction, and, if you so find, you will acquit the defendant."

"Gentlemen of the jury, you are further charged, as part of the law in this case, that in order to constitute an assault and battery it is necessary that violence used should have been done with the purpose and intention of inflicting an injury, and when an injury is caused by violence the law presumes it was done with the intent to injure, which presumption of law may be rebutted or contradicted by the person inflicting the injury, showing that his intention and purpose may be shown by the acts, manner, and declarations of the person inflicting the injury, made at the time when said injury was inflicted; and if you believe from the evidence that the defendant has acted without malice or passion you will acquit the defendant."

These charges should have been given. See *Dowlen v. State*, 14 Tex. App. 61; *Bolding v. State*, 23 Tex. App. 175, 4 S. W. 579, and *Hutton v. State*, 23 Tex. App. 387, 5 S. W. 122, 59 Am. Rep. 776.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### WASHINGTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### CRIMINAL LAW — TRIAL — MISDEMEANOR — ABSENCE OF ACCUSED.

Under White's Ann. Code Cr. Proc. art. 633, providing that the accused must be personally present on the trial of all indictments or informations for misdemeanors where the punishment or any part thereof is imprisonment in jail, no part of a trial for such a misdemeanor can be had in his absence, and error in conducting a portion of the trial in absence of accused was not cured by the court's proposal to permit the evidence to be introduced anew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1465-1484.]

Appeal from Cherokee County Court; R. L. Robinson, Judge.

Jack Washington was convicted of a petty theft, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of a petty theft, and his punishment assessed at a fine of \$15 and 30 days' confinement in the county jail.

Bill of exceptions No. 1 shows that appellant's counsel was forced to try appellant in his absence, on account of the absence of the defendant and several witnesses not necessary here to mention. The bill presenting the matter has this qualification of the trial court: "The court, having refused said above motion, ordered the clerk to deliver to B. B. Perkins and C. F. Gibson, county attorney (Perkins being appellant's counsel), each a list of the jury, and ordered both of said parties to make their challenges to said jury, which said Perkins objected to doing because the defendant was not present. The jury, however, were selected and sworn. The county attorney presented his information to the jury. B. B. Perkins pleaded not guilty to said information, and the state placed W. H. Miller upon the stand as a witness. After said Miller was excused from the stand, the state placed George Wright and Ed Summers upon the witness stand, and the state then announced that it was through with its testimony; and the court called upon B. B. Perkins to know what witnesses the defendant had to offer. Perkins then placed W. H. Oatley upon the stand as a witness. After this witness testified, the court announced that it was 12 o'clock and adjourned the court until 1:30 o'clock. When court reconvened in the afternoon, the defendant, Jack Washington, was brought into court, and the court then called upon the defendant to know why he had not been present in court this morning. Defendant stated to the court that he was not aware that this case was set for trial at this time. The court thereupon asked the defendant where he had been, and the defendant stated to the court that he was at work on the railroad section three or four miles from town. The court then ordered the trial to proceed, and the defendant then presented a motion," in substance as follows: That he had had no right of challenge, and was not present, and various witnesses were absent. The court told the defendant that he might have all of his and the state's witnesses reintroduced, if he desired to do so, and that he would have an opportunity to examine and cross-examine if he wished. This the defendant refused to do.

There is no law in this state authorizing the trial of a defendant in a misdemeanor case, where imprisonment is part of the punishment, in his absence. Article 633, White's Ann. Code Cr. Proc., reads as follows: "In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail." It is not necessary to cite authorities. The statute inhibits any part of the trial in the absence of the defendant. The fact that the county judge proposed to permit the evidence to be introduced anew would not cure this error and

violation of both the letter and spirit of the statute.

The judgment is accordingly reversed, and the cause is remanded.

HENDERSON, J., absent.

### POWELL v. STATE

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### CRIMINAL LAW—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Where there was no evidence that the prosecuting witness, on a trial for violating the local option law, was an accomplice, an instruction that his evidence could not be considered, unless corroborated by other competent testimony as to any material fact, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980, 1981.]

Appeal from Smith County Court; J. A. Bulloch, Judge.

Wess Powell was convicted of violating the local option law, and appeals. Affirmed.

B. B. Bealrd, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 30 days' imprisonment in the county jail.

Appellant insists the court erred in refusing the following charge: "Gentlemen of the jury, at the request of the defendant you are further charged and instructed by the court that the defendant, Wess Powell, and the state's witness, George Francis, are both separately prosecuted in separate complaints and informations in this court, each for himself, with the offense of the unlawful sale of the identical and same intoxicating liquors with which the defendant is herein charged with unlawfully selling, but are not charged as principal offenders in said transaction; and, this being the case, you are instructed that you cannot regard material facts in the case necessary to a conviction of the defendant herein upon the bare and uncorroborated testimony of the state's witness, the said George Francis; and, unless the said witness George Francis' testimony is corroborated by other competent testimony in the case as to any material fact sworn to by him and necessary to convict him, then you will not be authorized to consider said fact as proven." There is no evidence in this record authorizing such a charge. The charge is not a correct phase of the law of this state. It seems appellant was attempting to ask the court to charge the prosecuting witness was an accomplice. If this was the purpose, it was not a proper one; and it was not error for the court to refuse same. However, the evidence does not show that the witness was an accomplice. There was a sharp controversy as to whether the witness bought the whiskey from appel-

lant, appellant strenuously insisting that he did not, and he introduced a great deal of evidence to show that he did not. The jury has seen fit to believe the prosecuting witness, and we find the charge of the court properly presented the law to the jury.

Finding no error in the record, the judgment is affirmed.

HENDERSON, J., absent.

### Ex parte BUMBAUGH.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### CRIMINAL LAW—APPEAL—RECOGNIZANCE—TIME.

When the term of court at which relator was convicted adjourned without his giving the recognizance provided for, notice of appeal having been given, the jurisdiction of the Court of Criminal Appeals attached, and the trial court had no further authority at a subsequent term to accept a recognizance pending appeal, nor to take any other steps in the case till the appeal had been determined, except to supply or substitute lost papers.

Appeal from Grayson County Court; J. W. Hassell, Judge.

Habeas corpus on relation of A. P. Bumbaugh. From a judgment remanding relator to custody, he appeals. Affirmed.

Sidney Wilson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Relator applied for a writ of habeas corpus to the county judge of Grayson county. Upon a hearing of the writ, relator was remanded to jail to abide the judgment of the Court of Criminal Appeals in another case pending on appeal to this court.

The case as made is substantially as follows: At the September term of the county court of Grayson county, on the 4th day of September, 1907, applicant was convicted of violating the local option law and given a punishment assessed by the jury by both fine and imprisonment. In proper time applicant presented a motion for a new trial, which was overruled. He thereupon gave notice of appeal to the Court of Criminal Appeals, and his recognizance was fixed in the sum of \$450. Relator did not in fact enter nor offer to enter into such recognizance during the term of court at which his conviction occurred; but at a subsequent term, to wit, on the 3d day of December, 1907, he offered to enter into a recognizance in said sum, and requested the court to permit him to do so, and tendered securities which were sufficient under the law and would have been approved by the court. But the court declined to accept such recognizance, holding that he was without authority to do so, whereupon relator sued out this writ, and upon the above facts was remanded to jail. The court further finds, at the request of relator, that at

the adjournment of said term of court he (relator) was confined in jail pending an appeal to the Court of Criminal Appeals in a habeas corpus growing out of another case. This is a statement of the facts as certified by the trial judge.

The action of the court is legally correct. Relator could have entered into a recognizance at the term of court at which he was convicted, but could not at a subsequent term of said court. When the term of court at which the conviction occurred adjourned, and notice of appeal was given to this court, the jurisdiction of this court attached, and the jurisdiction of the trial court was ousted, and it had no further authority to take any steps in the case till his appeal was decided, otherwise than to supply or substitute lost papers. This question has heretofore been decided. See *Quarles v. State*, 37 Tex. Cr. R. 362, 39 S. W. 668, and *Quarles v. State*, 40 Tex. Cr. R. 353, 50 S. W. 457.

The action of the court was correct in remanding relator under the facts stated, and the judgment of the trial court is affirmed.

HENDERSON, J., absent.

#### CUMMINGS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

##### 1. LARCENY — VALUE OF PROPERTY — SUFFICIENCY OF EVIDENCE.

Where, in a prosecution for theft, a witness swore that the value of the property alleged to have been stolen was \$300 at the time of the trial, and there was no claim that the value of the property had undergone any change from the time of the theft up to such time, the value was sufficiently proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 154, 155.]

##### 2. CRIMINAL LAW—THEFT—SENTENCE—CONFINEMENT IN REFORMATORY.

Where, in a prosecution for theft, the evidence did not show that defendant was under 16 years of age, there was no error in the trial court instructing the jury, if they found her guilty, to assess her punishment at confinement in the reformatory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1934.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Cora Cummings was convicted of theft, and appeals. Affirmed.

Hanson & Robertson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and her punishment assessed at two years' confinement in the penitentiary.

Appellant's amended motion for a new trial insists the verdict of the jury is contrary to the law and evidence, and that the market value of the property alleged to have been stolen was not proved. The verdict of the jury is supported by the evidence. The market value of the property was established by

a jeweler, who was a witness in the case, who swore that the value of the property at the time of the trial was \$300. There was no insistence pro or con that the value of the property had undergone any change from the time of the theft up to the time of the trial. The evidence does not show that the defendant was under 16 years of age; hence there is no error in the trial court instructing the jury, if they find defendant guilty, to assess her punishment at confinement in the reformatory.

The evidence amply supports the verdict, and the judgment is in all things affirmed.

HENDERSON, J., absent.

#### TYLER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

##### CRIMINAL LAW — APPEAL — VERDICT — CONCLUSIVENESS.

A verdict in a criminal case on conflicting evidence will not be set aside on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

Appeal from Cherokee County Court; R. L. Robinson, Judge.

Henry Tyler was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

L. D. Guinn, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$100.

The evidence in this case, while not as satisfactory as it might be on the issue, from the state's standpoint, as to whether or not the pistol was broken and would not shoot, we believe, after a careful review of the testimony, authorizes the conviction of appellant. Appellant's evidence shows that the pistol was broken. The controversion of this proposition by the state is not as satisfactory as it might be; but we cannot say that the jury were not warranted in finding appellant guilty.

So believing, the judgment is affirmed.

HENDERSON, J., absent.

#### BUCKNER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

##### CRIMINAL LAW — EVIDENCE — ADMISSIONS BY ACCUSED—ADMISSIBILITY.

Where an officer arrested defendant on a charge of murder, and placed him in the custody of another, who took defendant to the latter's house, oral statements as to the commission of the crime, made by defendant while in his house to witnesses without being warned that the statements might be used against him, were inadmissible, though the person having defendant in charge was not bodily present when the statements were made, since an officer need not be in

the bodily presence of a prisoner in order to have him under arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1167.]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Nathan Buckner was convicted of murder, and appeals. Reversed.

Stephenson & Davis, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at lifetime imprisonment.

After appellant killed the deceased, he was arrested by an officer and placed in the custody of Trav Johnson. While he was in said custody, J. M. McCary and Porter Belcher went to appellant's house, where he was under arrest. According to the testimony of Belcher the following conversation occurred: Porter Belcher said to appellant, as he walked up to appellant's house: "Nath, what in the very devil got the matter with you fellows?" Appellant replied: "Once in awhile a man has to be killed, and to-day come time to kill one." McCary thereupon stated: "He has made a botch of it. He didn't kill him good." Defendant replied: "If I had known I had not broke his neck, I would have shot him again." The witness states that he did not recollect whether Trav Johnson was down at defendant's house when he and Porter came down there or not. If he was, he didn't see him. Johnson was not there when the above conversation occurred. Iverson Matthews, the officer above alluded to, testified that he was deputy sheriff at the time appellant killed deceased, and arrested him when he first went to his (appellant's) house. "I kept him in charge myself awhile, and they got to talking around right sharply, and I didn't want to carry him up to where the other folks were, and I got Trav Johnson to take him. I arrested defendant at his house." According to the testimony of Trav Johnson, after he got charge of the defendant he remained with him the balance of the day until he was taken to the county jail. When the testimony of the witnesses McCary and Porter Belcher was introduced, as above detailed, the defendant's counsel did not know that appellant was under arrest; and, the evidence having developed that he was in custody and having been arrested for the shooting of Treadwell, appellant made a motion to exclude the evidence of McCary, it not being shown that appellant's statement was in writing and signed by him, or that he had been warned by any one that the statement that he might make could be used against him. Thereupon the court had McCary recalled, and the following questions and answers were taken: "At the time you spoke of yesterday, when you was at Nathan Buckner's house, you and Porter Belcher were there, and had this talk with the defendant, Nathan Buckner, that you detailed on yes-

terday, in which he spoke of the killing. I don't remember just what you said about whether Trav Johnson was there or not. A. I said, if he was there, I never saw him. Q. Was any officer present? A. Just about the time the conversation closed between us, and a little before, Iverson Matthews came to the gate and called Nathan Buckner out. Q. Was that just after the conversation closed? Yes, sir; they went off up the road, and we got up and went home. Q. Matthews was deputy sheriff at the time, was he? A. Yes, sir. Q. Did you see anything about the place at the time you were talking with him, and while there with him, that indicated he was under arrest or restraint of any kind? A. No, sir."

The above facts show, however, or at least raise the issue, that appellant was under arrest. As stated, the deputy sheriff arrested appellant and placed him in the custody of Trav Johnson. Johnson swears he was present all the time and heard no such conversation as above detailed. The court approves the bill, with the following explanation: "That I acted upon the assumption that, if the jury believed Trav Johnson was present, then they would also necessarily believe his statement that defendant made no such statement as was imputed to him by state's witnesses McCary and Belcher. If they believed said state's witnesses' statement that Johnson was not present when this conversation took place, then there was no evidence that defendant was in actual custody at the time in question. Therefore my conclusion was that the issue presented is not whether he was in custody when the statement imputed to him was made, but is rather whether he made such statement at a time when Trav Johnson was not present, and, if so, he was not in custody, and whether he made such statement depends upon the credibility of said state's witnesses, and they do not locate it at a time when Johnson was present, but distinctly at a time when they say he was not present." The mere fact that Johnson may not have been bodily present, he having legal custody of appellant, would not preclude the fact or conclusion that he was under arrest at the time said statement was made, if it was made. Being under arrest when so made, it could not be admitted, and it was reversible error to so admit same. We do not understand the law to be that an officer must be in bodily presence of a prisoner in order to have him under arrest. The uncontradicted evidence, as we understand this bill, shows that appellant was in custody, in contemplation of law, of Trav Johnson, who had been deputized by the sheriff to hold him in custody until the sheriff could take him. It then becomes an immaterial issue whether Johnson was bodily present or not. However, he swears he was, and, whether he was or not, we hold that the defendant was in legal custody at the time the statement was made. On another trial, if

the evidence should show that Johnson had released appellant, then, of course, he would not be under arrest; but the undisputed record before us shows that he was. It follows, therefore, that the court committed error in not excluding the testimony from the consideration of the jury.

Appellant also presents a motion for continuance in this case, which we do not deem necessary to review, however, in view of the fact that the case is reversed upon the above-discussed question.

For the error pointed out, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### FITZGERALD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

#### WEAPONS—CARRYING WEAPONS—CARRYING BROKEN PISTOL FOR REPAIRS.

A person who carries a broken pistol in a useless condition to a blacksmith for repairs, and finds the blacksmith absent, is not guilty of carrying a pistol when he takes it away with him and later returns with it to the blacksmith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, §§ 9-14.]

Appeal from District Court, Shelby County; James Q. Perkins, Judge.

J. A. Fitzgerald was convicted of carrying a pistol, and appeals. Reversed and remanded.

Bryarly, Carter, Walker & Chamness, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of carrying a pistol. The state's case is that appellant was in the town of Center, Shelby county, loading his wagon with some purchases he had made from a store, when one of the proprietors observed a pistol in his coat pocket. He took him to one side and called his attention to it. Appellant replied that it was out of repair and he brought it to the shop to be repaired. In support of this statement, himself and his son testified that the pistol was out of repair and could not be used, and that in going to the town of Center he brought the pistol to Shelbyville to a blacksmith, who repaired pistols, for the purpose of having it repaired; that it was broken, and not in a condition to shoot. He proved by the blacksmith that he (appellant) did leave the pistol, and that he repaired it, and that it was practically in a useless condition. It was also shown that in bringing it from his home to Shelbyville, en route to Center, appellant stopped at the blacksmith shop to leave it, but the blacksmith was out of town and could not be found; that he went on to Center, carrying the pistol with him, having it in his wagon among effects carried in the wagon; that when he got ready to leave Center he

took it out of the wagon and put it in his pocket, so that he would have it convenient to leave with the blacksmith, and not have to go through the wagon and disturb things to get it out. This is practically the case.

The conviction seems to be predicated upon the theory that appellant had diverted himself from the proper line of travel, and that, therefore, he was guilty of carrying a pistol. Under some circumstances, as decided in *Stilly v. State*, 27 Tex. App. 445, 11 S. W. 458, 11 Am. St. Rep. 201, this would constitute a violation of the law; but these facts do not bring the case within the rule announced in the *Stilly Case*. There was no excuse offered by appellant, and none attempted to be shown, in justification of his carrying the pistol, if it had been a pistol as contemplated by the statute. The contention here is sustained by the evidence, as we understand it, that appellant had a broken pistol, out of repair, and that he carried it to the shop for the purpose of having it repaired, and, failing to find the blacksmith at home, carried it on, and returned to the blacksmith shop and did have it repaired. Appellant had a right to have his pistol repaired, and the right to carry it to the party who could do the work. This was not a violation of the law, and, if it was such a pistol as was not prohibited by the statute from being carried, the fact that he may have gone to Center and carried it with him would make no difference. It is only such pistol as is contemplated by the statute that is prohibited from being carried. We are of opinion that the facts do not justify this conviction.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### MERCER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. INFORMATION—COUNTS—CONCLUSION.

Where an information concluded with the words, "against the peace and dignity of the state," etc., it was not objectionable because each count did not so conclude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 159.]

#### 2. CRIMINAL LAW—NEW TRIAL—GROUNDS.

A statement of ground for new trial in a criminal case that the court misdirected the jury, without pointing out any particular portion of the charge or designating the particular error, was too general to constitute ground for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2366.]

#### 3. OBSCENITY—EVIDENCE.

Evidence held to sustain a conviction for swearing and using obscene language in a manner calculated to disturb the inhabitants of a private house.

Appeal from Harrison County Court; H. T. Lyttleton, Judge.

C. Mercer was convicted of swearing, etc., near a dwelling house, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The affidavit and information contain two counts, the first of which charges appellant with going into and near a private place, to wit, the private house of Dan Maloney, and that he did then and there curse and swear and yell and shriek, and use loud, abusive, vulgar, obscene, and indecent language in a manner calculated to disturb the inhabitants of said private house. The second count charges appellant with using abusive language to and concerning the said Dan Maloney under circumstances then and there reasonably calculated to provoke a breach of the peace, against the peace and dignity of the state.

It is contended by appellant that the indictment is defective, in that the first count, and that upon which appellant was convicted, is insufficient because it fails to conclude "against the peace and dignity of the state." An inspection of the complaint and information shows that the first count does not conclude, "against the peace and dignity of the state," but at the end of the second count that expression is used. This is sufficient. It is not necessary that each count conclude "against the peace and dignity of the state." See *Stebbins v. State*, 31 Tex. Cr. R. 294, 20 S. W. 552; *Dancey v. State*, 35 Tex. Cr. R. 615, 34 S. W. 113, 938; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628; *West v. State*, 27 Tex. App. 472, 11 S. W. 482.

The second ground of the motion is that the court misdirected the jury as to the law of the case. This is too general. No particular portion of the charge is pointed out, and no error is designated; nor did the pleader undertake to show wherein or in what part of the charge the jury were misdirected as to the law.

The third and fourth grounds of the motion aver that the verdict is contrary to the law and the evidence insufficient to support the verdict. We are of opinion that the evidence is sufficient. Maloney was in his yard, working on a scraper, when appellant and Hughes came up and spoke to him. After conversing awhile upon different subjects, appellant asked Maloney something about why the camp was at its present location and not closer to the work. It seems that Maloney and others were working on the county road. Maloney replied that they were stationed there because the teams would not have to go over the fresh-worked road every day, but would have hard road to travel in going to and from the work. Appellant said the county teams are about as good as any in the county, and, if they could not go over the road, how did Maloney or any one else expect other people's teams to travel over the road. Maloney replied that a person had

better work anywhere else for 50 cents a day than work for the county and have everybody monkeying with his business, and that he (Maloney) had heard what appellant had been saying. Appellant replied: "I have never monkeyed with your business, and whoever says I did tells a God-damned lie." Maloney then replied: "I say you have." Appellant then said: "I have not, and if you will come out here in the road I will make a white man out of you." Maloney declined to go. Appellant then left. Mrs. Maloney said she heard loud talking, and stepped to the door, and heard appellant say, "Whoever says I have monkeyed with your business tells a God-damned lie;" that Maloney said, "I don't want you cursing here in the presence of my children." Appellant then said, "I have not cursed," and then told her husband, if he would come out in the road, he would make a white man out of him. Hughes testified practically as did Maloney; but he says that appellant's statement to Maloney was that whoever said that he (appellant) had had anything to do with his (Maloney's) business "is a liar and a damn liar." This is practically the testimony of the case.

We think the evidence is sufficient, and the judgment is affirmed.

HENDERSON, J., absent.

#### TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### SEDUCTION — PROSECUTION — INSTRUCTIONS — EVIDENCE OF ACCOMPLICE.

In a prosecution for seduction, a charge that the female seduced was an accomplice and that accused could not be convicted upon her testimony, unless it was corroborated by other evidence tending to connect accused with the offense, but that the corroborating evidence need not be direct or positive, etc., but simply such facts or circumstances, independent of the accomplice's testimony, as "tried" to connect accused with the offense, was erroneous, since it did not state that the accomplice's testimony must be found to be true before it may be considered in arriving at a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 83-88, 90.]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Murph Taylor was convicted of seduction, and appeals. Reversed and remanded.

D. M. Short & Sons, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for seduction. The accomplice, the seduced female, is barely corroborated, if at all, as to the engagement supposed to have existed between herself and appellant. The testimony is on very narrow lines, if sufficient.

The court instructed the jury in regard to this witness as follows: "The witness Willie Thompson is an accomplice, and defendant cannot be convicted upon her testimony, un-

less the same is corroborated by other evidence tending to connect defendant with the offense charged; but the corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict independent of the testimony of the witness Willie Thompson, but simply such facts or circumstances independent of such testimony, as tried to connect the defendant with the offense charged." We do not know whether the word "tried" is misprinted in the record, or whether it is correctly typewritten. Either the court or typewriter has substituted the word "tried" for the word "tend" or "tended." Exception was reserved to this charge, and a special one requested, which was refused. The objection to the court's charge was that it was on the weight of evidence and did not properly instruct the jury as to the force of the accomplice's testimony, in that it fails to instruct the jury that before they could convict they must find that the evidence of Willie Thompson, the accomplice, is true, and that the corroboration must show, or tend to do so, that appellant was guilty of the offense committed. The court's charge does not properly present the law applicable to the accomplice's testimony. This charge nowhere informs the jury that they must find the accomplice's testimony to be true before they are authorized to consider it in making up their verdict. This question has been decided in a great number of cases and is settled law.

Because the charge is not sufficient, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

## VADEN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

### 1. CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS.

The court declined to approve the bill of exceptions of defendant's counsel, wherein it was stated that the district attorney during his argument said: "The defendant said, when he came back to the tent after the killing, that it was an accident, and now brings a witness into court who testifies for defendant on self-defense, and the defendant sits back and says nothing"—but filed a bill in which it was made to appear that the following language was used: "Defendant has placed a witness on the stand in his behalf who attempts to show self-defense, and defendant remains silent until he got to the tent and laid down on the grass after the killing and stated that it was an accident." Defendant proved up his bill by bystanders. Affidavits of jurors and of one of defendant's counsel were made a part of the bill, wherein it was stated that the language used was as stated in the bill of defendant's counsel. On motion for new trial, the district attorney under oath filed an answer that the language used was as set out in the bill filed by the court, which answer was attached to the motion for new trial. *Held*, that the bystanders' bill of exceptions prepared by defendant should be considered.

### 2. SAME—REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY.

It is error for the district attorney in his argument to refer to defendant's failure to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1672.]

Appeal from District Court, Jones County; Cullin C. Higgins, Judge.

R. W. Vaden was convicted of murder in the second degree, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree. There were 12 bills of exception reserved to various rulings and the charge of the court.

One of the bills was reserved to the introduction of some statements made by the deceased on the night following the shooting in the afternoon and perhaps a couple of days before death resulted. The testimony is in rather a questionable shape, if sought to be used as a dying declaration, and we are of opinion, as presented, that it is doubtful if it could be used as a dying declaration. If upon another trial it is sought to be used from this standpoint, it ought to be made to appear more clearly that the statement of the deceased is brought within the predicate required by our statute for the introduction of this character of testimony.

There is one bill of exceptions, however, that we believe requires a reversal of the judgment, and the matters perpetuated grow out of the speech of counsel for the prosecution, in which it is stated that the district attorney, making the closing argument, used the following language: "The defendant said, when he came back to the tent after the killing, that it was an accident, and now brings the witness Barker into court and testifies for defendant on self-defense, and the defendant sits back and says nothing." The court declined to approve this bill as written by appellant's counsel, because the district attorney did not use the language imputed, and filed a bill in which he makes it appear the following was the language: "Gentlemen of the jury, the defendant in this case has placed the witness Barker on the stand in his behalf, and who attempts to show a case of self-defense, and the defendant remains silent until he got to the tent and had laid down on the grass after the killing and stated that it was an accident."

Appellant refused to accept this bill, and proved up his bill by bystanders. Evidence in the form of affidavits were introduced and made a part of this bill. Among others was A. L. Hollums, who was on the jury that tried appellant, and he swears that the district attorney used the following language: "The defendant said, when he came back to the tent after the killing, that it was an accident, and now he brings the witness Bar-

ker into court and testifies for defendant on self-defense, and yet the defendant sits back and says nothing—or words to that effect. I am sure that said Hopson, district attorney, referred to the failure of the defendant to testify, and I noticed that Judge Thomas spoke to Judge Higgins at the time he did so." John B. Thomas states in his affidavit that he was of counsel for appellant, and the district attorney, Mr. Hopson, in making his closing remarks, said to the jury: "When the defendant was down at the tent after the killing, he said that the killing was an accident, and now he brings witnesses who claim to be eyewitnesses, and claims in the testimony in his behalf that it was self-defense, and the defendant sits back and says nothing." Affiant further says this is as near what Mr. Hopson said as I could recollect it, and I got up at once and called the attention of the court to the matter and took exceptions, and the court stated to me that he was not paying attention to the district attorney and did not hear the remark. He further states that the court had made a rule that counsel should not interrupt each other while speaking, but should quietly state their objections to the court, and assigns this as a reason that he did not interrupt the attorney at the time of the imputed remark." S. G. Castles files an affidavit in which he states that he was one of the jurors that tried appellant, and that when the district attorney, Hopson, was closing his case for the state in his argument he said: "Mr. Barker, an eyewitness, comes on the stand and testifies, and the defendant sits back and says nothing." He further states that he was under the impression that the attorney for the state did not have the right to refer to the fact that the defendant was not placed on the witness stand, and that that was the reason it was impressed on his mind. C. Spurling files an affidavit in which he says that he was one of the jurors that tried appellant, and when the district attorney was making his closing argument to the jury he used the following language: "The defendant said, when he came back to the tent after the killing, that it was an accident, and now he brings the witness Barker into court and testifies for defendant on self-defense, and the defendant sits back and says nothing." This is a bill of exceptions.

On motion for new trial the district attorney under oath files a controverting answer to the effect that the language that he used, instead of that set out in appellant's bill of exceptions No. 12, was as follows: "Gentlemen of the jury, the defendant in this case has placed the witness Barker on the stand in his behalf, and who attempts to show a case of self-defense, and the defendant remained silent until he got to the tent and had laid down on the grass after the killing, and stated that was an accident." This controverting statement of the district attorney was not embodied in the bill of exceptions,

but was attached to the motion for a new trial. In testing the matter, the evidence in regard to the matter perpetuated in the bill of exceptions was by affidavits, and all of these were put in the bill by the appellant. At the time the bill was rejected by the court and proved up by the bystanders, controverting the bill signed by the court, there was no evidence, nor was the matter further investigated, nor was there any separate issue, so far as the motion for a new trial is concerned, made, further than that in the motion for a new trial appellant set up this as a ground of said motion and the state controverted it by the statement of the district attorney above mentioned.

As this matter is presented, we are of opinion that the bystanders' bill of exceptions prepared by appellant should be considered. It is further made to appear by evidence sufficiently strong and cogent to show that the district attorney referred to the failure of appellant to testify in his own behalf. Where there is an issue of this sort, the statute provides that affidavits may be introduced in regard to the matter. Appellant introduced these affidavits, and the bill is thus perpetuated. In the statement of facts the evidence of the district attorney in regard to the matter is included, which is practically the same as in his controverting statement. There is also evidence of the witnesses contained in the statement of facts in regard to the matter, sustaining the bystanders' bill as being correct. We are of opinion, as the matter is presented, the bystanders' bill should be considered; and, that being so, the judgment must be reversed, because of the reference by the district attorney to the defendant's failure to testify.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

#### BROWN v. STATE

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

#### 1. CRIMINAL LAW—TRIAL—APPOINTMENT OF COUNSEL FOR DEFENSE.

In a criminal case the court appointed two attorneys to defend accused. When the case was called for trial, one of the attorneys was excused because he had consulted with persons interested in the prosecution; but another competent attorney was appointed in his stead, and the defense was allowed all the time asked by them in conducting the case. *Held*, that the court did not err in excusing the attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1496-1506.]

#### 2. WITNESSES—IMPEACHMENT—EVIDENCE TO SUSTAIN CHARACTER OF WITNESS—REPUTATION FOR VERACITY.

In a rape case, where accused seeks to contradict the prosecutrix by showing, among other things, that her testimony on the examining trial was different from and not as full as that given by her on the final trial, evidence of her good reputation for veracity is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1165-1169.]



**3. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE FOR ADVERSE PARTY.**

In a rape case, where accused testified to acts of intimacy between himself and the prosecutrix prior to the alleged rape, and sought to maintain this by testimony of other witnesses that she was encouraging him in his attentions as far as the outside world could ascertain, and the prosecutrix testified that he was forcing himself upon her, and that she rejected his attentions, and that she had advised with friends in regard to it, evidence of friends of prosecutrix as to complaints made by her to them in regard to accused forcing his company upon her was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 861, 862.]

**4. RAPE—SUFFICIENCY OF EVIDENCE—CONVICTION—DEATH PENALTY.**

Evidence in a prosecution for rape held to sustain a conviction and penalty of death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 71-84.]

Appeal from District Court, De Witt County; James C. Wilson, Judge.

John Brown was convicted of rape, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape; the jury assessing the death penalty.

A bill of exceptions recites that the court appointed Sam C. Lackey, an able and experienced attorney in criminal law, of Cuero, and Thomas Smoot, another attorney, who resided at Yoakum, and who is also an able and experienced attorney in civil matters, but who had had but little experience in criminal trials, to defend appellant; that on the 28th day of June, 1907, when the case was called for trial, the court excused Mr. Lackey from the defense and appointed W. F. Harris; that Harris was called into court and was appointed to assist Mr. Smoot in the defense. Appellant objected to the action of the court in excusing Mr. Lackey and appointing Mr. Harris. The court qualifies this bill by stating that Mr. Smoot had been employed by appellant and represented him in the examining court at Yoakum when he was arrested for this offense; that after the indictment had been returned by the grand jury Mr. Smoot declined to further defend, assigning as his reason that defendant had failed to pay or secure him in the payment of a fee; that appellant had satisfied the court that he was too poor to employ counsel and pay a fee, and the court then appointed Mr. Smoot, and to assist him Mr. Lackey; that Mr. Lackey had already at the same term of court been appointed by the court to defend two other criminal cases, in each of which cases the parties had been indicted for murder and were unable to pay a fee to secure the services of an attorney; and Mr. Lackey further stated to the court that he felt disqualified to defend this case by reason of the fact that he had consulted with

the parties interested in the prosecution and had declined to take employment on either side, whereupon the court excused Mr. Lackey and appointed Mr. Harris, a practicing attorney of the Cuero bar of ability and experience in the trial of criminal cases. Mr. Harris was then appointed to assist Mr. Smoot in place of Mr. Lackey. And the court further states that the defendant was defended with considerable ability and care. The court further certifies that he feels certain that defendant received as good and as able representation as any counsel under the circumstances could have given him, and that he allowed counsel all the time and delays asked by them in conducting the case for the defendant during the trial. Our statute authorizes—rather requires—the court to appoint counsel in capital cases under circumstances such as are mentioned in the statute. We agree with the statement of the court that appellant was defended with very decided ability and care, and we are disposed to congratulate the attorneys on the ability displayed in the defense of their client. We believe that any court who would examine this record would arrive at the conclusion that the attorneys showed very considerable zeal and ability in the defense of their client. That they were to some extent unfortunate in the verdict is no reflection on their conduct of the case or the ability shown in the defense of their client. The writer is of the opinion, from a careful inspection of the record, that they about exhausted all the matters that could have been of any service to their client. Their legal fight was decidedly able and covered the situation. We believe the court did right in excusing Mr. Lackey under the circumstances, even if he had not been appointed to defend the other two cases mentioned by the court. The fact that he had consulted with the prosecuting side of the case would have placed him in a rather delicate position to defend, and we think he was correct in insisting that he should not defend under the circumstances. We do not see how there could be any possible injury as this matter is presented from this record.

The motion for a new trial suggests error in regard to the ruling of the court admitting testimony. There were no separate bills of exception reserved, and the exceptions taken are found in the statement of facts. Among other things complained of was the admission of testimony sustaining the good reputation of the prosecutrix for veracity. We think this evidence was admissible. Appellant sought to contradict the prosecutrix by showing contradictory statements, and, among other things, introduced her testimony taken on the examining trial. That evidence was not as complete and full as that detailed by her on the final trial, and the examining trial evidence was introduced for the purpose of contradicting, as well as to show that she failed to testify on that trial to all the facts to which she testified on the final trial.

Without going into the record, which is a very voluminous one on the facts, the introduction of this impeaching testimony justified the court in admitting the evidence of her good reputation for veracity.

It is also complained that the court erred in admitting the evidence of Mary Klein, Noah Klein, Hattie Kinney (the prosecutrix), George Harris, and John Asberry in regard to complaints the prosecutrix should have made to them in regard to appellant forcing his company upon her prior to the alleged rape. We are of opinion that this question is not presented by bill in the statement of facts; but, if it had been, as this record is made, we are of opinion the testimony was admissible. It is a general rule of evidence that facts may or do become admissible by reason of the admission of facts by the other party. The prosecutrix's character and acts, and, in fact, pretty much her whole life, were examined into by appellant in her cross-examination, and by introduction of evidence from other sources. Her life was traced from her infancy in attempts to discredit her, and especially her conduct in reference to appellant prior to the alleged rape. Appellant himself took the stand and testified to acts of intimacy between himself and the prosecutrix prior to the alleged rape, and sought to sustain this by the testimony of witnesses to the effect that she was encouraging him as far as the outside world could ascertain in his attentions to her. This latter fact became a critical issue in the case, because it was a fact on the trial that he (appellant) had been accompanying her on several occasions, and she testified that he was forcing himself upon her, and that she insultingly rejected his attentions and tried to prevent them and advised with some of her friends in regard to it—among others, the principal of the school in which she was a teacher, John Asberry, and a Baptist minister named George Harris. It may be stated, in a general way, that the whole case was a running fight over the life, acts, conduct, and character of the prosecutrix, as before stated, from her infancy up to the time of the alleged rape, and in this connection she proved an exceptionally fine character and reputation, both among her own race or color and among the white people who had known and observed her. She was a teacher in a public school in Yoakum, the trustees of which school were white men who had employed her as such teacher. The testimony covered such a wide range of time, acts, conduct, life, and character that it would seem that almost any sort of evidence that had any relevancy to her life, character, and conduct would have been admissible as against the testimony which sought to break that life and character down. As this matter is presented, we are of opinion this evidence was admissible.

It is contended that the verdict of the jury is not supported by the facts. We are of opinion that it is. In the evening prior to the

night of the alleged rape, appellant had gone to the house where prosecutrix resided and where she was alone. She insisted upon his leaving, that she had matters to attend to that required her time, and that his attentions to her were repulsive; but he persisted in staying, and did remain until after dark and in a way compelled her to stay, and after dark he accomplished his purpose. Prosecutrix was a small woman and anything but robust. She immediately, when appellant left after accomplishing his purpose, went to the residence where her friends Noah Klein and wife lived and made complaint. The arrest followed shortly afterward. Appellant's contention was that she willingly consented to the act of intercourse, and had had intercourse with him on previous occasions. A physician, Dr. Godwin, on the following morning made an examination of the prosecutrix, and found her private parts bruised and inflamed and very sore. He said, among other things, that great force had been used in the penetration, and that, in his judgment, it was the first time that such thing had occurred. He goes into detail in regard to the manner of his examination and his discoveries; the indications to his mind as a physician sustaining his conclusions in regard to the matter. It is in evidence that the girl suffered greatly during the night after the intercourse. Without reviewing the testimony of the girl as to how he worried her down until she was unable to resist his superior physical strength, and his threat to kill her if she made any outcry or subsequent complaint, and her statement that she fought him as best she could in her exhausted condition, we are of opinion the evidence fully warrants the finding of the jury that this was a case of rape by force and threats. Appellant's testimony is to the effect that his attentions to prosecutrix were with her approbation, and that the intercourse was had with her consent. This was denied most strenuously by her in every respect. Sustaining her upon two propositions, as to the want of consent and force used, in so far, at least, as the penetration and the manner of it was concerned, the physician who made the examination shows that there was unusual force used in the penetration, and that an examination of her the following morning led him to form the expert opinion that the force was unusual and such as would occur under circumstances where the woman did not consent; but he further states that her physical condition was rather abnormally weak, and showed a want of even ordinary development for a grown woman at her age, both in regard to her sexual organs and other physical developments. For instance, he states that her leg from the hip down was not larger than the arm of a developed man, and the facts all show that she was a small woman, weighing anywhere from 90 to 100 pounds, and in delicate health.

The jury found the evidence of the girl

and supporting facts to be true. The testimony was of a revolting nature, and from the state's standpoint makes a clear case of rape by force and threats. The jury saw proper to inflict the most severe penalty known to the law, and no sufficient legal reason is shown, in our opinion, why this conviction should be set aside.

The judgment is therefore affirmed.

HENDERSON, J., absent.

### JETER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907.)

#### 1. SEDUCTION—EVIDENCE—ADMISSIBILITY.

In a seduction trial, it was improper to exclude testimony showing that prosecutrix's sister's reputation for chastity was bad, and had been for two or three years, and that witness knew of her unchaste acts, where the sisters resided with their father, and habitually went to social gatherings together unattended, and would return accompanied by young men.

#### 2. WITNESSES—CROSS-EXAMINATION.

In a seduction trial, defendant could show on cross-examining state's witness, who testified that prosecutrix's reputation for chastity was good, that witness had stated to another that prosecutrix's sister's reputation was bad, where the sisters resided with their father, and habitually went to social gatherings unattended, and returned accompanied by young men.

#### 3. SAME—CONTRADICTING OWN WITNESS—SURPRISE.

Where a party is surprised by the hurtful answer of a witness, and when he is led to believe by the witness that it would be favorable, he may contradict such witness; and where, in a seduction trial, a witness testifying for defendant stated that prosecutrix's reputation for chastity was good, defendant's counsel could ask her if she had not stated to them that she knew prosecutrix's reputation was bad, that witness and her deceased brother had often talked about it and deplored the fact, and that prosecutrix's family had become offended because they remonstrated with prosecutrix about her conduct with young men.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1094-1100.]

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Frank Jeter was convicted of seduction, and he appeals. Reversed and remanded.

Lively & Stanford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for seduction. The state relied upon the testimony of the alleged seduced female, Ella Taylor, for evidence to sustain the conviction, with whatever corroboration is shown.

Ella Taylor, the prosecutrix, testifies that she and appellant had been engaged for some time at the time of the first act of sexual intercourse between herself and appellant; that his solicitations continued through a space of about nine months before she finally yielded to his importunities; that it occurred one night while returning from a party; that the first act of intercourse occurred in Sep-

tember, 1905, and continued until some time in December, 1905; that her child was born on October 17, 1906. She further testified: "Defendant did not take me to the party. He hardly ever came to our house to take me anywhere, but would accompany me home from places." She further testified that she and her sister would usually go before night to these gatherings, and some of the young men would accompany them home. Her father testified that appellant visited his daughter at his house; that he did not come often to see her, but would come home with her from gatherings. It seems to be a conceded fact that appellant and other young men who waited upon the prosecutrix and her older sister seldom visited them at their father's residence, where they lived; that they would go to the gatherings of people in the neighborhood, and young men would accompany them home from such gatherings. The evidence is directly conflicting as to the reputation of prosecutrix; some of the witnesses giving her a good reputation for chastity, while others stated it was bad. Appellant testified that he was never engaged to the prosecutrix, but that he had intercourse with her during the fall of 1905, and that he had not had intercourse with her any time during the year of 1906. So it may be taken as a fact testified by both sides that the intercourse between appellant and prosecutrix ceased some time during the month of December, 1906, and it is an unquestioned fact that the prosecutrix's child was born on the 17th day of October, 1906, or in the neighborhood of 10 months after these acts of intercourse ceased between the parties.

Just prior to their act of first intercourse, appellant wrote a letter to prosecutrix, substantially as follows: "Ella, you have refused to do what I want you to do. This proves that you do not care anything for me. So I don't suppose there is any use of my going with you any more." The following is the prosecutrix's reply: "Mr. Frank Jeter—Dear Old Boy: Frank, you said, when I decided to do what you said, for me to let you know. So I thought I would write and tell you that I will when you get ready. I couldn't get a chance to tell you yesterday. I had rather you wait until about Sunday night. If I could get to talk to you, I would tell you why I want you to wait until then. I wish you would come and carry me to singing Sunday evening, and we wouldn't come home till just before daylight, if you think it would take you that long. Tell me one night this week if you think you can come Sunday evening, so I can iron my (other) corset cover. I hope you will come, sweetie. I sure do want to kiss you. I never do get to kiss nobody but you. Excuse bad writing. I wrote this and nursed Vernon at the same time. Didn't I have a big job. Your truest lover, Ella. S. W. A. K." There are some letters introduced, written by appellant to the prosecu-

trix subsequent to the birth of the child, indicating an anxiety on his part to see the child and have a picture of it on a stamp, so that he could carry it in his watch. One of the letters acknowledge the receipt of the picture, in which he states that the picture of the child has none of the Jeter family resemblance. There are some intimations in the letters that prosecutrix wanted appellant to do something, which he declined on the ground that she and her family were trying to trap him.

Dr. Bell, at the instigation, perhaps, of appellant, and with the consent of the prosecutrix, examined her in July, 1906, and ascertained the fact that she was about five months advanced in pregnancy. While they were together, and during a conversation between herself and Dr. Bell, she asserted that appellant was the father of her prospective child, but denied any engagement between them. Dr. Bell was used as a state's witness. His conversation in regard to this phase of the case is as follows: "Yes, in the conversation I talked with her, and I was sorry for her, and asked her who was responsible for her condition, and she said it was Frank Jeter. Then I asked her why she allowed him to do it, and if they were engaged, and if Frank had promised to marry her, and she said that he had not promised to marry her, that they were not engaged, but that she just loved him so." This witness was one of those who testified to her bad reputation for chastity. Her condition became known in the community shortly after this examination by Dr. Bell. The father of prosecutrix testified that, when Ella informed him of her condition and the circumstances of it, he and his son and son-in-law went to 'Squire Jordan, justice of the peace, and made a complaint, and had appellant arrested for rape on his daughter. When the grand jury met, however, the indictment in this case for seduction was found. This, perhaps, is a sufficient statement of the case to bring in review the questions presented.

Harper testified for the state, among other things, to the good reputation for chastity of the prosecutrix. A bill of exceptions is signed by the court showing this condition in regard to this witness' testimony: That he would have on cross-examination testified that the general reputation of the sister of prosecutrix for chastity, with whom Ella Taylor lived and associated, was bad, and had been bad for two or three years before this trouble came up, and that witness knew of his own knowledge of her unchaste acts. This testimony was excluded. The court would not even permit counsel for appellant to make any statement as to why said testimony was material or what witness would testify. The court qualifies the bill as follows: "The sister of prosecutrix, whose reputation was inquired about, lived with her father and mother (and the testimony so showed without con-

tradiction). The prosecutrix also lived there, and the court being of the opinion that a girl of prosecutrix's age was not compelled to abandon her home, nor were the father and mother compelled to ostracize one wayward daughter, in order to avoid an aspersions upon the character of another, and therefore sustained the objection."

Another bill in regard to this same witness in substance is as follows: That Harper was the third witness for the state, and testified that he knew the general reputation of the prosecutrix for chastity, and that it was good. He was then asked by the defendant if he had a conversation with Bud Jeter, on his gallery at Elm Grove, before this trouble came up, in which he stated that the reputation of the Taylor girls for chastity, meaning Ella and her older sister, living with her in her father's family, was bad. The witness answered that he had the conversation at the time and place mentioned, and that he only stated that the reputation of the older sister of prosecutrix was bad. On motion of the district attorney, and over appellant's protest, the court withdrew the answer from the jury, and instructed them not to consider it as evidence. Counsel protested against the action of the court, and offered to submit an authority to the court in support of the admissibility of said testimony, and the court stated in the hearing of the jury that he did not care to hear from counsel on any authority on that point, to which action of the court in excluding said testimony of the witness Harper from the jury and refusing to permit defendant to attempt to show the admissibility of said evidence, the defendant then and there excepted, etc.

In regard to the first bill of exceptions, we are of opinion that it was admissible. The facts show that the older sister had a bad reputation, and that she and the prosecutrix resided at the residence of their father. It further shows that they were in the habit of going to social gatherings in the neighborhood unattended by any male friend, but on their return from these gatherings the young men would attend them home. See *Caviness v. State*, 42 Tex. Cr. R. 420, 60 S. W. 555. In the *Caviness Case* it was proposed to be shown that the prosecutrix lived at the same house and associated with her two sisters and niece, that they were women of bad reputation, and that they were delivered of illegitimate children. On objection of the state this testimony was excluded. It was offered as tending to prove the real character of the seduced female. The prosecutrix in that case was delivered of a full-developed child in February, 1900. The court said in that case: "If she was an associate of these women at the time indicated, it would be a fact tending to show her character for want of virtue and chastity." See, also, *Mrous v. State*, 81 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834. It was held in that case the evidence should

have gone to the jury. We think under this authority this testimony should have gone to the jury. The judge, rejecting the testimony, seems to have thought, because they were living in the same house and under their father's roof, that the fact that prosecutrix associated with her sister of bad reputation should not be used against prosecutrix, and he further seems to have conceived the idea that to have so ruled would have required the father to ostracize his daughter from home. We do not understand what this has to do with the admission or rejection of testimony that proves or tends to prove a legitimate fact. Of course, the father was not required to drive his children from home, even if they were shown to be absolutely abandoned. He was not required to drive prosecutrix from his home, or in any way ostracize her after her shame had been known and the child born; but there would be no question that the fact she gave birth to the child would be legitimate testimony, even though the father was not required to ostracize her. The evidence seems to be conceded—proved, at least, by the state's testimony—that the young men seldom came to the house to visit the girls, but that they would go to parties and social gatherings unattended, except in company with each other, but that young men would accompany them home. They seldom went to visit the prosecutrix at the residence of their father. This testimony was admissible.

In regard to the second bill, it is shown that evidence was introduced through the witness Harper that he had stated to Bud Jeter that the reputation of the older girl, prosecutrix's sister, was bad, limiting his statement of bad reputation alone to the older sister. The court withdrew the answer of the witness, and instructed the jury not to consider it, and for the same reason stated by the court for the rejection of the testimony in the bill above discussed. We think this testimony was properly admitted and ought not to have been withdrawn.

The witness Mrs. Lydia Norris testified that she was an aunt of the prosecutrix, and had known her all her life. She was then asked by appellant if she knew the prosecutrix's general reputation for chastity prior to the time of her connection with this case. The witness answered: "I never heard her reputation for chastity discussed before then." She was then asked by defendant if she had not stated to Lively & Stanford that morning in their office that she did know the reputation of Ella Taylor for chastity in the community in which she was living, and that for chastity it was bad, and that witness and her brother, Isaac Taylor, now deceased, had often talked about it and deplored that fact; that Ella Taylor's family had become offended at them because they had remonstrated with her about her conduct with young men. It seems that Mrs. Norris was a witness for the defendant, and was placed on the stand

to prove the bad reputation of the prosecutrix for chastity, and they alleged surprise at her answer, and they insisted that they should be permitted to refresh her memory by said conversation and explain their reason for putting the witness on the stand, and, if she insisted upon her answer as given, they should be permitted to contradict her. The court refused to permit her to answer the question. Upon another trial this testimony should be admitted, if the matter presents itself in the same way as it does in this record. Where a party is surprised by the answer of a witness, which answer is hurtful to him, and when he is led to believe by the witness that it would be favorable, under our statute he has a right to contradict even his own witness.

Exception was reserved to the court's charge, and special instructions requested, but refused. The court, in a general way, charged the jury that before they could convict they must find from the evidence that the act of intercourse occurred alone by means of a promise to marry, and then gave the following charge: "If you find the defendant had carnal knowledge of Ella Taylor, and that defendant had promised to marry said Ella Taylor, yet if you find that Ella Taylor was moved to submit her person to the carnal embrace of defendant through any other inducement than a promise to marry her made by the defendant, or if you have a reasonable doubt as to whether her consent to the carnal knowledge was given alone and in good faith relying upon a promise to marry her, you must acquit." And, further: "If you find that prosecutrix was moved to submit to carnal intercourse through lust or a desire to get defendant to continue his visits to her, and not alone on an unconditional promise to marry in good faith relied upon by prosecutrix, or if you have a reasonable doubt as to whether she was moved to consent through motives other than a promise to marry, you will acquit." Perhaps, under the facts of this case, this charge was sufficient. The requested instructions were rather an amplification of the charges above mentioned. The testimony of prosecutrix along this line is about as follows: "He said that all young folks that were engaged did that way. He told me that he would marry me if he ruined me, and that he would marry me anyway." The testimony rather indicates, from the letter written by appellant to prosecutrix and her reply, that, if there had been any engagement, it was terminated, as appellant had written her there was no use in his paying her any further attention unless she would do what he wanted. Her reply would indicate, as copied heretofore, that she also understood the condition of affairs, and informed him of the fact that she was ready to comply, and would remain with him during the night if it would take him that long to get ready.

It is shown by testimony for appellant that

prosecutrix was seen in the act of sexual intercourse with one Jack Craft, and there is testimony tending to show, also, that she was intimate with Tom Reed, and that Tom Reed was the father of her child, and that he had had intercourse with her during the month of January, 1906. If her testimony is true, and in this she is corroborated by appellant, that no act of intercourse had occurred between them after some time during the month of December, 1905, it would seem to be practically impossible for appellant to have been the father of her fully developed child born on the 17th day of October, 1906. It would be a very unusual occurrence, doubtless, for a woman to be pregnant about 10 months with her first child, or even any subsequent children, if the testimony of physicians as to the law of gestation is to be credited. Upon another trial we believe the court's charge should be perhaps a little more full at this point. The case of *Nolen v. State*, 88 S. W. 242, 13 Tex. Ct. Rep. 735, was reversed because of the failure to give the charge written practically as appellant's special charges are written. Upon another trial, however, the charges can be more directly applied to the facts.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### ANIMALS—LOCAL OPTION STOCK LAW—ELECTIONS.

Where accused was charged with permitting his hogs to run at large in a subdivision of a county alleged to have voted in force the stock law in existence in 1893, and the evidence showed that if such law was ever adopted it was in 1893, while the law making it a penal offense to permit hogs to run at large in a subdivision of the county which had voted the law in force, did not take effect until August, 1897, there was no law in effect in such county justifying defendant's conviction of an offense in permitting his hogs to run at large.

Appeal from Montgomery County Court; S. A. McCall, Judge.

Charles Johnson was convicted of unlawfully and willfully permitting his hogs to run at large in a subdivision of Montgomery county, Tex., and he appeals. Reversed and remanded.

F. McDonald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for unlawfully and willfully permitting his hogs to run at large in a subdivision in Montgomery county, Tex., which had theretofore adopted the local option stock law, and his punishment assessed at a fine of \$5.

Bill of exceptions No. 15 shows that appellant asked the court to charge the jury as follows: "The complaint and information

charges the defendant with unlawfully and willfully permitting his hogs to run at large in a subdivision of the county which is alleged to have adopted and voted said law into existence in the year A. D. 1893, and the evidence adduced on the trial of this cause shows that, if such law was ever adopted and voted into existence in said subdivision of Montgomery county, Tex., it was done in the year A. D. 1893; that the law making it a penal offense to permit hogs, sheep, and goats to run at large in a county or subdivision thereof which had adopted and voted said law into existence did not go into effect until August, A. D. 1897; and that the freeholders and qualified voters of such subdivision of the county never voted on and adopted and carried said law as it existed—that is, with a penal penalty attached thereto. Therefore there is no law to sustain a conviction of defendant in this case, and you will acquit him." This exact question was decided in favor of the accuracy of said charge in the case of *McElroy v. State*, 39 Tex. Cr. R. 529, 47 S. W. 869. It follows, therefore, that the court erred in refusing said charge.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### MURDOCK v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

#### 1. INDICTMENT—DUPLICITY.

Pen. Code 1895, art. 856, provides that, if any person by assault or violence or by putting in fear shall fraudulently take from another any property with intent to appropriate the same to his own use, he shall be punished, etc., and that when a firearm or other deadly weapon is used, the punishment shall be death or confinement, etc. An indictment charged that defendant made an assault on the person of another, and by such assault and violence and putting in fear and by using and exhibiting a pistol fraudulently took from such person the property therein described. *Held*, that the indictment was void for duplicity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 375-394.]

#### 2. JURY—WAIVER OF TRIAL BY SPECIAL VENIRE.

Where one of defendant's attorneys, some time before the trial, stated to the court that he did not wish at that time to call for a special venire, and the court stated that he should either call for the special venire then or the court would consider it waived, and that the special venire would not be ordered, there was no waiver of the right to be tried by a special venire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Jury, §§ 310-332.]

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

J. H. Murdock was convicted under Pen. Code 1895, art. 856, providing that if any person by assault or violence, or by putting in fear of life or bodily injury, shall fraudu-

lently take from the person of another any property with intent to appropriate the same to his own use, he shall be punished, etc., and he appeals. Reversed, and prosecution ordered dismissed.

Buck, Cummings, Doyle & Bouldin, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Article 856 of the Penal Code of 1895 reads as follows: "If any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or by confinement in the penitentiary for any term not less than five years." The charging part of the indictment is "that J. H. Murdock, alias Dutch Murdock, alias E. Amos, in the county of Tarrant," etc., "did unlawfully and willfully make an assault upon the person of M. T. Tierce, and then and there by said assault and by violence to the said M. T. Tierce, and by putting the said M. T. Tierce in fear of his life and bodily injury, and then and there by using and exhibiting a firearm, to wit, a pistol, did then and there fraudulently take from the person and possession and without the consent and against the will of the said M. T. Tierce \$3.95 in money, of the value of \$3.95, one watch, of the value of \$20," etc.

It is contended by proper motion that this indictment is invalid and duplicitous, in that it charges two distinct offenses in the same count. We are of opinion that the position is well taken. The statute quoted prescribes a punishment for robbery by assault or violence, or by putting in fear of life or bodily injury, by confinement in the penitentiary for life or any term of years not less than five. The same statute prescribes a punishment, where firearms or other deadly weapons are used or exhibited, by death or confinement in the penitentiary for any term of years not less than five. Under the first section of the statute the case would be bailable and noncapital. Under the second clause of the statute, the case could be nonbailable and a capital offense. So we have included in the same count, and it is the only count in the indictment, two offenses, one noncapital and the other capital. The question of duplicity and the effect of duplicitous pleading has been the subject of a great deal of discussion. In the courts much has been written and said on the question. Where the offense, as in the first part of the quoted statute, can be committed by one of the different means therein specified, it may be singly charged, or all the means may be charged conjunctively; the punishment in any event being the same.

But where the offenses are different, with different ingredients or different punishments, a different rule applies. In *Heineman's Case*, 22 Tex. App. 44, 2 S. W. 619, the question was decided. In that case appellant was charged with embezzlement. The allegations were, substantially, that Heineman was the agent of Parker and that by virtue of his agency there came into his possession a horse, a gun, of the value of \$10, and a pistol, of the value of \$10, all being the property of Parker, and that the defendant fraudulently embezzled the property. Exception was raised upon the same ground as here. The court said: "We are of opinion that the indictment is duplicitous, and that it was error to overrule the defendant's exceptions to it. 'A count in an indictment which charges two distinct offenses is bad.' Whart. Crim. Pl. & Prac. § 243; 1 Bish. Cr. Proc. § 432. By our statute embezzlement is punishable as theft. Pen. Code 1895, art. 786. Theft of a horse is punishable by confinement in the penitentiary not less than 5 nor more than 15 years. Pen. Code 1895, art. 746. Theft of property of the value of \$20 or over is punishable by confinement in the penitentiary not less than 2 nor more than 10 years. Pen. Code 1895, art. 735. It is clear that these two kinds of theft constitute separate and distinct felonies, to which are attached different penalties. They cannot, therefore, be charged in one and the same count without rendering the indictment duplicitous. An exception to this rule is in the case of burglary and theft, which may be charged in the same count. *Turner v. State*, 22 Tex. App. 42, 2 S. W. 619." In 22 Tex. App. page 441, 2 S. W. 640, is found *Hickman's Case*. The indictment in the latter case charged appellant with fraudulently taking from Warnica, who was holding the property for Kuykendall, a horse, worth \$50, a saddle, bridle, and blanket, which was the property of Warnica; that the saddle was worth at one time \$20 and the blanket and bridle \$2 each; and it further charged that all of them were taken at one and the same time and carried away by Hickman. *Hickman's* as well as *Heineman's Case* contains one count, and both charged two distinct felonies, with different penalties. The court held that, this being the case, the motion in arrest of judgment was well taken. For further collation of authorities see *White's Ann. Code Cr. Proc.* § 383. The authorities in this state all seem to sustain this proposition. If the punishment for the use of a firearm was the same as that for violence or assault or putting in fear of bodily injury or life, this exception would not be well taken, perhaps; but the statute was amended first in 1883 and again in 1895. The latter enhanced the punishment for robbery from life sentence to death penalty where firearms or other deadly weapons were used or exhibited. By this act of the Legislature we have different offenses in regard to robbery.

There is another question that would require a reversal of the judgment, to wit, the failure of the court to permit appellant to be tried by a jury selected from a special venire. There is a good deal of testimony in regard to this question, set out in the bill of exceptions, bearing upon the question of waiver; but, as we understand the matter, there was no waiver. It is clear that appellant did not waive his right to be tried by a special venire, and this is not controverted. The point of controversy arises over the fact that one of appellant's attorneys, when called upon by the court some time previous to the date of trial in regard to this matter, stated that he did not wish at that time to call for a special venire, and a statement from the court in substance, as we understand the facts, that he would either call for the special venire then or the court would consider it waived, and that the special venire would not be ordered. The court cannot waive a special venire for a party charged with a capital offense. We, however, do not care to go into a discussion of this matter further than as above stated, as it will not arise upon another trial.

Because the indictment is invalid and duplicitous, the judgment is reversed, and the prosecution is ordered dismissed.

HENDERSON, J., absent.

#### WALKER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

##### 1. INTOXICATING LIQUORS — LOCAL OPTION — ORDER.

Sayles' Ann. Civ. St. 1897, art. 3391, provides that the county court's order declaring the result of a local option election and prohibiting the sale of liquors shall be published for four successive weeks or posted, the fact of publication to be entered "by the county judge" on the minutes of a commissioners' court, and that the entry or a copy thereof, certified under the hand and seal of the clerk, shall be sufficient prima facie evidence of the fact of publication. *Held*, that so much of a certificate as recited that the election was legally held, and that a majority of the votes being for prohibition, it was declared that local option should be in effect within the county, was not a proper part thereof.

##### 2. SAME — CERTIFICATE OF JUDGE.

In a prosecution for violating the local option law, the fact that a certificate of publication of the result of the local option election, offered in evidence, erroneously declared that the election was legally held, and that, as a majority of the votes were for prohibition, it was declared that local option should be in effect in the county, was not prejudicial to defendant; such recital being a mere repetition of what had in fact been done.

##### 3. SAME — ORDER OF PUBLICATION — EXECUTION.

Under Sayles' Ann. Civ. St. 1897, art. 3391, providing that the fact of publication of an order putting local option in force in a county shall be entered by the county judge on the minutes of the commissioners' court, such entry need not be made by the county judge himself; it being sufficient that he cause the entry to be made while acting in his official capacity.

##### 4. SAME — SALES — WHAT CONSTITUTES.

Where one receives whisky by express C. O. D., and takes money from a third person, delivering to him certain portions of the whisky for the money previously advanced, such facts constitute a sale of the whisky in violation of the local option law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 159-162.]

##### 5. SAME — INTENT.

Where defendant's acts constituted a sale of whisky in violation of the local option law, the court properly refused to charge that if defendant let prosecutor have the whisky as alleged, but in doing so did not intend to sell it, or if the jury had a reasonable doubt as to whether he intended to sell the whisky, he must be acquitted, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 161, 335.]

Appeal from Upshur County Court; Albert Maberry, Judge.

Jeff Walker was convicted of violating the local option law, and he appeals. Affirmed.

Warren & Briggs, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

Appellant's first ground of the motion for a new trial complains that the court erred in failing to quash the indictment. The indictment is in the usual form, as has been held on various occasions by this court.

The sixth ground of the motion complains that the court erred in permitting to be introduced the certificate of the county judge to the effect that the order declaring the result of the election had been published, first, because there is no allegation in the indictment to authorize such evidence; second, the county judge did not enter said certificate on the minutes of the commissioners' court, but that said certificate was made out by the county judge, which was filed by the county clerk, and by him recorded in the minutes of the commissioners' court; third, because the certificate of the county judge does not show that the order declaring the result of the election was published by the county judge of Upshur county, or by his order; fourth, because the certificate shows the commissioners' court published the result; fifth, because the certificate certifies that the election was legally held, and that the order declaring the result of the election was made by the commissioners' court, and that local option is in effect, all of which is unauthorized by law and is prejudicial to the defendant. The order in question is as follows:

"I, M. B. Briggs, county judge of Upshur county, Texas, do hereby certify that on the 29th day of August, A. D. 1903, an election in accordance with the laws of the state of Texas was held under and by virtue of an order of the commissioners' court of Upshur county, Texas, heretofore duly made and published, to determine whether or not the sale of intoxicating liquors shall be prohibited.



within the limits of Upshur county, Texas; and thereupon the commissioners' court of Upshur county, Texas, on September 9, 1903, did pass and publish an order declaring the result of said election prohibiting the sale of intoxicating liquors within the limits of said Upshur county, Texas, and thereafter, to wit, the 11th, 18th, and 25th days of September, A. D. 1903, and the 2d and 9th days of October, 1903, said order was duly published in the Searchlight, a newspaper of general circulation, published in Gilmer, Upshur county, Texas, said order having been duly published as required by law and in conformity therewith, said election was legally held in Upshur county, and, a majority of the votes being for prohibition, it was declared that local option should be in effect in said Upshur county, Texas, and thereafter the sale of intoxicating liquors shall be prohibited in said Upshur county, Texas. Therefore, in accordance with said order, I declare prohibition in full force and effect in Upshur county, Texas, after October 10, 1903. To all of which witness my official signature this the 10th day of October, 1903. M. B. Briggs, County Judge, Upshur County, Texas.

"Filed this October 10, A. D. 1903, at 10 o'clock a. m. J. W. Wall, County clerk, Upshur County, Tex."

Article 3391 of Sayles' Ann. Civ. St. 1897, authorizing the above certificate, reads as follows: "The order of court declaring the result and prohibiting the sale of such liquors shall be published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there is no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time. The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court. And entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court shall be held sufficient prima facie evidence of such fact of publication." The order is merely evidence of the fact of publication for the time required by law, and, therefore, any other statements by the county judge in a certificate would not be admissible as evidence and ought not to be contained in the certificate. Therefore that portion of the certificate which certifies that "the election was legally held, and, a majority of the votes being for prohibition, it was declared that local option shall be in effect in said Upshur county, Texas," ought not to have been placed in said certificate; but, in the light of this record, this was merely a bare repetition of what had been done, and could not have injured appellant.

The only other question we deem necessary to review is whether or not the county judge

could write out the certificate, or dictate same and have the clerk copy the same upon the minutes of the commissioners' court. We hold that he could. The mere fact that the clerk did the manual labor of transcribing the order upon the minutes either from the copy furnished by the county judge, or wrote the order upon the minutes under dictation of the county judge, there being no question or cavil over the fact that the county judge was directing the entry of the certificate, would not vitiate the certificate. There could be no merit in the insistence that the county judge should, with his own hand, write the certificate upon the minutes, unless the merit lay in the fact that everybody knew the handwriting of the county judge. The pith and point of the whole matter lies in the fact that in the official capacity the certificate is entered or caused to be entered by the man who is acting county judge at the time it is necessary to make the certificate. We have held that any county judge can make the certificate, whether he be the one that presided over the commissioners' court at the time the election was held or not. See *Crockett v. State*, 40 Tex. Cr. R. 173, 49 S. W. 392. If any county judge can enter the order, as held in the above-cited case, then certainly there is no merit in the contention that the county judge has to enter the order with his own hand. We accordingly hold that the certificate was sufficient.

Appellant requested the court to give the following charge: "I charge you that there can be no crime without a criminal intent, and in this case, if you should find that the defendant let the witness Ed Hitt have the whisky as alleged, if he did so, but that in doing so he did not intend to sell the whisky, then you must acquit the defendant, or, if you have a reasonable doubt as to whether he intended to sell the whisky, you must acquit." Appellant also requested the following charge: "If you should find that the defendant ordered one gallon of whisky to be sent to him at Bettie, Texas, C. O. D., and that he ordered same in good faith for medical purposes only, and shall further find that thereafter and before said whisky was delivered the witness Ed Hitt offered to go in with him and take one quart of the whisky, to which the defendant agreed, and said Hitt gave him \$1. being one-quarter of the price of said gallon of whisky, and that the defendant took said whisky from the express office, and Ed Hitt took one quart of same, and shall further find that the defendant did not intend to sell to said Hitt said quart of whisky, and did not believe that said facts constitute a sale, then you must acquit him." Neither of these charges are correct in this case, and the court did not err in refusing same. We have frequently held that where one receives whisky by express C. O. D., and takes money from a third party, delivering said third party certain portions of the whisky for the money theretofore advanced, these

facts constitute a sale of whisky in violation of the local option law. See *Treadaway v. State*, 42 Tex. Cr. R. 466, 62 S. W. 574, 2 Tex. Ct. Rep. 415, *Ashley v. State*, 46 Tex. Cr. R. 471, 80 S. W. 1015, and *Hillard v. State*, 87 S. W. 821, 13 Tex. Ct. Rep. 520.

This, we think, disposes of all appellant's contentions that we deem necessary to review. There was no error in the court giving the additional charge complained of, since the same presents the converse of the proposition contained in the last above cited special charges.

Finding no error in the record, the judgment is affirmed.

HENDERSON, J., absent.

#### DODSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

#### CRIMINAL LAW—CONDUCT OF TRIAL—RESTRAINT OF ACCUSED'S WITNESS.

One W., arrested with accused on a charge of robbery, was discharged by a justice of the peace for want of evidence, and subsequently two grand juries refused to indict him, though one of them indicted accused. Upon the trial of accused W. was brought under process from another county, where he lived, as a witness for accused, whereupon he was again arrested on a second complaint for the same offense. On accused insisting that he was virtually deprived of W.'s testimony, the court entered an order releasing W. from the complaint on condition that he would testify to the truth; but he was kept practically under arrest until the conclusion of the trial. *Held*, that accused was entitled to the testimony of the witness, uninfluenced by the fear of subsequent arrest for the offense, and his arrest and custody deprived accused of a fair trial.

Appeal from District Court, Williamson County; Victor L. Brooks, Judge.

Sam Dodson was convicted of robbery, and appeals. Reversed and remanded.

H. N. Graves, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. A history of the case in substance is that in the early part of December, 1906, a Mexican was alleged to have been robbed at the railroad station known as Coupland, in Williamson county. Appellant and Sylvester Webster were arrested, charged with the robbery, and had an examining trial before the justice of the peace in the town of Taylor in said county. The Mexican testified before the justice of the peace; his testimony being somewhat different from that given by him on the final trial of appellant. The justice of the peace, after hearing the facts, held appellant to bail, discharging Webster. The grand jury met for the following January term of the district court of Williamson county, and on or about the 15th of that month returned a bill of indictment against appellant for the alleged robbery, refusing to indict Webster. At the July term, 1907, the appellant's case

came up for trial. Webster was brought from De Witt county, where he lived and was raised, under process, as a witness for appellant, reaching Georgetown, where the court was in session, on the morning of July 22d about 3 or 4 o'clock. By 11 o'clock of the same morning he had been arrested on a complaint charging him with the same robbery. When the case was called for trial, Webster and the appellant were brought from jail, and it was insisted by appellant that he was virtually deprived of the testimony of Webster. The court then entered an order releasing Webster from the complaint charged, on condition that he would in the case swear the truth, or give his testimony truthfully. This order was entered of record. This occurred on the 23d, the day upon which appellant was placed upon trial. As we gather from the facts, the witness Webster was seated in the courtroom by the side of appellant and kept practically under arrest during the trial. During the trial another charge was filed against Webster, charging him with the same robbery, and, as soon as the jury was retired to consider their verdict in appellant's case, Webster was retained in custody, but the warrant not served upon him until the verdict had been returned into court, though the sheriff, in fact, did hold him under arrest.

There is a line of cases construing our statute, which authorizes the state, with the permission of the trial judge, to make a trade or contract with a party who is jointly held with the party on trial to use his testimony against the party on trial, and thus exonerate from further prosecution the party so testifying. *Camron v. State*, 32 Tex. Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763. The *Camron* Case has been followed in subsequent cases as being correct. It has not been called to our attention, if it has been held, that a case could be dismissed against a party where he testified for the defendant. In fact, the statute says parties held for the same transaction shall not testify for each other. We are not aware of any authority in the district judge to render immune from punishment a party testifying for a codefendant. Any ruling of the court in this respect would have no force or legal efficacy. Now, recurring to the condition of the case at the time of the trial, we find that Webster had been arrested as a principal with appellant in the robbery. The justice of the peace examined into the case and discharged him for want of testimony, and two grand juries had refused to indict, although one did indict appellant on the same facts. As soon as Webster was brought to the court as a witness for appellant, he was at once arrested on a second complaint. This arrest did not come within the law of severance, for it would necessarily work a continuance of appellant's case if a severance occurred, because, being a felony, he could not be tried, except upon an indict-

ment, and no indictment could be returned until January, 1908, the grand jury for the July term of the district court having been discharged. These occurrences placed appellant in the attitude of having his witness arrested after he had been once discharged, and an indictment twice ignored by the grand jury, and, the court not being able to grant a severance, appellant had been deprived of the testimony of his witness. Wherever, to avoid the law of severance, the state should dismiss a case against a codefendant, with a guaranty of immunity or further prosecution, the party on trial is entitled to the testimony of the witness uninfluenced by the fear of subsequent arrest for that offense. Without going into an elaboration of this idea, we are of opinion that legal fairness should mark all this character of proceedings; but in this instance the state had so managed the arrest of Webster that the law of severance could not obtain, and it was sought to render Webster immune only during appellant's trial. In the first place, this character of proceedings ought not to be indulged under the circumstances of this case. In the second place, Webster ought not to have been arrested: but, if he was, then it should have been so done as not to deprive appellant of a fair trial. In *Doughty's Case*, 18 Tex. Cr. App. 179, 51 Am. Rep. 303, a somewhat analogous question came before the court. In that case Burt and Horn had been arrested under a charge of murder in El Paso. On a writ of habeas corpus proceeding they were discharged. Doughty was subsequently indicted by the grand jury. Burt and Horn were not. The case went on change of venue to Presidio county. In the meantime Burt and Horn had left the state, and their depositions had been taken in appellant's behalf, and an agreement was made between the state and appellant in writing that their depositions could be used, which was filed among the papers of the case on the 22d day of April. On the 25th of the same month the grand jury of El Paso county presented separate indictments against Burt and Horn, charging them with the same murder with which Doughty was charged. When the case was brought to trial in Presidio county against Doughty, the indictments against Burt and Horn were interposed as a bar to the use of their depositions. The trial court permitted this procedure, and this court reversed the judgment. While the *Doughty Case* is not directly in point, the reasoning, in our judgment, is. Among other things, the court said in *Doughty's Case* that the disqualification urged against the admissibility of the depositions of Burt and Horn was by reason of the act of the prosecution, and the circumstances of the case showed prima facie, in the judgment of the court, that Burt and Horn were not indicted in good faith, but solely for the purpose of depriving defendant of their testimony. Here, as be-

fore stated, upon a trial the witness Webster had been discharged from custody. One grand jury had refused to indict on the same testimony upon which they indicted appellant and the same testimony on which the examining court discharged him. Another grand jury had failed to indict, and when the witness was brought to court to testify in behalf of defendant the complaint was filed, and it would seem for the purpose of preventing him from testifying. When this case was called to the attention of the court, he granted him immunity on condition that he would tell the truth, and Webster kept practically under arrest until the conclusion of the trial, and then incarcerated on another complaint filed while appellant's trial was in vogue. Under our law we do not believe this character of proceeding is justified.

There is another complaint with reference to bringing defendant into court in irons and situating him for some hours in the courtroom in this manner. Upon another trial this will not occur.

For the reasons indicated, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

#### HALL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

##### 1. BURGLARY—ACCOMPLICE—EVIDENCE—SUFFICIENCY.

Evidence held not to sustain a conviction as an accomplice to a burglary.

##### 2. CRIMINAL LAW—ACCOMPLICE—EVIDENCE.

Where one is charged as an accomplice to a crime, to justify a conviction, it must be shown that he advised and agreed, or urged the parties, or in some way aided them, to commit the crime, that he was not present when the offense was committed, and that the principals committed the crime.

##### 3. SAME—TESTIMONY OF ACCOMPLICE—CORROBORATION.

In a prosecution for being an accomplice to a crime, where the state relies upon the testimony of accomplices, their testimony must be corroborated, not only as to the fact that the principal offense was committed, but as to the fact that the accused brought himself within the statute by his advice or assistance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1124.]

##### 4. SAME—SUFFICIENCY.

The fact that a burglary is committed does not corroborate the alleged burglar's testimony that one accused of being an accomplice advised the commission of the offense, or that he was in any way connected with it; nor is it sufficient proof, as against the accused, that the alleged burglar committed the burglary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1128; vol. 8, Burglary, § 103.]

##### 5. SAME—NEW TRIAL—MISCONDUCT OF JURY.

On a motion for a new trial of one charged as an accomplice to a burglary, which resulted in the stealing of certain liquor, the affidavits of two of the jurors stated that the jury, after retiring, discussed the probability that the ac-

cused was engaged in the illegal sale of liquor, and his general reputation as a violator of the local option law, and the fact that his wife failed to testify in his behalf during the trial; also that one of the jurors stated that when he first knew accused he was engaged as a bartender at a certain saloon. *Held*, that the showing warranted a new trial.

Appeal from District Court, Haskell County; Cullen O. Higgins, Judge.

Gene Hall was convicted as an accomplice to a burglary, and appeals. Reversed and remanded.

W. H. Murchison, Jas. A. Stephens, and J. H. Milam, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was prosecuted under an indictment charging him as an accomplice to the burglary of the depot of the Orient Railway Company at the little village of Carney. Two errors are urged: First, the insufficiency of the evidence; second, the misconduct of the jury.

Appellant was not charged as a principal, but as an accomplice, advising, etc., those who should have burglarized the depot. The theory of the state, which is supported by the evidence, is that the burglary was committed for the purpose of stealing whisky which had been shipped in over the railroad by the express company consigned to different parties at Carney. Local option was in vogue in this particular section. Some of the whisky was consigned to Gene Hall (appellant), and some to other parties. The two witnesses for the state, Hub Speck and Claud Hindes, testified that they entered this house and took out some whisky. One of them does not mention the amount, and the other states 31 quarts. The depot agent, who is also the express agent, testified that he knew 35 quarts were taken, and perhaps more. These two confessed burglars turned state's evidence, and testified, among other things, they had been drinking that night, had gone to prayer meeting, taking some girls, returned from the meeting, and got in a buggy; that they had about a pint of whisky, and it was nearly exhausted, and wanted more (these were boys, about 17 or 18 years of age); that in search of whisky they went to appellant's house, and he was absent; that they drove away hunting appellant. Going down a street some distance away they met appellant, and said something about desiring whisky. He informed them that he did not have any, or very little. They then offered him a drink out of what they had remaining in their bottle. One testified that he declined to drink; the other that he accepted and did drink. Appellant mentioned to them the fact that he had some whisky in the depot. After discussing the matter a little while they say that it was agreed they would break into the depot and get the whisky; that they went to appellant's house, got his axe, went to the depot, prized up a window, went in, got some whisky, and carried it to appellant's house;

that it was put away there in the upper part of his house; that they drank until young Speck became very drunk, and the other boy not so drunk. They got in their buggy and drove around, finally going to Hindes' house, where they went to bed. From the evidence they had no further connection with the whisky and did not state further what became of it. They never received any more of it. They further state that the whisky they brought to appellant's house was put up over the ceiling. A Bohemian, Maturo by name, testified that he was at appellant's house subsequent to this transaction, and appellant asked him to take a drink; that he accepted; that appellant got a bottle from over the ceiling from which they drank. The burglary matter was mentioned. Maturo said something about the whisky being taken, or the amount of it, and appellant remarked that it was 31 quarts. On another occasion, after appellant had been indicted, arrested, and had given bond, he made a statement to Hub Speck that he (Hub Speck) had handed him a package, and that he had some trouble in giving the second bond. Appellant proved an alibi to the effect that he was in Knox county, at another town, on the night of the burglary, until 12 or 12:30 o'clock, which was some hours after the burglary should have occurred. Appellant also introduced evidence to the effect that one of the witnesses, Hub Speck, had denied appellant's participation in the matter in any way. This perhaps is a sufficient statement in regard to the sufficiency of the evidence.

We are of opinion that appellant's contention is correct; that the testimony does not sustain the conviction. Where a party is charged as an accomplice to a crime, there are several things that must concur in order to justify a conviction: First, that he advised and agreed, or urged the parties, or in some way aided them, to commit the offense; second, that he was not present when the offense was committed; third, that the principals committed the crime. In other words, it is in the nature of a compound offense: First, he must have done those things denounced by the statute in bringing about a subsequent offense; and, second, that that offense must be consummated. It is not a violation of the law with reference to the conviction of accomplices that he simply furnished the means, advised, or aided. There would be no offense, unless the offense in contemplation was subsequently committed. Therefore, whenever the state relies upon the testimony of an accomplice, the testimony must not only be corroborated as to the fact that the offense was committed, but must be corroborated with equal cogency that the party accused as an accomplice brought himself within the purview of the statute in his advice or assistance. So far as we have been able to ascertain, the cogency of the evidence with reference to the fact that appellant had advised or encouraged or aided or

furnished the means by which Hub Speck and Claud Hindes committed the burglary is found alone in their testimony, wherein, in a general way, it is made to appear that he encouraged them to commit the burglary and they used his axe, with his consent or advice, for the purpose of entering the house. If there is a fact or circumstance outside of their testimony in regard to appellant encouraging them in any way to commit this offense, before it was committed, we have failed to find it. The fact that the burglary was committed is not corroboration of the accomplices that appellant advised them to commit it. It is not a corroboration of them that appellant was in any way connected with it. It is not sufficient proof that they burglarized the house, when used against appellant. It is shown that whisky was taken from the depot; but, outside of their testimony, there is no fact that shows that these boys entered the house. Nobody ever identified the whisky in appellant's possession, and, if they had, this would be a very slight circumstance, if in fact a corroboration at all, as to prior advice.

But, be that as it may, appellant is shown to have gone to the depot the morning after the burglary, and receipted for some whisky, and took it home. This is testified by the depot and express agent. It is shown that he put this whisky over his ceiling. There were 12 quarts of this, and his (appellant's) statement to the witness Maturo was that he had gotten this whisky with which he treated Maturo all right, and the depot agent testifies that he had receipted for it and taken it out of the express office the day after the burglary. This was before he treated Maturo. It is shown that some of the whisky stolen from the depot on the night of the burglary was consigned to appellant. Even if appellant had been charged as a principal in the case, we do not believe there would have been sufficient corroboration here shown to have connected him with it in that capacity. Then, to restate, in order to convict appellant in this case, the accomplices must be corroborated, first, as to the fact that appellant advised them to commit the burglary, and, second, that he was connected with the burglary they perpetrated by reason of that advice, etc.; otherwise, the state has failed. It may be stated that one of the witnesses, Speck, stated he was testifying for the state because of a quickened conscience; that it troubled him very much that he broke into the house and took the whisky. This is sometimes the logic of the party who turns state's evidence. The other witness, Hindes, states that he would swear as he did swear against appellant, whether it was true or false, in order to save himself from the punishment for burglary. The mission of appellant at the railroad station in Knox county was shown to have been to dispose of some cotton,

and, further, to make arrangement with the witness to ship him some organs or pianos, or both, the witness being a seller of those articles, and that he parted company with appellant about 12 or 12:30 o'clock at night in Knox county, which was three or four miles from the scene of the alleged burglary. The burglary occurred some hours prior to 12 o'clock. We therefore are of opinion the evidence is not sufficient.

The other ground, to wit, the misconduct of the jury, we think equally tenable. The affidavit of two of the jurors was taken, to wit, Gardner and Ellis. Gardner states that after they had retired to consider of the verdict they discussed the probability that appellant was engaged at the time of the commission of the supposed crime in the sale of whisky at Carney in violation of the local option law from the amount of whisky that was consigned to him at the express office, and further, it was said in the presence of the jury that appellant, when the speaker first knew him, was engaged as a bartender at the Lone Wolf saloon, which was a saloon out in the country one mile from Stamford, but in Haskell county. It is stated in the motion for a new trial that this saloon had a very bad reputation. Ellis was foreman of the jury, and he states that after they had retired to consider of their verdict, and before it was returned into court, that the general reputation of defendant as a violator of the local option law was freely discussed during their deliberations, and it was further discussed that the defendant's wife failed to testify in his behalf during the trial. It would hardly need authority at this late day in this state to show that this conduct required a new trial in the court below, and, in the absence of such action there, a reversal here. It would hardly be contended that appellant's general reputation as a violator of the local option law, or that he run or was bartender of a saloon heretofore, would be evidence before that jury on a charge that he was an accomplice to a burglary; much less would the jury be authorized to discuss this in their retirement. Even if it had been admissible evidence, it was not admitted, and therefore it could not be discussed by the jury. We were of the impression that the Constitution guarantees an accused party the right to be confronted with the witnesses against him and that the testimony be detailed before a jury upon which a verdict is to be predicated. These matters were discussed in the jury room, in the absence of the defendant, with no opportunity to meet them, and without even any knowledge of the fact that such matters were being pressed or discussed.

Upon both grounds, this judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

## WARREN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

## 1. LARCENY—PROSECUTION — INSTRUCTIONS — CONFUSING INSTRUCTIONS.

In a prosecution for larceny in the original taking of certain cattle, it appeared that C. was authorized to take up certain stray cattle and put them in his mother's pasture, and that accused assisted C. in driving them to a different pasture; but accused testified that he did not know they were being stolen, that C. told him he thought they were cattle he was looking for, and that he was authorized to handle them. The court instructed that, while a necessary element of theft is a want of the consent of the owner of the property to its taking, yet the fact that the owner may have requested one to take the property for a certain purpose, if at the very time it is taken the person does so with the fraudulent intent at the very time of taking to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking the same, then such taking would be without the consent of the owner; but, whatever may have been the intent of C. in taking the cattle, if he did take them, still the jury must acquit defendant unless they were taken under such facts as constitute theft and defendant knew these facts when they were taken. *Held*, that the instruction was confusing and contradictory in terms.

## 2. SAME—FAILURE TO CHARGE WHOLE LAW.

The instruction was erroneous, as failing to charge the whole law, in that it failed to charge that, if the original taking was innocent, no subsequent appropriation could convert the innocent taking into theft.

## 3. SAME—TAKING—INTENT IN TAKING.

Whenever property comes into the possession of a party by lawful means, no subsequent appropriation of it can be theft, under an indictment for larceny in the original taking, and in order to convict the state must prove beyond a reasonable doubt that the original taking by accused was fraudulent; hence, in a prosecution for larceny in the original taking of certain cattle, where it appeared that C. had been authorized to take up the cattle, which had strayed, and put them in his mother's pasture, and that C. informed accused that he had a right to handle the cattle, and that accused assisted C. in driving them elsewhere, if accused believed that C. had the right to handle the cattle, or if C. did have the right to handle them and accused believed that C. had such a right, or if C. had taken up the cattle with the original intention of placing them in his mother's pasture, then accused would not be guilty, even if he subsequently had reason to believe that C. was committing theft by conversion after taking them up.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Walter Warren was convicted of larceny, and appeals. Reversed and remanded.

See 105 S. W. 817.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for cattle theft.

James Volentine, the alleged owner, testified to want of consent, ownership, etc. Among other things he testified that his son Doc was helping him attend to these cattle and assisted him in attending to everything, and to that extent was in charge of

the cattle by his consent and authority. He further shows that his son was not in charge of them to dispose of, but testified to facts sufficiently strong to show that he recognized the acts of his son in reference to them. Among other things, he testified that if any of them were gone, and he wanted somebody to help get them up, Doc had authority to employ some one; that if any of them were gone, and anybody helped get them, he always made it a rule to pay him for it. Doc Volentine testified that he knew Will Clark, and also Walter Warren, and knew the cattle described by the witnesses in the case, running on Smothers creek, and described the cattle; and the evidence shows that these are the cattle that appellant is charged with stealing. His testimony in this respect is as follows: "I never authorized Will Clark, or defendant, to handle the cattle or drive them off. Papa had some cattle out down there, and I found part of them. They were in Will Clark's mother's pasture, and I told him to look out for the balance of them, and, if he found them, to put them in his mother's pasture until I got them, and I would pay him for it." He also testified that he did not authorize Will Clark to sell or to do anything with these cattle, except place them in the pasture. He further stated: "Yes; I told Will Clark to look out for them, and to take them up and put them in his mother's pasture." These cattle were identified by these witnesses and others as being the identical cattle alleged in the indictment. Appellant testified that in the summer of 1906 he was at Will Clark's house, and left there with him in the direction of Waelder. En route, on Smothers creek they found some cattle, the other side of Will Clark's house. A portion of his testimony is as follows: "We were riding along, and saw some cattle, passed them a little, and Will Clark said: 'Hold on a little! I think there are some cattle I am looking out for, and we will take them along if you have some place you can put them.' I told him I thought I did, and we took them on up with us and put them in the J. R. Davis pasture." On cross-examination by the state, he said: "We were going on up, and struck these cattle. I did not state anything to him before we met these cattle. He said there was some cattle he believed he was looking out for and was authorized to handle. I did not know that he was stealing them." This much of the testimony is related, because it bears upon an alleged error in the charge.

The court charged as follows: "You are further instructed that, while a necessary element in the crime of theft is the want of the consent of the owner of the property to its taking, yet, notwithstanding the fact that the owner or his agent may have requested a party to take the property for a certain purpose, if the property is taken by such party, and at the very time it is taken the person does so, not for the purpose of dis-

posing of it as directed by the owner or his agent, but with the fraudulent intent at the very time of the taking to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking the same, then such taking would be without the consent of the owner; but, whatever may have been the intent of Clark in taking the cattle (if he did take them), still you must acquit the defendant, unless you find from the evidence that they were taken under such facts as constitute theft, and that the defendant knew these facts when they were taken." This charge is criticised by appellant, and a new trial sought in the court below, and in addition a bill of exceptions was reserved, on the ground that the court failed to charge that, if the original taking of the property was innocent, no subsequent appropriation would convert an innocent taking into theft. The court says, in qualifying this bill, that the only ground urged at the time the exception was taken was that the court failed to charge the law of the case. One of the grounds of the motion for a new trial is as follows: "The court failed to charge the jury the whole law of the case, in this: That it failed to charge the jury that, if the original taking of the cattle was innocent so far as defendant was concerned, no subsequent appropriation of them by the defendant would convert an innocent taking into theft." There was a further criticism of this charge in the motion for a new trial as being confusing and contradictory in terms.

We are of opinion that this criticism is correct. The state's witnesses Volentine, father and son, testified as to the authority given Clark to take up and handle these cattle for a certain purpose. Appellant was with Clark, and assisted him in taking them up. Clark informed him at the time that he had the authority to handle these cattle. Under this state of case, if appellant believed that Clark had the right to handle the cattle, or if in fact Clark did have the right to handle the cattle, and did handle them, and appellant only assisted Clark in handling them, he would not be guilty of theft, if such was his belief at the time of the taking. If he believed that Clark had the right to handle the cattle, but subsequently had reason to believe that Clark was committing a theft of the cattle by a conversion after taking them up, he would not be guilty under this indictment. Wherever the property comes into the possession of a party by lawful means, no subsequent appropriation of it can be theft, under an indictment such as is contained in this record. It will be noted that the indictment does not charge a lawful possession with subsequent fraudulent appropriation. The charge is theft, committed in the original taking. The testimony as to the authority of Clark to handle the cattle and to place them in his mother's pasture is proved by the state. Clark did not inform appellant of the fact of his limited authority, but presented it in general.

If Clark had taken up the cattle with the original intention of placing them in his mother's pasture, then neither he nor appellant would be guilty under this indictment. In order to secure appellant's conviction, the state must prove beyond a reasonable doubt that the original taking on the part of appellant was fraudulent. We are therefore of opinion that the criticism of the charge, under the facts, is correct.

The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

## MORRIS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

### 1. FORGERY—UTTERING FORGED INSTRUMENT—TRIAL—INSTRUCTIONS—CONFUSING INSTRUCTION.

On a trial of accused for attempting to pass a forged check to W., where the evidence showed that accused entered a store to make a purchase and dealt with F., to whom he passed the check, and that F. took it to W., whose business it was to O. K. checks, a charge that, if the jury should find beyond a reasonable doubt that the instrument was attempted to be passed to W., the state must establish beyond a reasonable doubt that the instrument was passed to W., and if they should find that accused attempted to pass it to both F. and W. it would make no difference to which it was first offered, provided it was in fact attempted to be passed to W., and if they should have a reasonable doubt as to whether the instrument was attempted to be passed to W. they should acquit, was erroneous, because confusing, as it authorized a conviction if accused attempted to pass the check upon either W. or F., and an acquittal if there was a doubt as to whether he undertook to pass it to W.

### 2. SAME—PROSECUTION—VARIANCE BETWEEN ALLEGATION AND PROOF.

In a prosecution for attempting to pass a forged instrument, an allegation that accused passed a false check to one W. is not sustained by proof that he passed it to one F., who delivered it to W.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 92-95.]

Appeal from District Court, Jefferson County; E. A. McDowell, Special Judge.

C. A. Morris was convicted of attempting to pass a forged instrument, and appeals. Reversed and remanded.

T. B. Ridgell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for attempting to pass a forged instrument to one Webber. The evidence shows it was passed to Fisher. Webber and Fisher were both employed in the same business, one as sort of head clerk and the other as a salesman. Appellant went into the house to make a purchase, and dealt with Fisher. He passed the check to Fisher, who was working downstairs. Fisher took it up to Webber, whose business, it seems, was to O. K. checks presented to their house.

The court charged the jury "that, if they should find beyond a reasonable doubt that the instrument was attempted to be passed to Frank Webber, that it was incumbent upon the state to establish beyond a reasonable doubt that said instrument was passed to Webber, and if they should find from the evidence that appellant attempted to pass it to Fisher and also to Webber, it would make no difference to which of said witnesses it was first offered, provided it was in fact attempted to be passed to Webber, and if you should have a reasonable doubt as to whether the said instrument was attempted to be passed to Webber they should give appellant the benefit of the doubt and acquit." Appellant requested the court to charge the jury that inasmuch as the attempt was made to pass it to Webber, and the testimony shows that if the defendant attempted to pass the instrument at all it was on a different person, and not on the person alleged, and for said reason they would not consider the second count. We believe that this charge should have been given, and that the court's charge as given was confusing, and authorized the jury to convict if he undertook to pass it upon either Webber or Fisher, but if there was a doubt as to whether he undertook to pass it to Webber they should acquit. The evidence shows that he did not undertake to pass the check to Webber, but did to Fisher, and Fisher, after receiving it, carried it upstairs and delivered it to Webber. Under the authority of *Huntly v. State* (Tex. Cr. App.) 34 S. W. 923, this judgment must be reversed. The proof did not sustain the allegation, for the state's case is that appellant passed the instrument to Fisher, and Webber was not known, as far as appellant is concerned, in the matter until after Fisher had given it to Webber.

The judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

#### GORMAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. INTOXICATING LIQUORS—LOCAL OPTION—PUBLICATION—EVIDENCE OTHER THAN ENTRY OF JUDGE—COMPETENCY.

Sayles' Ann. Civ. St. 1897, art. 3391, providing that the fact of publication of the order of the county court declaring the result of a local option election, etc., shall be entered by the county judge on the minutes of the commissioners' court, and that the entry so made, or a certified copy thereof, shall be sufficient prima facie evidence of the fact of publication, does not prevent the fact of publication from being otherwise established; and hence evidence independent of the entry may be introduced, and, whether prima facie or not, it is sufficient, if it proves the fact of publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 44.]

#### 2. CRIMINAL LAW—EVIDENCE—OTHER TRANSACTIONS—RUNNING "BLIND TIGER."

In a prosecution for keeping a "blind tiger" and selling whisky by that means, evidence of sales other than that charged, made in a similar manner, is admissible to show the manner of sale and the fact that accused was running or keeping a "blind tiger."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822, 833, 834; vol. 29, Intoxicating Liquors, § 286.]

#### 3. SAME—HEARSAY.

In a prosecution for selling whisky in a "blind tiger" evidence that witnesses understood, had heard, or been informed that whisky could be bought at certain public places in the town, or at accused's place, is hearsay and inadmissible.

#### 4. SAME—DOCUMENTARY EVIDENCE—BOOK ENTRIES—SLIPS MADE BY EXPRESSMEN.

In a prosecution for selling whisky in a "blind tiger," though the state might show, as circumstantial evidence, by an express agent, or by other proper evidence, that accused received shipments of whisky directed to him, the fact that liquor had been shipped to accused could not be shown by slips of paper which the express agent said he took from the books.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1023.]

#### 5. INTOXICATING LIQUORS—SALE—CRIMINAL PROSECUTION—INTERNAL REVENUE—LICENSE—PRIMA FACIE EVIDENCE—STATUTORY PROVISIONS.

Under Laws 28th Leg. p. 57, c. 40, § 407a, providing that an examined copy of the entries on books of the internal revenue collector, showing that the United States internal revenue license has been issued to the person charged with violating the act, should be admissible, and prima facie evidence that the person paying the tax was engaged in selling intoxicating liquors, the fact that an accused had such a license would not be proof that he was guilty of the particular sale or offense charged, though it would be proof that he was engaged in the business mentioned in the license.

Appeal from Upshur County Court; Albert Maberry, Judge.

Clyde Gorman was convicted of selling whisky in a "blind tiger," and appeals. Reversed and remanded.

See 105 S. W. 200.

J. P. Hart and M. B. Briggs, for appellant.  
F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling whisky in a "blind tiger," alleged to have been conducted by himself.

It is contended that the entry on the minutes of the court of a certificate of the county judge was not in fact entered by said judge, but by the county clerk, and that the law required that it should be the personal act of the county judge and could not be performed by another. Article 3391, Sayles' Ann. Civ. St. 1897, uses this language: "The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court; and entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court, shall be held sufficient prima facie evidence of such fact of publication." If it is sought to use this entry upon the minutes of the court in order to constitute prima



face evidence of the fact of publication, perhaps, it would be necessary that the county judge should make the entry, as the language seems to be rather strong and of mandatory nature. In this particular case it seems that the county judge had written out the order and the county clerk had copied it into the minutes at the suggestion or order of the county judge. This, perhaps, would be sufficient. If the judge has not in person made the entry, or there has been no entry at all, still evidence can be introduced of the publication, independent of the entry. It might not constitute prima facie evidence of the fact of publication; but it would be sufficient evidence, whether prima facie or not, if it were proved otherwise. Such has been the rule since the Ezzell Case, 29 Tex. Cr. App. 521, 16 S. W. 782. The facts show the county judge handed a copy of the order putting local option into effect to the clerk to be entered by him, and it was entered as shown by the evidence. This, with the other proof in this connection, we hold is sufficient to show that the publication was made as a necessary step to local option going into effect. And we further hold that it was a sufficient predicate for the court, under the facts of this case, there being no question of the fact that the law had gone into effect, to instruct the jury that local option was in effect in Upshur county.

It is contended that the proof of another sale or another transaction was inadmissible; that is, a transaction showing a sale in a similar way to that charged in the indictment. We believe in this case this testimony was admissible. Appellant was charged with keeping a "blind tiger" and selling whisky by this means, and the evidence of other sales was admissible to show the manner of sale and that he was in fact running or keeping a "blind tiger." The state sought to establish this by circumstantial evidence, and it was competent to introduce similar sales to show the method. See *Hollar v. State*, 73 S. W. 961, 7 Tex. Ct. Rep. 552; *Roach v. State*, 84 S. W. 586, 11 Tex. Ct. Rep. 985; *Stovall v. State* (Tex. Cr. App.) 97 S. W. 92. It was not competent to prove by witnesses that they understood, had heard, or been informed that whisky could be bought at public urinals in the town of Big Sandy, or at appellant's urinal. This was hearsay testimony. Nor was it competent for the state to show, in the manner done in this case, that appellant had recently before the alleged offense received packages of beer and other merchandise by express. It might be competent to show that recently before the offense appellant had received whisky by express, or that he had whisky on hand at the time of the alleged offense, for he was charged with selling whisky. Of course, this must be shown by proper and competent evidence. If the express agent had received shipments of whisky directed to appellant,

and he knew the fact, or the state could prove that fact by other proper evidence, it could be shown; especially so, where it is a case of circumstantial evidence. The evidence, however, here offered, was slips of paper which Williams, the express agent, says he took from the books. The books were not offered, nor was there testimony to show that appellant had received the whisky from the express office, nor is it pretended that appellant receipted for the whisky to the express agent. While proper evidence of this character might be introduced, it could not in the manner here shown. Slips made out by the express agent were improperly admitted.

The following charge was given by the court to the jury: "You are charged, at the request of the state, that the law provides that a person who has procured retail liquor dealer's license upon the trial for violation of the local option law, that said license is prima facie evidence that the defendant is engaged in the business of a retail liquor dealer. Therefore, if you find from the evidence in this case that the defendant had procured from P. B. Hunt, at Dallas, Tex., a retail liquor dealer's license, and that said license was in force and effect on the date of the alleged sale, then said license would be prima facie evidence of the defendant's guilt, and you will consider same with the other facts and circumstances in this case in passing upon the guilt or innocence of this defendant." Objection was urged to this charge on the ground that the jury was instructed that the possession of the license was prima facie evidence of appellant's guilt. The Twenty-Eighth Legislature (Laws 1903, p. 57, c. 40, § 407a) enacted that an examined copy of the entries on the books of the internal revenue collector, showing that the United States internal revenue liquor or malt license has been issued to the person or persons charged with violating the provisions of that act, should be admissible and be held as prima facie evidence that the person named in the license had paid the United States a special tax as a seller of spirituous or malt liquors, and shall be held to be prima facie proof that the person or persons paying such tax are engaged in selling intoxicating liquors. Appellant had an internal revenue license for the sale of spirituous liquors, and by virtue of the act above mentioned the same would be evidence that appellant was engaged in the business mentioned in the license; but it would not be proof that he was guilty of the particular sale or offense charged against him in the indictment. The court's charge went beyond the statute, and instructed the jury that such license would be evidence of his guilt of the offense charged. This is not correct. See *Uloth v. State*, 87 S. W. 822, 13 Tex. Ct. Rep. 521.

We are of opinion that, while the indictment is informal and not as technically ac-

curate as it might be, yet it is sufficient to charge the offense.

For the reasons indicated, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### SPENCER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

#### 1. BAIL—EFFECT.

Under Acts 30th Leg. p. 31, c. 19, entitling one under bond on a felony charge to remain on bail up to the return of a verdict of guilty, it was improper to remand to custody during the trial one charged with assault with intent to murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 143.]

#### 2. CRIMINAL LAW—ACCOMPLICE—CORROBORATION—EVIDENCE—ADMISSIBILITY.

An accomplice may not be corroborated by his statements, made in the absence of him against whom he is testifying.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1138.]

#### 3. SAME.

Though, in a trial for assault with intent to murder, testimony that before the offense was committed R. told witness that he and others had agreed to go to prosecuting witness' place and kill his hogs was inadmissible to show a conspiracy to steal his hogs and kill any one who interfered, though it had been shown that R. and the other alleged conspirators were at the prosecuting witness' place acting together when the offense was committed. The testimony was admissible to show that R. was not an accomplice, but merely a detective.

#### 4. WITNESSES—WIFE—COMPETENCY.

A wife was incompetent to testify to criminative facts against accused, where her husband, whose case under a charge of the same offense was undisposed of, did not testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 124-136.]

#### 5. CRIMINAL LAW—ACCOMPLICE—INSTRUCTION—PROPRIETY.

It is proper to instruct that a witness was an accomplice, instead of submitting the question to the jury, where the facts are apparent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1717, 1720.]

#### 6. SAME—ACCOMPLICE OR DETECTIVE—CORROBORATION.

An accomplice's testimony must be corroborated, but a detective's need not be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1138.]

#### 7. INDICTMENT—HOMICIDE—CONVICTION OF ASSAULT WITH INTENT TO MURDER.

Where one is indicted for an assault with intent to kill a specified person, he may not be convicted for shooting at another.

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Dave Spencer was convicted of an assault with intent to murder, and he appeals. Reversed and remanded.

R. H. C. Butler and Fitzgerald & Butler, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder one Jim Williams, and his punishment assessed at confinement in the penitentiary for five years.

Appellant's first ground of the motion for a new trial complains that the court erred in remanding the defendant to the custody of the sheriff and directing the sheriff to place said defendant in jail during the trial of the cause; defendant having executed bond for his appearance as required by law. Acts 30th Leg. (Laws 1907, p. 31) c. 19, entitles appellant, where he is under bond, as the record in this case shows, to remain on bail during the trial of his case and up to the return into court of a verdict of guilty, and the court erred in remanding appellant to custody.

The facts in this case, in substance, show the following: Reese Post, Ed Choice, D. D. Choice, and Dave Spencer (appellant), according to the testimony of the said Reese Post, formed a conspiracy to steal the hogs belonging to the prosecuting witness, Jim Williams. The said prosecuting witness testified to the above facts, in substance, and further stated that the said Reese Post told Gus Lott the same facts, and Gus Lott told Reese Post to go and let the prosecuting witness, Williams, know about it, and said Post informed Williams that said parties would come armed to his pen, which was located in the woods, and if he resisted their efforts to take the hogs that they would fight and kill him. The witness Williams went to the place where the hogs were in company with his son and the constable, named Lowry. When they got within 20 steps of the hogen they saw Ed Choice. The constable told him to throw up his hands, or something of that sort, and Choice turned around and fired his gun immediately. "Mr. Lowry and I fired our guns and covered everything in smoke, and I run up to the fence and saw Dave Spencer and D. D. Choice in the pen, and as I was raising my pistol they fired at me. Ed Choice shot towards us, but shot over us. I don't think I was over 10 steps from the pen when the others began to shoot their guns. They were shooting pistols. Ed Choice was shooting a shotgun. After the firing took place we got through the fence and went to the pen, and they had run off across the field." This is a sufficient statement of the facts to illustrate the points necessary to be passed on in this record.

Bill of exceptions No. 2 shows that, while the witness Gus Lott was on the stand in behalf of the state, he was permitted to testify that on Sunday morning, before the alleged assault with intent to kill was committed, he had a conversation with Reese Post, in which Reese Post told him that Dave Choice and the said Post had entered into an agreement by which they, meaning Dave Choice, Reese Post, and others, would

go to the hogpen of Jim Williams and kill his hogs. Defendant objected to said testimony, because it was hearsay, immaterial, and irrelevant, and because same did not tend to show any conspiracy on the part of this defendant to commit an assault with intent to kill, and because it was improper to admit as testimony statements made by Reese Post to the witness Lott in the absence of defendant, and because said statements were the statements of an accomplice or co-conspirator, made to another person in the absence of defendant, and not in the furtherance of the common design, and because it was not shown that this defendant knew of said purported conversation between Dave Choice and Reese Post, and because said testimony could not be offered to corroborate an accomplice. The court allows the bill with this qualification: "This testimony was admitted after the state had shown that Ed Choice, Dave Spencer, D. D. Choice, and Reese Post were at the pen and acting together, and the state's theory was, and the evidence of Reese Post showed, that there was a conspiracy entered into by the above, together with Dave Choice, to go to the pen and steal the hogs, and kill any one who interfered, and this testimony was a declaration of a co-conspirator before the consummation of the design and while the conspiracy was still in progress. Bill of exceptions No. 3 shows that the state was permitted to prove by Will Phillips substantially the same conversation the prosecuting witness had with Reese Post, and the judge approves the bill with the same qualification above quoted. This testimony was not admissible for the purpose that the learned judge suggests. An accomplice cannot be corroborated by proving statements made by him in the absence of the party against whom he is testifying, and hence the testimony was not admissible for the purpose for which it was introduced; but the testimony is admissible for the purpose of showing that the witness Post is not an accomplice, but is merely a detective. When admitted for this purpose, the testimony should be limited in the charge of the court for the sole purpose for which it is admissible, and the jury should be expressly told that it could not be used to corroborate the accomplice, if they thought or decided that Reese Post was an accomplice, and not a detective. See *Clay v. State*, 40 Tex. Cr. R. 556, 51 S. W. 212, *Dungan v. State* (Tex. Cr. App.) 45 S. W. 19, and *Cohea v. State*, 11 Tex. App. 153; and other authorities will be found in later decisions of this court.

Bill of exceptions No. 5 complains that the court permitted Anna Choice to testify to criminative facts against appellant in this case, when her husband was indicted for the same offense, but by different indictment. The testimony of the wife was criminative evidence, and we do not deem it necessary to copy same. Her husband did not testify in

the case, and, furthermore, his case is not disposed of until this court finally acts upon it; hence it was error to permit the wife to testify. See *Daffin v. State*, 11 Tex. App. 76, and *Dungan v. State*, above cited.

Appellant's seventh ground of his motion for a new trial complains that the court erred in charging that the witness Reese Post was an accomplice, instead of submitting that question to the jury. We have frequently held it was proper, where the facts are apparent, to so charge a jury. The evidence in this case presents two theories: One was that the witness Post was a detective; and the other, that he was an accomplice. The court should have charged on both theories. If he is a detective, his testimony does not have to be corroborated; if he is an accomplice, it does.

Appellant further complains that the court erred in instructing the jury that they might convict the defendant in the event he shot at Jim Williams, or in the event he shot at a crowd in which Jim Williams was, with intent to kill him, Jim Williams, or some one in the crowd. There being a specific allegation in the indictment that appellant shot at Jim Williams, it was error for the court to permit a conviction for shooting at some one else. If the indictment had charged that appellant shot at a crowd, naming them, which included Jim Williams, then the charge might have been appropriate; but, where there is a specific allegation of intent to kill one man, appellant cannot be convicted of assault with intent to murder for killing another. See *Brown v. State*, 16 Tex. App. 198, and *Rutherford v. State*, 13 Tex. App. 98.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

## CHOICE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

### 1. BAIL—SCOPE OF REMEDY—CUSTODY PENDING TRIAL.

Under Act 30th Leg. p. 31, c. 19, § 2, providing that, when defendant on trial for felony is on bail when the trial commences, he shall not be considered discharged until the jury shall return a verdict, but shall have the right to remain on bail during the trial, one accused of a felony had the right to remain on bail during his trial, and an act of the court forcing him into the custody of the sheriff pending trial was unauthorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 143.]

### 2. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

Where accused is indicted for assault on two persons named, an instruction that if he with malice aforethought shot at such persons with intent to kill, or if with malice aforethought he shot at a crowd with a gun, and the said persons named were in such crowd, with specific intent to kill one or more in the crowd,

he would be guilty of an assault with intent to murder, was erroneous.

### 3. CRIMINAL LAW — CO-CONSPIRATOR — DECLARATIONS.

Offer of statements of a co-conspirator against another, made in the absence of the latter, will be rejected, unless the statements or acts are in furtherance of the common design.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 989-1001.]

### 4. SAME—HEARSAY EVIDENCE.

On trial for assault with intent to kill, evidence that witness the day before the assault had a conversation with a third party, in which such third party told him that the accused and such party had agreed to go to a hogpen of a certain person and kill his hogs, was inadmissible as hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 973-983.]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Ed Choice was convicted of assault with intent to kill, and appeals. Reversed.

R. H. O. Butler and Fitzgerald & Butler, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder, and his punishment was fixed at four years' confinement in the penitentiary.

Prior to the trial the appellant had given bond for his appearance before the trial court. When the case went to trial the appellant was, over his objection, placed in the hands of the sheriff during said trial. The bills of exceptions state various grounds why this was error and detrimental to him, and claim the benefit of the act of the Thirtieth Legislature (Laws 1907, p. 31, c. 19), which authorized him to go upon his bail during his trial. Section 2 of the act, *supra*, provides: "That where the defendant in cases of felonies is on bail when his trial commences, the same shall not thereby be considered as discharged until the jury shall return into the court a verdict of guilty and the defendant taken in custody by the sheriff, and he shall have the same right to have and remain on bail during the trial of his case and up to the return into court of such verdict of guilty, as under the law he now has before the trial commences; but immediately upon the return into court of such verdict of guilty, he shall be placed in the custody of the sheriff and his bail be considered as discharged." It would seem from a reading of these provisions that appellant had the right to remain on bail during his trial, and that the action of the court in forcing him into the custody of the sheriff pending his trial was unauthorized. What effect this may have had upon his case before the jury we are unable to say, but they assessed his punishment at four years in the penitentiary. While this may be, the statute guarantees to him the right to go upon bail, free from restraint by the sheriff, or from being held in custody by the sheriff,

while his trial is in progress. The statute has been violated in one of its essential elements beneficial to the accused party.

The indictment charges the assault to have been made upon Jim Williams and W. D. Lowry. The court charged the jury that if they should find from the evidence that appellant with malice aforethought shot at Jim Williams and W. D. Lowry with intent to kill them, etc., or if they should find that defendant with such malice aforethought shot at a crowd with a gun or pistol, two of whom were Jim Williams and W. D. Lowry, with the specific intent to kill one or more in the crowd, etc., that he would be guilty of assault with intent to murder. Exception was reserved to this portion of the charge. We believe the exception to this charge is well taken. Appellant was charged with shooting at two parties, and the conviction must be predicated upon shooting at one or both of those parties with the intent to kill. He should not be convicted for shooting at any other party in the crowd, if there were more than these; and the evidence shows there was. See *Brown v. State*, 16 Tex. App. 198.

Bills of exceptions were reserved to the ruling of the court admitting statements made by Reece Post to Gus Lott, and by the same witness to Will Phillips, and also statements by the same witness to Jim Williams. One of these, perhaps, is sufficient to illustrate the three bills of exceptions. Gus Lott was permitted to testify that on Sunday morning before the alleged assault with intent to kill he had a conversation with Reece Post, in which Reece Post told him that Dave Choice and the said Post had entered into an agreement by which they, meaning Dave Choice and others, would go to the hogpen of Jim Williams and kill his hogs. This was admitted by the court on the theory that a conspiracy had been shown between D. D. Choice, appellant, Dave Spencer, and Reece Post to do the very thing that Post told Lott they were going to do, and that this was the declaration of a co-conspirator pending the conspiracy, and which was still in existence at the time the statements were made and before its final consummation. It is a very serious question whether the conspiracy was pending or not; but, conceding it was, we are of opinion this testimony was not admissible as against appellant. It was not in furtherance of any design. It was just simply a narration of the fact that a conspiracy had been entered into between them to kill hogs belonging to another party. Wherever there is an attempt or an offer to use the statements of one co-conspirator against another, made in the absence of the other, it will be rejected, unless the statements or the acts are in furtherance of the common design. The fact that Post told Lott that he and another, or others, were going to kill hogs, was not in furtherance of the common design, and it would not be used against the alleged ab-

sent co-conspirator; nor could Post corroborate himself by the use of this character of evidence. It is purely hearsay, and should have been rejected. If admitted to assist in showing that he was a detective, there might not have been error. For discussion of this question, see *Spencer v. State* (this day decided) 106 S. W. 386.

It is unnecessary to discuss the other bills.

For the errors mentioned, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

### GARRETT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

#### 1. HOMICIDE—EVIDENCE—THREATS.

On a trial for the killing of a negro woman, threats by defendant to kill a "guinea" are inadmissible against him, where it is not shown that the threat was directed against decedent, except that "guinea" means a negro woman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 295.]

#### 2. CRIMINAL LAW—CONFESSIONS—VOLUNTARY EVIDENCE—CHARACTER.

Where, on a trial for homicide, there was an issue whether the confession of defendant was voluntarily made, defendant testifying, contradictorily to the officer who testified to the confession, that he was mistreated and kicked to obtain the confession by the assistant county attorney, who he testified was intoxicated, evidence that witness saw the attorney just after he left the jail, and that the attorney told him that he talked and fussed with defendant, and even choked him, and that the attorney was intoxicated, was erroneously refused, though it was offered during the argument; it having been just then discovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 1216, 1217.]

#### 3. SAME—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On a trial for homicide, there was an issue whether the confession of defendant was voluntarily made; defendant testifying, contradictorily to the officer who testified to the confession, that he was mistreated and kicked to obtain the confession by the assistant county attorney, who he testified was intoxicated. At the close of the testimony, and before other argument than that of the assistant county attorney, defendant offered newly discovered evidence that witness saw the attorney just after he left the jail, and that the attorney told him that he talked and fussed with defendant, and even choked him, and that the attorney was intoxicated; but the court excluded the same, stating that he would control it in his charge to the jury. The court in its general charge withdrew the testimony of the officer as to the manner in which the confession had been obtained, and the attorney's condition, but not until after the argument had been concluded. *Held*, that the withdrawal of the officer's testimony in the manner and at the time it was done was more injurious than if it had remained before the jury, contradicted to a certain extent by defendant's evidence, and guarded by an appropriate charge.

#### 4. SAME—ARGUMENT OF COUNSEL.

On a trial for the killing of a negro woman, the defendant's attorney stated to the jury that defendant had testified that a man told him that a man and woman had been killed the night before, and defendant's counsel further stated

that he believed from that that the rumor had gotten out that a man and woman had been killed, and that the rumor was to the effect that another and decedent had been killed, and that he believed that this indicated that such other was with decedent that night. Thereupon the assistant county attorney stated that as a matter of fact there was a negro man killed that night in another place. *Held*, that the remark of the assistant county attorney ought not to have been permitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1668, 1669.]

#### 5. WITNESSES — EXAMINATION — LEADING QUESTIONS.

A question to a witness, to prove a confession by a defendant charged with a homicide, "Is it not a fact that defendant told us, after being duly warned by me, that on the night of the shooting a negro barber came into his room and presented a pistol to him, and told him with an oath, 'You get up from there and pull your freight, or I will blow your brains out,' and that thereupon he jumped up from the bed and grabbed a shotgun?" was objectionable as leading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-851.]

Appeal from Criminal District Court, Dallas County; E. B. Muse, Judge.

Will Garrett was convicted of murder, and he appeals. Reversed and remanded.

Graham B. Smedley and Wm. M. Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The evidence shows that appellant at night killed Letitia Bedford. The jury assessed the death penalty.

The facts are very voluminous and unnecessarily prolix. In substance it is gleaned from the record that appellant was paying rent for a house occupied by himself, the deceased, and relatives of the deceased, and that she (deceased) had for some time been playing the part of mistress to him. Another negro came upon the scene as a rival for the favors of appellant's mistress. This, as usual under such circumstances, brought trouble. This rival had threatened the life of appellant. The girl had been going out at night with appellant's rival, which disconcerted appellant. On the night of the tragedy this girl came on the gallery from a nocturnal outing and was opening the door of appellant's room, which seems to have been an unusual occurrence for her, if in fact she had ever done so previously. Appellant was anticipating a dangerous visit from his rival. On the evening prior to the homicide appellant had borrowed a gun for the purpose of going hunting the following day, and bought some shells loaded with small shot. He made an appointment with another party for the hunt. Their purpose was to kill birds. Some time prior to the homicide, the same night, appellant had retired to his room and had gone to bed. The gun and cartridges were in his room. He testifies he had been asleep at the time the noise occurred at his front door. When the party undertook to open the door, appellant grabbed his gun and fired. The

death of Letitia Bedford was the result. Appellant in his nightclothes immediately fled, leaving his gun, cartridges, wearing apparel, and everything in the room where he was sleeping. Without going into a detailed statement of the many facts and circumstances, pro and con, developing the state's theory of intentional killing of the girl and appellant's theory that he thought he was killing his rival, who had come to destroy his life, and statements to the effect that he was not aware at the time of his arrest that he had killed anybody, we think the above is a sufficient statement for the disposition of the case.

However many disputed facts this record discloses, and however antagonistic the testimony is in regard to matters and conversations, threats, etc., occurring prior to the night of the homicide, it is not a disputed fact, but a conceded one, that appellant had retired for the night, and at the time of the killing was in his nightclothes, and fired just as the party was trying to open the door, and in this condition fled out into the darkness. The writer desires to state, at this point, that he is of the opinion that this evidence does not show a capital case. There is not sufficient evidence, in my judgment, to show that this killing occurred under circumstances that indicated premeditation and deliberation to take the life of the girl when it occurred. This record makes it apparent that appellant was not expecting the deceased at that point. But, be that as it may, there are some matters occurring in this record that require a reversal of the judgment. There are quite a number of bills of exception reserved in the statement of facts and scattered along through 250 pages of evidence, all of which we do not think necessary to review.

One of the bills of exception shows that the witness Owens was testifying for the state, and among other things it was sought to prove by him substantially that he overheard appellant talking with another party, in which he (appellant) made threats to kill a guinea, and that in the opinion of the witness he meant this girl; but he did not know what he meant by saying "guinea." It is shown in the record by some of the testimony that the word "guinea," mentioned, referred to negro women generally. Objection was urged to this testimony. Without going into a detailed statement of it and the grounds of objection, we are of opinion that this character of threat was not admissible. This has been decided so frequently we deem it unnecessary to cite authorities. Before a threat supposed to have been made by the accused can be used against him in his trial, the evidence must show that the threat was directed against and individuates the deceased. The fact that "guinea" meant negro women is not sufficient.

There is a bill of exceptions in the record which recites, in substance, that after the testimony for the state and defendant had

closed, and the assistant county attorney was making his opening argument to the jury, and before any other argument had been made to the jury, and during an intermission of the court immediately following the close of said argument, which intermission was from 5:30 to 7 o'clock p. m., counsel for appellant discovered certain new testimony, the failure to discover which previously was not due to negligence on his (appellant's) part or on the part of his attorneys. When the court reconvened, the judge asked appellant's counsel if they were ready to proceed with the argument, and was informed that during recess they had discovered new testimony which they desired to introduce before proceeding with their argument, and explained the nature of it privately to the court at the request of the court. The court retired the jury, and had J. C. Coleman, one of the witnesses to the newly discovered facts, placed on the witness stand. Appellant's confessions were testified by Tanner, one of the officers, who stated that he and the assistant county attorney had gone to the jail where appellant was confined and obtained certain confessions after warning. Appellant testified contradictory to Tanner in regard to the same confessions, and that he was mistreated and kicked and abused in order to obtain the confessions or statements, and this by the assistant county attorney, who he further testified was intoxicated at the time. It then became an issue before the jury whether or not these confessions were really voluntarily made after warning. Without discussing the question of warning, there was a direct issue between Tanner's testimony and appellant's as to the manner of obtaining the confessions, and as to what the confessions or statements of appellant were. Appellant stated that the assistant county attorney was intoxicated and used violence upon his person to extort the confessions, and stated what he did because he was fearful of the result of the visit of the two officers to his cell, etc. If the confessions were not voluntary, although a warning had been given, they should not have been introduced in evidence; but, there being an issue upon it, appellant's newly discovered testimony was offered for the purpose of sustaining his testimony as to the condition of the officers and the manner of obtaining the confession. Coleman then testified before the court that he saw the assistant county attorney on the night of the confession and just after he left the jail, and heard him talking about the confessions of appellant; located the place of the conversation at Felix Tanco's bar. Getting down to a material part of the testimony of this witness, the following occurred: "Q. Did he tell you that he had gotten a confession from Will Garrett? A. Yes, sir. Q. What did he say about the negro, Will Garrett, at that time? A. He made the remark that he was the most stubborn son-of-a-bitch that he had ever seen in his life. Q. Did he say that it was dif-

difficult to get a statement and confession from him? A. He did; yes, sir. Q. Did he say that it was necessary for him to do anything? A. He said he talked with him, and fussed with him, and even choked him, and it took him 40 minutes before he could get that negro to open his mouth. Q. Did he say he choked Will Garrett? A. He did. Q. What was his condition at the time he made this remark at the bar? A. He was drinking. Q. Was he drinking very much. A. It looked as though he was. Q. Was he about drunk? A. I think he was intoxicated; yes, sir. Q. Are you a judge of when a man is intoxicated? A. I think I should be. Q. Why do you think you should be? A. I have been tending bar for a good many years and handled a good many drunken people. Q. Have you seen a good many drunk people? A. Yes, sir; I have, a number of them. Q. Have you ever seen Mr. Nelms drinking? A. I have, yes, sir; several times. Q. Have you seen him sober? A. I have; yes sir. Q. Do you think you could tell the difference in Mr. Nelms when he was drinking and when he was sober? A. I think I could tell the difference. Q. At the bar that night did he indicate that he was drinking? A. He indicated that he was drinking; yes, sir. Q. By what? A. By his talk. Q. Did he stagger, or anything of that kind? A. Why, yes; he was staggering a little." The following part of the testimony of this witness goes on to elucidate and amplify these questions. It is also agreed that the testimony of Felix Tanco would be practically the same as Coleman in regard to this matter, and it is made to appear this is entirely newly discovered testimony. This evidence should have gone to the jury. Tanner had testified that Mr. Nelms was not intoxicated. Appellant had testified that he was, and to the treatment. There was a square issue between these two witnesses, appellant and Tanner, in regard to these matters. The evidence of the outside witnesses as to the condition of Mr. Nelms immediately succeeding this visit to the jail was pertinent testimony in regard to the manner of obtaining this confession; at least, as to the condition of Mr. Nelms immediately succeeding what transpired at the jail. It is just to state that Mr. Nelms did not object to the introduction of this testimony before the jury, stated his entire willingness to let it go before the jury, and himself desired to take the witness stand to meet it. The court ruled it out of his own volition. This was error. In ruling it out the court stated that he would control it in his charge to the jury. It would be a very difficult matter to control evidence to the jury that had not been introduced, for the jury was supposed to know nothing about it. The jury had been retired from the courtroom and did not hear it. Appellant was seeking to get it before the jury; but the court undertook to solve all questions connected with this matter by withdrawing Tanner's testimony from the jury in his written charge.

Perhaps the withdrawal of Tanner's testimony in regard to these confessions, in the manner and at the time it was done, was more injurious than if it had remained before the jury contradicted to a certain extent by appellant's evidence; for the record discloses that the court did not inform the jury that they should not consider this testimony until after the arguments had been concluded, and did so then in the general charge. The county attorney had argued this question in his opening argument. Coleman's and Tanco's testimony was sought to meet this as far as possible immediately upon it being discovered. It was rejected, and Tanner's testimony remained before the jury during the remainder of the discussion by counsel. Then, after it had been fully discussed, the court informed the jury that they should not consider his testimony. We are of opinion this matter is placed in such relation that it is more injurious to appellant than if Tanner's evidence had remained properly guarded by an appropriate charge. A great many authorities have been cited by appellant in his brief in support of his contention, but we deem it unnecessary to cite them. The most injurious course to appellant was followed in this whole matter.

Another bill recites that, while one of appellant's attorneys was addressing the jury, he said that "Will Garrett had testified that while he was on his way to Buckner's Orphans' Home he had met a man with a bottle, and that the man had told him they are raising hell in Dallas, and that there was a man and woman killed there last night," and defendant's counsel further said to the jury that "he believed from that that the rumor had gotten out that a man and woman had been killed here in Dallas, and that the rumor was to the effect that Joe Smith and Letitia Bedford had been killed, and that he believed that this indicated in an indirect way that Joe Smith was with Letitia Bedford that night." Thereupon the assistant county attorney interrupted counsel for defendant and stated, "As a matter of fact there was a negro man killed in Dallas that night in another place." Objection was urged to this. This ought not to have been permitted. No witness would have been permitted to testify, as against appellant that in another part of the city on that night another man had been killed.

Another bill was reserved to the manner of asking certain questions, because they were leading, suggestive, and prejudicial, etc. Tanner was placed on the stand by the state to prove confessions of appellant while in jail. The following occurred: "Q. Mr. Tanner, do you remember the occasion of Letitia Bedford being killed? A. Yes, sir. Q. Did you make any effort to locate the defendant after that killing? A. Yes, sir; our department did. Q. Your whole department was after him? A. Yes, sir. Q. Do you remember the occasion of his being arrested and

being brought to Dallas? A. I do. Q. Do you remember the night he was brought here? A. Yes, sir. Q. Did you see him that night? A. Yes, sir. Q. Who was with you at the time you saw him? A. Yourself. Q. Where did you meet me, or where did I meet you, that night? A. At the city hall. Q. What, if anything, did I say to you in reference to this negro? A. Asked me to go to the jail with you; that you wanted to talk with this negro and see what he had to say about this killing. Q. At that time was I drunk, drinking, intoxicated, or in any degree under the influence of liquor? A. None whatever. Q. Did I have a bottle of whisky with me? A. Never did show it if you did. I never did see any whisky. Q. During the conversation with the defendant did I at any time offer him whisky or try to get him to drink whisky? A. You did not. Q. Did I at any time curse, abuse, or threaten the defendant? A. You did not. Q. Did I at any time kick or strike the defendant? A. You did not. Q. Is it not a fact, Mr. Tanner, that the defendant told us, after being duly warned by me on the night of this shooting, Joe Smith, a negro barber, came into his room—Mr. Hamilton: We object. Mr. Nelms: And presented a six-shooter to him? Mr. Hamilton: Wait a minute. Mr. Nelms: No; I won't wait. Court: Let him ask the question. Mr. Hamilton: We object, and say the question is leading. Mr. Nelms: And presented a pistol to him, and told him, 'God damn you! get up from there and pull your freight, or I will blow your damned brains out?' Mr. Hamilton: Don't answer that; we object. Mr. Nelms: I am not through. The Court: Go ahead. Mr. Nelms: And that thereupon he jumped up from the bed and grabbed a shotgun? Mr. Hamilton: Wait just a minute; we want to except. Mr. Nelms: I won't wait. The Court: Now what is your objection? Mr. Smedley: We object to it because the question is leading. The Court: The court will sustain your objection and let Mr. Tanner tell what was said." Then appellant objected substantially that it was error to permit the attorney to place his questions in a leading form for evidence he sought to elicit from the witness, and that they were suggestive, and intended to suggest the answer, and for the reason the county attorney by his questions indicated to the witness the line of answers that he desired, and indicated and suggested in advance testimony which was hurtful and injurious. We are of opinion that this bill of exceptions is well taken. These questions were as leading and suggestive as it was possible for them to be framed, and under all the authorities, as far as we are aware, this testimony was clearly inadmissible. See *Ripley v. State* (Tex. Cr. App.) 100 S. W. 943; *Davis v. State*, 43 Tex. 190; *Wright v. State*, 10 Tex. App. 480; *Rangel v. State*, 22 Tex. App. 645, 3 S. W. 788; *Ashlock v. State*, 16 Tex. App. 21; *Railway v. Hammon*, 92 Tex.

508, 50 S. W. 123; *Railway v. Dalwigh*, 92 Tex. 655, 51 S. W. 500; *Bridge Co. v. Cartrett*, 75 Tex. 681, 13 S. W. 8; *Lents v. Dallas*, 96 Tex. 258, 72 S. W. 59; *Able v. Sparks*, 6 Tex. 349; *Railway Co. v. Duellin*, 86 Tex. 450, 25 S. W. 406; *Conn v. State*, 11 Tex. App. 390-401; *Hopperwood v. State*, 39 Tex. Cr. R. 15, 44 S. W. 841; and *Craddick v. State*, 88 S. W. 347, 13 Tex. Ct. Rep. 637. While the court said he would sustain the objection, yet he told the witness to answer and he did answer.

There are other bills of exception in the record that we have thought perhaps unnecessary to discuss.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

HENDERSON, J., absent.

Ex parte VACCAREZZA.

(Court of Criminal Appeals of Texas. Dec. 18, 1907.)

# 1. INTOXICATING LIQUORS — STATUTES — REPEAL.

The Baskin-McGregor law (Acts 30th Leg. p. 258 et seq., c. 138), which went into effect on July 12, 1907, and provides new regulations for the sale of intoxicating liquors, not only expressly repealed all former laws with reference to the retail of intoxicating liquors, but also repealed such laws by substitution.

# 2. SAME.

Relator, on May 28, 1907, obtained a license entitling him to pursue the business of retailing intoxicating liquors for 12 months. The Baskin-McGregor law (Acts 30th Leg. p. 258 et seq., c. 138), which went into effect on July 12, 1907, provided new regulations for the sale of intoxicating liquors, and declared that all laws or parts of laws in conflict therewith were expressly repealed. *Held*, that relator had no authority to sell under the license of May 28th on September 12, 1907, long after he could have complied with the Baskin-McGregor law, which expressly and by substitution repealed all former laws with reference to the retail of intoxicating liquors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 114.]

Habeas corpus on application of Steve Vaccarezza. Writ granted. Relator remanded.

Newton & Ward and Wm. Aubrey, for relator. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to Ex parte Steve Vaccarezza (No. 3,839, decided on a previous day of the present term) 105 S. W. 1119. The writer was absent when the decision in that case was rendered, and in this case gives his views for remanding applicant to custody. It is unnecessary to go into any detailed statement of the facts, as they have been sufficiently given in the former case.

Relator obtained license for the retail sale of intoxicating liquors on the 28th of May, 1907, which, under the then existing laws, would entitle him to pursue that business



for 12 months. What is known as the "Baskin-McGregor Bill" went into effect on the 12th of July, 1907. Acts 1907, p. 258, c. 188. Relator was arrested on the 19th of September, 1907, upon complaint charging him with violating the provisions of the Baskin-McGregor act on or about the 12th of September, 1907. These dates are mentioned simply to show that relator was arrested for selling long after he could have complied fully with all the provisions of the Baskin-McGregor bill and obtain license to operate under that law. Relator puts his proposition tersely and clearly, as follows: "From the capias, information, complaint, and agreement aforesaid it is obvious that there is involved in this case but one question, viz.: Did the act of the last Legislature revoke liquor licenses which had not expired by their terms when said new law took effect?" The writer believes, while the question stated is as clearly put as could have been well done it is not exactly the question involved. The writer's view of the question is this: Did relator have authority to sell under his old license at the time that he sold, to wit, on the 12th of September, 1907?

Whether we look to relator's proposition, or that stated by the writer, the answer is the same, and in the negative. My Brethren have decided, without difference of opinion, that on the 12th of September, 1907, the Baskin-McGregor bill was in full force, and that the license under the old law could not be economized to sell intoxicants at that time. They differed to some extent as to the condition of the law regulating the retailing intoxicants from the 12th of July until the provisions of the Baskin-McGregor act could have been complied with. To the writer's mind the condition of the parties retailing intoxicants from the 12th of July until they could have obtained license under the provisions of the Baskin-McGregor bill is not involved in this case, and could not be. Relator could have complied with the provisions of the Baskin-McGregor bill long before he is charged with selling, but did not. Ordinary diligence would have enabled applicant to comply with the terms of the Baskin-McGregor bill within 30 days from the 12th of July. At farthest, by the middle of August relator could have been operating under the Baskin-McGregor bill. Had relator been charged with selling intoxicants between the 12th of July and the time when he could have obtained license under the Baskin-McGregor bill, the questions discussed by my Brethren and about which they have differed would be involved. Anything said in this case with reference to the attitude of the parties after the 12th of July until they could have complied with the provisions of the said bill would be obiter dicta. The question is not involved. As before stated, we answer relator's proposition in the negative: First, because the provisions of the Baskin-McGregor bill expressly repealed all

laws in conflict with it; second, said bill is a complete substitute for the old law in regard to retailing intoxicants. It does not affect the wholesale business. It is unnecessary to discuss the plain provisions of express repeal. It needs none.

With reference to the substitution of the Baskin-McGregor law for the old, we would say the rule is well stated in *Stebbins v. State*, 22 Tex. App. 32, 2 S. W. 617, by Presiding Judge White, as follows: "Where a new statute in itself comprehends the entire subject, and creates a new, independent, and entire system respecting the subject-matter, it is universally held to repeal and supersede all previous systems and laws respecting the same subject-matter"—and in support of this proposition he cites *Bryan v. Sundberg*, 5 Tex. 423; *Stirman v. State*, 21 Tex. 734; *Wade on Retroactive Laws*, §§ 291, 292; *Etter v. Missouri Pacific Railway Company*, 2 Willson, Civ. Ct. App. § 58. The question was again before this court in *Dickinson v. State*, 38 Tex. Cr. R. 472 (the quotation being on page 479), 41 S. W. 759, 760, 43 S. W. 520. Judge Henderson, rendering the opinion for the court, speaking of the substitution of one act for another, says: "It is well settled, under all the authorities of which we have any knowledge, that a subsequent statute, revising the subject-matter of a former one and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied (see *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Cain v. State*, 20 Tex. 355; *Tunstall v. Wormley*, 54 Tex. 476; *Stirman v. State*, 21 Tex. 734; *Ex parte Valasquez*, 26 Tex. 178; *Holden v. State*, 1 Tex. App. 225); and where the revised statute, in and of itself, comprehends another subject, and creates a new, independent, and entire system respecting that subject-matter, it is universally held to repeal and supersede all previous statutes and laws respecting the same subject-matter (see *Bryan v. Sundberg*, 5 Tex. 423; *Stirman v. State*, 21 Tex. 734; *Etter v. Railway*, 2 Willson, Civ. Ct. App. § 58; *Stebbins v. State*, 22 Tex. Cr. App. 32, 2 S. W. 617)." The question again was commented on by the court in *Ex parte Coombs*, 38 Tex. Cr. App. 656, 44 S. W. 854, in the following language: "It may be asserted with equal confidence that a repeal may be had by amendment and substitution. So, when a subsequent statute reviews the subject-matter of a former one, and is evidently intended as a substitute for it, though it contains no express words to that effect, it must be held to operate as a repeal of the former to the extent to which its provisions are revised and supplied. And a new statute, which comprehends the entire subject-matter of the previous one, and enacts a new and independent system respecting it, repeals and supersedes all prior systems and laws upon the same

subject-matter. See *Stebbins v. State*, 22 Tex. Cr. App. 32, 2 S. W. 617; *Rogers v. Watrous*, 8 Tex. 63, 58 Am. Dec. 100; *Goodenow v. Buttrick*, 7 Mass. 140; *Stirman v. State*, 21 Tex. 734; *Ex parte Valasquez*, 26 Tex. 178; *Holden v. State*, 1 Tex. App. 226; *Harold v. State*, 16 Tex. App. 157; *Bartlett v. King*, 12 Mass. 545, 7 Am. Dec. 99; *In re Ashley*, 4 Pick. (Mass.) 21, 23; *Com. v. Cooley*, 10 Pick. (Mass.) 39; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 45; *Inhabitants of Rutland v. Inhabitants of Mendon*, 1 Pick. (Mass.) 154; *Blackburn v. Inhabitants of Walpole*, 9 Pick. (Mass.) 97; *Suth. Stat. Const.* §§ 133, 154, and note, for collated supporting authorities."

We deem it unnecessary to pursue this subject further, for the authorities are too clear for discussion that, when the Baskin-McGregor bill went into effect on the 12th of July, it not only expressly repealed all former laws with reference to retail of liquors in Texas, as provided for under the terms of the act, but that the repeal by substitution is as equally certain. As before stated, the writer does not deem it necessary to discuss the attitude, rights, or liabilities of relator, had he been charged with selling intoxicants after July 12th and before he could have obtained license under said Baskin-McGregor law, and expresses no opinion as to the attitude of parties who may have so sold.

For the reasons indicated, the relator is remanded to custody; and it is accordingly so ordered.

BROOKS, J. I barely concur in the conclusion.

HENDERSON, J., absent.

#### CLARK v. GURLEY et al.

(Court of Civil Appeals of Texas. Dec. 18, 1907.)

#### 1. WITNESSES—IMPEACHMENT—USE OF DEPOSITION TAKEN IN ANOTHER SUIT.

A deposition of a witness for plaintiff, taken in another suit to which he was not a party, is not admissible against plaintiff to show that witness made statements tending to contradict her testimony for plaintiff, but such statements might be shown, after laying the proper predicate, by the officer before whom the deposition was taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1049-1051.]

#### 2. GIFTS—VALIDITY—GOOD FAITH.

In a contest as to the title to notes executed to a decedent between decedent's heirs and one claiming under decedent's wife, to whom it is alleged decedent made a gift of the notes, the rights of creditors not being involved, the question of good faith, as generally understood, is not involved.

#### 3. SAME—INSTRUCTIONS.

In a contest as to the title to notes executed to a decedent between decedent's heirs and one claiming under decedent's wife, to whom it was alleged decedent made a gift of the notes, the expression, "explicit intention," in an instruction as to whether decedent made the gift

with explicit intention to relinquish his rights and transfer them to his wife, was too strong, and may have been understood by the jury as signifying expressed intention.

#### 4. SAME—INTENT.

A delivery of notes to another with the intention by the owner, whether express or implied, of divesting himself of title and vesting the same in such other, constitutes a gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 58-60.]

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by O. C. Clark against W. E. Gurley, in which action J. F. Morris and others filed a plea of intervention. Judgment for interveners, and plaintiff appeals. Reversed and remanded.

Barnwell & Eberhart, for appellant. Warren & Briggs, for appellees.

KEY, J. O. C. Clark instituted this suit against W. E. Gurley on three negotiable vendor's lien notes, payable to E. G. Morris, or bearer. The defendant Gurley made no defense. J. F. Morris and the other children and heirs of E. G. Morris filed a plea of intervention, alleging that they were the owners of the notes and entitled to recover thereon. The plaintiff claimed that before his death E. G. Morris made a gift of the notes to his wife, Jane Morris, and that the plaintiff bought them from Mrs. Morris, giving therefor a valuable consideration. The interveners claimed title to the notes as children and heirs of their deceased father, and controverted the alleged gift. There was a jury trial, resulting in favor of interveners, and the plaintiff has appealed.

Mrs. Jane Morris having testified as a witness for the plaintiff that her husband gave her the notes in controversy, and that she sold them to the plaintiff, the court, over the objection of the plaintiff, permitted the interveners to introduce in evidence an alleged deposition of Mrs. Morris, taken in another suit between her and the interveners. The alleged deposition was not signed by Mrs. Morris, and the officer who took it certified that she refused to sign it. Mrs. Morris testified that she refused to sign it because her answers to the questions had not been properly written down by the officer taking her deposition. The signature of the witness is required by the statute, and unless the witness signs the deposition, it would seem that such deposition has not been taken in accordance with the statute. Furthermore, the plaintiff was not a party to the suit in which the deposition was taken, and, for that reason, it should have been excluded. If in answer to questions propounded to her by the officer taking her deposition she made statements tending to contradict the testimony she gave in this case, the interveners had the right, after laying the proper predicate, to place the officer referred to on the stand as a witness, and prove by him that she made such answers, but his official

certificate made in the other case was not admissible against the plaintiff in this case for the purpose of proving that Mrs. Morris made such statements.

We are of opinion that the court should have submitted to the jury the question as to whether E. G. Morris made the gift of the notes to Mrs. Morris without using the expressions "in good faith," and "with explicit intention to relinquish his rights in said notes, and to transfer them to Mrs. Morris." The rights of creditors are not involved in this case, and the question of good faith, as generally understood in legal parlance, was not involved. The expression "explicit intention" is too strong, and may have been understood by the jury as signifying expressed intention. If E. G. Morris delivered the notes to his wife with the intention, either express or implied, of divesting himself of his title thereto, and to vest title in her so as to make them her separate property, then the interveners were not entitled to recover.

On the other questions of law we rule against appellant. We express no opinion as to the merits of the case as developed by the testimony.

On account of the error already pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

# MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. LIGHTFOOT et al.\*

(Court of Civil Appeals of Texas. Dec. 7, 1907.)

## 1. APPEAL—REVIEW—HARMLESS ERROR—RULING AS TO MISJOINDER OF ACTIONS.

Where plaintiff joined in his complaint a claim for damages for being ejected from defendant railroad's train with one for damages by reason of delay in the shipment of cattle as a result of the wrongful ejection, the error, if any, of the trial court in ruling that there was no misjoinder of causes of action, was cured by its withdrawing from the jury the claim for damages to the cattle.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4076.]

## 2. TRIAL—IMPROPER REMARKS OF COUNSEL—WITHDRAWAL OR CORRECTION OF OBJECTIONABLE MATTER—ACTION OF COURT.

A judgment will not be reversed for improper remarks of counsel, where the jury were specifically instructed in writing by the court that the remarks were improper, and not to consider them for any purpose, and neither the size of the verdict nor anything else in the record indicated that the jury were improperly influenced by the remarks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, § 316.]

## 3. CARRIERS—EJECTION OF PASSENGER FROM TRAIN—DAMAGES—INSTRUCTIONS.

In an action against a railroad for the ejection of plaintiff, a passenger, from defendant's train, there was no reversible error in charging that, if the jury found for plaintiff, to allow him such damages as the evidence showed would be a reasonable compensation for the expenses occasioned by the ejection, and in refusing to limit such recovery to hotel and laundry bills, where it did not appear that any other item of

expense was considered by the jury or included in their verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1500.]

## 4. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action against a railroad for the wrongful ejection of a passenger from a train, plaintiff was entitled to recover under the evidence, and under such evidence the amount of recovery was not excessive, error in an instruction as to damages did not require a reversal of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225, 4228.]

## 5. DAMAGES—ELEMENTS—MENTAL ANGUISH—PLEADING.

Mental anguish is an element of damage for which a recovery may be had, though no actual personal injury was inflicted, and all damages that are the proximate, natural, and probable consequences of the act complained of may be recovered under a general allegation of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 100, 441-446.]

## 6. CARRIERS—EJECTION OF PASSENGER FROM TRAIN—DAMAGES—EVIDENCE—FRIGHT.

Where, in an action for the wrongful ejection of a passenger, plaintiff alleged that he was wrongfully, etc., ejected from a train at a strange place on a dark night, and by reason thereof suffered great mental distress, evidence that plaintiff was frightened as a result of the ejection was admissible.

## 7. APPEAL—HARMLESS ERROR.

Error in the admission of evidence was harmless, where its admission did not affect the result of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4157.]

## 8. TRIAL—VERDICT—SUFFICIENCY—CONSTRUCTION.

In an action by two plaintiffs against two railroads, the verdict was in favor of one of the plaintiffs, and in favor of "the defendant" against the other plaintiff, the court having instructed to find against him. *Held*, that in view of the statutory provision that where there has been a substantial compliance with the requirements of law in rendering a verdict, the judgment shall not be arrested or reversed for mere want of form therein, the verdict was to be construed as in favor of the first plaintiff against both defendants and in favor of both defendants against the second plaintiff.

## 9. TRIAL—DAMAGES—ELEMENTS—PROOF—INSTRUCTIONS.

Where, in action for damages, there is no evidence tending to establish an item of expense for which plaintiff might recover, it is error to refuse an instruction, when requested by defendant, that no recovery can be had as to such item.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, § 484.]

## 10. EVIDENCE—JUDICIAL NOTICE—DIRECTION OF RAILROADS—LOCATION OF COUNTY SEATS.

The court takes judicial notice of the direction, run, and location of important railroads within the state, and of the location of county seats, but not of towns which are not county seats.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 9-12.]

## 11. APPEAL—HARMLESS ERROR.

Where, in an action for the wrongful ejection of a passenger, plaintiff alleged that he paid \$21.50 for railroad fare to a certain point, but the evidence was that he paid that amount for fare to another point, the error in refusing to instruct that no recovery could be had for the

\*Writ of error denied by Supreme Court.

sum paid did not require the reversal of a judgment for plaintiff, provided he remitted such sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4220, 4230.]

## 12. CARRIERS—EJECTION OF PASSENGER—EXCESSIVE DAMAGES.

Plaintiff, a passenger, received a duplicate drover's pass, instead of the original, through the mistake of defendant railroad's agents; was charged by defendant's conductor and auditor in the presence of other passengers with knowingly attempting to travel on an invalid scalper's ticket, and was forcibly ejected from defendant's train about 1 o'clock at night at a station some distance from a town to which he was compelled to walk for shelter. He was a stranger in the town, and was without money or friends; was compelled to remain in the town three or four days, and suffered much humiliation and mental anguish. The conductor and auditor knew when they ejected plaintiff that he had no money. *Held*, that a verdict for \$400 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1490.]

Appeal from District Court, Johnson County; W. R. Walker, Special Judge.

Action by B. C. Lightfoot, Jr., and another, against the Missouri, Kansas & Texas Railway Company of Texas and another. Judgment for plaintiff Lightfoot, and defendants appeal. Affirmed, provided plaintiff remit \$21.50, otherwise to be reversed.

Ooke, Miller & Coke and Ramsey & Odell, for appellants. S. C. Padelford, for appellees.

**TALBOT, J.** This suit was instituted by appellees B. C. Lightfoot, Sr., and B. C. Lightfoot, Jr., against the Missouri, Kansas & Texas Railway Company and the Missouri, Kansas & Texas Railway Company of Texas for damages sustained by the said B. C. Lightfoot, Jr., on account of being wrongfully ejected from one of appellants' passenger trains by their servants in charge thereof at St. Charles, Mo., and for damages alleged to have been sustained by both appellees by reason of the delay in a shipment of certain beef cattle from Johnson county, Tex., to Chicago, Ill., as a result of said wrongful ejection. After the evidence was closed, the trial court instructed the jury that they could in no event find in favor of appellee B. C. Lightfoot, Sr., and as to him to return a verdict for the defendant. The court also, in writing, expressly withdrew from the consideration of the jury the issue as to the alleged damages and injury to appellees by reason of the alleged delay in the shipment of their cattle and expenses in feeding them. They were also instructed that they could, in no event, find in favor of plaintiffs any sum as damages on account of any expense in keeping said cattle, or by reason of any alleged depreciation in their market value. The issue made by the pleadings and the evidence as to the right of appellee B. C. Lightfoot, Jr., to recover for being ejected from appellants' train was the only issue submitted to the jury. The trial resulted in a

verdict and judgment for appellee B. C. Lightfoot, Jr., in the sum of \$400, and appellants have appealed.

The facts material to state are as follows: Appellees B. C. Lightfoot, Sr., and B. C. Lightfoot, Jr., father and son, owned certain beef cattle situated in Johnson county, Tex. In July, 1904, they shipped two car loads of said cattle over appellants' railroad to Chicago, Ill., and by the terms of the contract of shipment appellant obligated itself to give to appellees two tickets or "drover's passes" from Ft. Worth, Tex., to Chicago, Ill., and from Chicago back to Ft. Worth, by way of St. Louis, Mo. B. C. Lightfoot, Jr., and his brother received tickets or passes in accordance with the terms of said contract to Chicago, and accompanied the two car loads of cattle to that place, sold them, and returned to St. Louis. On the afternoon of July 25, 1904, as required by his contract, B. C. Lightfoot, Jr., went to the proper office of appellants in St. Louis, delivered the contract to its agent, and received from said agent a return ticket or pass from St. Louis to Ft. Worth, Tex. The return ticket or pass was made out by appellant's agent in duplicate, one of which was delivered to appellee Lightfoot, Jr., and the other kept by the agent. After this ticket or pass had been examined by the gate keeper at St. Louis and appellant's porter or brakeman, appellee was allowed to board one of its passenger trains for the purpose of being transported to Ft. Worth. After the train upon which appellee had taken passage left St. Louis, the conductor of appellant in charge thereof asked appellee for his ticket, examined it, and placed the usual check in appellee's hat indicating the said ticket or pass was all right. After this, appellee's brother went into the sleeping car, for the purpose of obtaining for himself and appellee a berth for the night, and upon presentation of their transportation tickets or passes to the Pullman conductor he made some objection to appellee's ticket, and shortly thereafter the train conductor, in company with appellants' train auditor, came to where appellee and his brother were, took appellee's ticket from him, told him it was no good, that he could not ride on it, and would have to get off of the train. Appellee told the conductor and the auditor from whom, and the circumstances under which, he had received the pass; that he only had about \$1 in money, and no means of paying his fare to Texas. The conductor then remarked in the presence and hearing of a number of passengers in the car, "This looks like the work of scalpers to me," and the auditor said: "That is what it looks like to me. It looks like a scalper to me." Appellee denied that scalpers had anything to do with the sale or his possession of the ticket, and the conductor and auditor turned to leave the car, and said that appellee would have to get off of the train at St. Charles, Mo. When the train arrived at St.

Charles, the conductor and auditor returned to the car where appellee was, and ejected appellee from the train. In doing so the conductor seized the coat of appellee, gave him a pull, and said: "Young man you will have to get off. There ain't no use in arguing. There is no time for argument here. You will have to get off. I will put a stop to this scalping business." This was about 1 o'clock at night, and it was dark, the appellee a stranger in the town of St. Charles, and he did not know where to go. The town was a short distance from the railway station and some one directed appellee how to find it. He was compelled to walk to the town and remain there until he received a ticket and some money from his father in Texas, which was three or four days. Appellants' auditor, who was present when the conductor ejected appellee from the train, got off at St. Charles, and insisted that appellee return with him to St. Louis, telling him that he would bear the expense to St. Louis, and that, if the ticket taken from appellee by the conductor of the train was a good ticket, he (the auditor) would get him a ticket to Texas. Appellee declined this offer, giving as his reason for so doing that the auditor was a stranger to him, and he did not know whether he was lying to him or not; that he was a stranger in St. Louis, and did not have the "drover's pass" taken from him by the conductor or the contract to show that he was entitled to a ticket, that he had no money, and, if it was decided in St. Louis that he was not entitled to a ticket, he would be unable to get to Texas or back to St. Charles where he was expecting money to be sent to him by his father. By reason of the language used by the conductor and auditor when they took appellee's ticket from him, and by reason of the wrongful ejection of him from the train, he was humiliated and suffered mental distress, and together with the necessary expenses, etc., incurred on account of the said conduct of appellants' conductor and auditor, appellee sustained damage in the sum awarded by the jury.

Appellants' assignments of error from 1 to 5, inclusive, complain of the court's action in refusing to sustain certain special exceptions urged to appellee's petition. These exceptions are, in substance, that there was a misjoinder of causes of action, in that the expenses of feeding the cattle and the decrease in the value of the same, as claimed by both appellees, were improperly joined with the action of tort by B. C. Lightfoot, Jr., for damages solely recoverable by and strictly personal to him; that the allegations that appellants' servants publicly charged appellee with attempting to steal a ride from St. Louis to Ft. Worth, Tex., on an invalid and scalper's ticket, and that he was caused thereby to suffer humiliation and mental distress, and caused by reason of his ejection from appellants' train to incur expenses, etc., were improperly joined with the

alleged cause of action for keeping said cattle and their depreciation in market value, etc.; that the allegations in reference to the depreciation in the market value of the cattle are too vague and uncertain, and the damages sought to be recovered thereby too remote. These assignments will be overruled. We are inclined to the opinion that all the matters set up in appellee's petition could be properly embraced in one petition and suit under the practice of this state; but, however that may be, the court's action in withdrawing the claim for damages to the cattle, and instructing the jury that appellee B. C. Lightfoot, Sr., in no event could recover, cured any error the court may have committed in its ruling on the pleadings in the respect complained of.

For the same reason appellants suffered no injury by the admission of the testimony complained of in its sixth, eleventh, and twelfth assignments of error, and they will also be overruled.

Nor do we think the case should be reversed because of the remarks of counsel for appellee made the basis of appellants' fourteenth, fifteenth, and sixteenth assignments. If it be admitted that the remarks to which exceptions were taken exceeded the bounds of legitimate argument, the jury were specifically instructed in writing by the court that they were improper, and not to consider them for any purpose; and the size of the verdict, nor anything else in the record, indicates that the jury were improperly influenced by the remarks.

There was no reversible error in charging the jury that, if they found for appellee, to allow him such damages as the evidence showed would be a fair and reasonable compensation to him for the expenses occasioned directly and proximately by the acts of appellants' agents, and in refusing to give appellants' special charge limiting such recovery to hotel and laundry bills. If the evidence showed that appellee's expenses were for hotel bills and laundry bills only, as claimed, it would not have been improper, perhaps, for the court to have given appellants' requested instruction limiting a recovery for such expenses to these items; but it does not appear that any other item of expense to which this portion of the court's charge related was considered by the jury or included in their verdict, and the presumption is that they only allowed such as the evidence warranted.

In the eighth paragraph of the court's charge the jury were instructed that if the servants of appellants in charge of the train upon which appellee was riding used more force than was necessary to eject appellee from said train, or used language or made statements or performed other acts not necessary to remove the appellee from said train, and that appellee was thereby inconvenienced and suffered mental pain and humiliation as a direct and proximate result there-

of, to find in favor of the appellee "for such damage as the evidence shows will be a fair and reasonable compensation to him for such inconvenience and mental anguish and humiliation, if any." This charge is objected to on the ground that it, in effect, tells the jury that if the servants of the defendants used any language towards plaintiff, or made any statement to him that was not necessary, to secure his removal from the train, and the plaintiff thereby suffered mental pain or humiliation, he could recover, whether such statement or language was calculated to produce such effect or not; and because there was no testimony of any "other acts" on the part of the defendants' servants or employes which would justify or authorize such an instruction. We think it must be admitted that the charge is not entirely free from criticism; but inasmuch as it seems clear that the plaintiff was entitled to recover under the practically undisputed evidence, and that under this evidence the amount of the recovery is not excessive, we conclude defendants suffered no substantial injury by the charge, and that it affords no sufficient reason for a reversal of the case.

Appellants in their second proposition under their forty-first assignment of error concede that appellee B. C. Lightfoot, Jr., was unlawfully ejected from the train at St. Charles, Mo.

Nor do we think the admission of the evidence, over the objection of appellants, that appellee B. C. Lightfoot, Jr., was frightened as a result of the manner and circumstances under which he was put off of appellants' train, requires a reversal of the case. The only objection urged to the introduction of this evidence was that there was no allegation of fright. It was not contended that the testimony was inadmissible because no bodily injury to B. C. Lightfoot, Jr., was alleged, or shown, and therefore fright as an element of mental suffering or actual damages could not be recovered. That question was not involved in the trial court's ruling, upon the objection made, and does not arise upon appellants' assignment of error. Mental anguish or suffering is an element of damage for which a recovery may be had under the decisions of this state, although no actual personal injury may have been inflicted. (*Railway Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *Tel. Co. v. Kendzora* [Tex. Civ. App.] 26 S. W. 245; *Railway v. Anchonda* [Tex. Civ. App.] 68 S. W. 743; *Id.*, 33 Tex. Civ. App. 24, 75 S. W. 557; *Railway v. Coopwood* [in which writ of error was refused] 96 S. W. 102); and all damages that are the proximate, natural, and probable consequences of the act complained of may be recovered under a general allegation of damage. It was alleged in this case, in effect, that appellee was wrongfully, maliciously, and forcibly ejected from appellants' train at a strange place to him about 1 o'clock on a dark night, and that by reason thereof he

suffered great mental distress. Now, fright is unquestionably a painful emotion of the mind, and, in view of the manner of appellee's expulsion from appellants' train and of the time and place when and where it occurred, might reasonably have been expected to result to him from the acts done by the servants of appellants in violation of his rights. We conclude, therefore, that the testimony objected to was admissible under the general allegations mentioned; but, if we should be mistaken in the foregoing views, then we are of the opinion that it may be safely and fairly said that, without the testimony that appellee was "frightened," the result of the trial would have been the same, and hence appellants have suffered no material injury by the admission of said testimony. Appellants concede, in their brief, as above stated, that appellee was "unlawfully" ejected from their train at St. Charles, Mo., and the evidence is amply sufficient to show that, entirely independent of any question of "fright," appellee sustained damages in the amount of the verdict and judgment.

It is assigned that the trial court erred in overruling appellants' motion in arrest of judgment. The principal ground of this motion is, in substance, that the verdict returned by the jury was too vague, indefinite, and uncertain to authorize or sustain the judgment rendered for the reason that two defendants were sued and a recovery sought against both of them, whereas, the verdict returned is against only one of the defendants, and does not state which one. The verdict as incorporated in the judgment of the court reads thus: "We, the jury, find in favor of the plaintiff, B. C. Lightfoot, Jr., the sum of four hundred (400) dollars, and we further find in favor of the defendant against plaintiff, B. C. Lightfoot, Sr. J. S. Ezell, Foreman." Upon this verdict the court entered judgment in favor of appellee B. C. Lightfoot, Jr., against both of the appellants for the amount named in the verdict, and in favor of both appellants against B. C. Lightfoot, Sr., that he take nothing, and that they recover as to him all costs. We think this action of the court correct. It is said that "the verdict of a jury should be construed liberally, not technically, and so that it may rather stand than fall." Besides, it is statutory in this state that, "where there has been a substantial compliance with the requirements of the law in rendering a verdict, the judgment shall not be arrested or reversed for mere want of form therein." The court instructed the jury to find in favor of appellants against B. C. Lightfoot, Sr., and, in the event they found the existence of certain facts, to return a verdict in favor of appellee, B. C. Lightfoot, Jr., for such sum as he was entitled to recover under the measure of damages given. The verdict is in favor of B. C. Lightfoot, Jr., for the sum of \$400, but does not recite, as will be noticed, that it is "against the de-

defendants" or either of them. That the jury intended, however, to find against both of the defendants, is manifest, and their verdict will be construed to be such finding. A verdict reading, "We, the jury, find for the plaintiff for five hundred dollars," was held in the case of the New York, T. & M. Ry. Co. and the Southern Pacific Railway Co. v. Gallaher, 79 Tex. 685, 15 S. W. 694, to be sufficient to authorize and support a judgment against both defendants. In that case Judge Gaines says: "The question was, was the plaintiff entitled to recover the penalty claimed of the two defendants? The verdict very clearly answers that question in the affirmative. As we understand it, a verdict in favor of one party is always taken to be a verdict against the other, and it is unusual for a verdict in an ordinary case to name or mention the party against whom the verdict is found." And the use of the singular "defendant," instead of the plural "defendants," in that portion of the verdict wherein the jury find against B. C. Lightfoot, Sr., must be regarded as a mere clerical error, and should be construed to be a finding in favor of both defendants, there being two of them, against the said Lightfoot. This view is supported by the case of Tom v. Sayers et al., 64 Tex. 339. In that case two plaintiffs were claiming title to land in the same right. The verdict was in the singular—for the plaintiff—and the Supreme Court held that it should be construed as rendered for both plaintiffs. Furthermore, judgment was entered in the present case in favor of both of the appellants, as has been shown, against the appellee B. C. Lightfoot, Sr., and certainly they have no cause to complain of the form of the verdict here under consideration.

Appellants' eighteenth assignment of error complains of the trial court's action in refusing to give the following requested instruction: "There is no evidence before you as to the amount of the railway fare paid by plaintiff B. C. Lightfoot, Jr., from St. Charles, Mo., to Ft. Worth, Tex., the only evidence in the case being the amount paid for a ticket from St. Charles, Mo., to Grandview, Tex., and there being no evidence as to the distance from St. Charles, Mo., to Ft. Worth, Tex., or the value of a ticket from St. Charles to Ft. Worth, you are not authorized to find any sum for plaintiff for any sum expended for such ticket." This assignment must be sustained. Where there is no evidence tending to establish an item of expense for which a plaintiff might recover, in the event he prevails in his suit, it is error to refuse to instruct the jury that no recovery can be had as to such item, when requested by the defendant so to do. Appellants' contention that there was no evidence as to the amount of the railway fare paid by appellee B. C. Lightfoot, Jr., from St. Charles, Mo., to Ft. Worth, Tex., is sustained by the record. The allegation is that he paid \$21.50 for railroad fare from St. Charles, Mo., to Ft. Worth,

Tex., but the testimony is that he paid "\$21.50 or \$20 and something to Grandview." The contention of appellee, in answer to this assignment, to the effect that we judicially know the distances separating these towns, the railroad fare from one to the other, and hence know that the railway fare from St. Charles to Ft. Worth is \$21.50, or that the difference in the fare from St. Charles to Grandview is so small the law will not take notice of it, is not tenable. We take judicial cognizance of the "direction, run, and location of important railroads within this state" (Railway Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; Railway v. Marrs et al. [Tex.] 101 S. W. 1177), and that Ft. Worth is the county seat of Tarrant county, Tex., and is located in that county (Hambel & Hasty v. Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46), but, Grandview not being a county seat in any county in this state, we do not judicially know where it is located, and, in the absence of proof, have no means of knowing what the railway fare is from St. Charles to either Ft. Worth, Tex., or "Grandview," or from Ft. Worth to Grandview. This error of the court, however, does not necessarily require that the case be remanded for a new trial. This may be obviated at the discretion of the appellee by a remittitur of the sum of \$21.50 claimed to be the railway fare paid by appellee from St. Charles, Mo., to Ft. Worth, Tex.

The remaining assignments of error have been considered, with the conclusion reached that neither of them disclosed any reversible error. The verdict in our opinion is not excessive. It is not so large as to indicate that it is the result of passion or prejudice or other improper motive. It is conceded that appellee B. C. Lightfoot, Jr., was entitled to a return ticket or pass over appellants' line of road from St. Louis, Mo., to Ft. Worth, Tex. If he received a duplicate of such pass, and not the original at St. Louis, the verdict of the jury, which is amply supported by the evidence, establishes that the mistake was through no fault of his, but an error of appellants' servants. Appellee was without money, of which the appellants' conductor and auditor were informed. He was in effect charged in the presence of other passengers with knowingly attempting to travel over appellants' road upon an invalid scalper's ticket, and forcibly ejected from its train about 1 o'clock at night at a station some distance from the town of St. Charles and its hotels and lodging houses, to which he was compelled to walk in search of shelter. He was a stranger in the town, without money and without friends. By reason of the conduct of appellants' servants, he was forced to remain in said town three or four days in the condition described, away from his home and family, and, in addition thereto, suffered much humiliation and mental anguish. For these and other reasons shown by the record, we think the verdict is not excessive.

It is, therefore, ordered that if appellee B. C. Lightfoot, Jr., remits in this court within 10 days from the filing of this opinion the sum of \$21.50, to which we have referred, the judgment of the court below for the remaining sum will be affirmed, otherwise said judgment will be reversed and cause remanded. The costs of this appeal will be taxed against appellee B. C. Lightfoot, Jr.

FT. WORTH & D. C. RY. CO. v. WALKER.\*  
(Court of Civil Appeals of Texas. Dec. 5, 1907.)

1. DEPOSITIONS—IRREGULARITIES IN RETURN.

The return on a deposition envelope serves the purpose only to preserve the purity of the return of the deposition, and is a matter properly for the court, and not for the jury, as evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 197-199.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE — PREJUDICIAL EFFECT IN GENERAL.

Reading to the jury the indorsements on a deposition envelope is harmless error, where it would not have the effect to challenge the validity of the taking of the deposition or the legality of the return or raise such issues, or cause the jury to discard the deposition on the ground that it was illegally taken or returned.

3. SAME—ARGUMENT OF COUNSEL.

The use of the indorsements on a deposition by counsel in his argument to the jury is harmless error, where he did not question the legality of the return or the validity of the taking of the deposition, and where the deponent's testimony is opposed by all the other evidence, upon which no other verdict than that rendered could have been properly returned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4084, 4185.]

4. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES — SUFFICIENCY OF EVIDENCE.

In an action for personal injuries sustained in being thrown from a seat of a passenger coach because of the derailment of the train, evidence examined, and held to support a verdict for plaintiff.

5. WITNESSES — EXAMINATION — LEADING QUESTIONS IN GENERAL.

In an action for personal injuries sustained in being thrown from a seat of a passenger coach because of the derailment of the train, it was not a leading question to ask a witness: "Did anybody direct your attention—rather to the speed of the train?"

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-851.]

6. APPEAL—OBJECTIONS BELOW—NECESSITY — INSTRUCTIONS—REQUESTS.

Rev. St. 1895, art. 1316, as amended by Laws 1903, p. 55, c. 39, providing that the judge shall deliver a written charge on the law of the case, makes it the duty of the court to deliver a written charge on the law of the case, but does not change the rule precluding a party from complaining of the court's failure to submit an issue, in the absence of a special request therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1306-1314.]

7. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action for personal injuries sustained in being thrown from a seat of a passenger coach because of the derailment of the train, evi-

dence examined, and held not to show contributory negligence.

8. APPEAL — HARMLESS ERROR — ERRORS NOT AFFECTING RESULT.

An erroneous ruling of the court upon an exception to a paragraph of a petition is harmless error where the right result on the paragraph was reached in the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4077.]

9. DAMAGES—GROUNDS — PERSONAL INJURIES — EXPENSES — NECESSITY OF ACTUAL PAYMENT.

Where a husband sues for personal injuries sustained by his wife in being thrown from a seat of a passenger coach because of the derailment of the train, and also seeks to recover the reasonable expense for nurse hire, and it appears that the wife's mother was her nurse, and there is no evidence as to whether the mother expected to charge for her services or not, an instruction authorizing the jury to award such expense is not erroneous, since, even if the mother's services were rendered gratuitously to plaintiff, they were for his, and not for defendant's, benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 99, 244, 249-254.]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by C. Q. Walker against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee brought this suit against the railway company to recover damages for personal injuries received by his wife, Mrs. Kate Walker, while a passenger on the railway of the company. The case was tried in the district court to a jury, and resulted in a verdict and judgment for the appellee for \$7,500, which the appellant seeks to have reversed for errors assigned upon the action of the trial court in admitting testimony, giving instructions to the jury, and the refusal to give certain special instructions requested by the defendant company, and other errors mentioned herein later on. It is established by the evidence in the record that on Christmas Day, 1905, at about 11:30 o'clock in the morning, and about six miles south of Decatur, Tex., the appellant's passenger train became derailed. Consequent upon the derailment, the track was torn up for the distance of about 400 or 500 feet. The baggage car and the mail car were thrown on the right-hand side of the track, and the sleeper and the other day coaches on the left-hand side of the track; all the cars having gone off the track, excepting the front end of the baggage car and the tender and engine. The track at the place where the derailment occurred at the time of the derailment was in a bad condition, the roadbed very soft and unballasted, and the ties under the rail were in very bad condition, to the extent of a number of them being rotten ties. It is shown that the roadbed at this point of derailment was situated near a water hole which came up to within three or four feet of the track. The derailment was caused by the defective condition of the roadbed and track at this point,

\*Writ of error denied by Supreme Court.



and from the defective and rotten condition of the ties in the track. The appellee's wife and her child, accompanied by her sister and two small nephews, were passengers on the train together at the time of the derailment, and were traveling over the railway line of appellant on a visit to relatives at Sunset to spend the Christmas holidays. Mrs. Walker was between five and six months advanced in pregnancy at the time. The train upon which Mrs. Walker was riding, and at the time of its derailment, was running at a rate of speed variously estimated by the witnesses at from 25 miles per hour by the conductor to 40 to 50 miles per hour by some of the other witnesses. Mrs. Walker and her companions were occupying the rear seat on the left-hand side of the last chair car next to the sleeper. The derailment made a sudden stoppage of the train, and this threw or jerked Mrs. Walker forward, and down in the aisle, inflicting injuries upon her as alleged by her. At the scene of the wreck Mrs. Walker received medical attention; the company's doctor waiting upon her. She continued her journey to Sunset, where her relatives lived. There a physician waited upon her for the period of about 10 days, when she was carried to her home at Ft. Worth, Tex., where she was further attended by physicians for a period of four months, during which time she was confined to her bed from her injuries. The evidence shows a sharp contest in the trial over the extent of her injuries and suffering, as well as the cause of same. But there is evidence sufficient to support the finding that for a period of four months Mrs. Walker was confined to her bed after receiving the injuries in the wreck, and was partially paralyzed, unable to move her lower limbs, and showed signs of spinal concussion, and wasted away to a skeleton. It is shown: That to keep her bones from working through the skin she was constantly bathed in alum and alcohol, and required the attention of nurses both day and night. During this time she gave birth to a child, which when born, according to the testimony of the family physician, was weakly and fretful, and that she was unable to nourish the child at all. The child died at two months. That at the time of the trial Mrs. Walker was weakly and delicate, and had not regained her strength and was a nervous wreck. According to the evidence of the physician Mrs. Walker was permanently injured, and he considered it improbable that she would ever regain her health or be free from suffering. That prior to the injury Mrs. Walker was in average good health, and was 29 years old. The appellee proved the expenses incurred by him as a necessary consequence to his wife's injuries, consisting of medical bills, medicine, employment of house help, and reasonable value of nurse hire.

Spoonts, Thompson & Barwise, for appellant. Carlock & McLean, for appellee.

LEVY, J. (after stating the facts as above). The appellant complains of the admission in evidence of the indorsements on the deposition envelope, and the use thereof in argument before the jury by appellee's attorney, and the refusal of the court to give the special charge in relation thereto. These three assignments will be considered one with the other.

It is contended by appellee that the indorsements on the envelope are a part of the deposition, and the entire deposition, including the envelope with its indorsements, constituted a filed paper in the case, and was admissible in evidence. The return on the envelope serves the purpose only to preserve the purity of the return of the deposition. It is a matter properly for the court, and not for the jury, as evidence. In the case of *Blum v. Jones*, 86 Tex. 495, 25 S. W. 694, the legality of the taking of the deposition was challenged in the trial before the jury by proof that the officer taking the deposition was, by reason of relationship, not legally authorized to take it. *Railway v. Long* (Tex. Civ. App.) 65 S. W. 883, was where testimony was offered in the trial to impeach the notary who took the deposition. The effort was to attack the legality of the taking of the deposition. In *Railway v. Edins* (Tex. Civ. App.) 35 S. W. 953, the legality of the taking of the deposition was challenged by evidence in the trial. In *Hord v. Railway*, 33 Tex. Civ. App. 163, 76 S. W. 227, the correctness of the taking of the deposition by the notary was challenged by evidence in the trial. Reading in evidence the indorsements on the envelope in this case would not of itself have the effect nor the same force like proof of independent facts not appearing connected with the deposition to challenge the validity of the taking of the deposition or the legality of the return, or have the same purpose to make an issue thereof before the jury, and have the jury discard the deposition of the witness upon any ground that it was not lawfully taken or returned. The reading of the indorsements on the deposition envelope was irregular and immaterial; yet we cannot hold it to be in this case such error as to require reversal. In the argument of this case appellee's attorney, in his opening argument to the jury, alluded to the return on the deposition envelope in connection with the deposing witness's testimony. The appellant's attorney answered the allusion in his speech, as well as commented upon the deposing witness's testimony. The appellee's attorney in his closing speech further replied to the appellant's speech. The appellee's attorney in the course of his closing argument to the jury did not denounce to the jury as illegal the return of the deposition, or argue to the jury that it was invalid or illegally returned into court; but, on the contrary, in the course of his remarks admitted to the jury that the party returning the deposition "had the right to take charge

of the deposition when taken by the notary and delivered to him, and to return the same to the clerk of the district court," although he made observations to the jury on the fact shown by the return. In *Railway v. Butcher*, 83 Tex. 309, 18 S. W. 583, the attorney in his argument to the jury denounced the particular order of the court, and the court's procedure, as being illegal and an outrage. As we have observed, the case before us shows the absence of a line of argument by the attorney denouncing the illegality of the return or the validity of the taking of the deposition. Did the use of the indorsements by the attorney in his argument to the jury, in connection with the deposing witness's evidence, probably cause the jury to disregard the depositions in consideration, or so influence the jury as to return a wrong finding of evidence in the case? Appellee in his brief states the contention before the jury on the testimony of the deposing witness was that the testimony was manufactured, and that she was not on the train at all. A brief examination of her testimony shows that she testified that the cars were running on the ties before the derailment, and that they did not make enough jar or shock to throw Mrs. Walker out of her seat, or any one else in the car, and that she had felt worse jars in street cars or while on other cars that were being coupled together; that the train on which she was riding was not running fast, probably 15 miles an hour; that the wreck occurred in the fore part of the night of Christmas Day; that she did not know Mrs. Walker, and had never seen her before; that she made no examination of her, had no talk with her, had had no occasion to investigate her injuries. Opposed to this testimony in the record, briefly stated, is the testimony of Mrs. Walker and her sister, Miss Bryson, that they were thrown forward and downward in the car. Two postal clerks testified that the jolt of the train was severe. The conductor testified that he was thrown forward from the middle of the car to the end, striking against the toilet, and sustaining injuries. The track was torn up for something like 400 or 500 feet, and the cars were off the track. The engineer and conductor say, with the other witnesses, that the wreck occurred at 11 o'clock in the morning of Christmas Day. The engineer and conductor and other witnesses say the train was running at the rate of 25 or more miles per hour. Edwards, another passenger on the train, corroborates Mrs. Walker. In fact, the testimony of the deposing witness is practically different from that of all the other witnesses. In view of these irreconcilable conflicts in the testimony of this deposing witness and the other witnesses in the case, we are not prepared to say that a jury of average sensible men was led away from the consideration of the deposing witness' evidence on account of the reading of the indorsements on the envelope, or such observations or allusions

thereto on the part of the appellee's attorney in his argument. Considering the entire evidence in the case, no other finding by the jury than one of liability could have been properly returned; and it appears to us that the irregularities complained of could not have even probably affected or influenced the result, or operated to appellee's injury, and therefore will afford no grounds for reversal. The three assignments are overruled. *Railway v. Killebrew* (Tex. Civ. App.) 20 S. W. 1005; *Railway v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Railway v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; *Railway v. Elvis*, 31 Tex. Civ. App. 280, 72 S. W. 216; *Railway v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 441.

The fourth assignment is directed to the admission of evidence relative to the condition of the weather at the time of the wreck. It was stated by the attorney for the appellee at the time of the objection that this evidence was not offered for a general purpose or as a basis of recovery, but merely as explanatory of the situation of Mrs. Walker at the time of the wreck in connection with the evidence then being elicited. Looking to the record in this case, we do not think the evidence thus limited in its purpose and use constitutes reversible error.

We do not think the question as finally put to the witness, complained of in the fifth assignment, was a leading question. The record shows the question as finally put and answered was: "Did anybody direct your attention—rather to the speed of the train?" The answer of the witness to the question may have contained more matter than the question called for, but it was voluntary on the part of the witness, and not required of him in answer to the question. This voluntary matter of the witness could have been stricken out on motion.

The appellant claims in the sixth assignment that contributory negligence was an issue in the case; and the court erred in not submitting the issue to the jury. The appellant had a general plea of contributory negligence. The court did not charge the jury on any issue of contributory negligence, and appellant did not ask a special charge covering this phase of the case. But appellant contends that, as contributory negligence was a substantial issue under the plea and evidence, it was the duty of the court, under Rev. St. 1895, art. 1316, as amended by Acts 1903, p. 55, c. 89, to "deliver a written charge on the law of the case," even though a special charge was not requested; and it was error in the court not doing so. The evidence in the record does not show negligence in the remotest degree on the part of Mrs. Walker, in so far as the accident itself was concerned. She was a passenger, and was occupying her seat at the time in the passenger car, when the derailment happened, and was by reason of the derailment thrown from her seat and injured. The ap-

pellant, however, contends that the testimony of the appellee and Dr. Harvey, the physician at Sunset, showed and strongly tended to show that appellee was guilty of negligence in removing and in permitting the removal of his wife from Sunset, after her injury at the wreck, to Ft. Worth, her home, on account of her then physical condition. The conclusion from the testimony of Dr. Harvey, the physician at Sunset, is that Mrs. Walker had the appearance of getting better under his 10 days' treatment of her at Sunset, and that her condition looked favorable for the time he treated her, but at that time he could not say as to the permanency of the injury or what it might or would result in; that she sat up a little the evening before she left, and was very desirous of returning to her home; that he gave his consent to her removal to Ft. Worth, though it was unwillingly done. He did not forbid the trip; and told appellee he could take her home, and that, if careful with her, she would take the trip all right. He was somewhat apprehensive of the trip, because from her general appearance it was probable that she might sustain miscarriage during the trip. She was carefully attended by the appellee on the sleeper of the train, and in removing her from the depot to her home. The evidence shows that no miscarriage did result from the trip, that the baby was born at the regular time three months later, and that no backset resulted to her, nor was her condition in any wise affected by the trip. In our view, properly construing the evidence, we do not think error can be predicated on the failure of the court to instruct the jury on contributory negligence. If deemed a particular phase of the case, a special charge should have been requested covering the phase before a reversible error could be predicated thereon. *Railway v. Van Alstyne*, 56 Tex. 439; *Railway v. Casey*, 52 Tex. 124; *Railway v. Helm*, 64 Tex. 148. The charge of the court, so far as it went, was correct; and we do not think, following the construction placed upon the act of 1903 mentioned in *Railway v. Votaw* (Tex. Civ. App.) 81 S. W. 130, appellant was relieved of the necessity of presenting a special charge on the issue desired in order to predicate reversible error for the omission to submit the desired issue by the court.

We do not think there was reversible error in failure to give the special charge complained of in the seventh assignment, and it is overruled. *Railway v. Weldeman* (Tex. Civ. App.) 62 S. W. 810.

We are of the opinion that both the eighth and ninth assignments should be overruled. In this case it appears affirmatively in the record that the verdict of the jury was returned in favor of the appellee alone upon the paragraph in his petition against which no complaint was urged. The jury, in precise words, returned a finding upon the paragraph of the petition excepted to in fa-

vor of the appellant as to the death of the child. If the right result on this paragraph excepted to was reached in the verdict, it substantially met the erroneous ruling of the court upon the exception to the paragraph, and is a reliefment of the erroneous ruling to the extent of requiring a reversal of the case.

The tenth assignment is overruled. The main charge of the court and the special charges given at the request of appellant fairly submitted the issue to the jury admitting of a finding for the appellant on the issue of negligence, if it had not been guilty of negligence.

The appellant complains in the eleventh assignment of the charge of the court wherein it authorized the jury, in assessing damages, to award reasonable and necessary expense for nurse hire, because there was no testimony justifying the submission of this issue to the jury. The evidence in this record established the fact that Mrs. Bryson, the mother of Mrs. Walker, nursed her through her sickness of four months, being the period that she needed such services, having left her home and come to her daughter's house in Ft. Worth, and had taken charge of her daughter throughout her affliction because of her injury received in the derailment; that she was the one who nursed her through her sickness. It is shown in the record that the value of these services of a nurse in the premises was from \$5 to \$8 per day, including the night. The appellee sought in his petition a recovery for nurse hire. The appellant, though, asserts that there was no basis in the testimony justifying the court in submitting the issue of nurse hire because of the mother's having nursed the daughter, as the law will not imply an obligation to pay for the services of the mother in nursing her daughter, and by reason thereof it was reversible error to submit the issue to the jury. The evidence does not disclose that the appellee ever made any contract with Mrs. Bryson, or ever hired her to nurse his wife. The evidence does not disclose that Mrs. Bryson performed the services gratis to the appellee, nor that she expects to make a claim against appellee for the payment of the same. In our opinion it is wholly immaterial whether Mrs. Bryson was hired as a nurse by the appellee, or whether Mrs. Bryson for her services as a nurse to her daughter expects to make a legal charge against the appellee, or whether she means her services as a gratuity to the appellee, as it is a matter in which the appellant, as a wrongdoer, has no concern, and which does not affect the measure of its liability. Appellant could not claim any exemption from its liability in negligence for this item of damage, even though these services were voluntary and gratuitously rendered by Mrs. Bryson to appellee. They were for his benefit, and not for the benefit of the defendant. *Railway v. Lorentzen*, 79 Fed. 291, 24 C. C. A. 592; *Railway v.*

Marlon, 104 Ind. 239, 3 N. E. 874; Cunningham v. Railway, 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683; Crouse v. Railway, 102 Wis. 196, 78 N. W. 446; Railway v. Holman, 15 Tex. Civ. App. 16, 39 S. W. 130.

The twelfth assignment is overruled. While the evidence was sharply conflicting as to the severity and extent of the injuries to Mrs. Walker, there is sufficient testimony in the record to sustain the finding of the jury that she was seriously and permanently injured in the wreck. There is no evidence of prejudice or passion or misconduct on the part of the jury. We are not prepared to say that the verdict is excessive in this case.

The case is ordered affirmed.

### McKEON et al. v. ROAN et al.\*

(Court of Civil Appeals of Texas. Nov. 23, 1907. On Rehearing, Dec. 21, 1907.)

#### 1. BOUNDARIES—ESTABLISHMENT—EVIDENCE.

In trespass to try title to recover a city lot, plaintiff could show a mistake in the description in a deed more than 10 years old, in order to prove the actual location of the lot in controversy.

#### 2. SAME—PLEADING.

In trespass to try title, where the description of the lot in controversy is dependent on the location of another lot, the actual location of the other lot may be shown without specially pleading it, where the purpose was to show the true location of the lot in controversy.

#### 3. SAME—EVIDENCE.

In trespass to try title, parol evidence tending to show the true location of the lot on which depends the description of the land in controversy is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 178-183.]

#### 4. SAME—ASCERTAINMENT—AGREEMENT BETWEEN PARTIES.

Where the boundary between two lots of land is in dispute, the owners may agree upon a division line as the true boundary between them, and the agreed line is binding upon them and those claiming under them, whether it be the true boundary or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 212-226.]

#### 5. FRAUDS, STATUTE OF—AGREEMENTS AS TO BOUNDARIES.

An agreement between adjoining landowners as to their common boundary is not within the statute of frauds, in that it is not a conveyance of land within the meaning of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

#### 6. HOMESTEAD—TRANSFER—AGREEMENT AS TO BOUNDARY.

The right of adjoining landowners to agree as to their common boundary is not affected by the fact that one of the lots is a homestead, such an agreement not being a sale.

#### 7. EVIDENCE—HEARSAY.

In trespass to try title, evidence of a conversation between the prior owner of the lot in controversy and his wife regarding the boundary line of the lot is hearsay and inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

### On Rehearing.

#### 8. WITNESSES—REPRESENTATIVES OF DECEDENT—STATEMENTS AND TRANSACTIONS WITH DECEDENT.

Under Rev. St. 1895, art. 2302, providing that in actions by or against the heirs or legal representatives of a deceased, arising out of any transaction with such decedent, neither party will be allowed to testify against the other as to any transaction with or statement by the testator or intestate, evidence of statements made by defendant's grantor, since deceased, is admissible where the action was dismissed as to such defendant.

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Trespass to try title by Mrs. Mary McKeon and others against F. L. Roan and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This is a suit of trespass to try title, instituted by Mrs. Mary McKeon for herself and as next friend for her minor children, the other appellants herein, against F. L. Roan, Lee O. Ablowich, A. A. Ablowich, J. H. Jernigan, and Patrick McGrory to recover a lot in the city of Commerce. The defendants answered by a general and special exception and not guilty, and the three, five, and ten years' statute of limitations. At the conclusion of the trial, the court gave a peremptory instruction for defendants, and plaintiffs perfected an appeal to this court.

Mulkey & Hamilton, for appellants. A. A. Ablowich and Looney & Clark, for appellees.

BOOKHOUT, J. On January 30, 1877, William Jernigan and wife, Sarah Jernigan, deeded a lot of 2½ acres out of the J. A. Burnett survey, in Hunt county, to their son, J. H. Jernigan, calling to begin "260 varas south and 70 varas west" from the beginning corner of the original survey. On August 6, 1878, the said patentee, William Jernigan, and his wife deeded to A. S. Ablowich a lot in same survey, "beginning at the southeast corner of a two-acre tract belonging to J. H. Jernigan; thence east 60 varas; thence north 147 varas; thence west, 50 varas, to said Jernigan's northeast corner; thence south to the beginning." The appellees claim that the last described deed covers the land in controversy, and they claim under a regular chain of transfers from A. S. Ablowich. The patentee, William Jernigan, died September 30, 1880, intestate. After his death his surviving widow and children deeded to J. H. Jernigan, one of the children, the lot in controversy, described as "beginning at the southeast corner of A. S. Ablowich residence lot; thence east 52 feet; thence north 120 feet; thence west to said Ablowich east line; thence south to the beginning." Appellants claim under a regular chain of transfers by deed from J. H. Jernigan down to Patrick McKeon, and as heirs of Patrick McKeon, being his surviving widow and children. Appellants alleged that there was a mistake in the call for distance of "70 varas west" in deed of Jan-

uary 30, 1877, from William and Sarah Jernigan to J. H. Jernigan of the 2½-acre lot; that said distance was unknown to them, but greater than 70 varas; that the deed of August 6, 1878, from William and Sarah Jernigan to A. S. Ablowich, was intended to begin, and, in fact, did begin, at the southeast corner of the first lot as such lot actually existed, and that the deed from Sarah Jernigan et al., to J. H. Jernigan was intended to begin, and did begin, at the southeast corner of said A. S. Ablowich lot, as it actually existed, 60 varas east of the southeast corner of the 2½-acre lot; that said A. S. Ablowich lot lay between the lands in controversy and said 2½-acre lot; that the recital in said deed, as well as all other deeds showing only 70 varas, was a mistake, and there has always been a greater distance than 70 varas from the J. H. Jernigan 2½-acre lot to the east boundary line of the Burnett survey. The defendant A. A. Ablowich excepted to the petition as wholly insufficient wherein it alleges that a mistake was made in the execution of a deed by William and Sarah Jernigan to James H. Jernigan, of date January 30, 1877, and wherein plaintiffs seek relief by reason of said facts, because the said cause of action, if any ever existed, is long since barred by the statute of limitation, as appears from the face of plaintiffs' petition, and because the necessary parties to correct and reform said deed are not before the court, and because it is an attempt to vary and contradict the terms of the said deed and deeds under which this defendant claims. These exceptions were sustained by the court and plaintiffs excepted, which action is preserved in the record. The petition did not seek to reform the deed, but to show that there was a mistake in the distance in the call, "beginning 260 varas south 70 varas west" from the beginning corner of the original survey. It alleged that the distance was more than 70 varas, and that the call of 70 varas was a mistake. The purpose was to show the actual location on the ground of the southeast corner of the 2½ acres sold by William and Sarah Jernigan to J. H. Jernigan. Neither the plaintiffs nor defendants were parties to, or claimed under, that deed, and we see no reason why the plaintiffs could not show the actual location of the southeast corner of the 2½ acres conveyed by it. The southeast corner of this 2½-acre tract, as actually located, was the beginning corner of the lot deeded to A. S. Ablowich, and the 52-foot lot in controversy began at the southeast corner of the Ablowich lot. We are of the opinion that the court erred in sustaining the special demurrer. We are also of the opinion that the actual location of the 2½ acres on the ground could have been shown as well as the mistake, if there was a mistake, in the call "70 varas west," without specially pleading it. The purpose was to show the true location of the land in controversy upon the ground. This could be done in the absence of a special plea.

The plaintiffs offered to prove by the witness J. H. Jernigan that it was a greater distance than 70 varas from the southeast corner of the 2½-acre lot of J. H. Jernigan to the east boundary line of the original James A. Burnett survey and he had measured 60 varas from the southeast corner of said lot, and that the 52 feet claimed by appellant and a 16-foot lot deeded by the witness to C. E. Ablowich still remained between the said 2½-acre lot and Park street. This testimony was objected to and excluded because it was an attempt to vary the terms of a written instrument, and the deeds were the best evidence, and because the property of A. S. Ablowich was a homestead, and because it was incompetent by parol evidence to establish the title to real estate. The testimony was admissible; and it was error to exclude it. It was admissible as tending to show the true location of the southeast corner of the 2½-acre lot deeded to J. H. Jernigan in January, 1877, and a mistake in the call in his deed. The mistake was claimed to be in the call for "70 varas west," and it was sought by appellants to show that the actual distance was greater than 70 varas. It also tended to show that there was sufficient land upon the ground for each party to get the full amount of land called for in his deed. This testimony did not tend to vary the terms of the deed from William and Sarah Jernigan to J. H. Jernigan of January, 1877, but tended to show the actual location of the 2½ acres on the ground.

The third, fourth, fifth, and sixth assignments of error are grouped, and complain of the court's action in excluding the testimony of several witnesses tending to show that in 1887 the boundary line between the A. S. Ablowich lot and the lot in controversy, which adjoins the Ablowich lot on the east, was in dispute between A. S. Ablowich and J. H. Jernigan, the then owner of the lot in controversy; that dispute culminated in an agreement between them, whereby the line now claimed by plaintiffs to be the true boundary line between plaintiffs and defendants was established and agreed upon, and that witness, in accordance with said agreement, removed A. S. Ablowich's bois d'arc fence back from where it stood west, on the agreed boundary line, and that said fence stood there from the time it was moved, which was about the year 1887, until about the year 1896, and that said established line was never objected to by the defendants and their grantees, but was recognized and acquiesced in by them; that witness and said Ablowich measured their lands and arrived at an agreement as to the true boundary line in making this agreement, and said A. S. Ablowich retained all the land called for in his deed. This testimony was objected to "because the property was a homestead, and the evidence in the case showed C. E. Ablowich, the wife of A. S. Ablowich, did not join therein and because affirmative equitable relief is sought, without setting it up and pleading to

authorize it, and because it is not in evidence or admitted that the witness owned land east of A. S. Ablowich's tract and could make a binding agreement, and therefore without consideration, and because the location of such agreed line is not shown, and because no consideration for such agreement, and not shown there was any uncertainty as to the true location of the boundary line at the time of the agreement, and because such agreement was verbal, and no possession taken or occupancy had or improvements made in accordance therewith, all as shown by the evidence and so within statute of frauds, and because it could not affect and was inadmissible as to defendants without notice of same, and because, in so far as the evidence tended to locate the lots, it called for an opinion and conclusion of the witness in conflict with the calls in the deeds with no predicate laid for such parol and contradicting testimony." The objections were sustained and the evidence excluded, to which ruling plaintiffs excepted and took bills of exception. This ruling of the court was error. Where a dispute arises between adjoining landowners as to the true location of the division line between them, and they get together and in settlement of such dispute agree upon a division line as the true boundary line between them, such agreed line is binding upon them and those claiming the land under them. This is true, whether such agreed line be the true boundary line between them or not. *Cooper v. Austin*, 58 Tex. 501; *Browning v. Atkinson*, 46 Tex. 608; *McArthur v. Henry*, 35 Tex. 816; *George v. Thomas*, 16 Tex. 87, 67 Am. Dec. 612. Such an agreement is not within the statute of frauds, in that it is not a conveyance of land within the meaning of the statute, but a settlement of the division line between adjoining landowners. Nor does the fact that the property of one of the parties to the agreed line was his homestead affect the validity of his agreement as to the boundary line between himself and the owner of adjoining land. As stated, such an agreement does not constitute a sale of real estate, but a settlement of the boundary line. If the agreement be fairly and honestly made, it is binding on all parties. *George v. Thomas*, 16 Tex. 89, 67 Am. Dec. 612.

Upon the trial the witness Mrs. C. E. Ablowich was permitted to testify as to a conversation between herself and husband, as follows: "My husband came home, and I said, 'See what Mr. Jernigan has done for your fence; and sorter laughed; and he says, 'Yes, I see;' and I says, 'What are you going to do about it?' and he says: 'I am not going to do anything. It is my land and Jim Jernigan can't take it away from me. I paid for it from his father, and I bought it to the road.'" This testimony was objected to as hearsay and irrelevant. The objection was overruled and plaintiffs excepted. The evidence was hearsay; and it was error to admit the same.

Complaint is made of the court's action in overruling the plaintiffs' objections to the testimony of Mrs. C. E. Ablowich as to statements made by William Jernigan at the time they bought their land in 1878, as follows: "William Jernigan came to our house once in a while. He was there, and saw and knew where the fences were put up, and he never made any objections. William Jernigan was there, and showed us the land he was selling us. He showed us the lot, and showed me several others, not lots, but different parts. He said the lot he sold us would be a nice place to build; said there was room for two houses. We talked of building on the corner at first, and then decided to build on the other side. He said there would be roads on both sides, and it was so we could build a house on either place, on either corner." William Jernigan, the person making these statements, died in 1880. J. H. Jernigan, under whom the appellants claim, is one of the heirs of William Jernigan, and purchased the interests of the other heirs to the land in controversy after his father's death. The petition makes him a party to the suit. The witness Mrs. Ablowich was the wife of A. S. Ablowich, and who conveyed the lot purchased by him from the Jernigans in 1878 by warranty deed to the appellee Lee O. Ablowich. The objection made to this testimony was that it was inadmissible under the terms of article 2302 of the Revised Statutes of 1895, which provides, in substance, that in actions by or against the heirs of legal representatives of a decedent arising out of any transaction with such decedent neither party will be allowed to testify against the other as to any transaction with or statement by the testator or intestate. William Jernigan had executed a warranty deed to A. S. Ablowich, who conveyed his lot to Lee O. Ablowich by warranty deed. If Lee O. Ablowich should be cast in the suit, the heirs of William Jernigan might be made liable on their father's warranty. The testimony was within the prohibition of the statute, and it was error to admit it.

For the errors pointed out, the judgment is reversed, and the cause remanded.

#### On Rehearing.

Our attention is called in the motion for rehearing to the fact that the cause was dismissed in the trial court as to J. H. Jernigan. Hence at the time of the trial he was not a party to the suit, within the meaning of article 2302 of the Revised Statutes of 1895. It follows that we were in error in holding that the statements made by William Jernigan in reference to the location of the lot conveyed by him to A. S. Ablowich were inhibited by the statute. J. H. Jernigan not being a party to the suit, the testimony of Mrs. C. E. Ablowich as to said statements was admissible. This modification of the opinion does not affect our disposition of the case.

The motion for rehearing is overruled.

**ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CUNNINGHAM.\***

(Court of Civil Appeals of Texas. Nov. 28, 1907. Rehearing Denied Dec. 19, 1907.)

**1. CARRIERS—TRANSPORTATION OF PASSENGERS—PERSONS ASSISTING PASSENGERS—DUTY TO HOLD TRAIN.**

Where a railroad company makes no provision for assisting passengers to seats when necessary, a person accompanying a passenger needing such assistance may enter the train for that purpose, and may rely upon information furnished by a brakeman stationed at the steps to assist passengers getting on and off the train as to the time the train will remain at the station.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

**2. SAME.**

The practice of passengers and licensees accompanying them of seeking information from the employé placed at the car steps to assist passengers off and on as to the length of the train's stop, which practice is well known to the public and acquiesced in by the carrier, renders the carrier responsible for the information imparted. Hence, where plaintiff, accompanying his wife, who was a passenger, was assured by the brakeman at the car steps that the train would remain for three or four minutes, and was invited to enter the car with his wife, it was the carrier's duty to hold the train for a time reasonably sufficient to enable him to enter the car, procure a seat for his wife, and alight in safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

**3. SAME—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS.**

A charge that, where defendant railroad company invited plaintiff to accompany his wife, who was a passenger, onto the train, it was its duty to stop the train a reasonably sufficient time to allow plaintiff to assist his wife to a seat and alight in safety, is not misleading as authorizing a recovery against the railroad company without regard to plaintiff's diligence, or the time consumed by him in seating his wife and alighting, especially where the court charged that it was plaintiff's duty to use such dispatch in assisting his wife to a seat and alighting from the train as an ordinarily careful person would have used under the same circumstances.

**4. SAME—CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad company for injuries received in alighting from a moving train, a charge that in determining whether plaintiff was guilty of contributory negligence in getting off the train the jury should consider the speed of the train, nature of the ground where he alighted, hour of day or night, distance to ground, plaintiff's age and physical condition, his experience in getting off trains in motion, and his manner of getting off, etc., is not subject to the objection that it failed to state whether the circumstances enumerated were to be considered as for or against plaintiff, since the question submitted to the jury was that of contributory negligence *vel non*, and had the court instructed that the circumstances were to be considered for or against plaintiff, it would have been objectionable as on the weight of the evidence.

**5. SAME.**

The instruction did not authorize the jury to find that, on account of plaintiff's age and physical condition and his inexperience in getting on and off moving trains, he was not negligent.

**6. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—EVIDENCE TO SUSTAIN.**

Where it appeared that plaintiff, in an action against a railroad company for injuries, had his shoulder dislocated, arm and hand injured, and a kidney dislodged, an instruction that if he

was entitled to recover he should be given compensation for injury he had sustained and pain he had suffered and would thereafter suffer was not subject to the objection that there was no evidence that plaintiff had sustained any injury other than the pain he had suffered.

**7. CARRIERS—TRANSPORTATION OF PASSENGERS—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad company by one who had accompanied a passenger onto a train at the company's invitation for injuries received in alighting from the moving train, the refusal of a charge that if, when plaintiff came out of the car to get off, the train was standing still or moving slowly, and he could have alighted safely, but failed to get off then, and if he was negligent in not getting off at that time, which negligence contributed to the injury, defendant should recover, etc., was not error, since if plaintiff had an opportunity to alight in safety, it was because defendant had discharged its duty to hold the train long enough to enable him to do so, and was therefore not negligent nor liable for plaintiff's injuries, irrespective of whether plaintiff was negligent.

**8. SAME.**

In an action against a railroad company by one who had accompanied a passenger onto the train at the company's invitation for injuries received in alighting from the moving train, the refusal of a charge that if plaintiff got off the train while it was in motion, and negligently held onto the rail of the steps, thereby contributing to his injuries, defendant should recover, was not error, since if plaintiff were placed in a position of danger by defendant's negligence in failing to hold the train a sufficient time to allow him to safely alight, defendant may not have been absolved from liability because he acted negligently in attempting to extricate himself from his dangerous position.

**9. TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.**

It is not error to refuse an instruction covered by the court's general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from District Court, Camp County: P. A. Turner, Judge.

Action by H. D. Cunningham against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Glass, Estes & King, for appellant. Sam D. Snodgrass, for appellee.

**WILLSON, C. J.** On August 2, 1905, plaintiff's wife, about 55 years of age and nearly blind, was in Naples, and wished to go to her home in Pittsburg. Plaintiff, about 70 years of age, was with his wife and procured a ticket entitling her to transportation over defendant's line of railway from Naples to Pittsburg. When defendant's train reached Naples, its brakeman thereon, in the discharge of his duty, for the purpose of assisting passengers off and on the train, took a position at the steps of one of the coaches, when plaintiff with his wife, ready to get aboard the train, stated to the brakeman that his wife was nearly blind, and requested him, the brakeman, to assist her to a seat in the coach. This the brakeman declined to do, suggesting to the plaintiff that he get aboard the train and help his wife to a seat thereon, and remarking that the train would

\*Writ of error denied by Supreme Court Jan. 22, 1908.

remain where it was for three or four minutes. Plaintiff then got aboard the train with his wife, without delay secured a seat for her near the door through which he entered the car, and turned to leave same. About this time the train began to move, and he at once proceeded to the steps of the car for the purpose of alighting therefrom. He had had no experience in getting off of a moving train, and for a moment stopped on the steps of the coach, rather dreading to get off while the train was moving for fear he might thereby get hurt, and then, while the train was moving at the rate of four or five miles per hour, got off, or was jerked off, the lower step, and, falling to the ground, received injuries which confined him to his bed for about 40 days, and during about four months prevented him from following his occupation as a tombstone agent, at which he had been earning about \$100 per month. The acts charged against defendant as negligence in plaintiff's petition were (1) putting the train in motion before he had had time to alight therefrom; (2) moving the train without giving him notice of its intention to do so; and (3) moving the train from the station while he was aboard same, after having had notice of his intention to alight therefrom. Defendant answered plaintiff's petition by a general denial of its allegations and a plea in general terms of contributory negligence. A trial had December 12, 1906, resulted in a verdict and judgment for the sum of \$500 in favor of plaintiff, appellee here, and the defendant, appellant here, appealed.

By its first assignment of error appellant complains of the action of the court in refusing its requested charge peremptorily instructing the jury to return a verdict for the defendant. In support of this assignment it is urged that the record shows that its conductor in charge of the train did not know that appellee had gotten aboard the train, nor anything about his intention to get off of same after he had assisted his wife to a seat, and falls to show that the brakeman who invited appellee to go aboard the train and assured him that it would not be moved for three or four minutes, was authorized by such invitation and assurance to bind appellant to hold its train at Naples after all the passengers had gotten off of and on the same. We do not think the assignment should be sustained. As was shown by the testimony, it was the brakeman's duty to take a position at the steps of one of the coaches when the train arrived at a station, and there assist passengers in getting off of and on the train. It is true appellee was not a passenger, and that it was not a part of the brakeman's duty to assist him on or off of the train. It is equally true that appellee, in the absence of proper provision made by appellant for the performance of the service, had a right to enter appellant's coach for the purpose of assisting his wife in her partially helpless condition, and for his guidance in

the exercise of this right we think he was entitled to rely upon information furnished to him by the person selected by appellant to perform the service then being performed by the brakeman. Furnishing such information we think was clearly within the scope of the duty then being discharged by the brakeman and imposed on him by appellant. Frequently it is not only proper but necessary that a person intending to become a passenger on a railroad company's train should be assisted by some one interested in his or her comfort and welfare in getting thereupon and in procuring proper accommodations thereon. Persons entering cars, not as passengers, but for the purposes indicated, often are without information as to the railroad company's custom in moving its trains at particular stations, and for their guidance in the performance of such service for a friend or relative constantly are asking for and relying and acting upon information as to such matters furnished by employes placed in the position occupied by the brakeman on the occasion in question. The practice of passengers and licensees accompanying passengers to seek such information from an employe so placed, and the practice of such employe to furnish same, so often followed and so well known to the public, we think the railroad company cannot be held to be ignorant of, but must be held to know of and to countenance and acquiesce in. If so, then the invitation and assurance given to the appellee by appellant's brakeman was not given without, but was given with, authority in the brakeman to give it. And as a result of such invitation and assurance so given appellee, it became appellant's duty to hold the train at the station for a time reasonably sufficient to enable plaintiff to go upon the car with his wife, procure a seat thereon for her, and alight therefrom with safety. Authority for the conclusion reached by us we think will be found in *Railway Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 47 S. W. 41. There the trial judge instructed the jury that if Satterwhite's intention to get off of the train after assisting a female relative thereon was known to either the conductor or the brakeman, such knowledge would be effectual as against the railroad company. The instruction was held not to be erroneous. In the case mentioned the brakeman had enjoined Satterwhite to get off the train, and the railroad company asked the court to charge the jury that it was not responsible for the brakeman's injunction. In disposing of the railroad company's complaint because of the refusal of the trial court to so instruct the jury, the Court of Civil Appeals say: "The plaintiff was not seeking to recover of defendant on the ground that he was induced to leave the train while in motion by the words spoken by the brakeman. These words were offered in evidence as tending to show knowledge on the part of the trainmen of plaintiff's purpose and intention to alight



from the train as soon as he rendered proper assistance to Mrs. Fambough. We think there was no error in refusing this instruction." *Railway Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

By its second assignment of error appellant complains of that part of the court's charge which instructed the jury that if they believed from the evidence "that one of the employes of the defendant in charge of said train took his position at the steps of the coach for the purpose of assisting passengers off and on said train, and that appellee informed said employe of his intention to attend his wife, seat her, and then leave the train, and said employe assented thereto, then it was the duty of defendant to stop its train a reasonably sufficient time to allow the plaintiff to assist his wife thereon and to attend her and to seat her and then alight therefrom in safety; and if you further believe from the evidence that the defendant did not so stop its train a reasonably sufficient time as above charged caused the plaintiff to fall from said train and to be injured, then you will find for the plaintiff, unless you find against the plaintiff on the ground that he was guilty of contributory negligence under subsequent paragraphs of this charge." The specific objections urged to the charge in propositions under this assignment are (1) that it assumes that appellant's employe, who took his position at the steps of the coach for the purpose of assisting passengers off of and on its train, was at that time, with some other employe, in charge of the train, in the face of uncontradicted evidence that he was merely appellant's brakeman; and (2) that in imposing upon appellant the duty to stop its train for a reasonably sufficient time to allow plaintiff to assist his wife thereon and attend her and seat her and then alight therefrom in safety, it was erroneous because it placed upon appellant a greater duty than was due from it to appellee, and misleading in that the jury were authorized to find appellant liable without regard to the diligence used by appellee or to the time consumed by him in seating his wife on the train. For reasons sufficiently indicated in what we have said in disposing of appellant's first assignment of error, we do not believe the objection first urged to this portion of the court's charge should be sustained. Nor do we think the other objection made to this portion of the court's charge is well taken. The duty it placed upon appellant was to hold its train for a time reasonably sufficient to enable appellee to assist his wife upon the car, procure for her a seat thereon, and then alight therefrom in safety. The law placed upon appellant identically the same duty. *Railway Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Railway Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 47 S. W. 41; *Railway Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 844; *Railway Co. v. Viney* (Tex. Civ. App.) 30 S. W. 253. Giving to the language

of the charge the meaning, it seems to us, it necessarily carried, the complaint that it was misleading and authorized the jury to find appellant liable without regard to the diligence used by appellee, or the time consumed by him in seating his wife on the train and alighting therefrom, is not believed to be tenable. The jury were not authorized by the language of the charge to extend the "reasonably sufficient time" it declared appellant must hold its train one instant beyond the period necessary to enable appellee to accomplish the purpose for which he went aboard the train and then to alight therefrom. If the jury had believed from the evidence that appellee loitered on the way, or consumed time in any other way than for the accomplishment of the purposes specified in the instructions given them, they could have found in the language of the court's charge no warrant for charging against appellant the time so wasted. On the contrary, in another portion of the charge they were plainly told that it was appellee's duty to use such dispatch in assisting his wife on the train, in attending her, seating her thereon, and getting off of same, as a person of ordinary care and prudence would have used under the same circumstances. Therefore, to construe the instructions as authorizing the jury to find appellant liable without regard to the diligence used by appellee or to the time consumed by him in rendering the assistance specified to his wife and then alighting from the train, it seems to us would be a perversion of their meaning of which it ought not to be assumed the jury might be guilty. How long it properly might take a person under the circumstances shown by the evidence to surround appellee to get aboard the train with his wife, procure a seat thereon for her, and then alight therefrom, we think might well have been determined by the jury, without any other guide than the common knowledge and experience to be credited to all men alike. If they concluded, after determining the time necessary to be so consumed, that the train did not remain at the station for that length of time, the effect of such finding we think would be to determine that it did not remain at the station a "reasonably sufficient time" to enable appellee to accomplish the purposes specified in the charge. *Railway Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 844; *Railway Co. v. Viney* (Tex. Civ. App.) 30 S. W. 253; *Railway Co. v. Hardy*, 61 Tex. 232; *King v. Bremond*, 25 Tex. 637; *Carter v. Eames*, 44 Tex. 547; *Railway Co. v. Styron*, 66 Tex. 427, 1 S. W. 161; *Railway Co. v. Johnson*, 74 Tex. 262, 11 S. W. 1113; *Railway Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47; *Railway Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1090.

On the issue of contributory negligence on the part of appellee, the court charged the jury as follows: "In passing on the question whether or not plaintiff was himself guilty of contributory negligence in getting off the

train, which helped to bring about the accident whereby he was injured, if he was injured, you will consider the speed of the train, the nature and character of the ground where he got off, the hour of the day or night, distance from the step to the ground, age and physical condition of the plaintiff at the time, his experience or want of experience in getting off trains in motion, the manner in which he got off of the train, and all his surroundings at the time and all the circumstances and facts in evidence in the case, and say from it all whether or not a person of ordinary care and prudence would have attempted to get off the train under the same circumstances and in the same way he did. If you find he would, then the plaintiff would not be guilty of contributory negligence in doing so; and if you find that a person of ordinary prudence and care would not have attempted to get off of the train, and in the way the plaintiff did, under the same circumstances, then the plaintiff would be guilty of contributory negligence, which would defeat his right to recover, and you will find for the defendant." The objections urged to this part of the charge are (1) that it does not appear from the charge whether the jury were to consider the circumstances enumerated therein as for or against appellee; (2) that the charge authorized the jury to find that on account of the age and physical condition of appellee at the time and his inexperience in getting on and off of moving trains that he was not guilty of contributory negligence; (3) that there was no evidence that appellee was of such an age and in such a physical condition, or so lacking in experience in getting on and off of trains, as to relieve him from using ordinary care to prevent injury to himself in undertaking to get off of the train as he did; and (4) that the charge failed to enumerate some of the facts in evidence tending to show that appellee was guilty of contributory negligence. We do not think the objections urged are tenable. Consideration by the jury of the circumstances enumerated properly was limited to the issue of contributory negligence vel non, without respect to whether these circumstances tended to establish or disprove such negligence. Had the court in his charge instructed the jury to consider the circumstances enumerated in favor of appellant on the issue of contributory negligence, it would have been objectionable as on the weight of the evidence. The objection last specified to the charge in question seems to have no support in the record. We have been unable to find therein any other facts testified to which should have been enumerated in the charge. If there were others, appellant, by a special charge requested, should have directed the court's attention to them. From an inspection of the charge it is apparent, we think, that it is not obnoxious to the other objections urged to it.

The court instructed the jury if they found for appellee, to give him such sum as in their

opinion would compensate him for injury they might find from the evidence he had sustained, and for pain suffered and which they might believe would thereafter be suffered by him. This charge is objected to on the ground that it authorized the jury to find in favor of appellee damages for injuries sustained by him, and in addition thereto for pain suffered by him, when the evidence showed that the only damage he sustained was caused by the pain he suffered. There is in the record evidence tending to show that appellee, as a result of the fall to the ground in his effort to get off of the train, had his shoulder dislocated, his arm and right hand injured, his head wounded, his back wrenched, and a kidney dislodged. Therefore we think the assignment of error attacking this part of the charge should be overruled. Appellant's fifth, sixth, seventh, and eighth assignments of error question the correctness of the court's action in refusing to give to the jury special charges requested by it to be given to them. One of the charges refused was as follows: "If you believe from the evidence that when the plaintiff came out of the car, where he had carried his wife, and onto the steps of the same to get off the train was standing still or was moving slowly, and that he could have gotten off without injury to himself at said time, but that he failed to get off then, and that he was negligent in failing to do so, and that such negligence, if any, caused or contributed to his injuries, if any, then you will find for the defendant, and in passing upon this issue, you will take into consideration the charge defining contributory negligence." If appellee had an opportunity to get off of appellant's train with safety, it was because appellant had discharged its full duty to him by holding its train at Naples long enough to enable him to do so. If it had discharged that duty, then it was not guilty of negligence, and was not liable to appellee for the injuries he sustained, irrespective of the question as to whether he had been guilty of contributory negligence or not. It was not error to refuse the charge. Another of the charges refused was as follows: "If you believe from the evidence that the plaintiff got off of the train while it was moving, and that he held onto the rod or rail of the train steps, and that he was negligent in so doing, if he did so, and that by such negligence, if any, he caused or contributed to cause his injuries, if any, then you will find for the defendant, and in passing upon this issue you will take into consideration the charge defining contributory negligence." And still another of the charges refused was as follows: "If you believe from the evidence that the plaintiff got off of defendant's train, and that it was moving from where it had stopped at Naples, and was increasing in speed at the time, and that plaintiff at the time and before doing so realized that there was some danger of injury to himself to do so, and that under the

circumstances he was negligent in doing so, and that by such negligence, if any, he caused or contributed to cause his injuries, if any, then you will find for the defendant, and in passing upon this issue you will take into consideration the charge defining contributory negligence." We think the charge first set out in the preceding paragraph was properly refused, because it failed to embody the limitation on the rule it invoked made proper by the position of danger in which appellee may have found himself by reason of the negligence of appellant in failing to discharge the duty it owed to him to hold its train for a time reasonably sufficient to enable him to safely alight therefrom (Railway Co. v. Neff, 87 Tex. 307, 28 S. W. 283); and that it was not error to refuse the other charge set out in said paragraph, because its matter was covered by the court's general charge. The remaining special charge asked and refused was as follows: "If you believe from the evidence that the plaintiff came out of the car and down the steps of the defendant's coach while the same was standing still or just starting and moving slow, and that plaintiff could have stepped from the train to the ground with safety, and that he failed to do so, and that such failure, if any, to alight at the time was negligence, as that term has been defined to you in the main charge, you will return a verdict for the defendant; or, if you believe that plaintiff could have, by the use of ordinary care, gotten off of said train in safety, and negligently failed to do so, but that he remained on the train until he was injured in attempting to alight, and you believe an ordinarily prudent man would not have so acted, you must find for the defendant." The part of this charge not subject to the objection suggested to the special charge first set out above we think is sufficiently covered by the court's main charge.

The judgment is affirmed.

### TEXAS MIDLAND R. R. v. GRIGGS.

(Court of Civil Appeals of Texas. Nov. 30, 1907. Rehearing Denied Dec. 21, 1907.)

#### 1. CARRIERS—CARE REQUIRED TO PROTECT PASSENGERS.

A carrier is held to the highest degree of care to prevent injury to its passengers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1087.]

#### 2. SAME—COMMENCEMENT OF RELATION.

Ordinarily, when one goes to a railroad's station to take the next train, he becomes in contemplation of law a passenger, whether he has actually bought a ticket or not, provided he goes within a reasonable time before the scheduled time for the departure of the train, and, where his arrival is not within such reasonable time, the carrier owes him no duty, save such as it owes to a licensee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 985-987.]

#### 3. SAME—CARE OF PASSENGER AT STATION.

Where a railroad, in compliance with the express requirements of Rev. St. 1895, art. 4521, opened its station one hour before the de-

parture of a train, it was not liable to a prospective passenger for injuries and suffering resulting to the passenger from exposure before the station was opened.

Appeal from Ellis County Court; J. T. Spence, Judge.

Action by Susan Griggs against the Texas Midland Railroad. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Ogden, Brooks & Napier, A. H. Dashiell and Edw. H. Wicks, for appellant. Jack & Jack, for appellee.

TALBOT, J. Appellee, Susan Griggs, sued the appellant in the county court of Ellis county to recover the sum of \$1,000 as damages alleged to have been sustained by her through the negligence and wrongful acts of appellant's agent. She avers, in substance, that on the morning of the 5th day of January, 1906, she went to the railroad depot of appellant at Alsdorf, and entered the waiting room and asked for a ticket over appellant's road to Rosser, Tex.; that the agent of appellant refused to sell her a ticket, and that after she had remained in the depot for some time said agent told her to leave, which she did, and he closed said depot, and did not open it again until about 15 minutes before the arrival of the train upon which she desired to take passage; that, by reason of being required to leave appellant's depot, she was exposed to the cold weather, made sick, and suffered much physical or bodily pain. Appellant pleaded a general denial, and specially that it was in no way instrumental in causing the sickness and suffering of appellee; that, if she was sick and suffered as alleged, the same was wholly due to causes other than any act or omission on the part of appellant; that its depot and waiting room were open for an hour before the arrival and for an hour after the departure of all passenger trains due to arrive and depart from its station Alsdorf on the day in question. The case was tried by the court without a jury, and resulted in a judgment for appellee in the sum of \$150.

There is no statement of facts in the record, but the trial court filed the following conclusions of fact: "The defendant, Texas Midland Railroad, is a corporation, owning and operating a line of railway in and through Ellis county, and is a carrier of passengers and freight, and has an agent in the town of Alsdorf in said county. That plaintiff, Susan Griggs, with some three or four other negroes on or about the time alleged in plaintiff's petition, went to the depot of defendant at the town of Alsdorf, in said Ellis county, to purchase transportation to the town of Rosser, in Kaufman county. She arrived at said depot at Alsdorf about 10 o'clock a. m. on said date shortly after the departure of the south-bound passenger train for Ennis, and immediately asked the agent for a ticket to the said town of Rosser. The agent informed her that tickets for the north-bound

passenger train, scheduled to arrive at 1 o'clock and 58 minutes p. m., were not yet on sale. The agent of the defendant permitted her to remain by the fire in said depot until 11 o'clock and 45 minutes a. m., at which time she was requested to go out of the depot, which she did, and the agent of defendant closed said depot and went to dinner, returning about 1 o'clock p. m., and reopened to plaintiff said depot. While the agent of said defendant was gone to dinner, the plaintiff was exposed to cold air, the day being a rather clear, cold, wintry day, which exposure gave her a severe chill. The north-bound train arrived on schedule time, the plaintiff was put upon the train, and arrived at her point of destination a short time thereafter. The next day after her arrival at the town of Rosser, she having grown more ill, a physician was called in and she was under his professional care about 8 days, although he saw her only twice. Plaintiff suffered considerable bodily pain by reason of said exposure. She at the time of the injury was about 60 or 65 years old. That the town of Alsdorf is a small station, having one store, and the agent of said railway, J. T. Bishop, its only employé at said station. By reason of said agent of defendant ejecting plaintiff from its depot, and compelling her to stand out in the cold air for an hour or more, was negligence on the part of the defendant, and which said act of defendant caused the plaintiff to suffer damage therefrom."

Appellant's assignments of error are to the effect that the judgment of the court below was not authorized by its findings of fact, and we are of the opinion they are well taken. The time that railway companies are required to keep their depots open for the accommodation of passengers is fixed by article 4521 of our Revised Statutes of 1895, and the time prescribed is not less than one hour before the arrival and after the departure of all trains carrying passengers. There are no special facts alleged or proved that tend to show that it was appellant's duty to keep its depot open to prevent injury to appellee a longer time than the statute provides, or that it agreed to accommodate appellee by allowing her the use thereof for a longer time. Her right, therefore, to recover depended upon a violation of the statute by appellant's agent at Alsdorf, and, if its depot was open to appellee for one hour before the arrival and departure of passenger trains on the day she was there to become a passenger, the duty imposed was discharged, and no recovery can be had. That the depot was kept open for such time for appellee's benefit is clearly and conclusively shown by the court's findings of fact. These findings are that appellee arrived at appellant's depot about 10 o'clock a. m., shortly after the departure of the south-bound passenger train for Ennis, and wanted a ticket for passage on the north-bound train to Rosser, which was scheduled to arrive at 58 minutes past

1 o'clock p. m.; that the agent informed her that tickets for the north-bound passenger train were not then on sale, and permitted her to remain by the fire in the depot until 11 o'clock and 45 minutes a. m.; that at this time she was requested to go out of the depot, which she did, and appellant's agent closed the depot and went to dinner, returning about 1 o'clock p. m. and reopened to appellee said depot. As indicated, the duty that appellant owed appellee, under the facts, was to keep its waiting room open for her accommodation for one hour before and one hour after the arrival of passenger trains, and this duty, according to the court's findings, was unquestionably performed. It is true the carrier is held to the highest degree of care to prevent injury to its passengers, and that ordinarily, when a party goes to a railway station with the intention of taking its next passenger train, he becomes, in contemplation of law, a passenger on such road, whether he has actually bought his ticket or not. But to constitute him such passenger he must have gone to the station within a reasonable time before the scheduled time for the departure of the train upon which he desires to take passage. If his arrival at the station is not within a reasonable time before the scheduled time for the departure of such train, the carrier, until such reasonable time arrives, owes him no duty save such as it owes to a licensee; that is, to so conduct its business as not to purposely or recklessly injure him. The statute to which we have referred "may be regarded as legislative construction of the length of time that should be considered reasonable for the carrier to be required" to keep open for the accommodation of passengers its depots. *Railway Co. v. Laloge*, 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405. In the case cited it was held that, where the plaintiff was assaulted in the waiting room of a station about three hours before the schedule time for the departure of the train upon which she proposed to take passage, the company was not liable in the absence of any contract, express or implied, to accommodate her for a longer time than it was required by statute to keep its waiting room open for passengers, which was 30 minutes immediately preceding the schedule time for the departure of all passenger trains. In that case it is said: "The carrier is not an innkeeper. It cannot, in the discharge of its other duties required by law, be held to furnish accommodation for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers. It would have been just as reasonable to have held appellant liable for the safety and comfort of appellee at any time, while at its depot, from 9 o'clock in the morning of the 16th to 12:30 in the morning of the 17th, as for the time sued for." Appellee went to appellant's depot about four hours before the time the train upon which she proposed to take passage was scheduled

to depart. This was an unreasonable time before such departure, and she cannot claim that the relation of carrier and passenger was then established between herself and the appellant. The waiting room of appellant was kept open for more than an hour after the departure of the south-bound train, was then closed that its agent might go to dinner, and opened again and kept open for one hour before appellee's train was scheduled to or did depart. Appellant cannot be held responsible for any exposure to cold or suffering appellee may have experienced from such exposure during the time its depot was so closed.

The judgment of the court below is therefore reversed, and judgment is here rendered for appellant.

# WANDELOHR et al. v. GRAYSON COUNTY NAT. BANK et al. \*

(Court of Civil Appeals of Texas. Nov. 30, 1907. Rehearing Denied Dec. 21, 1907.)

## 1. ERROR, WRIT OF—REVIEW—RES JUDICATA.

Where judgment against several has been affirmed as to one, and she subsequently joins the others in a writ of error, the writ will be dismissed as to her.

## 2. SAME—HUSBAND AND WIFE—PRO FORMA JOINDER—HUSBAND'S LIABILITY.

On writ of error from a judgment against husband and wife, it is not proper to affirm the judgment as against him and the sureties on the error bond because he has filed no assignments of error, and has pointed out no error in the judgment below, where he did not appeal from that part of the judgment affecting him individually, but, as husband, joined his wife pro forma; he not being such a party as to make him liable further than for costs assessable against his wife for suing out the writ of error.

## 3. SEQUESTRATION—REPLEVIN BOND—SURETIES—RIGHTS.

Where property was sequestered, a replevin bond conditioned that the replevying parties would not injure the property, and would pay the value of the rents if condemned so to do, did not make the sureties parties so that they could litigate the title to the property, but they were parties in the sense that judgment could go against them if judgment went against their principals for injury to the property; sequestration being an ancillary writ, and the sureties being interested only in the proceedings relating thereto, having the right to attack defects in the affidavit and bond and the errors in rendering judgment against them when the principal has not been condemned, etc.

## 4. SAME—SURETIES' LIABILITY—NECESSITY FOR PLEADING.

Under Rev. St. art. 4876, providing that where property is sequestered and a replevin bond is given, on judgment against the principal in the suit, judgment shall go against all the obligors jointly and severally for the value of the rents, etc., judgment may go against sureties without pleading as to their liability.

## 5. SAME—EXTENT OF RECOVERY.

Recovery may not be had against the sureties on a replevin bond given in a sequestration proceeding for rents accruing prior to the execution of the bond.

## 6. SAME.

Evidence held to show that the judgment against sureties on a replevin bond given in a sequestration proceeding represented no rents accruing before the bond was executed.

\*Writ of error granted by Supreme Court.

## 7. SAME.

Two principals in a replevin bond in a sequestration proceeding being jointly and severally bound thereby, the sureties are bound if judgment goes against either principal.

## 8. SAME—EVIDENCE.

For the purpose of recovery on a replevin bond in a sequestration proceeding the amount of rents collected by the principal may be shown, but not what he did with it.

## 9. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in permitting the obligee of a replevin bond given in a sequestration proceeding to show what the principal did with rents collected was harmless; there being no controversy as to the amount collected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

## 10. TRIAL—OBJECTIONS TO EVIDENCE—INSUFFICIENCY.

An objection to evidence as a whole is not tenable where part of it is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 223-225.]

Error from District Court, Grayson County; B. L. Jones, Judge.

Suit by Adelaide Wandelohr and C. B. Wandelohr against the Grayson County National Bank and others. From the judgment, plaintiffs, and Paul Waples and Jot Gunter, sureties on a replevy bond, bring error. Dismissed as to plaintiffs in error Wandelohr. Affirmed as to the sureties.

See 102 S. W. 746.

Galloway & Vervell and Don. A. Bliss, for plaintiffs in error. A. L. Beaty, for defendant in error.

RAINEY, C. J. Adelaide Wandelohr, joined by her husband, C. B. Wandelohr, instituted this suit against the Grayson County National Bank, the Sherman Grain Company, W. P. Head, trustee, and J. P. Everheart to cancel and remove cloud from title to a certain lot of land in Sherman, Grayson county, Tex. The instruments sought to be canceled were a deed executed by Adelaide Wandelohr and husband on the 30th day of September, 1899, wherein they conveyed said lot to the Sherman Grain Company; a deed of trust executed by C. B. Wandelohr, as president of said Grain Company, conveying said premises to J. W. Blake as trustee, to secure the payment of five bonds for \$1,000 each, with interest at 8 per cent. and 10 per cent. attorney's fees, if collected by suit, executed by the said C. B. Wandelohr as president of said grain company; a certain deed executed March 3, 1903, by C. B. Wandelohr as president of said grain company conveying said premises to J. P. Everheart; a quitclaim deed executed by Adelaide Wandelohr and husband on March 3, 1903, conveying all their right, title, etc., in said premises to said J. P. Everheart; a deed dated March 3, 1903, by J. P. Everheart, conveying to C. B. Wandelohr said premises, in consideration of \$8,667.70, evidenced by five notes of same date; a certain deed of trust executed March 3, 1903, by C. B. Wandelohr, conveying the said

premises to W. P. Head, as trustee, to secure the notes payable to said Everheart, and a certain deed executed by said Head, trustee, on April 5, 1904, conveying said premises to the Grayson County National Bank. It was alleged that at and during the time said transactions took place said premises belonged to Adelaide Wandelohr in her own separate rights, and were occupied and used by C. B. Wandelohr, her husband, as a place for the exercise of his avocation, that of grain and produce dealer, and that the same was the business homestead of her said husband and herself; that the incorporation of the Sherman Grain Company was a mere device adopted at the suggestion of J. W. Blake, cashier of said bank, for the purpose of enabling the said premises to be used as a security for a loan made by said bank to said C. B. Wandelohr; that what was known as the Everheart transaction, consisting of the execution and delivery by her and her said husband of a quitclaim deed to said premises unto J. P. Everheart, the execution and delivery of a deed by C. B. Wandelohr in the name of the said Sherman Grain Company, purporting to convey said premises to the said Everheart, and a deed executed by the said Everheart purporting to convey said premises to C. B. Wandelohr, and a deed of trust executed by the said Wandelohr purporting to convey said premises to W. P. Head as trustee, to secure the payment of the notes described in the deed from Everheart to Wandelohr, was merely a continuation of said mortgage executed to secure said bank and constituted one transaction. The said bank, besides pleading a general denial, reconvened in the suit, and sought to recover the title and possession of the said premises of the said Adelaide Wandelohr and her said husband; and sued out a writ of sequestration, which was duly levied by the sheriff of Grayson county on the said premises, whereupon the said Adelaide Wandelohr, joined by her said husband, replevied the premises, executing a replevy bond therefor, with Paul Waples and Jot Gunter as sureties. The said bank also sought to recover of the said Adelaide Wandelohr on a certain guaranty in writing executed by her, wherein she purported to bind herself and her separate property for the payment of one of the notes executed and delivered by C. B. Wandelohr to J. P. Everheart, being a note for the sum of \$1,000, which, according to its face, became due on the 1st day of January, 1904. Said bank further sought to recover of C. B. Wandelohr the balance it claimed that the said Wandelohr owed it after deducting the price that had been bid by said bank for the property at the sale thereof by W. P. Head, trustee. As an alternative plea, in case the court should hold that the sale made by said trustee and the deed made by said trustee to said bank in pursuance of said sale were for any reason invalid, the said bank set up the ex-

ecution and delivery by the said C. B. Wandelohr of the notes to Everheart, the execution and delivery by the said Wandelohr of the said trust deed purporting to convey said property to W. P. Head as trustee, for the purpose of securing said notes, that the said notes had been truly transferred and assigned to it by the said Everheart, and that the said notes, by the terms thereof, were due; and the said bank sought to recover of the said C. B. Wandelohr the amount of said notes and prayed for a foreclosure of its mortgage lien on said premises as against both the said C. B. Wandelohr and Adelaide Wandelohr. A trial before a jury on the 23d day of January, 1905, resulted in a verdict and judgment in favor of all the defendants that each and all of said defendants go "hence without day" and recover of said plaintiff and her said husband their costs, and in favor of said bank, that it recover of said plaintiff and her said husband the title and possession of said premises and of the said C. B. Wandelohr and Paul Waples and Jot Gunter, sureties on the said replevy bond, the sum of \$1,800, the rents of said premises; and of said C. B. Wandelohr alone the sum of \$2,836.17 additional, but that said bank take nothing against said plaintiff Adelaide Wandelohr. Adelaide Wandelohr, joined by her husband, C. B. Wandelohr, and Paul Waples and Jot Gunter, sureties on said replevy bond, prosecute this writ of error.

As to Adelaide Wandelohr, the judgment herein complained of was appealed from by her, and on the 7th day of October, 1905, the said judgment was affirmed by this court; therefore she is not entitled to complain herein, and her assignments of error will not be considered and the writ of error as to her is dismissed. The defendant in error suggests "that, since C. B. Wandelohr has filed no assignments of error and has pointed out nothing fundamentally wrong with the judgment of the court below, it should be affirmed as against him and the sureties on his error bond." In the writ of error bond there is a clause to this effect: "And whereas, the said Adelaide Wandelohr and the said Paul Waples and Jot Gunter desire to remove said judgment to the Honorable Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas for revision and correction, but the said C. B. Wandelohr does not desire to remove to said appellate court, so much of said judgment as is against him individually and alone." This, we think, shows that C. B. Wandelohr did not appeal from that part of the judgment that affected him individually, and as he, as husband of Adelaide Wandelohr, joined her pro forma, as the law requires in such cases, he is not such a party as to make him liable further than for costs that may be assessed against his wife by reason of the suing out of the writ of error, and it would not be proper to render judgment against him and sureties as suggested by defendant. The foregoing

disposes of the two Wandelohrs, which leaves for consideration the rights of Paul Waples and Jot Gunter, the sureties on the replevy bond against whom judgment was rendered thereon by the court below.

In pursuing this investigation, the question arises: Of what errors can the sureties on a replevy bond avail themselves in this proceeding, where a summary judgment has been rendered against them? They are authorized to bring up the case for review. They may join their principal in an appeal, or writ of error, or bring up the case without the principal. In ordinary contracts the principal and surety are bound for the purpose of carrying out a certain object, such as the payment of money, or doing some special thing; the surety being bound in the event the principal fails. Therefore the sureties must be made parties to all proceedings to enforce such contracts to bind them, and can make any and all defenses that the principal is authorized to make that will defeat the action. Is this such a case? What is the contract of the sureties? The replevy bond is "conditioned that the said Adelaide Wandelohr, joined by her said husband, C. B. Wandelohr, and each of them being plaintiffs in said suit, but defendants in said sequestration proceedings, will not injure the said property, and that they and each of them will pay the value of the rents of the same in case they, or either of them, shall be condemned so to do." This bond did not make the sureties parties in the sense that it gave them the right to litigate the title to the property, but they were parties in the sense that judgment could be rendered against them in the event judgment was rendered against the Wandelohrs for injury done the property and for the value of rents arising therefrom. Sequestration is an ancillary writ, and the sureties are only interested in the proceedings relating thereto; that is, they can only attack the proceedings in the case, such as defects in the affidavit and bond, and the errors of the court in rendering judgment against them when the principal has not been condemned, etc.

The principle announced in the case of *Methodist Churches v. Barker*, 18 N. Y. 463, is applicable here. The court in its opinion says: "That question, it appears to me, is one of interpretation merely. If the sureties in such an instrument undertake, in effect, that their principal shall pay whatever amount of damages shall be adjudged against him on a reference to be ordered by the court in the injunction suit, that amount, when thus ascertained, would seem to be the measure of their liability by the very terms of the contract. On general principles of law the most solemn judgments do not conclude persons who are not parties or privies. But, if a man undertakes the payment of a judgment which may be recovered against another, he owes the amount of the judgment, when recovered, irrespective of its le-

gal merits, because such is the nature of his contract. He cannot go behind the judgment, if there be no collusion, and allege that it is contrary to law. The obligation of a surety in a replevin bond is an obvious illustration of this doctrine." The bond here is that they will pay the value of the rents of the property in case the principals shall be condemned so to do. The principals have been condemned to pay, no collusion or fraud has been shown, and the defense by the sureties can only rest on the legality of the proceeding relating to the sequestration.

The sureties cite authorities to show that they have the right to prosecute this writ of error. That proposition is not denied. But it is denied that they can deny the legality of the judgment as far as the title is concerned. No case cited by plaintiff, as we construe it, is directly in point. Some of them were in sequestration proceedings, and in those there were errors relating to the legality of the writ, for instance where there was a defective affidavit, where the bond is invalid, or where the judgment was against the principal for the land, but no judgment against him for the rents and revenues, as required by statute in such cases.

There are various errors assigned that relate solely to questions that affect the title, but these we hold cannot be raised by the sureties. We will, therefore, only consider those that affect them.

The first error assigned is that the court erred in instructing the jury that, if they found for the bank as to the premises in controversy, they should also find against the sureties for \$1,800, "rents collected by plaintiff pending this suit." The contention is that there was no allegation that the plaintiffs in error ever executed the replevy bond, and that there were no allegations as to the value of the rents that accrued, and were collected by the principals after the execution of the bond. There was no necessity of pleading on the replevy bond or alleging the value of rents in order for the court to render judgment thereon. The statute (article 4876, Rev. St. 1895) provides for the return of a replevy bond to the court from whence the writ issued, and in case the suit decided against the principal in the bond final judgment shall be entered against all the obligors in such bond jointly and severally for the value of the rents, etc. This authorizes the court to render judgment on the bond without further pleading as to liability.

The further proposition is made that there could be no recovery on said bond for rents other than the value of such rents as accrued after the execution of the bond and the judgment for rents prior to the execution of said bond is not authorized. This is a correct proposition of law; but do the facts sustain it? C. B. Wandelohr testified: "After the lot in controversy was sequestered in this suit by the bank, and after my wife had replevied same, I rented it to J. B. Brennan & Co. for

one year, commencing June 1, 1904, for \$1,800 cash, which I collected from them." This is all the testimony pointed out by plaintiff that relates directly to the point at issue. The replevy bond was given June 20, 1904. Wandelohr says after it was given he rented the property for one year, beginning June 1, 1904. If his testimony be literally correct, Brennan & Co. must have gotten possession after the execution of the bond, and, if they paid \$1,800 for possession until June 1, 1905, they got the use for less than a year, but Wandelohr received \$1,800 for that use. Therefore the \$1,800 was the value of the rents collected by him after the property was replevied, and the court did not err in its instruction. The foregoing, we think, answers the second assignment of error presented.

The third assignment of error is: "The court erred in rendering judgment against these sureties on plaintiff's replevy bond filed herein in favor of the Grayson County National Bank for the sum of \$1,800 without rendering any judgment against the principal in said bond." There was no judgment rendered against Adelaide Wandelohr for the rents, presumably for the reason that she was not personally responsible for the rents collected by C. B. Wandelohr. Be this as it may, she and C. B. Wandelohr were principals in the replevy bond, by the terms of which they were jointly and severally bound, which would bind the sureties if judgment was rendered against either principal, and judgment was rendered on the bond against C. B. Wandelohr, one of the principals.

Error is assigned to the admission of evidence of C. B. Wandelohr as to the amount of rent, and what he did with it. The admission of evidence as to the collection of rents was legitimate. But what was done with it was immaterial, and was not a proper subject of inquiry. This, however, was harmless, as there was no controversy about the amount collected. Besides, objection was made to the evidence as a whole. Part of it being admissible, complaint will not be heard as to the admissibility of the other.

Finding no reversible error, the judgment is affirmed as to Paul Waples and Jot Gunter.

#### HOUSTON & T. C. R. CO. v. GROVES.

(Court of Civil Appeals of Texas. Dec. 4, 1907.)

##### 1. CARRIERS—CONNECTING CARRIERS—LIMITATION OF LIABILITY—LOST GOODS—STATUTES.

Sayles' Rev. Civ. St. 1897, art. 331b, relating to the liability of connecting common carriers for goods received by one of them on a contract for through carriage between points in the state, and making them the agents of each other and of the shipper, and making the through bill of lading or proof that one of them had received the freight prima facie evidence of their agency, notwithstanding any stipulations by them to the contrary, has no application to an interstate shipment; but in such case each connecting carrier may by contract limit its liability to such loss as may occur on its own line, and

no recovery can be had for loss occurring on the lines of connecting carriers, in the absence of allegation and proof of some joint traffic arrangement between the several connecting carriers.

##### 2. SAME—CARRIERS OF GOODS—LOSS OF GOODS—ACTIONS—PLEADING.

In an action against a carrier for loss of freight, where plaintiff pleads the contract of carriage, its provisions inure to the benefit of defendant without being pleaded by it.

##### 3. SAME—CONNECTING CARRIERS—LIABILITY FOR LOSS OF GOODS.

The mere receipt by a connecting carrier of its proportionate share of the general freight rate charged does not render it jointly liable for a loss of the goods occurring on another connecting line.

##### 4. SAME.

The fact that a connecting carrier receives and hauls a car of goods and collects the charges does not render it jointly liable for damages to the goods with the company that executed the bill of lading, nor does it operate as a ratification by it of the contract for shipment.

##### 5. SAME.

An arrangement between two carriers that each should receive traffic from the other, and one collect the entire toll, does not create such an agency or relation between them as to render one liable for loss caused by the other.

Appeal from Limestone County Court; Jas. Kimbell, Judge.

Action by J. R. Groves against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Baker, Botts, Parker & Garwood and Williams & Bradley, for appellant.

RICE, J. This suit was brought by appellee Groves in the justice's court to recover of appellant the value of certain household goods shipped from Junction City, Ark., to Groesbeck, Tex., and alleged to have been lost en route. On trial the plaintiff recovered judgment in the justice's court, from which the defendant company appealed to the county court, where judgment was again rendered against it in favor of the plaintiff for \$190, the amount sued for, from which last judgment it has appealed to this court.

The material allegations of the citation upon which the case was tried are that the plaintiff shipped certain household goods, amounting in the aggregate to the sum of \$192.50, from Junction City, Ark., to Groesbeck, Tex., and routed said goods over the line of the defendant, alleging that the same had never been delivered to him, and that the defendant company negligently permitted the loss or destruction thereof; that the shipment was made under a bill of lading, and that defendant operated a line of railway in and through the state of Texas, over which it undertook to haul plaintiff's goods. The defendant answered by general demurrer and general denial. Upon trial in the county court, a jury having been waived, it was shown that plaintiff on November 7, 1905, delivered for shipment at Junction City, Ark., to the Arkansas Southern Railroad Company, a sewing machine in one case and a box of household goods in another,



which shipment was routed by said Arkansas Southern Railroad Company over its own line from Junction City, Ark., to Winfield, La., thence over the Arkansas & Louisiana Railroad Companies line to Hope, Ark., thence over the St. Louis & San Francisco Railroad Companies line to Sherman, Tex., and from thence over defendant's line to Groesbeck, Tex. The case containing the sewing machine was promptly forwarded over said lines of railway, reached Groesbeck, and was promptly delivered to plaintiff by defendant, but the box of household goods was never received by defendant or any of the other companies, except the initial carrier, and was checked "short" at Winfield, La. The freight was paid in advance to the initial carrier, and the defendant received its proportional part of the entire freight money. The bill of lading under which the shipment was made contained, among other provisions, the following: "This company shall not be responsible under this bill of lading for loss or damage of any kind beyond its own line, but upon delivery of said property to its connecting carrier all responsibility of every kind therefor shall cease and terminate." It was proved without dispute that the goods were worth \$190, the amount of the judgment. This was an interstate shipment, and it appears from the evidence that the defendant company never received the box of household goods, for the value of which this suit was instituted; that the same never came into the possession of any of the intermediate carriers under said bill of lading, and was, in fact, checked "short" at Winfield, La., the terminus of the initial carrier. There was no allegation nor proof nor attempted proof of any partnership, agency, or joint traffic arrangement of any kind between any of said above-named carriers.

Appellant by its first and second assignments raises the sufficiency of the evidence to sustain the judgment, contending that the facts in the case fail to show any liability on its part for the loss of the goods, but that the loss of the same was caused by another party, to wit, the Arkansas Southern Railroad Company, with which this defendant is not shown to have any business connections whatever; that the shipment was under a contract limiting liability for damage or loss to such as might occur on the line of the initial carrier; and as the box of household goods was in fact lost on the line of the initial carrier, and there being no allegation, agreements or proof of any relation of partnership, agency, or a joint operating arrangement existing at any time among any of said carriers, the judgment should have been for the defendant. We think, under the settled law of this state, that the contention of appellant should have been sustained. In interstate shipments it is clearly settled that article 331b, Sayles' Rev. Civ. St. 1897, does not apply, but that each company has

the right by contract to limit its liability to such loss as may occur on its own line, and that no recovery can be had in such cases for loss occurring on the lines of connecting carriers, in the absence of allegation and proof of partnership or some joint traffic arrangement between the several connecting carriers. *T. & N. O. Ry. Co. v. Berry*, 31 Tex. Civ. App. 3, 71 S. W. 326; *G. C. & S. F. Ry. Co. v. Baird*, 75 Tex. 258, 12 S. W. 530; *Ft. Worth & D. C. Ry. Co. v. Williams*, 77 Tex. 121, 13 S. W. 637; *McCarn v. I. & G. N. R. R. Co.*, 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 89, 31 Am. St. Rep. 51; *Ft. Worth & D. C. Ry. Co. v. Fuller*, 3 Tex. Civ. App. 340, 22 S. W. 1006. Where plaintiffs plead the contract of carriage, as in this case, its provisions inure to the benefit of the defendant without being pleaded by it. *G. W. & T. P. Ry. Co. v. Griffith* (Tex. Civ. App.) 24 S. W. 362.

There are no conclusions of law and fact found by the trial court in this case, and we are at a loss to know upon what fact the court predicated its judgment; but suppose that it must have done so upon the idea that the defendant company received its proportional part of the freight money. But this fact alone would not sustain the judgment of the court, since it has been held in this state that no joint liability exists by reason of the mere receipt of the proportionate part of the general freight rate charged, where the loss occurs on another than the defendant's line. *G. H. & S. A. Ry. Co. v. Johnson* (Tex. Civ. App.) 37 S. W. 243. It has likewise been held that a joint liability with the company that executed the bill of lading or ratification of the contract by transporting the freight will not be presumed from the fact that the defendant received and hauled the car, and collected the charges. *Miller & Co. v. T. & N. O. Ry. Co.*, 83 Tex. 518, 18 S. W. 954. And it has likewise been held that an arrangement between two companies that each should receive traffic from the other and one collects the entire toll for same would not create such agency or relation between them as to render one liable for injury or loss caused by the other. *W. U. Tel. Co. v. Lovely* (Tex. Civ. App.) 52 S. W. 563.

We think, under the facts of this case, that judgment should have been rendered for the defendant. We therefore reverse, and render the judgment in favor of appellant. Reversed and rendered.

#### WALLING v. TRINITY & BRAZOS VALLEY RY. CO.\*

(Court of Civil Appeals of Texas, Nov. 30, 1907. Rehearing Denied Dec. 21, 1907.)

#### 1. APPEAL — RECORD — BILL OF EXCEPTIONS — INSUFFICIENT SHOWING OF ERROR.

In an action against a carrier for injury caused to one falling from a train, plaintiff's bill of exceptions under complaint against the

\*Writ of error denied by Supreme Court Jan. 23, 1908.

exclusion of testimony of a conversation between plaintiff and the conductor after the accident does not show error where it fails to show the objection made, and what time elapsed between the accident and the conversation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2237.]

## 2. CARRIERS—PASSENGERS—ACTION FOR INJURY—EVIDENCE—DEFECTS—ADMISSIBILITY.

In an action for injury to a passenger through an alleged defective car step, evidence of the condition of the step at times after the date of the accident is immaterial, in the absence of proof that it was in the same condition as when the accident occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1299.]

## 3. SAME—INSTRUCTION—CARE REQUIRED OF YOUTH.

In an action for injury to a passenger, an instruction authorizing recovery if plaintiff was a youth of tender years, and did not know of the track's defective condition, and the conductor did know thereof and negligently failed to warn plaintiff, or if a step on the car was negligently defective, and plaintiff was injured through the carrier's negligence in either respect, was not objectionable as requiring of plaintiff a higher degree of care than required by law, in that if plaintiff knew of the track's defective condition, being a youth, he was only bound to use such care as a person of ordinary prudence of his years would have exercised, whereas, the instruction required the jury to believe plaintiff knew nothing of the defective condition, where the instruction followed plaintiff's pleading, and the court instructed that, in determining whether plaintiff was negligent, the jury should look to all the evidence, considering his age and discretion, and that, if he did not exercise such discretion as a similar person would have exercised in the same circumstances, the jury should find for the carrier, and that the law does not fix any precise age when one is exempt from that degree of care expected from persons of ordinary care, but leaves the question to the jury, looking to plaintiff's age, his intelligence, and opportunity to judge of the danger of the act charged to be negligent.

## 4. SAME—BURDEN OF PROOF.

A 15 year old boy is presumed to be sufficiently intelligent to appreciate the danger of riding upon the platform of a railway car; and the burden is upon him in an action for injuries sustained while so riding to show he lacked such intelligence and discretion.

## 5. SAME—DUTY OF CARRIER AS TO CHILDREN.

If a boy passenger on a railway train had intelligence enough to understand that it was more dangerous to ride on a car platform or on the steps than inside the car, no duty devolved upon the company to prevent him from so riding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1097.]

## 6. SAME—ASSUMPTION OF RISK.

A boy passenger riding on the platform and a defective step of a railway car assumed the risk of injury through such step, and the swaying of the train caused by defective track and roadbed, if he knew the step was defective and that the car was swaying, unless he was insufficiently intelligent to be able to understand the danger of so riding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1376-1378.]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Personal injury action by Travis Walling, by next friend, against the Trinity & Brazos Valley Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. E. Spell, for appellant. Andrews, Ball & Streetman and Morrow & Smithdeal, for appellee.

**BOOKHOUT, J.** The plaintiff in this case, by next friend, A. D. Walling, sued the Trinity & Brazos Valley Railway Company to recover damages for injuries alleged to have been sustained by him through defendant's negligence while riding as a passenger upon defendant's passenger train between the stations of Malone and Bynum. Plaintiff alleged damages in the sum of \$20,000, and based his right to recover upon the following allegations, to wit: That on or about the 27th day of April, 1904, he was a passenger on defendant's passenger train between the stations of Malone and Bynum; that, on boarding said train, plaintiff took a position on the rear platform of the train, which position he kept continuously until the time of the injury complained of; that the plaintiff at that time was a youth of tender years, being about 15 years of age, and had never prior to that time been upon the train of defendant company, and had never ridden on the track of said company between the aforesaid stations; that at the time plaintiff took his position upon the platform of the car he did not know of the condition of the track, but believed, and relied upon it as a fact, that the railway company had properly constructed and was properly maintaining said track, and that he had no knowledge whatever of any danger attending the position which he occupied on the train; that the conductor of the defendant company upon the train in question was a man of mature years, who had been long in the service of the company, and who was thoroughly familiar with the conditions of the cars and roadbed and with the danger incident to the passing over the tracks in question by a person occupying the position of the plaintiff; that the aforesaid conductor, although well knowing the condition of the tracks and the danger attendant upon riding over them by a person occupying the position of plaintiff, failed in every respect to notify or warn, or in any way disclose to, this plaintiff the faulty and defective condition of the roadbed and the peril incident to the position occupied by the plaintiff, but, on the contrary, acquiesced in plaintiff's actions; that the track of defendant company over which plaintiff was passing at the time alleged was defective and faulty by reason of lack of ballasting and repair and by the presence therein of "reverse curves," "low joints," etc., causing the train in question to rock and jerk in a violent manner; that the step upon the car on which plaintiff was riding was defective and out of repair, and the planks therein were split and broken in such a manner as to make it incapable of sustaining the weight of a person boarding or alighting from said car; that the defendant company was negligent in permitting the said track to be so constructed and maintain-

ed, and that, because of the violent rocking and jerking of the car as aforesaid, plaintiff was thrown or pitched from the train upon which he was riding, and permanently and incurably injured by having one of his legs broken in such a manner as to make it permanently deformed, suffering intense physical and mental pain, all resulting in a greatly diminished earning capacity for the remaining years of his life. The defendant answered with a general demurrer and a general denial, and further pleaded contributory negligence and assumed risk on the part of plaintiff. A trial resulted in a verdict and judgment for defendant, and plaintiff appealed.

It is contended in the first assignment of error that the court erred in excluding from the jury the conversation and statements between Travis Walling, the plaintiff herein, and Mr. Baird, the conductor of defendant's train, which conversation and statements occurred after the said plaintiff had been thrown from defendant's train, and after the train had been backed to the point where the plaintiff fell and after said plaintiff had been picked up and put on the car. The bill of exceptions upon which this assignment is based fails to show the objection made to the testimony, or what length of time had elapsed between the time of the injury and the conversation, and for this reason it is insisted by the appellee that we are not authorized to consider the assignment. It is to be presumed that the trial court acted properly in excluding the testimony. The evidence was not admissible unless it was *res gestæ*. The burden was upon the appellant to show that it was admissible as *res gestæ*. As the bill of exceptions fails to show the length of time between the injury and the conversation, it is not made to appear that the evidence was admissible. There was no error in excluding it.

Again, it is contended that the trial court erred in excluding from the jury the testimony of plaintiff relative to the condition of the steps of the coach in May or June, 1905. The injury took place on April 27, 1904, and the evidence, the exclusion of which complaint is here made, related to the condition of the steps in the months of May or June, 1905, after the injury. The plaintiff testified to his having examined the steps in the months of May or June, 1905. He testified that they were the same steps from which he was thrown, and offered to testify as to their condition in 1905, and would have testified "that one of the planks which formed the steps, the one that was fastened to the platform on the coach, was split the entire width of said plank, and that when you put your weight on the step by stepping thereon that it would give down as much as an inch or an inch and a quarter, thus forming a sharp inclined plane, causing one stepping thereon to be thrown forward by reason of the giving of the steps." He did not testify that

the condition of the steps at the time of the injury was the same as when he made the examination in May or June, 1905. The steps may have been in good condition at the time of injury, and have become defective in the respects shown by this testimony after injury. The testimony was properly excluded.

There was no error, as contended in appellant's third assignment of error, in excluding the testimony of plaintiff that the condition of the steps in July and August, 1906, was the same as it was in May and June, 1905. The injury having occurred in April, 1904, the condition of the steps after that date was immaterial, in absence of evidence that they were then in the same condition as at the date of injury.

The fifth assignment of error complains of paragraph 2 of the court's charge, which reads: "If you believe that the plaintiff was a youth of tender years, and knew nothing of the condition of defendant's track, and that the conductor in charge of said train knew that defendant's track was faulty and in a defective condition, and failed to notify the plaintiff of the danger, if any, attending the position which he occupied, and failed to notify the plaintiff of the condition of said track and that the same was negligence as hereinbefore defined, or if you believe from a preponderance of the evidence that the steps upon the rear end of the car leading up to the platform upon which the plaintiff was standing was out of repair, as alleged by the plaintiff, and that the same was negligence as heretofore defined, and that the plaintiff was injured, and said injuries, if any, resulted from the negligence of the defendant in either of the respects hereinbefore submitted you in this paragraph of this charge, you will find a verdict in favor of the plaintiff, unless you find for the defendant under some one or all of the issues hereinafter submitted to you." It is insisted that this charge requires of plaintiff a greater degree of care than required by law, in that, if plaintiff knew the condition of the track, being a youth of tender years, and he further knew that the track was faulty and defective, the law only required of him such care as a person of ordinary prudence of his tender years would have exercised under the same or similar circumstances; whereas, the charge in question required the jury to believe the plaintiff knew nothing of the condition of the track or its defective condition before the said accident, and, unless they did so believe, the said defendant was due the plaintiff no consideration whatever. The charge followed the plaintiff's pleading. The petition alleged that the plaintiff did not know at the time he boarded the train, nor while he was on the platform of the car, of the condition of the track; that defendant did know it and that a step on the rear end of the car upon which plaintiff was standing was defective. The charge authorized a recovery for plaintiff if the jury found he was a youth of tender years and did not

know of the condition of the track, and the conductor did know its condition and that the track was defective, and failed to notify plaintiff of the danger of riding in the position he occupied, and such failure was negligence, or if the step on the car was out of repair and this was negligence, and the injury to plaintiff resulted from the negligence of defendant in either of these respects, to find for plaintiff. In another paragraph of the charge the jury were instructed, in substance, that in determining whether or not appellant was guilty of negligence they would look to all the evidence considering the age and discretion of the appellant, his ability to judge of the hazard of attempting to ride upon the platform, and that, if under all the circumstances he had not exercised such discretion and prudence as a similar person would have exercised under the same circumstances, then to find for the defendant. They were further charged: "The law does not fix any precise time or age at which any person is exempt from that degree of care and judgment which the law expects from persons of ordinary care and prudence; but the law leaves the question open for the decision of the jury under all the facts of the particular case looking to the age of plaintiff, his intelligence or lack of intelligence, and information and opportunity to judge of the hazard and danger of the particular act which is the basis of the complaint of negligence." Considering the charge as a whole, in our opinion it did not place upon plaintiff a greater burden than required by law.

The fourth special charge, given at the request of defendant, is assailed as error. The charge reads: "In this case the plaintiff is required to prove by a preponderance of the evidence that he was not a person of sufficient intelligence to understand the nature or danger of his acts or conduct before he can be excused from the consequences of such acts." The petition alleged that plaintiff was a youth of tender years when injured, and did not know the condition of the track, and the conductor did know it and that it was faultily constructed. The defendant pleaded contributory negligence on the part of the plaintiff, and that he jumped from the train while the same was in motion, and not at a station. It was shown that plaintiff was 15 years of age when injured. The court was not authorized to assume that a boy of the age of plaintiff was too young to not be guilty of contributory negligence. The law, as stated by the charge, does not fix any particular age at which a person is exempt from the degree of care required of an adult; but it becomes a question of fact for the determination of the jury. The defendant alleged that plaintiff was guilty of contributory negligence in riding upon a part of the car not provided for passengers. The appellant had pleaded that he was a youth of tender years, and did not know of the danger attending the position which he occupied. He alleged

that he was riding upon the platform, but did not know of the danger. The law presumes that an infant 15 years of age has sufficient intelligence and discretion to be sensible of the danger of riding upon the platform of a car, and the burden was upon plaintiff to show that he was lacking in such discretion and intelligence. 1 Thomp. Neg. §§ 311, 312, and note 111; Nagle v. Allegheny, 88 Pa. 35, 32 Am. Rep. 413; Waterworks v. White (Tex. Civ. App.) 44 S. W. 181. The charge is correct.

Complaint is made of the court's action in giving at the request of defendant special charge No. 8, as follows: "You are charged as the law in this case that, if the plaintiff had intelligence enough to know and understand that it was more dangerous to ride on the platform or on the steps of the coach than it was to ride on the inside thereof, then you are instructed that no duty would devolve upon the defendant to prevent him from riding on the platform or steps of the coach." It is contended that this charge imposed a greater burden upon plaintiff than the law requires. The plaintiff alleged that he was standing on the platform of the coach, but did not know it was dangerous, and the conductor knew of the danger, and failed to warn him. The defendant denied the allegation, and alleged that he did know of the danger and of the rule forbidding him to ride there. This raised an issue which the court submitted in the special charge. There was no error in giving the charge.

It is contended that the court erred in giving a special charge requested by the defendant reading: "If you believe from the evidence that the plaintiff was riding on the rear platform and on one of the steps of the coach, and you further believe from the evidence that the step was defective, and that by reason of the condition of the roadbed and track the coach swayed and rocked, and further believe from the evidence that plaintiff by virtue of the swaying and rocking of the coach and the defective step was thrown from the same and injured; yet if you further believe from the evidence that he knew the step was defective, and knew the coach was swaying and rocking from side to side, he would be held to have assumed the risks arising therefrom, and could not recover, unless he was so lacking in intelligence and discretion as not to be able to understand the danger incident to his position"—the contention being that this charge imposed a greater burden on plaintiff than required by law. The proposition falls to state wherein the charge imposes a greater burden on appellant than the law requires. The issue having been made by the pleadings and the evidence as to whether appellant had sufficient intelligence and discretion to understand the dangers incident to riding on the platform and on one of the steps of the coach, and as to whether he knew the condition of the step and roadbed, it was proper

for the court to tell the jury that, if he did know of such conditions, he would assume the risk arising from his conduct, unless he lacked sufficient intelligence to appreciate the danger incident thereto.

Finding no reversible error in the record, the judgment is affirmed.

# NEW YORK LIFE INS. CO. v. HERBERT.\*

(Court of Civil Appeals of Texas. Dec. 5, 1907.

Rehearing Denied Dec. 19, 1907.)

## 1. APPEAL — REMITTITUR — FILING IN TRIAL COURT.

Where plaintiff's recovery was excessive, the filing of a remittitur of the excess in the trial court, after the Court of Civil Appeals had obtained jurisdiction on writ of error, was unavailing.

## 2. SAME — REMITTITUR IN COURT OF APPEALS.

Under the express provisions of Rev. St. 1895, art. 1024, a plaintiff who has obtained an excessive recovery may, after the case has been removed to the Court of Civil Appeals on a writ of error, of her own motion relinquish such excess by remittitur in a Court of Civil Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4465.]

## 3. SAME — REVIEW — DISPOSITION OF APPEAL.

Where, in an action against a foreign insurance company, plaintiff obtained judgment by default for the amount of the policy, together with damages and an attorney's fee, and defendant, without moving to open the default, removed the case to the Court of Civil Appeals by writ of error, where plaintiff filed a remittitur of the damages and attorney's fee, the only error alleged being that the judgment was excessive to that extent, it will be reformed and affirmed, less the remittitur, and will not be reversed and remanded to enable defendant to make a defense under Rev. St. 1895, art. 1029a, providing that if the Court of Civil Appeals should be of the opinion that the judgment was excessive, and for that reason only that the cause should be reversed, it shall indicate to the party in whose favor the judgment was rendered the amount of the excess, and, if a remittitur be filed, shall reform and affirm the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4462–4463.]

## 4. SAME — OBJECTIONS IN TRIAL COURT.

Where a judgment was rendered against a foreign insurance company by default, it was not entitled to urge for the first time on a writ of error, as ground for reversal, that its default was due to accident, and that it had a valid defense to the action; the proper remedy being an application to the trial court to set aside the judgment and open its default.

Error from District Court, Cooke County; D. E. Barrett, Judge.

Action by Mrs. Melville Cannon Herbert against the New York Life Insurance Company. From a judgment for plaintiff, defendant brings error. Reformed and affirmed.

Locke & Locke and Jas. H. McIntosh, for plaintiff in error. Cruce & Blakemore and Davis & Thomason, for defendant in error.

LEVY, J. This was an action brought by Mrs. Melville Cannon Herbert against the New York Life Insurance Company to recover upon a policy of insurance upon the life

of her late husband. The company, though duly cited, did not appear and answer the suit, and a judgment by default was rendered against it on November 1, 1906, for the full amount of the policy of \$5,000, together with \$500 as attorney's fees and 12 per cent. of face of the policy as damages, and interest and costs of suit. The company by writ of error has brought the judgment so obtained to this court for revision, assigning as error the inclusion in the judgment of the \$500 as attorney's fees and the \$600 as damages. The company filed its supersedeas bond on February 2, 1907, and sued out a writ of error and served the same on the same day. On the 4th day of February, 1907, the attorneys for Mrs. Herbert filed a remittitur for her attorney's fees and damages so recovered in the judgment with the clerk of the district court. The plaintiff in error filed its assignment of error February 5, 1907, complaining of the inclusion of the attorney's fees and damages in the judgment. The district court adjourned its regular term on December 31, 1906, and there was no term of the district court when Mrs. Herbert filed the remittitur, but the district court was in vacation between its regular terms in that county. The defendant in error files in this court the following: "Now comes Melville Cannon Herbert, and confirms the remittitur filed by her in the court below, and says she does not now claim, and has not claimed, anything as damages and attorney's fees since the filing of said remittitur in the lower court." The plaintiff in error also files a motion in this court to remand this case to the district court for a new trial, instead of reforming the judgment, in the event this court shall find error in the record, which motion was ordered to be submitted in connection with the merits of the case. This motion is in the nature of an original motion, setting up facts in this court in the first instance, and has attached to it affidavits and written exhibits as evidences of the facts alleged in the motion. It is founded upon averments that (1) the plaintiff in error had a defense, perfectly good in law and morals, to the cause of action sued upon, and that the judgment is unjust; and (2) that the failure of the plaintiff to set up its defense in the district court was due to an accident of such character as that this court in the exercise of its discretion ought to give it opportunity to be heard upon the merits of the case; and (3) that a default judgment which embodies error ought to be remanded upon reversal, unless it appears affirmatively to the court that the judgment will be just after the elimination of the error; whereas in the present case, if the facts alleged in the motion be taken and considered, it appears affirmatively that when the errors shall have been eliminated the judgment will be grossly unjust.

Considering in its order, first, the contention arising from the petition for error:

\*Writ of error denied by Supreme Court Jan. 29, 1908.

Plaintiff in error contends there was error in rendering judgment for the plaintiff against the defendant company for the damages and attorney's fees, because the petition in the district court does not allege (1) that the defendant company in the contract of insurance expressly promised to pay such damages and attorney's fees; or (2) any facts surrounding the making of the contract that would indicate that the policy sued upon was issued in the state of Texas, or to a citizen of Texas, or that it was payable in Texas, or that for any reason whatsoever it was subject in any respect to the laws of Texas, to make article 3071, Rev. St. 1895, form a part of the contract of insurance; or (3) such facts as to subject it to the laws of some other state whose statutes provided for the recovery of damages and attorney's fees. That it was incumbent upon the plaintiff to allege in proper form the existence of some of these facts to justify the prayer for the recovery of attorney's fees and damages, and for this failure the case should be reversed and remanded. The defendant in error replies to this contention, and says, among other things, that, the portion of the judgment for attorney's fees and damages complained of having been remitted and relinquished before the assignment of error complaining of the same was filed, the error, if any, has been cured, and the plaintiff in error has already secured the relief which it seeks, and has no just cause to complain, and the judgment should therefore be reformed and affirmed, less the remittitur. It might be contended in a given case that there is legal authority for entering a remittitur of a part of a judgment in vacation of the court rendering the judgment. Article 1355, Rev. St. 1895. It might be contended in a given case that the release of a portion of the judgment by a plaintiff in execution is equitably sufficient to protect a defendant in the execution against a collection of such portion of the judgment so remitted under the statute. *Chrisman v. Davenport et al.*, 21 Tex. 483. But according to the record the remittitur in the court below was filed too late to prevent this case being properly before this court. The Court of Civil Appeals had acquired jurisdiction of the review at the time the remittitur was filed. *Arnold v. Williams*, 21 Tex. 413; *Chrisman v. Davenport*, 21 Tex. 483; *Howe v. Merrill et al.*, 36 Tex. 319; *Pearce v. Tootle et al.*, 75 Tex. 148, 12 S. W. 536. However, the defendant in error files in this court a relinquishment of the portion of the judgment complained of, and submits the same to this court along with his submission of the case. We are of the opinion that the defendant in error can, of her own volition, as she has elected to do, make the remittitur in this court. *Railway v. Measles*, 81 Tex. 478, 17 S. W. 124; article 1024, Rev. St. 1895.

The three several sums going to make up the judgment in this case, as shown by the face of the judgment, can be specifically de-

termined and separated from each other, and consequently any portion of the judgment claimed to be in excess of the amounts warranted by the averments in the petition can be released or remitted by striking therefrom any distinct or particular item, and then leave the balance a certain, fixed, and distinct item or sum, as it was before the remittitur of any distinct item was entered. *Thomas v. Womack*, 13 Tex. 580, 585. The elimination of the error by the remittitur would appear to direct the course of this court, in a wise exercise of our power, to permit the remittitur, and to exercise our power to reform the judgment at the cost of the defendant in error. To reform the judgment in accordance with a remittitur, and then affirm, less the remittitur, is the exercise of a power to reform with the consent of the prevailing party. *Gulf, C. & S. F. Ry. Co. v. McFadden* (Tex. Civ. App.) 25 S. W. 451. It is the proper and wise exercise, in our opinion, of judicial discretion to reform and affirm, instead of remand, an error based solely in the record on the ground of excessive amounts in a judgment, because a remittitur of the excessive amounts is a complete answer to the embodied error for a new trial. It is also in contemplation of the statute. Article 1029a, Rev. St. 1895. The practice of the appellate courts in this state has been uniformly to reform and affirm, instead of to remand, these remittitur cases, where the errors embodied in the judgment complained of are removed by the consent of the prevailing party, and his relinquishment is made of that portion of the judgment claimed to be error by reason of excess of an amount warranted by the averments in the petition, and where the remainder of the judgment is not complained of as excessive of the averments, or found to be otherwise error from the record itself, and where the remainder of the judgment not complained of is not necessarily permeated with the unwarranted excess, or in some way vitiated thereby. *Railway v. Overton* (Tex. Civ. App.) 34 S. W. 165; *Railway v. Measles*, 81 Tex. 474, 17 S. W. 124; *Railway v. Viney* (Tex. Civ. App.) 30 S. W. 252; *Arnold v. Williams*, 21 Tex. 413; *McDonald v. Grey*, 29 Tex. 89; *Chrisman v. Davenport et al.*, 21 Tex. 483; *Howe v. Merrill*, 36 Tex. 319; *Pearce v. Tootle et al.*, 75 Tex. 148, 12 S. W. 536. The exercise of this authority and power to proceed to render judgment, either reforming and affirming, or reversing and rendering, or remanding, has, in the cases, been on the record made in the court below, and the authority has not been exercised, in the cases, upon facts other than those made in the record below. Such practice comports with an orderly and proper practice for a court, intended as a court of appeal, for cases tried in trial courts of original jurisdiction. We are not inclined, therefore, because cases are default cases, any the more to arbitrarily amplify the limits of practice on appeal, but

rather to confine ourselves to the practice and procedure of this state as authorized and allowed in such cases.

If we could look to the facts, as they are set up in the motion of the plaintiff in error, which were submitted for our consideration along with the record in this case, but as an independent motion, to have us reverse and remand the error, we are not prepared to say that it would not show a good and sufficient plea in defense of the suit in a trial on its merits; nor are we prepared to say that the facts stated in the motion would altogether show a good and sufficient reason for the defendant company's not appearing and presenting a defense in the district court. This motion would show, from the facts alleged therein, that when this suit was instituted a citation was duly issued and served upon the company's legal agent at Gainesville, which was in all things in due and legal form, and within a proper and reasonable time before the session of the court. The agent forwarded the citation in the regular course of business to the company's general agent at Ft. Worth, who in turn sent it immediately to the home office of the defendant company in New York City. There the citation got properly into the hands of the superintendent of the division of policy claims of the company. Upon receipt of this citation it was the superintendent's duty to investigate the records, and to ascertain why the claim sued upon had not been paid, and then to transmit the citation, with a statement of the information gained by him from the records, to the legal department of the company. The superintendent is a very busy man, and the citation reached his department at a time when his desk was full of work, and he was unable to make the necessary investigation on that day. For this reason he laid the citation aside for attention the following morning, and placed it for that purpose in a safe not generally used for keeping current papers. When the next morning came he forgot all about the citation; and having no occasion to go to that safe, he never thought of the matter until the attorneys for Mrs. Herbert wrote him a letter stating that a judgment by default had been taken against the company, and the payment of the judgment was requested. If the plaintiff in error had any valid defense to the suit, and any legal or equitable excuse for not appearing and making it in the district court, it could have sought the remedy in the district court which rendered the judgment, either by motion, or, after adjournment of the court, by original proceeding, and, if not satisfied with the result of the application, then could have appealed to this court, and had reviewed the judgment thereon of the trial court. We are of the opinion that, in the exercise of a wise and proper judicial discretion, we are without the right, looking to the record of this case to consider the matters set up in this motion, but should con-

sider the case as the record presents the same.

The judgment is ordered reformed and affirmed, less the remittitur, with costs of this appeal against the defendant in error.

#### STOCKTON et al. v. BROWN et al.

(Court of Civil Appeals of Texas. Nov. 20, 1907. On Rehearing, Dec. 18, 1907.)

#### 1. APPEAL—REVIEW—QUESTIONS NOT PRESENTED AT TRIAL.

An assignment that the court erred in not sustaining defendant's demurrer to plaintiff's petition cannot be reviewed, where it does not appear from the record that the demurrer was ever presented to or acted on by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2295, 2296.]

#### 2. SAME—MOTION FOR NEW TRIAL—GROUNDS—ASSIGNMENTS OF ERROR.

It is not necessary to make the overruling of a demurrer to the petition a ground for a new trial in order to predicate an assignment of error thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1686.]

#### 3. LANDLORD AND TENANT—BREACH OF LEASE—WATER CONTRACT—PARTIES.

Where defendants, having contracted with an irrigation company to provide water for certain land leased to plaintiffs, agreed to furnish plaintiffs with the necessary water to irrigate the crop on such land, but there was no privity of contract between plaintiffs and the irrigation company, the latter was neither a necessary nor a proper party to plaintiff's suit against defendants for damages for their failure to furnish such water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 115.]

#### 4. INDEMNITY—CONTRACT TO FURNISH WATER—EXTENT OF LIABILITY.

Where an irrigation company having contracted to furnish plaintiffs' landlords with water for the irrigation of the rented premises, the landlords agreed to furnish sufficient water to plaintiffs to irrigate their crops, but were unable to do so because of the irrigation company's breach of its contract, whereupon plaintiffs sued their landlords for damages, plaintiffs' recovery afforded the landlords no right to recover over against the irrigation company the amount thereof.

#### 5. EVIDENCE—RES INTER ALIOS ACTA—EXTRINSIC CONTRACTS.

In an action by tenants against their landlords for breach of the landlords' agreement to furnish water to irrigate the crops, a contract between the landlords and an irrigation company to which the tenants were not parties, by which the company agreed to furnish the water to the landlords, was inadmissible as *res inter alios acta*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 403.]

#### 6. LANDLORDS AND TENANT—LEASE—BREACH—ACTION—ISSUES AND PROOF.

Where tenants sued their landlords for breach of the latter's contract to furnish water to irrigate the rented premises, the tenants could not recover on proof of a contract by which the landlords warranted that an irrigation company from which the landlords had contracted to obtain the water would perform such contract.

#### 7. TRIAL—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

Where certain tenants sued on their landlords' contract to furnish water to irrigate the



land rented, and there was no evidence that the landlords guaranteed performance by an irrigation company of its contract to furnish the water to the landlords, the court properly refused to charge that if the evidence showed such contract of guaranty plaintiffs could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

#### 8. APPEAL—ASSIGNMENTS OF ERROR—REFERENCE TO RECORD.

An assignment of error relating to the evidence, but making no reference to the pages of the record where the evidence in question may be found, as required by rule 31 of the Court of Civil Appeals, will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2999.]

#### 9. TRIAL—REQUEST TO CHARGE.

Where the correct rule for measuring damages was given by the court in its main charge, a special charge submitting a different rule was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

#### 10. LANDLORDS AND TENANT—LEASE—BREACH—EVIDENCE.

Where landlords contracted to furnish their tenants with water to irrigate the crop planted on the leased premises, evidence that the landlords had no water for that purpose was immaterial in an action for breach of their agreement.

On Rehearing.

#### 11. APPEAL—PREJUDICE—EVIDENCE—CONTRACT WITH ANOTHER.

In an action by tenants for breach of their landlords' oral contract to furnish plaintiffs all water necessary for the proper irrigation of their rice crop planted on the leased land, the erroneous admission of evidence of W. that defendants agreed to furnish him land and water to raise a rice crop, which was not so dissimilar to the contract alleged by plaintiffs that the jury might not have believed that the fact that defendants made such contract with W. rendered it probable that they made a similar contract with plaintiff, was prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by C. T. Brown and others against J. G. Stockton and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

L. J. & W. D. Wilson and Linn, Holland & Austin, for appellants. E. F. Higgins and J. W. Conger, for appellees.

NEILL, J. The appellees, C. T. Brown, C. N. Kuney, and C. N. Stewart, as partners, sued the appellants, J. G. Stockton, E. V. Ley, Chas. Houkole, F. W. Spencer, Judd S. Nelson, William Walters, and J. W. McGarth, partners, doing business under the firm name of the Stockton Land & Rice Company, to recover damages for a breach of contract, alleged to have been made by and between the parties. Under one view of the case it is deemed unnecessary to set out in extenso the pleadings of the respective parties, but only essential to state so much as is required to disclose the issues raised by them. The plaintiffs alleged that in March, 1902, they entered into a verbal contract with the defendants,

whereby they leased from them a certain tract of land containing 267 acres for the purpose of raising a crop of rice thereon during that year; that by the terms of the contract plaintiffs were to properly prepare the land for cultivation and furnish the seed rice necessary for planting, plant the same in due time, and pay defendants two-fifths of all the rice raised thereon during the year of 1902; that in consideration of such agreement on the part of plaintiffs the defendant leased them the lands for that year, and agreed to furnish them at the proper time and place all water necessary for the proper irrigation of the land and rice planted thereon; that plaintiffs properly prepared the land for cultivation and planted it in rice, but that defendants failed to furnish the water necessary to irrigate the crop by reason whereof the crop was lost and destroyed to plaintiffs' damage in the sum of \$3,263.40. The defendants answered by a general demurrer, a general denial, and pleaded specially that they had a written contract with the Matagorda County Rice & Irrigation Company, whereby said company agreed to furnish them a sufficient quantity of water for irrigating rice on 500 acres of land during the year of 1902, and that if defendants ever agreed to furnish plaintiffs with water, as they allege, it was under the terms and provisions contained in their contract with said irrigation company, and that plaintiffs were subrogated to all the rights and interests of defendants under said contract to the extent of the land leased by them. The defendants asked that said irrigation company be made a party to the suit, and prayed that, in the event plaintiffs recovered against them, they have judgment over against the company for the amount so recovered. By an order of the court said irrigation company was made a party defendant, but after it appeared and answered to defendants' cross-action it was dismissed from the suit by an order of the court granted on motion of the plaintiffs. The case was tried before a jury, and judgment was rendered upon its verdict in favor of plaintiffs against defendants for \$2,076.40.

#### Conclusions of Fact.

We conclude that the evidence reasonably tended to prove the contract declared upon by plaintiffs; that they in all things performed their part of the contract; that the defendants failed to furnish plaintiffs with the water necessary to irrigate the crop of rice planted upon the land in accordance with their agreement, whereby plaintiffs' crop of rice was destroyed and lost, by reason whereof they were damaged to the amount found by the jury.

#### Conclusions of Law.

1. As it does not appear from the record that defendants' general demurrer to plaintiffs' first amended original petition was ever presented to or acted upon by the court, the



first assignment of error, which complains of the court's not sustaining such demurrer, is overruled. We will remark, however, in view of appellees' second counter proposition, that, had the demurrer been passed upon by the trial court, it would have been unnecessary to make the ruling of the court a ground for a new trial, in order to predicate an assignment of error upon it. *City of Austin v. Forbes* (Tex. Sup.) 89 S. W. 406; *Clark v. Pearce*, 80 Tex. 151, 15 S. W. 787.

2. It is apparent from the allegations in plaintiffs' petition, as well as from defendants' answer, that the Matagorda County Rice & Irrigation Company was neither a necessary nor proper party to this suit. It is manifest from the pleadings of both parties that there was no privity of contract between plaintiffs and the irrigation company, and that the plaintiffs, from the very nature of the contract sued upon, could not be subrogated to any rights defendants might have under their contract with such company. It is equally clear that a recovery by plaintiffs upon their cause of action would afford the defendants no right to recover over against the irrigation company the amount recovered by plaintiffs. Therefore the court did not err in sustaining plaintiffs' motion to dismiss the company from this suit.

3. The contract marked "Exhibit A," attached to defendants' answer, which was between defendants and the irrigation company, was *res inter alios acta*, and inadmissible in evidence for any purpose. Therefore the court did not err in not permitting defendants to introduce it.

4. While our ruling upon the third assignment of error also disposes of the fourth, we may add that it is manifest that plaintiffs relied only upon the contract they pleaded, and not upon a warranty of defendants that the irrigation company would perform their contract, for there are no allegations in their pleadings of any such contract of warranty. Had it been shown that such was the contract between the parties, the contract sued upon would have been disproved and plaintiffs' action defeated, regardless of the terms of the contract which defendants warranted that the irrigation company would perform. If such contract of warranty was made, instead of the one alleged by plaintiffs, the fact could have been proved by defendants under their general denial, and plaintiffs' recovery by such proof defeated. For they could not sue on one contract and recover on another, whose very existence proved that the one declared on was never made.

5. This assignment is directed against the action of the court in admitting in evidence the testimony of C. H. Williams in regard to a verbal contract between him and defendants. The testimony objected to, as stated in appellants' brief, is as follows: "The character of the contract is this: He [referring to J. G. Stockton] was to furnish us land and water and the rice to plant it,

and furnish us as much as \$2 or \$2.50 per acre, necessary to carry on the working of the land, and in case he failed to give us water he would pay us \$4 per acre for all the land we broke." The objections to such testimony were that such contract had no relation to this case; that it was immaterial, irrelevant, and tended to prejudice the jury against the defendants; that it was not *res inter alios acta*, and not made in the presence or with the knowledge of plaintiffs. We do not doubt that the objections to such testimony were well taken, nor that the court erred in admitting it in evidence. But the contract testified to by the witness is so dissimilar in its terms from the one sued on that such testimony could not, in our opinion, possibly have influenced or prejudiced the jury against the defendants. It is true that "a fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact." *Stuart v. Kohlberg* (Tex. Civ. App.) 53 S. W. 596; *Ross v. Moskowitz* (Tex. Civ. App.) 95 S. W. 86. The matter in issue in this case was whether defendants ever made the contract with plaintiffs upon which they ground their action. There is not such a resemblance between the contract sued on and the one testified to by the witness Williams as to render it probable that the one in issue was ever made between the parties. If such testimony has any pertinency whatever to the issue, its tendency is to show, by a dissimilarity of the two contracts, that the one in issue never was made. But we think that the testimony did not have the slightest probative force upon any issue in the case, and that, while totally irrelevant, and for that reason inadmissible as evidence, it could not possibly have prejudiced the jury against the defendants, or have had any influence at all upon it in deciding the issues in the case. It is only when the admission of irrelevant testimony may be prejudicial to the party complaining of its introduction in evidence that an appellate court is authorized to reverse a judgment on account of its wrongful admission. In other words, such a tribunal will not reverse a judgment when it clearly appears that it was not tainted or in any way affected by the admission of irrelevant testimony.

6. Regarding the sixth assignment of error, it is sufficient to say that, if the evidence showed the contract between plaintiffs and defendants was a guaranty on the part of defendants of the performance of an obligation of the Matagorda County Rice & Irrigation Company, the effect of such evidence would be to require a verdict in favor of defendants under the court's general charge, because it would prove that no such contract as the one sued on was ever made. Hence, it would have been entirely unnecessary to give the special charge referred to in the as-

signment. But the evidence does not tend, in the slightest, to show any such guaranty of the performance of any contract of the irrigation company. Such contract of guaranty rests entirely upon the imagination, unilluminated by even a scintilla of evidence. We are not inclined to explore the statute of frauds for the purpose of determining its effect upon an imaginary contract. The same may be said of the eighth assignment of error, which is also overruled.

7. That portion of the statement subjoined to the proposition under this assignment which relates to the evidence makes no reference to the pages of the record, as is required by rule 31 of this court. We are not required to read the stenographer's report of 125 pages for the purpose of ascertaining whether the evidence was such as required the court to give the special charge referred to in the assignment of error. Therefore the assignment will not be considered.

8. There is no evidence whatever tending to show that plaintiffs relied on the Matagorda, etc., Company to furnish the water necessary to water their crop. On the contrary, the evidence shows indisputably that they relied upon their contract with defendants to furnish the water. Therefore special charge No. 6 requested by defendants was properly refused.

9. The correct rule for measuring the damages was given by the court in its main charge, and special charge No. 7, by which defendants sought to have a different rule given, was properly refused.

10. The error in the charge indicated by the eleventh assignment, if error, was simply one of omission, which of itself furnishes no ground of reversal.

11. Our conclusions of fact dispose of the twelfth, fourteenth, and fifteenth assignments of error.

12. If the defendants contracted to furnish plaintiffs water to irrigate their crop, it is immaterial whether they had any water or not for that purpose; and the evidence offered by them to prove they had no water, the exclusion of which is the subject of the thirteenth assignment of error, was properly excluded.

There is no error in the judgment, and it is affirmed.

#### On Rehearing.

NEILL, J. Upon considering this motion, we have concluded that we were in error in not sustaining appellant's fifth assignment, and in not reversing the judgment on account of the error disclosed by it. If the dissimilarity in the contract testified to by the witness Williams to the one alleged by plaintiff in this case extended to all the terms of each, then, it might be said that the admission of the testimony of the witness was harmless. But the dissimilarity is not to that extent. In regard to appellants' agreement to furnish sufficient water to irrigate the rice crop, the

terms of the contract testified by Williams are the same as those which the plaintiff claimed were made by them with him. As the pivotal question in this case was, did the appellants agree to furnish plaintiff all the water necessary to cultivate and raise the crop of rice on the premises leased by him? the jury might have been induced to believe, from the fact that appellants had made such an agreement with Williams, that they had made a similar one with plaintiff, as was claimed by him. The evidence on this issue being such that the jury might have found in favor of either party upon it, we cannot say that the testimony of Williams, which, as we have seen, was erroneously admitted, did not so turn the scales on the side of the plaintiff as to cause the jury to find in his favor.

On account of the error, the motion is granted, the judgment reversed, and the cause remanded.

#### SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. MORRIS.

(Court of Civil Appeals of Texas. Dec. 19, 1907.)

#### NEGLIGENCE—TELEPHONE LINES—LIGHTNING—KILLING STOCK—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

In an action for the value of a horse alleged to have been killed by lightning through the defective condition of a telephone line, held, that the evidence would not warrant a finding that the wire or telephone line was the efficient cause of the bolt of lightning striking the horse.

#### Appeal from Wise County Court.

Action by J. H. Morris against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

The appellee sued the Southwestern Telegraph & Telephone Company in the justice court for damages in the sum of \$150 for the death of a horse. He recovered judgment in the justice court, and the appellant carried the case to the county court, where it was tried to a jury, and the appellee recovered again, and the appellant seeks to have that judgment reversed in this court.

The appellee alleged that on or about September 1, 1906, the defendant company operated and maintained a telephone line on to and across plaintiff's tract of land, and that the land was inclosed, and that appellee used the same for pasturage for his horses, and that said telephone line was negligently permitted to get out of and remain out of repair so that the wire became greatly slacked, and by reason of said telephone line and by reason of same being so out of repair, while plaintiff's horses were in the premises and near said line, the said line during a thunder storm became overcharged with electricity, and by reason thereof plaintiff's horse was struck and killed by such overcharge. The evidence in the record shows the following:

The appellee testified for himself that about 6 o'clock p. m. on Friday, August 31, 1906, he sent his boy with the horse to turn him and another one in his pasture situated on the outskirts of the town of Decatur. The pasture, consisting of about seven acres, was inclosed by a four-wire barbed wire fence. The horse was not seen any more until about dark the next evening, Saturday, when appellee found him dead beneath the telephone wires that went across his pasture. On the Friday night the horse was put in the pasture there was a hard rain, wind, and thunder storm, with great electrical disturbance and much lightning. Appellee's family went to a storm cellar, though appellee did not. He says when he found the carcass of the horse late Saturday evening he did not then make any examination, as it was getting dark. The next morning he got several parties to go with him, and went where the horse was lying, and made a careful examination of the carcass and the surroundings. The horse was lying with his hips about one foot west from a point directly beneath the most westerly of the three telephone wires suspended over the pasture, and with his head somewhat away from beneath the wires. The parties carefully inspected the horse's body to see if there were any marks, wounds, burns, or singed hair upon it, and found that there were none, except that on each hip near where the tail leaves the body there was a little place where some foam had oozed out. Neither the appellee nor any of the parties removed the foam, and did not know whether the skin was broken at those places or not. They did not know whether or not any bones were broken. At the place where the horse lay the middle wire of the three telephone wires was the lowest of the three, and as appellee testifies, was only about six inches higher than his head, and that he is six feet tall. The middle wire had been strung on the tops of the poles, and the other two wires had been strung on the ends of the cross-arms nailed to the poles beneath the tops. At the place where the horse lay the three wires were about 18 inches apart, and the center one about a foot lower in its construction than the other two. The nearest telephone pole was about 50 steps south of the horse. About 30 steps south of the horse was a small stick suspended above the ground and attached to each of the wires for the purpose of preventing them from coming in contact. This stick appeared to have been splintered, the splinters having been knocked off of it apparently by lightning, though the witnesses only give that as an opinion. There were green weeds and grass all around where the horse fell and all around the other places that have been mentioned. On the Sunday morning following appellee testifies that he discovered a swath of blasted weeds and grass extending from the point beneath the splintered stick before mentioned, and

it being 30 steps south of the horse, to the body of the horse, and stopping there. This swath lay directly beneath the three wires, was about three feet wide on an average, was not quite uniform in width, and showed plainly that the grass and weeds in such swath had recently been burned and killed. The other weeds and grass around there were green. There was no sign of the horse's having struggled—not even a broken weed. At the next telephone pole north of where the horse lay the cross-arm had been splintered, apparently having been done by lightning. From the pole, 50 steps south of the horse, the ground sloped north toward the horse, and at the splintered stick, 30 steps from the horse, the wires were about 4 or 5 feet from the ground. The wires were none of them burned in two or broken. Appellee says that he found two wires of his barbed wire fence on the south side of the pasture had been broken and rolled up, being broken loose from two or three posts, and that his other horse that was in the pasture at the time was cut on the breast by the wire. The original wire that was put up over the pasture was a wire extending from the residence of John Spencer in the country to the telephone exchange in Decatur that was then operated by Robert Moore. Appellee says he does not know whether defendant had anything to do with the local exchange. "My understanding was that Robert Moore himself owned the local exchange." He testifies that John Spencer built the line, and that the two other telephone wires had been put on said poles connecting the residences of several farmers with the Independent Telephone Exchange in Decatur; and that these last two wires were strung on cross-arms nailed to the poles that John Spencer had put up. He says the last time before the horse's death that he saw the wires at the place of the horse's death was when he cut his oats about three months before the horse was killed. John Spencer testified for the plaintiff that he put up the telephone line that passed over the pasture or field where the plaintiff's horse was found dead; that he connected his residence in the country with the telephone exchange in Decatur, which was then owned by Robert Moore. He says that Robert Moore told him that he could build the line and connect with his exchange if he wanted to for a monthly rental or charge of \$1.50. He further says that a short time before the horse's death Robert Moore sold his exchange to the Southwestern Telegraph & Telephone Company, and went out of business, and that the Southwestern Telegraph & Telephone Company assumed his contract that Robert Moore had made with him, and that the Southwestern Telegraph & Telephone Company continued furnishing him upon the same terms stated that Robert Moore did; that the two wires put up by his neighbors were used by them to give telephone communication between their farm

houses and the independent telephone exchange in Decatur, and that they got his consent to put them up on his poles; that the repairs made on the telephone line were at his cost and expense when made. He testifies that he examined the place where the horse had lain, and tried to reach up with his hand and touch the lowest of these three wires, and that he could not do so, and that he was 5 feet 10 inches tall; that the swath of burnt weeds and spot where the horse lay were still discernible out there even at the time of the trial of the case; that the swath of burned weeds began about 12 steps north of the nearest telephone pole south of the spot where the horse lay, and extended underneath the wires to a point 12 or 15 feet from where the horse lay, and that it did not extend nearer to the horse than that; that on the night of August 31st there was a severe thunder storm, and, while at his telephone, he received an electric shock that knocked him down and which burned out his telephone instrument or rendered it dead; that a day or two afterwards, at his request and expense, the appellant sent a man out there who fixed his instrument and restored communication; that two or three days after the horse was found dead that he and the other two parties owning the lines went together and set the poles entirely off of plaintiff's land because they had never entered plaintiff's land with any consent or right. The appellant offered in evidence one of its linemen, who testifies that he was a lineman for the company, and that after John Spencer's line had been put up two other wires were put up on the same poles by other parties, all of which wires connected inside the corporate limits and into the Independent Exchange; that Mr. Moore allowed the parties switching privileges at 25 cents per month; that, when the appellant bought out Moore's exchange, it bought nothing but his local exchange, including his instruments, poles, and wires, and the right to maintain the latter upon the streets of Decatur; that he repaired this line about six weeks before the death of the horse, and that he did it at Mr. Spencer's request and did not charge Mr. Spencer anything for his trouble; that Mr. Spencer did not go to the manager of the appellant company to arrange for this help, but came direct to him, and that he went with him of his own accord and for his accommodation; that he saw these wires about a month before the death of the horse, and that they were then in good condition just as he had left them when he repaired them.

Wm. D. Williams and R. M. Rowland, for appellant. Ford & Patterson, for appellee.

LEVY, J. (after stating the facts as above). The appellant complains in his first assignment of error of the refusal of the court to give a peremptory instruction to the jury to find for the appellant, and in another as-

signment of error complains of the action of the court in refusing to grant a new trial because the verdict was contrary to the evidence. The appellant asserts that the evidence in the record (1) wholly failed to show negligence on the part of the telephone company; and (2) was wholly insufficient to show that the death of the horse, in the manner shown by the testimony, was the proximate result of maintaining the telephone line; and (3) the evidence wholly failed to show that the appellant either owned or controlled the telephone line in question. These assignments are considered together and with the testimony in the record.

The examination of the horse after the storm, considered in the light of the height of the wire above him, discloses rather positively that the wire did not come in contact with him. Neither were the wires crossed or together. There is not shown any structural or inherent quality or defect of the line or wire, or that it was out of repair or maintenance at the time. The lightning in its course shattered the stick separating the wires from contact from each other, and a cross-arm on a pole distant therefrom, and cut a swath of grass underneath 3 feet wide beneath the wires, extending from a point 30 steps from the horse on the ground sloping north towards the horse and beyond him 12 or 15 feet. Two wires of a barbed wire fence on the south side of the pasture had been broken and rolled up, being broken loose from two or three of the posts. The shattered stick was 30 steps south from the horse, and the cross-arm 50 steps north from the horse. Was the horse killed by electricity which came from the wires, or directly by a bolt of lightning from the clouds? If the same bolt of lightning struck both the telephone line and the horse, but if the wire did not control the path of the bolt from the clouds to the earth so as to be the proximate cause of the bolt's striking the horse, the appellant as a matter of law would not be liable. It is not sufficient that the wire was a possible consequence of conducting the lightning to the horse. *Railway v. Earle* (Tex. App.) 14 S. W. 1068; *Railway v. Leal* (Tex. App.) 16 S. W. 909; *Railway v. Blair* (Tex. Civ. App.) 73 S. W. 1074; *Railway v. Bigham* 90 Tex. 223, 38 S. W. 162; *Stone v. Railway*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Phoenix L. & F. Co. v. Bennett* (Ariz.) 74 Pac. 48, 63 L. R. A. 219. In this case, even if it might be held in law that the appellant controlled or operated the telephone line as a part of its business, the proof in the record, properly construed, as a matter of law, would not warrant the finding by a jury that the wire or telephone line was the efficient cause of the bolt of lightning's striking the horse, or leaping to the horse's body from the telephone wire suspended out of his reach.

For these reasons, the assignments should be sustained. This ruling becomes the im-

portant and decisive question of the case. The judgment of the trial court is ordered reversed, and here rendered for the appellant, with all costs of the justice and county courts, as well as this court, adjudged against appellee.

**FT. WORTH & D. C. RY. CO. v. POLSON.**  
(Court of Civil Appeals of Texas. Dec. 5, 1907.)

**1. RAILROADS—KILLING STOCK—EVIDENCE.**

In an action against a railroad for killing an animal, evidence held to justify a finding that the animal was killed by a train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1608½.]

**2. SAME—LIABILITY—STATUTES.**

Under Acts 29th Leg. (Laws 1905) p. 226, c. 117, providing that each railroad company having a line in a district where the stock law is in force shall be liable for the value of stock killed by trains, and, if a railroad shall fence its road, it shall be liable only in cases of injury resulting from want of ordinary care, a railroad is absolutely liable for stock killed by it in districts where the stock law is in force, unless the track is properly fenced, which includes the maintenance of sufficient cattle guards at public crossings, in which case it is liable only for injuries resulting from want of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1411, 1412, 1415.]

**3. SAME.**

Acts 29th Leg. (Laws 1905) p. 226, c. 117, fixing the liability of railroads for killing stock where their roads are either fenced or unfenced, though amending the stock law, fixes the liability of railroads for killing stock in districts where the stock law is in force, and is valid when applied to a county which had prior to its enactment adopted the stock law.

Appeal from Wise County Court.

Action by Elmore Polson against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Spoonts, Thompson & Barwise, for appellant. T. J. McMurtry, for appellee.

**HODGES, J.** Appellee sued the appellant in the justice court of Wise county to recover the sum of \$175, alleged to be the value of a horse killed by one of the appellant's trains. Judgment was rendered for the full amount sued for, and an appeal taken to the county court by the appellant railroad company. Upon a trial in the last-named court a similar judgment was rendered for the appellee, and appellant appeals to this court.

The facts show that the appellee resided near the appellant's railroad track; that on the night preceding the killing of the animal, for the value of which suit is brought, appellee confined his stock, including the horse in question, within his lot; that on the next morning the stock were out. Appellee followed the tracks, which led down the crossing over the appellant's line of railroad. The track was fenced, but one of the cattle guards on the south side of the crossing was in bad condition, such as to permit stock to pass

over it on to the appellant's right of way and track within its inclosure. Appellee traced an animal, presumably the one killed, over this cattle guard and down the right of way a short distance. The animal appeared to have then turned north and gone back till near the south cattle guard where its tracks disappeared. The body of the horse was found on the north side of the north cattle guard, and the appearance indicated that it had been struck and killed by a passing train during the preceding night. There was testimony showing that one of the appellant's trains passed along some time during that night. Whether or not the animal was killed by one of appellant's trains, as charged, was a question of fact passed upon by the trial court and found in favor of appellee; and we think the evidence was sufficient to justify the finding.

Appellant contends that because the proof shows that its right of way was fenced at the point where the animal was killed, and that the stock law prohibiting horses and mules, etc., from running at large was in force in that county, appellee was not entitled to recover except upon proof of negligence on the part of the appellant's employés. There was no evidence in the record tending to show any negligence causing the death of the appellee's horse. The contention of appellant assumes that it was proven on the trial that the stock law was in force in Wise county at that time, and was being generally observed. Admitting this fact to be true, for the sake of this discussion, it by no means follows that the appellee was required to prove that his animal was killed through the negligent operation of the appellant's train before he could recover. Acts 29th Leg. p. 226, c. 117, provides: "Each and every railroad company, having a line of railway in any county or subdivision thereof, where the provisions of the preceding sections of this chapter have been or may hereafter be adopted, shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. If the railroad company shall fence its road it shall only then be held liable in cases of injury resulting from want of ordinary care." This had the effect of making the railroads absolutely liable for stock killed by them in districts or counties where the stock law was in force, unless the track was fenced. Where this was done, liability for killing stock arose only upon showing that the killing resulted from the want of ordinary care. We think that, when the Legislature gave the right to railroads to relieve themselves from absolute liability for killing stock on their rights of way by fencing their tracks, it meant that the track must be inclosed with a fence reasonably sufficient to prevent the intrusion of stock of ordinary

habits. At public crossings the cattle guard is necessarily a part of this fence, and must be constructed and maintained with the same degree of care as applies to other portions of the fence. A railroad company can no more claim exemption from liability for the killing of stock when it is shown that one of its cattle guards is out of repair sufficient to permit the ingress of stock than when it is shown that its fence is defective or insufficient. We conclude, therefore, that it was not necessary to prove negligence in order to entitle the appellee to recover in this suit.

But the appellant contends, further, that the statute above referred to is not applicable to Wise county, because the stock law was adopted in that county prior to the enactment of the statute, that this was an amendment to the stock law previously enacted, and adopted in Wise county, and that this amendment has not been adopted in that county. While this provision appears as an amendment to the stock law, as theretofore enacted, yet it seems to have an independent purpose in view—the fixing of the liability of railroads for killing stock in such districts as may have adopted the stock law. The language is: "Where the provisions of the preceding sections of this chapter have been or may hereafter be adopted." We presume that, if this had appeared as an independent statutory enactment, its validity would not be challenged. We think its character is not changed, nor its validity affected because it appears as an enactment to the stock law.

There was no error in the judgment of the county court; and it is accordingly affirmed.

#### HOLMAN v. VICKERY & COYLE.

(Court of Civil Appeals of Texas. Dec. 18, 1907.)

#### PARTIES—DEFECTS—MODE OF RAISING—PLEA IN ABATEMENT.

Where plaintiffs' petition alleged that defendant informed plaintiffs that he and others, whose names were unknown to plaintiffs, were partners doing business, etc., defendant could not object that the petition showed a defect of parties defendant, without raising such question by plea in abatement, and furnishing plaintiffs with the names and residences of defendant's partners claimed to have been omitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 134.]

Appeal from Dallas County Court; Hiram F. Lively, Judge.

Action by Vickery & Coyle against J. Q. Holman. From a judgment for plaintiffs, defendant appeals. Affirmed.

Haynes & Haynes and U. F. Short, for appellant.

KEY, J. This case originated in a justice of the peace court, and was finally tried in the county court, where it resulted in a judgment for the plaintiffs, and the defendant has appealed.

In the county court the plaintiffs filed a

petition in which they alleged that the defendant informed them that he and others, whose names were unknown to the plaintiffs, were partners doing business in the firm name of Planters' Wagon Yard. The defendant excepted to the petition upon the ground that it showed on its face that other persons who were not made defendants were jointly liable with him. Inasmuch as the plaintiffs alleged in their petition that the names of the defendant's associates were unknown to them, we think the defendant should have raised the question of nonjoinder of parties by a plea in abatement, and furnished the names and residences of his partners.

The other questions presented in appellant's brief have been considered, and are decided against him.

Judgment affirmed.

#### MARS v. MORRIS.

(Court of Civil Appeals of Texas. Dec. 12, 1907.)

#### 1. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY.

In trespass to try title, where a deed from a common grantor had been introduced in evidence, it was proper on cross-examination to ask defendant whether he went into possession of the entire tract, including the part in controversy, under the deed from the common grantor.

#### 2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where other testimony in trespass to try title established that defendant went into possession of the land under a deed from the common grantor, sustaining an objection to evidence on that point, *held* harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4184-4199.]

#### 3. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY—DEEDS TO OTHER PARTIES.

Under a plea of "not guilty" in trespass to try title, defendant may show that the legal title to land was not in the common grantor of plaintiff and defendant at the time he conveyed to plaintiff, but was outstanding in some one else. Hence evidence that, giving to others owning land in the survey by title superior to grantor's, the quantity to which they were entitled, would leave no more than the grantor conveyed to defendant, might tend to show an outstanding title, if accompanied by other testimony showing the boundaries of the land owned by others, and the other deeds would be admissible for such a purpose, but, if no evidence was offered indicating the boundaries under such deeds, they should be excluded on motion.

#### 4. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where plaintiff and defendant claimed under the same grantor, M., but the description in the deed to defendant, the prior grantee, did not extend so far as the established west boundary of an adjacent tract, as recognized by G., the owner of that tract, but such recognized west boundary coincided with the east line of the land in controversy, in an action of trespass to try title, it was error to instruct that, if the survey containing the land in controversy did not contain a greater number of acres than M. had conveyed to defendant, together with the number of acres in the survey deeded to other parties, then defendant should recover, unless before selling to defendant M. and G. agreed on the boundary line between them.

# 5. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY.

In trespass to try title, where plaintiff claimed under a subsequent deed of gift from defendant's grantor a piece of land which defendant claimed was included in his grant, evidence that the grantor refused to permit defendant to pay certain purchase-price notes before they matured, until he paid unearned interest, was inadmissible.

# 6. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In trespass to try title, where plaintiff claimed under a subsequent deed of gift from defendant's grantor, and defendant claimed that plaintiff's grantor was estopped to deny the amount of land included in his deed because of certain representations, admission of evidence that the common grantor refused to permit defendant to pay certain purchase-money notes until he had paid unearned interest thereon held prejudicial in view of the claim of estoppel.

# 7. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY—MISREPRESENTATIONS AS TO BOUNDARIES.

In trespass to try title, under a plea of not guilty, defendant may defeat recovery by proving an estoppel. Hence, where plaintiff claimed under a subsequent deed of gift from defendant's grantor, evidence was admissible to show that the common grantor had represented to defendant that the tract he was selling him included the land in controversy.

# 8. ESTOPPEL—PERSONS ESTOPPED.

In trespass to try title, a plaintiff claiming under a subsequent deed of gift from defendant's grantor is bound by representations which would estop the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 290.]

# 9. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY—ORAL PROOF OF MISREPRESENTATIONS OF GRANTOR.

In trespass to try title, where plaintiff claimed under a subsequent deed of gift from defendant's grantor, if defendant intended, and the grantor understood him as intending, to purchase the entire tract of land, including the parcel in controversy, and, so understanding, the grantor made representations that the boundaries of the part to be sold extended to the extreme boundary of the part in controversy, the grantor would be estopped from asserting in himself title to any of the land embraced in the tract as he represented it to defendant to be, and the estoppel would include plaintiff.

# 10. EVIDENCE—PAROL EVIDENCE—ESTOPPEL.

The rule which forbids evidence to vary, contradict, or explain the plain and unambiguous language of a deed, is not infringed by permitting misrepresentations as to the extent and identity of the land conveyed to operate as an estoppel.

# 11. TRIAL—INSTRUCTIONS UNWARRANTED BY EVIDENCE.

In trespass to try title, where there was no evidence tending to show that by mutual mistake of defendant and his grantor the deed failed to embody their common intention, though plaintiff claimed under a subsequent deed of gift from defendant's grantor, it was error to charge that defendant was entitled to recover if the common grantor by his deed intended to convey the land in controversy, and defendant intended to purchase it, since the issue was not made by the evidence.

# 12. ESTOPPEL—BY DEED—PERSONS ESTOPPED.

In trespass to try title, where M., the common grantor of plaintiff and defendant, owned a certain tract of land adjoining land belonging to G., and defendant, knowing the boundary line of G.'s tract, purchased a tract from M. under M.'s representation that the tract extended to G.'s boundary line, if de-

fendant would not have bought the land from M. but for the misrepresentations, then M. and plaintiff, who claimed under a deed of gift subsequent to defendant's deed, would be estopped from denying that the boundary line of G.'s tract was the true boundary line of the land conveyed to defendant, and defendant should recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 69-74, 290.]

# 13. ADVERSE POSSESSION—PAYMENT OF TAXES.

Where defendant in an action of trespass to try title claims under a deed which on its face does not include an entire tract of land owned by the grantor, and defendant has not paid the taxes on the amount of land claimed by him for the period necessary to the operation of the statute of limitations, he is not entitled to the land in controversy under the five years' statute of limitations.

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Trespass to try title by T. C. Mars against E. C. Morris. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

L. S. Schluter and C. E. Sheppard, for appellant. Templeton, Crosby & Dinmore, for appellee.

WILLSON, C. J. Appellant's suit against appellee was to try the title to 43<sup>32</sup>/<sub>100</sub> acres of the Joshua B. Hill survey, in Hopkins county. His petition, in the form usual in such suits, was filed in the district court of Hopkins county on January 8, 1906. Appellee answered by a general demurrer, a general denial, a plea of not guilty, a plea setting up the statute of limitations of five years, and a suggestion that he had in good faith made permanent and valuable improvements on the land. By a supplemental petition appellant demurred to appellee's answer, and averred that the improvements made by appellee on the land were made within 12 months before his suit was filed and after same was filed, and with a knowledge at the time on appellee's part that he had no interest in nor title to the land; and appellant further averred that if appellee in good faith held possession and made the improvements claimed to have been made by him, and was allowed to recover for same, he should be allowed to recover as against appellee the rental value of the land, which he alleged to be \$100 per year. On a trial had February 2, 1907, the jury returned a verdict in favor of the defendant, and accordingly on that date a judgment was rendered and entered in favor of appellee. By his deed dated July 23, 1900, and filed for record September 15, 1900, for a consideration of \$1,670 paid and to be paid to him, one J. H. Mars conveyed to appellee a tract of land described as containing "by estimate" 834 acres, and otherwise described as follows: "Beginning at the southwest corner of the J. B. Hill survey; thence north to the northwest corner of said survey, 1200 varas, a stake; thence east with the north boundary line of said survey, 1570, a stake; thence south to the south boundary

line of said Hill survey 1,200 vrs. a stake; thence west to the southwest corner of said survey 1,570 vrs. to the place of beginning, containing by estimate, 334 acres of land of the J. B. Hill headright survey." By his deed of gift dated February 15, 1904, said J. H. Mars conveyed to his son T. C. Mars, appellant, a tract of land described as containing "by estimate" 20 $\frac{1}{2}$  acres, and otherwise described as follows: "Beginning 1570 vrs. east from the southwest corner of the said J. B. Hill survey at E. C. Morris' southeast corner in said Hill survey; thence east 100 vrs. to the southwest corner of a tract sold to Alvin Gregg; thence north 1,200 vrs. to the north boundary line of Hill survey; thence west 100 vrs. to the northeast corner of E. C. Morris tract in said survey; thence south 1,200 vrs. to the place of beginning containing by estimate 20 $\frac{1}{2}$  acres of land." It appears from the evidence that the distance from the northwest corner of the tract of land purchased by appellee of J. H. Mars to a bois d'arc stake at the northwest corner of a tract of land in the same survey owned by one Gregg, according to one surveyor who testified, is 1,774 varas, and, according to another surveyor who also testified, is 1,778 varas. The call in appellee's deed from his northwest corner is: "Thence east with the north boundary line of said survey 1,570, a stake." The unit of measure is omitted in the call, but the other calls in the deed are for varas, and we think this call must be treated as a call east 1,570 varas. Because of representations made to him by J. H. Mars at the time he purchased the land, appellee contends that his north line extends to the bois d'arc stake at the northwest corner of the Gregg tract, and that his east line extends thence south with Gregg's west line, and so includes, with the other calls in his deed, the land in controversy. Appellant's contention is that the appellee's north line should not be extended farther east than the distance—1,570 varas—called for in his deed, and that the strip 208 by 1,200 varas along the west boundary line of the Gregg tract passed to him by his father's deed. It appears from the evidence that J. H. Mars owned a part of the Hill survey, bounded on the north, east, and west by inclosed land, and on the south by uninclosed land. The land on the west was owned by one McAnear, and that on the east by one Gregg. Appellee, a stranger in the neighborhood in which the land was situated, and ignorant of its boundaries, with a view of purchasing the tract owned by J. H. Mars on the Hill survey, went over it, along Gregg's west line as marked by his fence, and at his northwest corner found a bois d'arc stake. Another stake west from this one was pointed out to him by McAnear, who owned the land adjoining on the west, as marking the northwest corner of the Mars tract. After so inspecting the land, appellee went to see said J. H. Mars, who lived in an-

other county, and proposed to purchase from him the tract of land. Appellee testified that, for the purpose of identifying it, he inquired of Mars if the bois d'arc stake at the northwest corner of the Gregg land was the corner of his land, that Mars replied that it was—that the land he owned was against Gregg's—and at the same time informed appellee that he supposed the stake pointed out to him by McAnear was the northwest corner of the tract he (Mars) owned on the Hill survey; that his (Mars') proposition was to sell appellee the land he owned on that survey; that he thought the tract contained about 334 acres, and that he wanted \$5 per acre for it; that on this basis the sale was consummated, appellee paying to Mars \$270 in cash and executing and delivering to him seven notes for \$200 each, payable, respectively, on or before November 1, 1901, 1902, 1903, 1904, 1905, and 1907, and secured by the vendor's lien expressly retained in them on the land. Testifying for appellant, Mars denied having made the representations charged to him by appellee. The deed executed by Mars and delivered to appellee in consummating the sale was made July 23, 1900. By November 15th following appellee had inclosed the entire tract between the McAnear land on the west and the Gregg land on the east by a fence; and during October, 1900, built a cow shed and barn on the strip thereof now in controversy. He constructed a dwelling house on the other part of the land which, with a part of the land, he sold to one France in January, 1904. In the fall of that year he built a dwelling house on the land in controversy. Appellee testified that he intended to buy, and believed he had bought, and that his deed conveyed, all of the tract owned by Mars on the survey. When he sold to France in 1903, he ascertained that there was in the tract an excess of, as he thought, about 20 acres over the quantity (334 acres) specified as conveyed by his deed. Neither appellee nor Mars was sure as to the quantity in the tract at the time the contract for the sale and purchase of the land was made. The deed consummating the sale specified the quantity of land thereby conveyed as 334 acres "by estimate." On February 29, 1904, before several of them were due, appellee paid to Mars the amount of the notes given for the land, and, in addition to such amount, representing as the parties testified unearned interest, paid to him the sum of \$100 according to Mars, or \$140 according to appellee. Before these notes were paid, appellee had informed Mars that he thought there was an excess in the tract of about 20 acres over the 334 acres called for in his deed. The deed of gift from J. H. Mars to appellant was dated February 15, 1904. Appellee's deed was filed for record on September 15, 1900. It was shown that appellant rendered and paid taxes on land in the Hill survey as follows: For the year 1901 on 335 acres; for the year 1902 on 414



acres; for the year 1903 on 413 acres; for the year 1904 on 194 acres; for the year 1905 on 194 acres; and for the year 1906 on 197 acres. In January, 1904, he sold 175 acres of the tract conveyed to him by Mars to H. W. France, who rendered and paid the taxes thereon for the years 1904, 1905, and 1906.

To prove that he and appellee were claiming title to the land from a common source, appellant asked appellee while he was on the stand as a witness if he went into possession of all the tract west of the Gregg land under the deed to him from J. H. Mars. The question was objected to by appellee, and the objection was by the court sustained, on the ground that appellee should not be required to state under what claim of title he went into possession of the land. By his first assignment of error, appellant complains of this action of the court. The deed from J. H. Mars to appellee having been introduced in evidence, we think the objection made to the testimony should have been overruled. But the other testimony in the case established beyond question that appellee did go into possession of the land and claim title thereto solely under the deed to him from J. H. Mars. The error therefore was harmless.

Over appellant's objection that same was prejudicial to his rights and did not tend to show title in appellee to the land in controversy, the court admitted in evidence a deed dated January 29, 1874, conveying to W. B. Ward from the owner thereof 200 acres in a square in the northeast corner of the Hill survey. The admission of this deed as evidence is assigned as error, as is also the charge of the court with reference to it and others admitted as evidence for a like purpose, as follows: "The deeds to Ward, Lowe, and Gregg, which have been introduced in evidence, are sufficient to convey 860 acres out of the north and east parts of the Joshua B. Hill survey. Now, if you believe from the evidence that the said Hill survey, in fact, contains not exceeding the number of acres conveyed by Mars to the defendant in addition to and besides the 860 acres deeded to Ward, Lowe, and Gregg, then the said J. H. Mars had not title to any land in the Hill survey, except the land conveyed by him to the defendant, and in such case you should return a verdict for the defendant, unless you believe that before selling to defendant Mars and Gregg agreed on the boundary line between them."

To defeat appellant's suit under his plea of not guilty, appellee had a right to show, if he could, that the legal title to the land was not in J. H. Mars at the time he conveyed to T. C. Mars, but was outstanding in some one else. Evidence that, after giving to others owning land in the survey by title superior to that of Mars the quantity of land they were entitled to, there would not be left in the survey more than the 334 acres Mars had conveyed to appellee, might tend to

show such an outstanding title, if accompanied by testimony showing that the boundaries of the lands so owned by others, had not been so fixed as to exclude any claim on the part of such owners to the land in controversy. An objection, therefore, to the admission of a deed when offered for such a purpose should not be sustained. But if, in connection with it, other evidence such as has been indicated is not offered, it should, we think, on motion be excluded. Had such a motion been made with reference to this deed, we think it should have been sustained, because we have been unable to find in the record any evidence tending to show that any of the land in controversy was included within the boundaries of the deed objected to. And the statement made with reference to this deed applies as well to the Lowe and Gregg deeds. The east boundary line of the land in controversy, from the uncontroverted evidence in the case, seems to be identical with the line marked by Gregg's fence and recognized and established as his west boundary line. If, as we understand them to be from the evidence, the lines mentioned as so marked are identical, in the absence of other testimony than that in the record, the charge complained of should not have been given. *Jones v. Powers*, 65 Tex. 215.

Over appellant's objection that the same did not show the nature of the contract of sale between him and J. H. Mars and was immaterial and prejudicial to his rights, appellee was permitted to testify that J. H. Mars refused to permit him to pay certain of the notes he had executed for the purchase money of the land before they matured until he had paid said J. H. Mars about \$140 unearned interest. We are unable to see how this testimony could be regarded as tending to show that J. H. Mars had or had not conveyed to appellee the land in controversy. It was, we think, inadmissible, and, on the issue of an estoppel claimed by appellee, calculated to prejudice appellant's contention in the minds of the jury.

On the ground that the deed from J. H. Mars to appellee was so plain and unambiguous as not to permit of oral proof in explanation of its meaning, and that appellee had no pleadings authorizing evidence of fraud, misrepresentation, or mistake to affect the same, appellant objected to appellee's testimony to the effect that at the time he purchased the land J. H. Mars represented to him that the tract of land he was selling him was against the Gregg land, that the bois d'arc stake at the northwest corner of the Gregg tract was the northeast corner of his (Mars') tract, that he thought his tract contained about 334 acres, etc. The objection was overruled; and this is complained of in the fourth assignment of error. We think the testimony properly was admitted. Under a plea of not guilty, a defendant can defeat a recovery by plaintiff by proving as against him an estoppel. May-

er v. Ramsey, 46 Tex. 376; Guest v. Guest, 74 Tex. 664, 12 S. W. 831. Claiming, as appellant does, under a deed of gift from J. H. Mars, he would be bound by representations which would operate to estop said J. H. Mars. If appellee intended, and J. H. Mars understood him as intending, to purchase the tract of land, and not 334 acres out of same, and if, so understanding, Mars made to appellee the representations claimed to have been made to him, and if appellee relied upon and to any extent was thereby induced to consummate the purchase of the land, there can be no doubt, we think, as to the effect as against said J. H. Mars of the representations so made by him. He would be estopped from asserting in himself title to any of the land embraced in the tract as he represented it to appellee to be. The rule which forbids evidence to vary or contradict or explain the plain and unambiguous language of a deed is not infringed by permitting the representations to so operate. As said in Wright v. Doherty, 50 Tex. 41: "An estoppel does not give an estate or divest another of an estate in lands, but merely binds the interest by a conclusion which precludes the party against whom it operates from asserting or denying the state of the title." Regan v. Milby, 21 Tex. Civ. App. 21, 50 S. W. 587; McCrory et al. v. Lutz et al. (Tex. Civ. App.) 62 S. W. 1094.

In the court's main charge and in a special charge given at appellee's instance the jury in effect, were instructed to find for appellee if they believed from the evidence that J. H. Mars by his deed intended to convey the land in controversy and appellee intended to purchase same. The action of the court in so instructing the jury is complained of in appellant's fifth and sixth assignments of error. There was no evidence tending to show that by a mutual mistake of the parties, the deed failed to embody their common intention. On the contrary, the evidence strongly indicates that J. H. Mars at the time he executed the deed, whatever may have been his intention prior thereto, did not thereby intend to convey the land in controversy. Because on an issue not made by the evidence, we think the instructions complained of were erroneous.

At the request of appellee, the court charged the jury as follows: "If you believe from the evidence that at the time and before the making of the deed by J. H. Mars to defendant there was a bois d'arc stake at what was supposed to be the northwest corner of the Gregg 500 acres and at the northeast corner of the strip of land in controversy, and that what was supposed to be the Gregg west boundary line was marked by a fence, and if you further believe that at the time and before the making of said deed the said Mars and defendant knew where the said Gregg fence and line were located, and if you further believe that the said Mars represented to defendant that the said Gregg line was his

east boundary line, and agreed with defendant that for the consideration named in the said deed he would convey to defendant all the land owned by him in the Joshua B. Hill survey lying west of said Gregg line, and if you further believe that the defendant relied on said representations and agreement, and was thereby induced to buy the said land of the said Mars, and believed from the representations made to him by the said Mars that the said Mars was conveying to him by said deed all the land owned by him in said Hill survey lying west of the said Gregg line, and if you further believe that but for said representations defendant would not have bought the land of the said Mars, then the said Mars and the plaintiff, who claims under him, would be estopped from denying that the said Gregg line was the true east boundary line of the land conveyed to defendant by the said deed, and in such case you should find for the defendant." As we view the evidence in the record, this charge clearly and correctly presented the issue in the case. If under the circumstances stated in the charge J. H. Mars made to appellee the representations charged to him, appellant would be bound thereby, and should fail in his suit. If J. H. Mars did not make to appellee the representations charged, nor others sufficient to estop him, then appellant should recover the land in controversy. On the record before us the charge presented, and properly, the controlling issue in the case.

Appellant's ninth assignment of error complains of that part of the court's charge which submitted to the jury as an issue in the case appellee's claim of title under the statute of limitations of five years. The evidence in the record seems clearly to show that the distance from the northwest corner of the land claimed by appellee under the deed to him from J. H. Mars, on a direct line east to the northeast corner of the land in controversy, is 1,774 or 1,778 varas. The call in appellee's deed east from his northwest corner along such direct line is for a distance of 1,570 varas to a stake. The calls from this point are south 1,200 varas, and then west 1,570 varas. These calls satisfied, according to the evidence, exclude from the description in appellee's deed the strip 204 or 208 varas by 1,200 varas in controversy. Only by a resort to other evidence, as showing the intention of the parties, for instance, could the description in the deed be applied to the land in controversy. Therefore, and because it did not appear that appellee had rendered and paid the taxes on the land in controversy during the period necessary to the operation of the statute in his favor (Bassett v. Martin, 83 Tex. 344, 18 S. W. 587), appellee's deed should not have been held to be sufficient as a basis for a charge authorizing the jury to find in his favor under the five-year statute of limitations. Bassett v. Martin, 83 Tex. 344, 18 S. W. 587; Jones v. Powers, 65 Tex. 215; Brokel v. McKechnie, 69 Tex. 32, 6 S. W. 623.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

### MARSHALL et al. v. STUBBS.

(Court of Civil Appeals of Texas. Dec. 11, 1907.)

#### 1. WILLS—PROBATE—REVIEW—BOND ON APPEAL BY EXECUTOR.

Where, a will having been probated, the estate was appraised and inventoried, and the executor paid some of the debts, there being another still due, and the executor up to the time of the appeal by him from a judgment setting aside the judgment admitting the will to probate, which was not attacked on the ground that it was void, but because of testator's weak intellect and undue influence, had exercised all the functions of executor, the judgment setting aside the probate did not terminate his official duties so as to require him to execute an appeal bond on that appeal.

#### 2. SAME — TRIAL DE NOVO — REMAND OF CAUSE.

Under the statute providing that on appeal to the district court from the county court the trial shall be de novo, where an appeal was taken by an executor to the district court from a judgment of the county court setting aside the probate of the will, the district court was without authority to remand the cause because the sole legatee had not been made a party to the action to set aside the probate of the will, since, though she may have been a necessary party, yet the failure to join her did not render the judgment, as to the executor, void.

#### 3. SAME—APPEAL—NEW PARTIES.

The district court has the power, where a will contest is appealed to it from the county court, to require new parties to be joined.

Appeal from District Court, Blanco County; Clarence Martin, Judge.

Action by Mrs. Alle Marshall and others against M. T. Stubbs, executor. There was a judgment in the county court for plaintiffs, and the executor appealed to the district court. Thereafter the district court overruled plaintiff's motion to dismiss the appeal, and on the executor's motion remanded the cause to the county court, and plaintiffs appeal. Reversed and remanded.

Will G. Barber and L. Koeniger, for appellants. Cochran & Penn, for appellee.

FISHER, C. J. The appellants as the heirs at law of W. A. Kemp, deceased, brought this suit against the appellee Stubbs, as executor of the last will and testament of W. A. Kemp, to set aside, cancel, and annul a judgment and decree of the county court of Blanco county, rendered and entered on the 2d day of January, 1906, probating the will in question. On the trial of this case in the county court judgment was entered in accordance with the prayer of the appellants. From that judgment an appeal was taken to the district court of Blanco county by N. T. Stubbs, executor, without executing an appeal bond. The appellants in the district court filed a motion to the effect that the appeal of Stubbs be dismissed on the ground that he had failed to execute

an appeal bond. This motion was overruled by the trial court, and thereafter, on the same day, on a written application by appellee, Stubbs, the trial judge remanded to the county court of Blanco county the controversy for further proceedings to be taken in that court in order to make Mrs. Nan A. Kemp, surviving wife of the testator, mentioned in the will as sole legatee, a party to the cause of action by the appellants to set aside and cancel the former decree probating the will. On this branch of the case the judgment of the court states that "the court is of the opinion that Mrs. Kemp was and is a necessary party as urged in the motion, and that said motion [that is, the motion to remand] should be sustained, and it is ordered, adjudged, and decreed by the court that, for that reason, this cause be remanded to the county court of Blanco county, Tex., and that the order of said court made and entered at its July term, 1906, and appealed from by Stubbs, executor, be set aside and held for naught, and that all costs of bringing this case to this court by this proceeding be taxed against the appellants," naming them.

The first question raised in appellants' brief is whether or not the trial court erred in refusing to dismiss the appeal of Stubbs, on the ground that he had not perfected an appeal by executing an appeal bond. It is contended by the appellants that the judgment of the county court setting aside and vacating the previous order probating the will annulled the power of Stubbs as executor, and destroyed his official status. It appears that the will, several months prior to the time that these appellants brought their suit, to set aside the judgment probating it, had been regularly, by proper proceeding in the probate court of Blanco county, probated and judgment to that effect entered, and Stubbs, together with the appraisers, had appraised and inventoried the property of the estate. And it appears from the application filed by him in the district court to remand that he had taken possession of the estate and paid some of the debts provided for in the will, and that there was another debt still due, and that he had, up to the time of the appeal of the case by him from the last judgment rendered in the county court, exercised all the functions of an executor. The will by its terms appoints Stubbs executor, and provides that he might act in that capacity without giving bond. It provided for the making and return of an inventory, all of which was done during the time that Stubbs was acting as executor. It affirmatively appears from the recitals contained in the will that there are debts, and Mrs. Nan Kemp, the surviving wife of the testator, is mentioned as sole legatee. There was no attack made upon the original judgment entered by the county court probating the will on the ground that that judgment was void, but the ground upon

which the appellants assailed it was because of a weakened intellect of the testator at the time of the execution of the will, and because its execution had been procured by the undue influence of his wife. Appellants have cited us to some cases which, it is contended, settle the question that Stubbs, in order to appeal, should have executed a bond, but these decisions are distinguishable from this case on the facts. Stubbs, in entering upon his official duties as executor, occupied a trust relation, not only to the legatee, but to the creditors of the estate, and he rested under the duty of collecting and preserving the property for the purpose of complying with the terms of the will. He had no personal interest in the estate, and gained nothing under the will, except merely the commissions of fees that might be allowed him by the law. Having possession of the property, he was charged with the duty of preserving it, in order to execute the trust, which right had been established by a judgment heretofore lawfully rendered. His relationship that arose from the judgment of probation was merely official, and the subsequent judgment setting aside the former judgment probating the will did not terminate his official duties, so long as he took the proper steps to appeal from that decree. He rested under the duty, in the interest of those creditors that had been paid and whose claims were recognized, and in the interest of the legatee, to appeal from that judgment, and to protect, if possible, the rights that they had acquired by the former judgment; and in the pursuit of this remedy, and for the purpose of accomplishing these objects, we do not see how it can be said that he was merely acting as an individual, and not officially. Therefore we have reached the conclusion that there was no error in the ruling of the trial court refusing to dismiss the appeal on motion of appellants on the ground that Stubbs had not executed an appeal bond.

The next question raised in appellants' brief is to the effect that the trial court had no power to remand the case to the county court for the purpose of having Mrs. Nan Kemp made a party, or for any other purpose. The trial judge evidently proceeded upon the idea that Mrs. Kemp was a necessary party, and that the judgment rendered by the county court setting aside the former judgment probating the will, without her being made a party to the proceeding, was a nullity and absolutely void. Mrs. Kemp may have been a necessary party, but it does not necessarily follow that the judgment rendered against the executor would be void. *Stark v. Carroll*, 66 Tex. 397, 1 S. W. 188; *Hollis v. Dashiell*, 52 Tex. 187. The law provides that on appeal to the district court the trial shall be de novo. There is a similar provision of law with reference to appeals from the justice court to the county court, and in construing the latter statute

it has been held that an appeal which has been properly perfected from a judgment of the justice to the county court, which has not been dismissed for some good reason, does not merely suspend the enforcement of the judgment of the justice's court, but that judgment is absolutely destroyed and annulled (*Moore v. Jordan*, 65 Tex. 395); that the jurisdiction is then vested in the court to which the case is appealed for a trial de novo, just as if it had originated there, subject to certain provisions of the statute regulating the question of pleading and the introduction of additional causes of action. The same rules would apply to an appeal from the county court to the district court, and the latter court would have no more authority to remand a case to the county court for a new trial than would the county court have power to remand to the justice's court for a new trial. And we are of the opinion in this instance that the district court should have retained jurisdiction and proceeded to try the case de novo. It was in the power of that court to require the sole legatee, Mrs. Kemp, to be made a party before proceeding to trial (*Stark v. Carroll*, supra), and we are inclined to agree with the court that she was a necessary party in the sense that she should have been joined in order to make the judgment complete and binding upon all parties in interest, and in order to bring about a final determination of the controversy. *State v. Rhomberg*, 69 Tex. 220, 7 S. W. 195. And it may be conceded that the judgment of the trial court was indeterminate and irregular in this respect. But it by no means follows that, even if this could be conceded to be true, the judgment as to Stubbs would be void, nor can it be conceded that the mere fact that Mrs. Kemp does not appear to be a party on the record renders inconclusive the judgment of the county court setting aside the probation of the will.

It may be true that she has estopped herself to question the validity of that judgment by reason of the fact it might be made to appear that her interest was there represented by attorneys employed in her defense. One may become bound by a judgment, although not formally a party to the controversy. This is illustrated in the cases of *Powell v. Heckerman*, 6 Tex. Civ. App. 304, 25 S. W. 166; *Bomar v. Building Ass'n*, 20 Tex. Civ. App. 605, 49 S. W. 914; *Cleveland v. Heldenheimer* (Tex. Civ. App.) 44 S. W. 551; *Bonner v. Green*, 6 Tex. Civ. App. 99, 24 S. W. 835; 2 Black, Judgments, §§ 534, 539, 545, 549. But, however, it may be possible that these decisions would have no application to the facts of this case, and it may be that, if it should be established that Mrs. Kemp was represented at the trial in the county court, that the judgment there would not conclude her, for, as stated before, a perfected appeal from that judgment, unless it could be shown in this case

that she was a party to the appeal, renders that judgment inoperative; and it is doubtful, if such is its condition, whether it could support any right by estoppel or otherwise. These are just merely suggestions, because there is nothing appearing upon the face of the record showing what, if any, may have been the connection of Mrs. Kemp with the judgment of the county court, or the appeal perfected by Stubbs; and upon this branch of the case we are clearly of the opinion that the district court has the power, when a case is appealed to that court, to have new parties made, and may decline to proceed to the trial unless they are properly made parties, or unless he could reach the conclusion that such absent parties were concluded by the judgment rendered in the county court, and were parties to the appeal.

For the error of the trial court in remanding the case and not retaining jurisdiction for trial de novo, the judgment is reversed and the cause remanded.

Reversed and remanded.

# INTERNATIONAL & G. N. R. CO. v. NOWASKI et al.

(Court of Civil Appeals of Texas. Dec. 11, 1907.)

## 1. CARRIERS—INJURY TO ANIMALS—CARRIER'S LIABILITY.

Where a carrier received for shipment a mule in good condition, the carrier was liable for its safe delivery, and could be excused only on the ground that an act of God, the public enemy, the inherent vice of the animal, or some conduct of plaintiff was the cause of its death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 923-932.]

## 2. SAME—PRIMA FACIE CASE.

Delivery of a mule to a carrier for transportation being shown, proof that the mule was dead when it arrived at its destination was sufficient to create a prima facie case of liability against the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 957, 958.]

## 3. SAME—EVIDENCE.

In an action against a carrier for death of a mule delivered to it for transportation, evidence of the appearance of the mule's remains, their condition and surroundings, was only admissible to establish the cause of death.

## 4. EVIDENCE—OPINION EVIDENCE.

In an action against a carrier for death of a mule delivered to it for transportation, but found dead before destination was reached, there was evidence that the mule was tied with a rope when put in a car, and, when found, that the rope was either broken or cut. A conductor in charge of one of the trains in which the mule was transported testified that he discovered on the neck and shoulders of the mule places which looked like boils or sores, and other witnesses testified that there was no negligence in handling the train. Held, that a witness of experience in loading animals, having testified that he loaded the mule, tied him with a rope, and partially closed the car door for ventilation, should have been permitted to express his opinion as to whether the mule was tied in a proper place and manner, and whether the opening in the door provided sufficient ventilation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2248-2254.]

Appeal from Falls County Court; D. H. Boyles, Judge.

Action by John Nowaski and others against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Martin, Spivey & Carter, for appellant. Tom Connally, for appellees.

FISHER, C. J. This is a suit by the appellees to recover from the appellant the value of a mule shipped over appellant's road from Anderson, Tex., to Marlin, Tex. The mule before reaching the place of destination was found dead in the car, and before it reached Marlin was unloaded by the employees in charge of appellant's train. Verdict below was in favor of the appellees. There is evidence tending to show that the mule was in good condition when delivered by appellees to the railway company; and there is some evidence tending to show that possibly the mule may have died from natural causes, but the evidence leaves it uncertain as to what was the cause of the death of the mule. Appellant contends that there was no negligence upon its part that caused or contributed in any way to the death of the mule, and there were charges requested by appellant to the effect that it could not be held liable unless it was guilty of negligence. The court instructed the jury that the railway company would not be liable for the death occurring from causes over which it had no control.

The appellant, receiving the mule for shipment, would be held responsible for its safe delivery, and could be excused only upon the ground that an act of God, public enemies, or the inherent vice of the animal or some conduct of the plaintiff was the cause of the loss or death of the mule. The delivery to the carrier being shown, failure to deliver to the shipper or consignee would create a prima facie case of liability against the appellant. This was the theory upon which the case was tried in the court below, and was the reason doubtless why the court refused to instruct upon the issue of negligence, but the question at last is, what was the cause of the death of the animal? It is contended by the appellant that it died from causes over which it had no control; and, of course, if this is true, it would not be liable. The difficulty lies in proving the defense asserted. There was no evidence introduced in this case, that in a direct way accounted for the death of the animal. Its appearance, condition, and the surroundings could only be testified to, as having some bearing in tending to establish the cause of its death. These facts were merely circumstances. Now, while it is true that the appellant could not acquit itself merely by establishing the fact that it was not guilty of negligence, still evidence tending to acquit it of any negligence, and

tending to establish the fact that it carefully cared for and provided for the safety of the mule during transportation, would be some evidence tending to show, possibly, that the mule died from causes over which the appellant had no control. Such evidence would be admissible as a process of exclusion, as having some tendency to create an hypothesis consistent with the idea that death arose from natural causes; and it was in view of this theory that the evidence of the witness Mallard was offered by the appellant, as set out in the bill of exception stated under the seventh assignment of error. It was proposed to prove by that witness that he loaded the mule in controversy in the car, tying him with a rope, and seeing to a partial closing of the door for the purpose of ventilation. He was an experienced man in doing this character of work—that is, in loading and unloading stock—and, after testifying to these facts, he was asked the question whether or not the mule was properly loaded, as to tying in the car and as to the proper place in the car where he was tied, and the manner in which he was tied, and the means by which he was tied, and whether the opening left in the door was sufficient for ventilation; and it is shown by the bill of exceptions that he would have expressed an opinion favorable to the railroad company. It would be a difficult matter for a witness to so describe the several acts inquired about to a jury as to put before them the situation as it really existed. He testified as to what he did, and the evidence shows that he was experienced in that character of work, and we think it was proper for him to express his opinion. The questions inquired about present a combination of facts which are to be considered as a whole, in order to determine the effect which should be given to them, and this was a matter that would be difficult to reproduce, except by the opinion of the witness. *Railway v. Jarrold*, 65 Tex. 508.

The evidence showed that the animal was tied with a rope when put in the car. There is a witness who testified that when the animal was found in the car the rope was either broken or cut; and one of the conductors who had charge of one of appellant's trains on which this animal was transported testified that he discovered on the neck and shoulders of the mule places which looked like boils or sores. Other witnesses testified that there was no negligence in the handling of the train. If the opinion of this witness had been admitted, the jury possibly in connection with other evidence in the case, might have given it some effect, as having a tendency to establish that the mule died from natural causes, or that by pulling back on the rope might have caused its death. We find no other error in the record, except the refusal of the court to admit the opinion of this witness.

Judgment reversed and cause remanded.

## INTERNATIONAL & G. N. R. CO. v. RUSSELL.

(Court of Civil Appeals of Texas. Dec. 11, 1907.)

### 1. RAILROADS—KILLING STOCK—FENCES—GATES—DUTY TO CLOSE.

Where a railroad company constructed gates in its right of way fence for the convenience of the adjoining proprietor and his tenants, but exercised no control over them, no duty rested on the railroad company to keep the gates closed or in repair so as to render it liable for killing animals which escaped through the gate, there being no defect in the right of way fence immediately adjoining the gate, nor in the posts to which it was fastened.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1459-1473.]

### 2. SAME—NEGLIGENCE—PROXIMATE CAUSE.

Where animals killed on defendant's railroad escaped through a gate in defendant's right of way fence, and plaintiff testified that he securely fastened the gate on the night the animals were killed, the negligence of a third person who must have left the gate open in passing through during the night, and not that of the railroad company, was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1527-1533.]

Appeal from Falls County Court; D. H. Boyles, Judge.

Action by William Russell against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Martin, Spivey & Carter, for appellant. Nat Lewellyn, for appellee.

**FISHER, C. J.** This is a suit brought in the county court of Falls county by the appellee against the railway company to recover the value of one mare and one mule, which are alleged to have been run over and killed by one of appellant's trains. The judgment below was in favor of appellee for \$300.

There are several assignments of error presented in appellant's brief, which we find not necessary to discuss, as we have finally disposed of this appeal on the questions of fact that arise in the record.

The animals were killed at what is known as the "Connolly Switch," which was put there for the benefit of the Connolly farm. The right of way of the railway, going through the Connolly farm, is fenced, which fence was put there by the railway company. On the west side of the farm there are three gates, and an equal number on the east side. The appellee is a tenant on the Connolly farm, and on the east side of the railway, and adjoining the right of way fence, he controls and cultivates a field. The right of way fence is the west boundary of this field. In this inclosure there are located three gates, and the animals escaped from the field to the right of way through what is known as the "North Gate." These gates were placed in the right of way fence merely for the convenience of the owners and tenants

of the Connolly farm, but it appears from the evidence that the passway leading through these gates from one side of the track to the other was used by other people, but there is nothing to justify the conclusion that this was a public way. At the place where the switch is located on the Connolly farm there is no regular station, but it is merely used as a flag station. It appears from the evidence that there is no defect in the right of way fence, but the north gate, through which the animals escaped from appellee's field, is merely defective in its latch by which it is fastened. There is no evidence in the record that the railway company ever undertook to assume any control over these gates, or charged itself with the duty of keeping them in repair and in proper condition and closed, and, as said before, they were merely put there for the convenience of the owners of the farm. The appellee turned his two animals in his field on the east side of the track that he was cultivating, and at night fastened the north gate securely, as we take it from his evidence, with a wire. Some time during the night this gate was opened, evidently by some one passing through it who failed to properly fasten it, and thereby permitted the animals to escape from the appellee's field to the railway track, where they were killed. They were run over some time during that night, the exact hour is not definitely shown, but we take it from the evidence of the appellee that it must have been by a train that passed north somewhere near daylight. There is no evidence in the record of any importance that would suggest the idea that those operating the train that killed the animals saw them on the track in time to have stopped the train, or that they were guilty of any negligence in running them down.

There is no dispute in the evidence as to the facts stated. There are two reasons why the judgment below should be reversed and rendered in favor of the appellant:

1. The railroad company rested under no duty to keep these gates closed or in repair, and this branch of the case is controlled by the cases of *Railway v. Glenn*, 8 Tex. Civ. App. 301, 30 S. W. 845, and *Railway v. Adams*, 24 Tex. Civ. App. 231, 58 S. W. 1035. If the railway company had attempted to exercise any control over these gates, and had assumed the duty of keeping them in repair, a different case would have been presented. Or, as has been held, if there was a defect in the right of way fence immediately adjoining the gate or the posts to which it was fastened as a part of the system of fence, and as a part of the fence, which the railway was required to keep in repair, and the railway company had discovered in repairing the fence a defect in the gate, it might be charged with the duty of repairing the same.

2. If it could be held that the railway company in this instance was responsible for keeping the gate closed or in repair, we are

clearly of the opinion that the failure to do this was not in this instance the proximate cause of the death of the animals. There should be given to the act of the plaintiff in securely fastening the gate on the night that the animals were killed the same effect as if such act had been performed by the appellant. Of course, no one will contend that the duty imposed upon the appellant to keep the gates fastened would require it to have stationed at that place a guard or watchman at all hours of the night and day, in order to see that the gate was kept properly fastened; and if the duty was imposed upon the appellant, all that the law would require would be the exercise of ordinary care to see that this duty was performed. If the railway company, through one of its employes, had securely fastened the gate as the appellee did, on the night that the animals escaped, it would be a difficult matter to say that this would not be the exercise of ordinary care, unless some time during the night, prior to the time that the animals escaped, the employes who were charged with the performance of this duty had become aware that the gate had become unfastened or left open. But there is nothing of the kind shown by the evidence. The gate being closed and securely fastened, the act of some third party in passing through during the night and leaving it open was the proximate cause of the animals escaping from the field to the track, and, there being no negligence shown in running them down, the proximate cause of death would be the wrongful conduct of the third party in producing a condition that permitted them to wander upon the track. For the reasons stated, the judgment below is reversed, and here rendered in favor of appellant.

Reversed and rendered.

#### ROMINE v. LITTLEJOHN et al.

(Court of Civil Appeals of Texas. Dec. 18, 1907.)

#### 1. TRESPASS TO TRY TITLE—EVIDENCE—QUESTIONS FOR JURY.

In a trespass to try title, evidence held to require submission to the jury of the questions whether S. and wife under whom plaintiff claimed title had acquired title by 10 years' adverse possession, and whether plaintiff's deed, considered with a deed from J. and wife referred to therein, connected plaintiff with the land described in the petition.

#### 2. ADVERSE POSSESSION—PROOF—DISABILITY OF OWNERS.

In order to establish a prima facie case of adverse possession, plaintiff is not required to prove in addition to adverse possession for the requisite time that the prior owners were under no disability.

#### 3. TRESPASS TO TRY TITLE—POSSESSION—RIGHTS OF TRESPASSER—PRIOR POSSESSION.

Prior possession sufficient to entitle plaintiff to recover in trespass to try title as against a trespasser must have existed at the time of the entry, a remote or abandoned prior possession being insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, § 17.]

#### 4. SAME—PRIOR POSSESSION—EVIDENCE.

In trespass to try title, evidence held insufficient to establish plaintiff's right to recover by reason of prior possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trespass to Try Title, §§ 62, 63.]

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Action by J. Romine against J. A. Littlejohn and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Sallaway & McAskill, for appellant. Dibrell & Mosheim, for appellees.

JAMES, C. J. Appellant sued in trespass to try title, claiming title, and also title by virtue of limitations, to land described thus: "In Guadalupe county, Tex., on the waters of Sandy Elm creek, and being 4½ acres, of the John Isham survey, the said land being in controversy between A. H. Maddox and M. M. Maddox in a suit formerly pending in this court, No. ———, and by judgment and decree of said court said premises were adjudged to Amos H. Maddox on May 25, 1867, beginning at the southwest corner of the 100-acre tract in controversy in said suit, and running north 1,010 varas with its west boundary line to its northwest corner; thence east 307 varas with its northwest boundary line to a stake for northeast corner of said 55 acres and the northwest corner of the remaining part of said 100-acre tract; thence in a southerly direction to a stake set in north bank of Sandy Elm creek; thence west to the place of beginning; and for further description reference is made to Book U, pp. 493, 494, of the records of deeds in and for Guadalupe county; also Book M of said Deed Records to pages 288 and 289; also Book No. 166 of said records, pages 140 to 146, inclusive." It is deemed unnecessary to set forth defendant's pleadings further than those of general denial and not guilty. When plaintiff had concluded his testimony, defendants moved to have the jury instructed to find for defendant, which was done. The defendant was J. A. Littlejohn, who brought in his warrantors, Joseph Dibrell and Emil Mosheim.

The first assignment of error is that the court erred in holding that plaintiff did not by his testimony make a prima facie case, and in instructing the jury to return a verdict for the defendant. The propositions under this assignment are: (1) Prior possession to that of a trespasser is sufficient to warrant a recovery against such trespasser. (2) Prior possession to which one links himself by a chain of title is sufficient to warrant a recovery as against a trespasser. (3) Long claim of title with possession and assertion of ownership thereunder makes a prima facie case. All elements of the five and ten years statutes of limitation concurring make a prima facie case under either statute.

As we read the testimony, particularly that

of Mrs. Fischer, who testified that she knew the property involved in this suit, and that her father and mother, Charles and Augusta Schmidt lived upon it as their home from the time they bought it, a few days before the beginning of 1874, when she was nine years of age, and that they lived there about eight years, and other testimony that went to show that the family had possession of it by tenants for several years afterwards, we think we may say there was evidence sufficient to show a long enough possession and under proper circumstances to have constituted a title by ten years' limitation to the land in controversy. It may, for the purpose of this appeal, be assumed that plaintiff showed such possession by Schmidt and wife, and those holding in privity with them, of the land described in the petition, as would have constituted a valid title by limitation; but the difficulty is that the suit is brought by Romine, and in order for him to obtain the benefit of such limitation title, he must hold under said parties, or some of them, the land to which such evidence relates, to wit, that described in his petition.

The deed which he offered was from Chris Simmang, dated December 20, 1899, describing land as follows: "All my right, title and interest in and unto that tract or parcel of land lying in the county of Guadalupe and state of Texas, described as follows, to wit: Being five-sixth (5/6) interest in an undivided fifty-five (55) acres of land out of the Johane Jones survey and being on the waters of Sandy Elm creek together with all improvements thereon and interest in rents on the said lands. For further reference to this land will be found in the county clerk's office in Guadalupe county, Texas, in Book M, page 288 and 289; also Book No. 16, page 140 to 146." The deed does not of itself identify the land as the same as described in the petition. The deed says the land is in the Johane Jones survey, and the petition describes land in the John Isham survey. There might be two different surveys on the waters of Sandy Elm creek in Guadalupe county. The deed was capable of being made to refer to the same land, by resort to the references contained in it. The references were in evidence. The reference to Book M, pages 288 and 289, described the land as being in the Isham Jones survey, and did not help the matter any. There was no parol testimony taken to show facts which might have explained the call for the Johane Jones survey as a mistake and as intended for John Isham survey. The other reference in plaintiff's deed was to Book 16, pages 140 to 146. Deeds were introduced covering those pages in Book 16. They were as follows: A deed from Martha Schmidt to Chris Simmang, the only description therein being a reference to the deed recorded in Book M, pp. 288-289, which, as before stated, called for the land to be a part of the Isham Jones survey. A deed from Anna Doebller and husband to Chris Simmang,



which refers to nothing, and the description it gives would itself have to be aided by other testimony to make it refer to any particular land. A deed from Ernst Fischer and others to Chris Simmang, which refers merely to said deed in Book M, pages 288-289, for description. But there was a deed from Fred Jost, who was shown to have a deed from one of the children for an interest, and his wife, Amalie Jost (Amalie was the widow of Charles Schmidt), to Chris Simmang, which was recorded in said Book 16, pages 140, 141, and 142, and which described the land as part of the John Isham survey, and otherwise described the land as in the petition. This deed was one of the references in plaintiff's deed from Simmang, and was part of its description, and tended to identify the land as conveyed by Simmang to plaintiff with that described in the petition. Of course, if plaintiff showed title to only so much of the land as was owned by Jost or Mrs. Jost, it cannot be denied that he was entitled to some recovery, and as against persons showing no title he would have been entitled to recover all the land. But plaintiff did not show that Schmidt and wife had title from the sovereignty. He was, however, in a position to prove that Schmidt and wife and their children had acquired a title by limitations and to have the benefit of such title. His grantor had a deed from Jost and wife, which was for an interest in the land which was apparently that described in the petition; and his own deed, although calling for the land to be in Johane Jones survey, also had reference for description of the land to said deed from Mrs. Jost, which described the land as being in the John Isum survey (which was idem sonans with John Isham). We think there was sufficient evidence adduced for the jury to pass on the question whether or not the Schmidts had acquired title to this land by the ten-years statute of limitations. And it cannot be said as a matter of law that plaintiff's deed, considered with the deed from Mr. and Mrs. Jost which it referred to, failed to connect him with the land described in the petition.

It is contended by appellees that it was necessary for plaintiff, in order to establish a title by limitations, to prove, not only the adverse possession for the requisite time, but in addition he would have to prove that during the period of such possession the owners were under no disability. No decision has been cited to this effect. We think a prima facie case would be made without such proof. The proposition that prior possession is sufficient title to recover as against a trespasser is sound. But there is no testimony showing that when defendants entered they invaded anybody's possession. A remote or abandoned prior possession is not sufficient. It must be a possession shown to exist at the time of the entry.

In appellant's brief it is stated "that the children of Schmidt had charge of the property up to the time that defendant Mosheim

took possession. And the year that Mosheim took possession the place was rented to a man named Freiter, who cultivated it but did not live on it." The references made to the transcript for this testimony fail to substantiate it. Mrs. Fisher testified that they had charge of the land up to the time Mosheim got it. Her testimony excluded the idea that they had it in possession at that time, and having charge of it was not the same as having possession. The other witness referred to, Wille Frey, did not place Freiter on the land during the year defendants went into possession. The right to recover by reason of prior possession, which means an actual possession that is disturbed by an entry, was in no sense established by the evidence.

What has been said, we think, disposes of all assignments of error.

Judgment reversed, and cause remanded.

### SOUTHERN PAC. CO. v. ALLEN.

(Court of Civil Appeals of Texas. Dec. 4, 1907.)

#### 1. EVIDENCE—DECLARATIONS AGAINST INTEREST.

Where plaintiff alleged that defendant railroad company operated a line of railway in the county where the suit was brought, or maintained an office and an agent therein, and the company filed a plea of privilege, claiming a right to be sued in another county, a folder, issued and circulated by the defendant, containing statements proving the allegations of plaintiff, was admissible as in the nature of a declaration against interest.

#### 2. RAILROADS — ACTIONS — JURISDICTION — DETERMINATION—QUESTIONS OF FACT.

Whether a foreign railway corporation, sued for injuries to an employé received outside of the state, did business or had an agent in the county where the suit was brought and process served, is a question of fact.

#### 3. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding of the trial judge on such question, when supported by evidence, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

#### 4. COURTS—JURISDICTION OF STATE COURTS—DECISIONS AS PRECEDENTS.

A state court must construe the law and determine the facts on which its jurisdiction depends, and, unless a principle controlled by the federal Constitution is involved, it need not follow the decisions of the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 327, 328.]

#### 5. SAME—JURISDICTION—TRANSITORY ACTIONS.

An action for injury to the person or to personality is transitory, and the right to sue therefor is not confined to the place where the cause of action arises.

#### 6. SAME—COURTS OF DIFFERENT STATES—COMITY.

The right of a court of one state to take jurisdiction of a transitory action founded on an occurrence in another, if not contrary to the public policy of the forum, arises from comity.

#### 7. SAME.

Where the *lex fori* and the *lex loci delictus* concur in holding that an act is the subject of legal redress, it is conclusively shown that it is not against the public policy of the state where the action is brought to entertain jurisdiction.

## 8. SAME.

Where the law of the state in which an action is brought and a law of the state in which the act complained of arose both give a right of action for the act, and the redress given the injured party by the law of the state in which the cause of action arose is such as may be enforced in the state in which the action is brought, the difference in other features of the law of the respective jurisdictions does not constitute a barrier to the jurisdiction of the court in which the suit is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 13, 19.]

## 9. SAME.

The courts of Texas have jurisdiction of an action for injuries to a switchman received in Arizona through the failure of a foreign railroad company to furnish proper automatic couplers, whether based on negligence or on a violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]); the laws of Texas and Arizona concurring in holding that such a negligent act is subject to legal redress, and the federal statute being in force throughout the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 14.]

## 10. SAME.

Nonresidence of the parties does not, in the absence of a statute of the forum to that effect, deprive the court of jurisdiction of a tort occurring outside of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 22-31, 35, 36.]

## 11. SAME.

As a general rule, neither citizenship nor residence is requisite to entitle a person to sue in the courts of Texas.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 35.]

## 12. TRIAL—INSTRUCTIONS—OPERATION AND EFFECT.

An instruction must be considered and construed as a part of, and in connection with, the entire charge of the court in the light of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

## 13. MASTER AND SERVANT—INJURY TO SERVANT—INSTRUCTIONS.

Where, in an action for injuries to a switchman while uncoupling cars equipped with automatic couplers, the question of negligence, or of noncompliance with the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), depended on whether or not the lift chain was too long to prevent the couplers from being automatic, and the court charged that railroads must comply with the act and exercise ordinary care to see that cars are equipped with automatic couplers, etc., an instruction that if the lift chain was too long, and was attached to a drawhead at the time the same was purchased by defendant, or if the same was made a part of the drawhead by defendant after the same was purchased by it, defendant had, as a matter of law, knowledge of the defects in the chain, was erroneous as withdrawing the question of negligence from the jury.

## 14. ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

The defense of assumed risk rests on the fact that a servant voluntarily exposes himself to danger and thus assumes the risk thereof, while the defense of contributory negligence rests on an omission of duty on the part of a servant, and is available, though the master was negligent, where the proximate cause of the injury was the servant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543.]

## 15. SAME.

The federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) abolishes the defense of assumed risk and any other defense based on factually the same facts which would estop the defense, if available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 544-546.]

## 16. SAME—CONTRIBUTORY NEGLIGENCE—ACTION FOR JURY.

Whether a switchman, injured while uncoupling cars equipped with defective automatic couplers in violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), was guilty of contributory negligence in failing to use proper means, and in violation of his employer's orders, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

## 17. SAME.

Whether a switchman, injured while uncoupling cars equipped with defective automatic couplers, was guilty of contributory negligence in placing his arm between the buffers, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

## 18. SAME.

A switchman, who has signaled the train to move cars while he is between the couplers attempting to uncouple them, has the right to act on the assumption that his signal will be obeyed, and is not guilty of contributory negligence as a matter of law in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675-677.]

## 19. SAME—ASSUMPTION OF RISK—NEGLECT OF FELLOW SERVANT.

Where a switchman who was, while employed in Arizona, injured in switching cars equipped with sufficient automatic couplers required by the federal safety appliance act (Act March 2, 1893, c. 196, § 8, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3176]), which provides that any employee injured by any cause contrary to the provisions of the act shall not be deemed to have assumed the risk, was injured, though caused by the negligence of a fellow servant, was from a risk which, as a matter of law, he did not assume, though the common-law doctrine of fellow servants, as applied on the principle of assumed risk, obtained in Arizona, except as modified by Rev. St. Arizona, 1901, par. 2767, making an employer liable for injuries to an employee in consequence of the incompetency of other employees, provided the employer had previous notice of such incompetency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 544-546.]

## 20. SAME—FELLOW SERVANTS.

The term "fellow servants" in connection with evidence in an action for injuries to a switchman, while uncoupling cars, through the negligence of fellow servants, another switchman and the engineer, implies that each of them was engaged with the injured switchman in the common purpose of coupling and uncoupling cars; the other switchman in giving aid in furtherance of the work, and the engineer in operating the engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.]

## 21. SAME.

A railroad company failed to equip its cars with sufficient automatic couplers as required by the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). A switchman was injured while uncoupling cars equipped with defective automatic couplers, rendering it necessary for him to go between the cars. The engineer

fellow switchman violated signals not to move the cars. Held, that the company was liable for the injuries received, notwithstanding the negligence of fellow servants, the negligence of the fellow servants only concurring with the negligence of the company, since at common law the concurrence of a servant's negligence in causing an injury to another servant does not absolve the master from his liability thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515-534.]

## 22. SAME—VIOLATION OF RULES OF EMPLOYMENT—CONTRIBUTORY NEGLIGENCE.

A violation by a servant of his master's rules is not negligence per se, and whether the servant is negligent is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 759-775, 1069-1132.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by P. G. Allen against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Beall & Kemp, for appellant. Patterson & Wallace, for appellee.

NEILL, J. We adopt the appellant's statement of the nature and result of the suit, which is as follows: "This is a suit for personal injuries—loss of left arm—brought in the district court of El Paso county by plaintiff, a resident citizen of Arizona, against the defendant, a foreign corporation. Plaintiff alleges, in substance, that on August 15, 1905, he was employed by defendant, an interstate carrier, as a switchman at Yuma, Ariz., and that it became necessary for him to uncouple two freight cars equipped with automatic couplers, and that he took hold of the lift lever in the usual manner in order to raise the lock pin, but that the chain attached to the pin was too long, and kinked in the drawhead and prevented the appliances from uncoupling, and that in order to uncouple the cars it became necessary for him to enter between the cars and raise the lift lock, or release the lift chain, by taking hold of the lift lock or lift chain with his hand, and that while he was doing this with his arm between the buffers the two cars came together, and caught and mangled his arm, so that it was necessary to amputate the same near the shoulder. The plaintiff also alleged liability on the defendant's part under what is known as the "Safety Appliance Act" of Congress. The defendant filed a plea of privilege, claiming its right to be sued, if at all, in Harris county, Tex., which being overruled, it filed a special exception raising the question of the court's jurisdiction; and, this demurrer being overruled, it filed a general demurrer, general denial, and plea of not guilty, and certain special pleas, among which were those of assumed risk, contributory negligence, violation of the defendant's rules, negligence of fellow servants and the laws and statutes of Arizona relating to fellow servants. The court over-

ruled the defendant's plea of privilege and special demurrer. On the 22d day of November, 1906, a verdict was rendered in favor of plaintiff for \$12,500. The defendant's motion for a new trial was overruled, but the court required a remittitur of \$2,500 which was entered. Defendant gave notice of appeal, and in due time filed supersedeas, appeal bond, and assignment of errors, and comes to this court on appeal." In considering the several assignments of error we shall state our conclusions of fact as well as of law. They are as follows:

1. The court did not err in admitting in evidence the folder referred to in the first assignment of error, upon the issue made by the defendant's plea of privilege; for, if the defendant was engaged in operating a line of railway into the county and city of El Paso, Tex., or maintained an office or local agent there, as was alleged by plaintiff, defendant's plea could not be maintained. The folder in question was issued and put in circulation by the Southern Pacific Company, and contained such statements as tended to prove such allegations of the plaintiff. Such statements, being in the nature of declarations of a party against interest, in view of the issue made by the plea of privilege, were admissible as evidence tending to show that the venue of the suit was properly laid in El Paso county, Tex. In the case of *Peterson v. C., R. I. & Pac. R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 851, a folder of the same kind was introduced and considered as evidence upon a similar question. That it was not, in connection with other evidence, deemed sufficient to prove the fact in issue, did not affect its admissibility, but only its probative force.

2. It is contended by the second assignment that the court erred in not sustaining defendant's plea to its jurisdiction. It being undisputed that the Southern Pacific Company is a foreign corporation and that plaintiff's cause of action arose in Arizona, the question was whether the company operated a railroad, did business in, or had an agent or representative in El Paso when the suit was brought and process served. This was a question of fact for the jury, or the court sitting as a jury, to determine. *Audenried v. East Coast Milling Co.* (C. C.) 124 Fed. 697. There being evidence tending to support the finding of the trial judge upon the issue, it is not within our province to disturb it. While the evidence introduced pro and con upon the issue is much similar to that in the case of *Peterson v. C., R. I. & Pac. R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 851, it was directed in that case to a motion made by the defendant to quash the service. In this case the question is one of jurisdiction of the state court, which depends upon the interpretation of the state statute under which it is asserted. This, it would seem from the opinion in *Green v. C., B. &*

Q. R. Co., 205 U. S. 531, 27 Sup. Ct. 595, 51 L. Ed. 917, differentiates the cases. A state court must necessarily construe the law and determine the facts upon which its jurisdiction depends; and if, in the exercise of this duty, its action is questioned by a federal court, it may, unless it involves a principle controlled by the Constitution of the United States, reply in the language of St. Paul: "Who art thou that judgest another man's servant? To his own master he standeth or falleth." The case in hand cannot, as to the question under consideration, be distinguished in any manner from that of *Southern Pacific Company v. Cranmer*, 101 S. W. 534, and we can perceive no reason why we should not adhere to our opinion in that case.

3. It is claimed under the third assignment that this is a local, as distinguished from a transitory, action, and that the court had not, or should not entertain, jurisdiction. "If an injury be done to the person or to personalty of another, it is at common law said to be 'transitory'; that is, the liability therefor is deemed to be personal to the perpetrator of the wrong, following him wherever he may go, so that compensation may be exacted from him in any proper tribunal which may obtain jurisdiction of the defendant's person, the right to sue not being confined to the place where the cause of action arises." *Minor's Conflict of Laws*, § 192. The right of the courts of one state or country to take jurisdiction of this class of actions, if not contrary to the public policy of the forum, arises from the comity due one state or country to another, and is established beyond dispute. The concurrence of the *lex fori* and *lex loci delictus* in holding the act complained of to be the subject of legal redress conclusively shows that it is not against the public policy of the state where the action is brought to entertain jurisdiction. This concurrence, however, may not be an absolute condition of the jurisdiction; for it does not follow from the lack of such concurrence that the policy of the forum is necessarily hostile to entertaining an action for tort based upon acts occurring in another jurisdiction. Though the *lex fori* and *lex loci delictus* may in some features be different, yet if both give the right of action for the wrong complained of, and the redress given the injured party by the *lex loci delictus* is such as obtains and may be enforced in the *lex fori*, the difference in other features of the law of the respective jurisdictions will not constitute an insuperable barrier to the jurisdiction of the forum. The law of Texas and the law of Arizona concur in holding that a negligent act, such as that upon which this suit is based, is subject to legal redress; for, if the action should be regarded as distinctively statutory, the statute upon which it is based gives the same right of action and redress for injuries caused from its violation in every state and territory in the American Union. The nonresidence of the parties does

not, in the absence of a statute of the forum to that effect, deprive the court of jurisdiction of a tort occurring outside of its state. As is said by the Supreme Court of Pennsylvania in *Knight v. Railroad Co.*, 108 Pa. 250, 56 Am. Rep. 200: "We think the weight of recent and better-considered adjudications in this country decidedly favors the application of the same rule to all transitory actions for injuries to persons or property, whether recognized by the common law or created by statute to meet new exigencies of modern life, unless such statute is contrary to the policy of the laws of the state where the action is brought. The claim of comity on which the rule is founded is as urgent in the one case as the other. \* \* \* As a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit in Pennsylvania. A court having jurisdiction of the subject may acquire jurisdiction of the person by lawful service of its process. If a defendant were not liable to answer in a civil action in any state where he may be found, he could easily evade service of process. A preliminary inquiry respecting the citizenship or residence of the parties could not advantage the public." See, also, *Eingartner v. Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 784, 22 South. 53; *Railway v. Crudup*, 63 Miss. 291. The reasoning of the court in the Pennsylvania case, as well as in the cases just cited, applies to the case under consideration; for in Texas, also, "as a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit" in her courts.

4. The fourth assignment of error complains of the court giving plaintiff's fourth special instruction, which is as follows: "At the request of the plaintiff you are further instructed that if you should find and believe from a preponderance of the evidence before you that the lift chain in question was too long, if it was too long, as alleged by plaintiff, and that said lift chain was attached to said drawhead at the time the same was purchased by the defendant, or that the same was placed on and made a part of said drawhead by the defendant at any time after same was purchased by it, then you are instructed as a matter of law that the defendant had full knowledge of the defects in said chain, if any." The propositions asserted under the assignment are: (1) That this charge withdrew from the jury the questions of notice and negligence; (2) that it made the defendant liable if the lift chain was in fact too long, regardless of whether it had or had not used proper and reasonable care in providing appliances and couplers in compliance with the safety appliance act. If, giving the charge its proper construction, it can reasonably be said to have had the effect claimed by either proposition, the assignment should be upheld. It must be considered and

construed as a part of and in connection with the entire charge of the court, in the light of all the facts and circumstances adduced in the evidence. The issues made by the pleadings and evidence were whether the lift chain was defective, in being too long, without a lug attached thereto, and liable on account of such defect to become kinked or twisted, so as to prevent uncoupling the cars by means of the lift lever, and whether the construction of the coupler with such a chain was negligence and rendered it nonautomatic, or not in compliance with the statute requiring cars to be equipped with automatic couplers. In other words, the question of negligence, or non-compliance with the statute, depended upon whether or not the lift chain was too long to prevent the couplers from being automatic, as required by the act of Congress. The court in its main charge instructed the jury that it is the duty of railway companies to reasonably comply with the provisions of the safety appliance act, and to exercise ordinary care to see that all cars handled by them, engaged in carrying interstate commerce, are equipped with automatic couplers such as can be uncoupled by the trainmen without the necessity of their going between the ends of the cars, and that a failure to exercise ordinary care to do so is negligence on the part of the company, and that if an injury proximately results to an employé from such cause the company is liable to such employé in such damages as he may sustain by reason thereof, unless he is precluded from recovering by his contributory negligence. The court then proceeds in its charge to apply the principle thus enunciated to this case as made by the pleadings and evidence. The defect, if any, in the chain, consisted in its being too long. If it was too long, then there was an end of any question as to its defect. If the defendant was charged by the law with knowledge that it was too long from the fact that it was too long at the time it was purchased, or when it was placed on and made a part of the drawhead after the purchase, it would follow that defendant must in the same manner be charged with its defect, and consequently be charged as a matter of law with negligence in equipping its cars with defective coupling appliances, without regard to whether it had exercised ordinary care to properly equip them with automatic couplers in compliance with the statute or not. Though the defendant may have known, or been charged with knowledge of, the length of the lift chain, yet it does not follow from such knowledge that he knew, either at the time or after it was purchased and made a part of the drawhead, that it was too long to perform its office as a part of the coupling appliance, nor that defendant failed to exercise ordinary care to properly equip its cars with automatic couplers and maintain such equipment in compliance with the safety appliance act. We therefore think that the effect of the special charge was to

withdraw the question of negligence from the jury, and make the defendant guilty of negligence as a matter of law if the lift chain was too long, and that it was not relieved of such defect by the court's general charge.

5. By this assignment it is claimed that the court erred in not peremptorily instructing the jury at defendant's request to return a verdict in its favor, upon the ground that the undisputed evidence shows that plaintiff was injured in failing to use safer means at hand to uncouple the cars, and in violating his employer's rules by placing himself in a position of imminent and obvious danger. The evidence shows that the couplers of the two cars were automatic, one a "Tower" and the other a "Lone Star" coupler, and that they coupled by impact. Each coupler, in uncoupling, was operated by means of a lever at the end of the car, attached to a chain which opened the knuckles of the coupler. The lever of the Tower coupler was on the engineer's or north side of the train, and that of the Star coupler on the other side. The plaintiff, who was on the north side of the train, testified that he undertook to uncouple the cars by taking hold of the lever of the Tower coupler, and, it failing to work, he looked and saw that the chain in the drawhead was kinked; that he then went between the cars, and with his left arm between the buffers reached over with his right hand, and while working with it upon the coupling apparatus, for the purpose of undoing or loosening it, the engine moved the cars, and his arm was caught and crushed between the buffers. When he went between the cars he signaled the engineer not to move the engine while between them, which signal it was the engineer's duty to obey. Had the engineer obeyed his signal, the plaintiff would not have been injured in the way he was. There was no defect shown or claimed in respect to the coupler on the opposite side, and the undisputed evidence shows that the cars could have been uncoupled by plaintiff's going around to the opposite side and using the lift lever of the Lone Star coupler. Though the statute under which this action is brought provides that an employé injured by any locomotive, car, or train in use contrary to its provisions shall not be deemed thereby to have assumed the risk thereby occasioned, it does not assume to affect the defense of contributory negligence, but seemingly leaves it undisturbed as it exists at common law. The plaintiff seeks to avoid the force of defendant's contention under this assignment upon the ground that his injury resulted from what would be regarded at common law as an assumed risk which has been expressly abolished by the statute. As is well said by the Supreme Court of Arkansas in *C. & G. R. Co. v. Jones*, 77 Ark. 372, 92 S. W. 246, 4 L. R. A. (N. S.) 837: "There is, of course, a distinction between the defense of assumed risk and that of contributory negligence. The defense of contributory

negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff, but for which the injury would not have happened. It applies when the plaintiff is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. The defense of assumed risk comes within the principle expressed by the maxim, '*Volenti non fit injuria.*' This defense does not impliedly admit negligence on the part of the defendant and defeat the right of action therefor, as the defense of contributory negligence does; for, where the injury was the result of a risk assumed by the servant, no right of action arises in his favor at all, as the master owes no legal duty to the servant to protect him against dangers the risk of which he assumed as a part of his contract of service. *Narramore v. Cleveland R. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68. In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. *Smith v. Baker*, 1891 Appeal Cases (Eng.); opinion of Lord Bowen in *Thomas v. Quartermaster*, 18 Q. B. Div. (Eng.) 685. But, though the defenses of contributory negligence and assumed risk are separate and distinct, yet it frequently happens that they are both available in the same case and under the same state of facts. For instance, as we have stated, a servant assumes all the risks ordinarily incident to the service in which he is employed, and it is also true that he cannot recover for an injury caused by his own negligence. Now it may turn out that the injury of which the servant complains was not only due to one of the ordinary risks which the servant assumed, but that it was also caused in part by his own negligence. In dealing with such a case it is, so far as results are concerned, immaterial whether it be disposed of by the courts on the ground of assumed risk or contributory negligence, for either of them make out a good defense. For this reason the distinction between these two defenses is not always brought out in the reported cases; it being often unnecessary to do so." In the present case there was no risk assumed by the plaintiff occasioned by the defendant's failure to equip its cars with automatic couplers as provided by the act of

Congress. If there was such failure, only the defense of contributory negligence was available. This defense would have been available at common law, though that of assumed risk may have been available under the same facts; for, as has been seen, these defenses are separate and distinct. The purpose of the act of Congress was to relieve employes of common carriers from going between the ends of cars in order to couple or uncouple them. And, in our opinion, it should be given such construction as will reasonably effect such purpose. If, in cases where the same facts which would make out the defense of assumed risk (were such defense not abolished) would also constitute the defense of contributory negligence, the latter defense should be allowed to prevail, the humane and beneficent purpose of Congress would in a large number of cases be rendered abortive. Therefore, as a statute should be so construed as to accomplish its evident intention and purpose, we are of the opinion that the act, in abolishing the defense of assumed risk, did away with any other defense, though of a different name, which would be constituted by identically the same facts which go to establish that of assumed risk. But there is not in this case such an identity of facts. There was on the other side of the train from the plaintiff a lever of the Lone Star coupler by the use of which he could have uncoupled the cars without going between their ends. Did his failure, under the circumstances, to go on the opposite side of the train and use this lever, and his going between the ends of the cars and placing himself in the position he was when injured, constitute contributory negligence as a matter of law? Though there are decisions of some courts—notably *Gilbert v. B. & N. Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27, *Gilbert v. C. & P. R. Co.* (C. C.) 123 Fed. 832, and *Morris v. Duluth, S. S. & A. R. Co.*, 108 Fed. 747, 47 C. C. A. 661—which would seem to require an affirmative answer, the decisions of this state in similar cases hold that the question is one of fact for the jury to determine. *G., H. & S. A. Ry. v. Courtney*, 30 Tex. Civ. App. 544, 71 S. W. 307; *Tex. Mex. Ry. Co. v. Higgins* (Tex. Civ. App.) 99 S. W. 202. We prefer to follow our own opinions to those of courts of another jurisdiction. Besides, where it is apparent from the evidence that plaintiff would have been in no danger had it not been for the engineer's moving the engine in disobedience to the signal given him, we are of the opinion that the question of contributory negligence was properly submitted to, and rightly decided by, the jury.

6. Nor can it be said as a matter of law that the plaintiff was guilty of contributory negligence in placing his arm between the buffers when the engine was attached to the cars, as is contended by this assignment. The plaintiff had no reason to think that the engine was liable to move the cars at any moment. On the contrary, he had the right to

assume, and act upon the assumption, that his signal not to move the cars while he was between them would be obeyed by the engineer.

7. This assignment complains that the court erred in refusing a peremptory instruction to the jury to find for defendant, upon the ground that the undisputed evidence shows that plaintiff was injured by reason of the negligence of one or the other or both of his fellow servants—the engineer in moving the engine, or of Marshall, a switchman, in giving signals. Section 8 of the act under which this action is brought is as follows: "That any employé of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." Act March 2, 1893, c. 196, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3170]. This act was afterwards amended by Congress, making it applicable to common carriers in the territory of Arizona. It was admitted on the trial that in Arizona, where plaintiff was injured, the common-law doctrine of fellow servants obtains, except as modified by paragraph 2767, Rev. St. 1901, of that territory, which is as follows: "Every corporation doing business in the territory of Arizona shall be liable for all damages done to any employé in consequence of any negligence of its agents or employes to any person sustaining such damage; provided such corporation has had previous notice of the incompetency, carelessness, or negligence of such agent or employé." The fellow-servant doctrine which obtains at common law was grafted by the courts upon the principle of "assumed risk," upon which stock its growth was so balefully luxuriant that the pruning knife was applied by the Legislature in most jurisdictions where it prevailed. In *Farwell v. Boston & W. Ry. Co.*, 4 Metc. (Mass.) 57, 38 Am. Dec. 339, from which may be dated the origin of the fellow-servant doctrine, it is said by Chief Justice Shaw: "The general rule, resulting from considerations of justice as well as policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment." If, then, the plaintiff cannot, under the statute quoted, be deemed to have assumed the risk of the negligence of his fellow servants in operating "cars not equipped sufficiently" with automatic couplers, we need not notice the statute of Arizona, which breaks to the hope of a

railway employé the promise it contains before it reaches his ear. The assignment under consideration is predicated upon the assumption that either one or both of plaintiff's fellow servants was guilty of the negligence which proximately caused his injury. The use of the word "fellow servant," in connection with the evidence, implies that each of them was engaged with him in the purpose, common to them all, of coupling and uncoupling the cars—the engineer operating his engine, and the switchman giving signals, in furtherance of the work in which they were all engaged. If, then, the cars were not sufficiently equipped with automatic couplers in accordance with the act of Congress, as was found by the jury, it is a logical sequence that plaintiff's injury, though caused by the negligence of a fellow servant, was from a risk which, as a matter of law, he did not assume. As before intimated, the purpose of the safety appliance act is to relieve the employé of the danger of going between the ends of cars to couple or uncouple them. If they are not moving when he goes between them, nor moved while he is there, no danger is incurred by him. The danger is from their movement, which is necessary to couple them by impact and oftentimes required to uncouple them. It is always an employé other than the one who is between the cars who moves them. If, in doing so, he is negligent, and such negligence relieves his employer from his negligence in failing to comply with the act of Congress, and visits the consequence of the negligence of both upon the employé whom the act was intended to protect, then such legislation is as worthless as "the stuff that dreams are made of." See *Schlemmer v. Railway Co.*, 205 U. S. 8, 27 Sup. Ct. 407, 51 L. Ed. 682. Even at common law, where the harsh fellow-servant doctrine applies with undiminished rigor, the concurrence of a servant's negligence in causing an injury to another servant does not absolve the master from his liability for its consequences. In this case the most that can be said of the negligence of plaintiff's fellow servants is that it simply concurred with that of the defendant in causing the injury to plaintiff.

8. The substance of the eighth and ninth special instructions requested by defendant, the refusal of which is the basis of the eighth and ninth assignments, is comprehended by the main charge, and it was not error to refuse to give either of them.

9. The court did not err in instructing the jury, in its supplemental charge, that if it believed plaintiff was injured by reason of his disobedience and violation of defendant's rules introduced in evidence, and that if such violation or disobedience was negligence on his part, causing or contributing to cause his injury, the verdict should be for defendant. The violation or disobedience of the servant of his master's rules is not negligence per se; but whether negligence vel non is a question



of fact for the jury. *S. A. & A. P. Ry. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246; *M., K. & T. Ry. v. Parrott* (Tex. Civ. App.) 96 S. W. 950; *G., H. & S. A. Ry. v. Cherry* (Tex. Civ. App.) 98 S. W. 901; *G., H. & S. A. Ry. v. Still* (Tex. Civ. App.) 100 S. W. 179. This also disposes of the eleventh assignment of error.

10. The twelfth assignment of error complains that the verdict is contrary to the law and evidence, because the evidence shows that the defendant had used ordinary care in endeavoring to equip its cars with reasonably safe appliances, and to comply with the safety appliance act of Congress, and if there was any defect about the coupling apparatus it was a mere temporary incident to the best appliances, and could not have been discovered by reasonable inspection. While the evidence upon this issue seems to us barely sufficient to prove the alleged negligence of plaintiff, we would not be prepared to say that, had it not been for the error in the charge indicated, it does not reasonably tend to support the verdict.

11. The foregoing conclusions dispose of the remaining assignments of error adverse to appellant.

On account of the error in giving the special charge complained of by the fourth assignment, the judgment is reversed, and the cause remanded.

#### PAUL v. STATE.\*

(Court of Civil Appeals of Texas. Nov. 30, 1907. Rehearing Denied Dec. 21, 1907.)

#### 1. INTOXICATING LIQUOR—INJUNCTION—STATUTORY PROVISIONS—CONSTRUCTION.

Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2, provides in effect that any one who conducts a saloon within the county or precincts of the state where the sale of intoxicating liquors has been prohibited by law shall be regarded as a creator and promoter of public nuisances, and may be enjoined, etc. The new charter of Dallas, granted by the Thirtieth Legislature (article 2, § 3, subd. 24), under the head of "Police Powers," authorized the city to license, tax, and regulate saloons; and article 12, § 1, of the charter provided that it shall be unlawful to conduct a saloon within the corporate limits of the city, outside of certain boundaries. Under the authority of the charter the board of commissioners of Dallas enacted an ordinance making it unlawful for any person to conduct a saloon outside the limits therein described, which were the same as defined in the charter. Accused procured a permit to apply for a license under the Baskin-McGregor law (Gen. Laws 30th Leg. p. 258, c. 138) to sell at a place in the city of Dallas outside the prescribed saloon limits, and thereafter a license was granted by the county court, and issued by the clerk after payment of the tax. *Held*, that the license did not give accused the right to conduct a saloon at the point named outside the saloon limits, nor excuse him for a violation of the law declaring him a creator of a public nuisance.

#### 2. SAME—APPLICATION—NATURE OF INHIBITION.

Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2, making one a creator and promoter of a public nuisance who establishes or conducts a saloon within any county or precinct of the state where the sale of intoxicating liquors has been pro-

hibited by law, applies not only to cases where saloons have been prohibited by the adoption of local option, under Rev. St. 1895, tit. 69, arts. 3384-3399, but in all cases where it has been made unlawful to carry on the liquor business in any defined territory, since the statute was intended as a cumulative remedy, without regard to the method by which the inhibition of the sale was enacted or put into operation.

#### 3. SAME—EXTENT OF TERRITORY UNDER INHIBITION.

The operation of the statute relating to creators of public nuisances (Gen. Laws 30th Leg. p. 166, c. 81) applies not only where the sale of intoxicating liquors has been prohibited in an entire county or precinct of a county, but to any defined or prescribed portion thereof within which the sale has been prohibited.

#### 4. STATUTES—REPEAL—GENERAL AND LOCAL LAWS.

Special legislation or local laws are not repealed by a later general act, unless especially mentioned in the general law, or the purpose to repeal is manifest from the plain provisions of the general law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 235-237.]

#### 5. SAME.

Where a general intention is expressed by the Legislature, and also a particular intention which is incompatible therewith, the particular intention will be considered an exception to the general one, and in such case full effect may be given to the general law beyond the scope of the local or special one, and, by allowing the latter to operate according to its special purposes, the two acts can stand together.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 235-237.]

#### 6. INTOXICATING LIQUOR—INJUNCTION—STATUTORY PROVISIONS—REPEAL.

The Baskin-McGregor law (Gen. Laws 30th Leg. p. 258, c. 138), relating to control of the liquor traffic, did not repeal provisions relating to the liquor business in the new charter of Dallas, which was enacted by the same Legislature, since it did not mention the charter specifically, and there is nothing to indicate an intent to repeal; for the Baskin-McGregor law was intended as a general system, while the provisions of the Dallas charter relating to the same subject were local in operation and enacted for the benefit of the city only.

#### 7. SAME—ENACTMENTS BY SAME LEGISLATURE—CONSTRUCTION AS SAME ACT.

The two laws, having been passed at the same session of the Legislature, should be considered as if embraced in one act, and construed so that both may stand.

#### 8. SAME—PRESUMPTION AS TO CHANGE OF INTENT—EXCEPTIONS OF LOCAL LAW FROM OPERATION OF GENERAL STATUTE.

If the acts were to be considered separately, it would not be presumed that the Legislatures had undergone such a radical change of mind within a few days as to destroy absolutely the provisions of the charter making it unlawful to conduct a saloon outside the saloon limits of the city of Dallas, unless the conflict is irreconcilable; but no such conflict exists, and the provisions of the charter must be considered as having been excepted by the Legislature from the operation of the general statute.

#### 9. SAME—INTENT OF LEGISLATURE.

The provisions of the new charter of the city of Dallas relating to control of liquor traffic, and the Baskin-McGregor law (Gen. Laws 30th Leg. p. 258, c. 138), being enacted of the same Legislature, should be treated as if embraced in one act, and as Dallas Charter, art. 14, subd. 29, declares that the provisions of the act conflicting with any state law shall be held to supersede the state law to that extent, and shall not be held invalid on account of such conflict, the provision is an express declaration of

\*Writ of error denied by Supreme Court.



the legislative intent, conclusively showing that no repeal of the charter provisions was intended to be effected by the Baskin-McGregor law.

**10. SAME—RES JUDICATA—ISSUE OF LICENSE BY COUNTY COURT.**

The judgment of a county court in authorizing the issuance of a license for the sale of intoxicating liquor at a place where such sale is forbidden by law is not conclusive of an accused's right to conduct a saloon there; for whether the sale of intoxicating liquor has or has not been prohibited at the place or within the territory where an applicant proposes to conduct the saloon business is not one of the facts required to be stated in his petition to the county judge, and the county judge has no jurisdiction to determine such question, and any adjudication of it would be without authority of law, and not binding in a proceeding to punish the accused as a promoter of a public nuisance.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Bill for injunction by the state of Texas against Frank Paul. From an order granting a temporary writ, defendant appeals. Affirmed.

J. J. Eckford, Barry Miller, and Finley, Knight & Harris, for appellant. Dwight L. Lewellen, for the State.

**TALBOT, J.** This suit was instituted by the county attorney of Dallas county, Tex., in his official capacity and in behalf of said state, to restrain by writ of injunction the appellant, Frank Paul, from engaging in and pursuing the occupation of a retail liquor dealer in the city of Dallas. The action is based upon an act of the Thirtieth Legislature, declaring that persons, firms, and corporations who sell intoxicating liquor without first procuring a license and paying all taxes due, or who engage in selling and dispensing intoxicating liquor contrary to the provisions of said act in counties and precincts wherein the sale of such liquor has been prohibited by law, to be creators and promoters of a public nuisance. Gen. Laws 30th Leg. p. 166, c. 81. The amended petition, upon which the hearing was had, was filed October 29, 1907, and alleges, in substance, that appellant was then, and had been for several weeks prior thereto, engaged in the occupation and business of selling spirituous, vinous, or malt liquors in quantities of one gallon or less, and in conducting a saloon upon the premises known as No. 568 Ross avenue, in the city of Dallas, Dallas county, Tex., without having first procured the necessary license therefor and paid the tax required by law for such occupation; that the city of Dallas is a municipal corporation, and is authorized and empowered to license saloons and all persons engaged in selling such liquors, and to levy a tax upon the same; that the board of commissioners of said city, by an ordinance passed August 21, 1907, did levy an annual tax upon every person \* \* \* selling spirituous or malt liquors in the city of Dallas; that appellant since the 21st day of August, 1907, has been engaged in the occupation of a retail liquor

dealer in said city, and has never paid the said tax nor procured the license required by said ordinance. It was further alleged that appellant was at the time of the filing of said petition, and for several weeks prior thereto had been, the owner and proprietor, managing and conducting a public place and business at No. 568 Ross avenue in the said city of Dallas, where intoxicating liquors were stored, drank, and dispensed, the same being a place in Dallas county, Tex., wherein the sale of such liquors had been prohibited by law in this: that by an act of the Thirtieth Legislature of the state of Texas, to wit, an act granting a new charter to the city of Dallas, and by an ordinance passed by the board of commissioners of said city in accordance therewith, on the 8th day of July, 1907, entitled "An ordinance regulating the location of any saloon in certain territory of the city of Dallas, and providing a penalty," it became and was, at the time of the institution of this suit and for some time prior thereto, unlawful to locate, establish, maintain, or conduct a saloon within the corporate limits of said city outside of the limits as described in said act and ordinance. Appellant answered by general and special exceptions, a general denial, and specially that on the 12th day of July, 1907, he, in accordance with the laws of this state and specially under the act of the Thirtieth Legislature (Gen. Laws 30th Leg. p. 258, c. 138) approved April 18, 1907, and known as the "Baskin-McGregor Bill," obtained from the Comptroller of the state a permit to apply for license as a retail liquor dealer in the county of Dallas at the location and place named in plaintiff's petition; that thereafter in full compliance with said law appellant filed his petition with the county judge of said county for license to do business as a retail liquor dealer at the place and locality referred to, which was set down for hearing July 23, 1907; that when said petition came on to be heard the county attorney of Dallas county, Tex., appeared and filed a written contest of appellant's right to procure such license, and the county judge, after hearing the evidence upon the issues made and the argument of counsel, rendered judgment decreeing that appellant was entitled to license as prayed for, which judgment has been in no wise vacated or set aside and is conclusive of appellant's right to do business at said place and locality as a retail liquor dealer. Appellant further pleaded that in pursuance of said law and said judgment he paid to the tax collector of Dallas county, Tex., the lawful taxes fixed and required to be paid by said Baskin-McGregor law upon said business, took his receipt therefor, and on presenting the same and said judgment to the county clerk of said Dallas county said clerk issued and delivered to him a license authorizing appellant to engage in and conduct the business of a retail liquor dealer at the place and locality named in appellee's peti-

tion for the period of one year. The petition for the injunction came on to be heard before Hon. E. B. Muse, judge of the Forty-Fourth judicial district, at chambers, on November 11, 1907, and after hearing the evidence and argument of counsel a temporary writ of injunction was granted restraining appellant from further prosecuting and carrying on his business until the further order of the court upon a final hearing of the cause. From this order and judgment of the court the appellant has appealed.

The material facts are substantially as follows: On the 12th day of July, 1907, the defendant, Frank Paul, applied to the Comptroller of the state of Texas, as provided by the act of the Thirtieth Legislature approved April 18, 1907, and commonly known as the "Baskin-McGregor Bill," for a permit to apply for a license as retail liquor dealer at No. 568 Ross avenue, in the city of Dallas, county of Dallas, state of Texas, and the same was granted him, and thereafter on the 12th day of July, 1907, he filed his petition with the judge of the county court of Dallas county for a license as a retail liquor dealer at said place, which was by an order or judgment of said court granted him. He paid to the tax collector of Dallas county the tax due the state of Texas and the tax levied by the commissioners' court of Dallas county upon said business of retail liquor dealer at said place, and subsequently presented said judgment of the county judge of Dallas county and said tax receipts to the county clerk of Dallas county, together with his bond as required by section 13 of the last-named act of the Legislature, whereupon said clerk issued to the defendant the proper license, which said license authorized this defendant to pursue the business of retail liquor dealer at No. 568 Ross avenue for the period of one year from the 1st day of August, 1907. On the 20th day of October, 1907, and ever since then, the defendant has been engaged in the occupation of retail liquor dealer, and conducting a saloon as defined in the charter and ordinances of the city of Dallas at said No. 568 Ross avenue, in the city of Dallas, Dallas county, state of Texas; and on said date he was the owner and proprietor, managing and conducting a public place and business where intoxicating liquors were kept, drank, sold, and dispensed, and he had no license therefor other than the license issued by the county clerk of Dallas county, Tex., on the 1st day of August, 1907, which license was issued in full compliance with a law passed by the Thirtieth Legislature, approved April 18, 1907, being House Bill No. 13, and popularly known as the "Baskin-McGregor Bill," and has paid no other tax on said business other than the tax levied by said last-mentioned act and the tax levied by the county of Dallas in pursuance of said act, and has not paid any tax whatever to the city of Dallas. Said location, to wit, No. 568 Ross avenue, is in that portion of the

city of Dallas outside of the limits prescribed in paragraph 1, art. 12, of the charter of the city of Dallas, and an ordinance entitled "An ordinance regulating the location of saloons in the city of Dallas, and prohibiting the establishing, maintenance and location of any saloon in certain territory of the city of Dallas and providing a penalty." The business conducted by this defendant at said place was the sale of intoxicating liquors in quantities in compliance with said license, and he has made no sale of intoxicating liquors in quantities other than in the manner prescribed by said license issued by the county clerk of Dallas county as aforesaid. The sale of intoxicating liquors has not been prohibited in Dallas county as a county, nor in said justice precinct No. 1 of Dallas county as a precinct, in accordance with title 69 of the Revised Civil Statutes of the State of Texas, known as the "Local Option Law." The authorities of the city of Dallas refused to receive any money from said Frank Paul as occupation tax, or to issue a permit or license to him to do business as a retail liquor dealer for any period at said No. 568 Ross avenue in said city. The city of Dallas has legally passed "An ordinance regulating the location of saloons in the city of Dallas, and prohibiting the establishing, maintenance, and location of any saloon in certain territory of the city of Dallas, and providing a penalty," and said ordinance is, and was at the time of the filing of the petition herein and at the time of the alleged violation, in full force and effect, as prescribed by the charter of the city of Dallas, and also an ordinance providing for the issuance of license to liquor dealers, and said ordinance is, and was at the time of the filing of the petition herein and at the time of the alleged violation, in full force and effect.

The first subdivision of section 1 of the law under which the state is proceeding in this case, declares that "any person, firm or corporation who may engage in or pursue the business of selling intoxicating liquor without having first procured the necessary license and paid the taxes required by law," is a creator and promoter of a public nuisance, and the infringement of this section of the statute is alleged as one of the grounds upon which the injunction sought should be granted. Appellant insists that, inasmuch as it conclusively appears that he had paid the state and county occupation taxes and procured a license from the county clerk to carry on the business of a retail liquor dealer at the place named in appellee's petition, and that by the charter and ordinances of the city of Dallas it was made unlawful to locate or conduct a saloon at such place, and no tax had been levied upon such business and license required by said city to engage therein, appellant could not be enjoined upon the ground alleged, that he was selling without a license. This question we deem it unnecessary to decide.

The second subdivision of section 1 of the statute referred to provides that "any person, firm or corporation who may as owner, proprietor or agent, establish, manage, or conduct any public place or business where intoxicating liquors are stored, kept, drank, sold or dispensed, within any county or precinct within this state wherein the sale of intoxicating liquor has been prohibited by law," shall also be regarded as a creator and promoter of a public nuisance. Laws 1907, p. 166, c. 81. The violation of this provision of said statute is alleged as a ground for the injunction obtained at the hands of the judge to whom appellee's petition was presented, and, being established by the evidence, authorized the action in granting the writ. The Thirtieth Legislature of this state passed an act entitled "An act to grant a new charter to the city of Dallas, Dallas county, Texas," and by subdivision 24, § 3, art. 2, under the head of "Police Powers," authorized and empowered said city "to license, tax and regulate \* \* \* drinking houses or saloons, bar-rooms, beer saloons and all places or establishments where intoxicating or fermented liquors are sold." Article 12, § 1, of said charter also provides that it shall be unlawful to locate, establish, maintain, or conduct a saloon, as therein defined, within the corporate limits of the city outside of certain described boundaries. Under the authority given by the charter and consistent therewith, the board of commissioners of the city of Dallas enacted an ordinance which provides that it shall be unlawful for any person, firm or corporation to maintain or conduct a saloon outside of the limits therein prescribed, which were the same as defined in the charter. It is not denied, but is admitted, that appellant was at the time alleged in the petition conducting a saloon within the corporate limits of said city, and outside of the saloon limits as prescribed by the charter and ordinances of the city, and had no authority or license for so doing, except the license granted by the state and county. Such license, in view of the charter and ordinances of the city of Dallas to which we have adverted, did not confer upon appellant the right to conduct and maintain a saloon at the point named in appellee's petition, and relieve him from the consequences of a violation of the second section of the statute under consideration.

With the contention of appellant that this section of the statute has reference only to precincts and counties that have adopted the local option law as contained in title 69, arts. 3384-3399, of the Revised Statutes of 1895 of the state, we do not agree. The language of the statute, to wit, "where the sale of intoxicating liquors has been prohibited by law," was not, in our opinion, intended by the Legislature to be, and should not be, restricted to our local option laws proper. The statute was intended as a cumulative remedy for suppressing the viola-

tion of all laws inhibiting the sale of intoxicating liquors in any prescribed territory, without regard to the method by which such laws were enacted or put into operation. At the time the statute in question was passed, by charter provisions and ordinances enacted under authority conferred by the Legislature, it was made unlawful to sell intoxicating liquors outside of certain defined limits in many cities in this state. Such efforts to regulate the sale of intoxicating liquors, and protect the residence portions of incorporated cities from the evil influences and effects of the open saloon, was a well-known part of the legislative history of this state upon that subject; and it is not believed that the Legislature intended that the operation of the statute under consideration should not be extended to such cities and localities. Significant of the fact that they did not so intend is the use of the comprehensive language "prohibited by law," and not that of a much more restricted meaning, as usually understood, "where local option is in force." The language employed in its broadest sense will apply to and cover, not only cases where the sale of intoxicating liquor and the maintenance of such a business has been prohibited by the adoption of local option under the provisions of title 69 of our Revised Statutes, but also where it has been made unlawful, as in the present case, to carry on and conduct such business in any defined territory. Such was evidently the intention of the Legislature.

Nor do we believe the operation of this statute should be confined to cases where the sale of intoxicating liquors has been prohibited in the entire county, or entire precinct of the county. No good reason is perceived why the Legislature should declare a person to be a creator and promoter of a nuisance who conducts a business where intoxicating liquors are stored, drank, sold, or dispensed within a county or precinct wherein the sale of such liquors has been prohibited by law in the entire county, or entire precinct, and authorize the abatement of such nuisance by injunction, and not to so denounce such a person and provide the same remedy, where the sale of intoxicating liquors has been prohibited in a subdivision or smaller portion of the county or precinct. Evidently it was the intention and purpose of the Legislature that the remedy by injunction, as provided for in the statute, should apply to and become operative in any clearly and legally defined subdivision or portion of the county or precinct where intoxicating liquors are being stored, sold, or dispensed in violation of the law. The language, "within any county or precinct," must therefore be construed to mean and include, not only the entire county or precinct, but any defined or prescribed portion thereof within which the sale of intoxicating liquors has been prohibited, and in which it is made unlawful for a person to manage or conduct

any public place or business where such liquors are stored, drank, or sold.

Appellant contends that the Baskin-McGregor law is a complete scheme of legislation affecting the business of retail liquor dealers; that the charter of the city of Dallas, which was passed by the Thirtieth Legislature a few days previous to the passage of the Baskin-McGregor act, relates generally to the municipal affairs of the city and incidentally to the subject of retail liquor dealers; that the provisions of the charter are inconsistent with the general or Baskin-McGregor act, and therefore the charter provisions must yield to the general act. We cannot agree with this construction of the law. It is well settled that special legislation or local laws are not repealed by a later general act, unless specially mentioned in the general law or such purpose is made manifest from the plain provisions of the general law. *Ex parte Neal* (Tex. Cr. App.) 83 S. W. 881; *State v. Connor*, 86 Tex. 133, 23 S. W. 1108; *Ellis v. Batts*, 26 Tex. 703; 26 Am. & Eng. Enc. of Law (2d Ed.) p. 739, and note 3. In the authority last cited, after stating the rule substantially as we have above, though more elaborately, it is said: "The reason which has been given for this rule is that in passing a special act the Legislature has its attention directed to the special case which the act was made to meet, and considers and provides for all the circumstances of that special case, and, having done so, it is not to be considered that the Legislature by a subsequent general enactment intended to derogate from the special provision previously made, when it was not mentioned in such enactment." *Fitzgerald v. Champneys*, 2 Johns. & H. 54. There is no mention made in the Baskin-McGregor law of the act granting the Dallas charter, nor to any of its provisions. If, therefore, the Baskin-McGregor act effects a repeal of any of the provisions of said charter, it is by implication and not by expression. In his work on Statutory Construction (section 157) Mr. Sutherland says: "It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special or local, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the Legislature contemplated and intended a repeal." Mr. Black on this subject says: "When the provisions of a general law applicable to the entire state are repugnant to the provisions of a previously enacted special law applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either wholly or in part, unless such modification or repeal is provided for in express words or arises by necessary implication. A local statute, enacted for a particular municipality for reasons satisfactory to the Legislature, is intended to be excep-

tional and for the benefit of such municipality. It has been said that it is against reason to suppose that the Legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances made necessary." *Black, Interp. Laws*, 116. It is also a well-established rule that "when a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one." In such cases full effect may be given to the general law beyond the scope of the local or special law, and by allowing the latter to operate according to its special purposes and aims the two acts can stand together. The application of these principles seems clear. If it be admitted, which is not done, that the provisions of the Baskin-McGregor act and the provisions of the charter of the city of Dallas relating to the subject-matter of this controversy are repugnant to each other, yet we see nothing in the former act or in the course of legislation touching such provisions that renders it manifest that the Legislature contemplated and intended a repeal. The Baskin-McGregor law is intended as a general system for the state in dealing with the whisky traffic, whereas the provisions of the act constituting the charter of the city of Dallas and relating to the same subject are local laws in their operation and enacted for the benefit of said city, which local conditions and experience dictated were necessary. Again, as said in the case of *McGrady v. Terrell*, 98 Tex. 427, 84 S. W. 641, "the two laws, having been passed at the same session of the Legislature, should be considered as if embraced in one act, and should be so construed as that both may stand." *Suth. on Stat. Const.* § 233. That case is also authority for the legal conclusion that, if the acts be considered separately, "it would not be presumed that the legislators had undergone such a radical change of mind within four (or five) days as to destroy absolutely the provisions" of the charter making it unlawful to locate or conduct a saloon within the corporate limits of the city of Dallas outside of certain limits described, unless the conflict is irreconcilable. No such conflict in our opinion exists, and the provisions of the charter conferring upon the city of Dallas authority to license, tax, and regulate saloons and places where intoxicating liquors are sold, etc., and prohibiting the sale of such liquors and the establishment of such places outside of certain defined limits, must be considered as having been excepted by the Legislature out of the operation of the general statute commonly known as the "Baskin-McGregor Law." Furthermore, subdivision 29 of article 14 of the city charter declares "that the provisions of this act in so far as they may conflict with any state law shall be held to supersede the state law to that extent and it shall not be held invalid on account of

such conflict." The Baskin-McGregor act and the act constituting the charter of the city of Dallas were passed at the same session of the Legislature, and practically at the same time; and treating them as if embraced in one act, as should be done, the foregoing provision of the charter is an express declaration of the legislative intent, and conclusively shows that no repeal of the charter provisions was intended or should be effected by the Baskin-McGregor law.

We are also of the opinion that the judgment of the county court in authorizing the issuance by the clerk of the state and county license to appellant is in no sense conclusive of appellant's right to engage in the sale of intoxicating liquor, or to conduct an establishment where such liquor was stored, drank, or sold at No. 568 Ross avenue. That the sale of intoxicating liquors has or has not been prohibited at the place or within the territory where the applicant proposes to conduct such business is not one of the facts required to be stated in his petition to the county judge for such license. The county judge has no jurisdiction to determine such question, and any adjudication of it would be without authority of law and not binding in a proceeding like this. We therefore hold that the license issued by the county clerk to appellant did not confer upon him the right to sell intoxicating liquors, or to conduct a public place or business, in violation of the charter of the city of Dallas and its ordinances prohibiting such sales and business in the city outside of the limits prescribed in said charter and ordinances.

The judgment of the court below is affirmed.

#### ELLIS et al. v. LEHMAN et al.\*

(Court of Civil Appeals of Texas. Dec. 21, 1907. Rehearing Denied Jan. 4, 1908.)

#### 1. ACKNOWLEDGMENT — CONCLUSIVENESS OF CERTIFICATE.

A certificate of the wife's acknowledgment of a deed is conclusive of the facts therein stated where no fraud was perpetrated on her by grantee, and it is not shown that grantee or her husband were present at the taking of the wife's acknowledgment, or knew anything about the manner of its taking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 303-315.]

#### 2. EVIDENCE — PAROL — CONSIDERATION OF DEED.

The consideration of a conveyance can be shown by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1912-1917.]

Error from District Court, Grayson County; B. L. Jones, Judge.

Trespass to try title by John Ellis and another against E. L. Lehman and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

T. L. Brame and J. W. Finley, for plaintiffs in error. Hamp. P. Abney, for defendants in error.

RAINEY, C. J. This is an action of trespass to try title to lot of land bought by John Ellis and wife against E. L. Lehman and wife. A trial was had before the court without a jury, which resulted in a judgment for Lehman and wife.

We adopt the trial court's findings of fact, which are supported by the evidence, to wit: (1) That the land in controversy was deeded by H. N. Tuck and W. M. Scott, trustees, to John Ellis, plaintiff, on October 30, 1901, and recorded in volume 140, at page 527, Deed Records of Grayson county, Tex., transferred the title to the land in controversy to plaintiff, John Ellis, and that such deed of transfer is the common source of title under which all of the parties hereto claim. (2) That at the time plaintiff purchased the land in controversy there were no improvements on said land, but that shortly thereafter the improvements that are on the land to-day were placed on said land, and that plaintiff and his wife moved on said land and occupied for a short time same as their homestead and at the time of these transactions it was their homestead. (3) That the cost of the improvements so placed on said land was as to the major part thereof paid for by defendant E. L. Lehman under a verbal contract with the said John Ellis by which the said Lehman was to be reimbursed. A small part of the value of the improvements was paid for by the plaintiff Ellis. (4) That there arose a disagreement between the parties, and that on the evening of the 21st of January, 1902, the plaintiff John Ellis and his wife agreed with the defendant E. L. Lehman and his wife that the property should be deeded to Mrs. E. L. Lehman in consideration of said E. L. Lehman paying to plaintiff the amount he had expended for the lot, and in placing the improvements thereon, and that this agreement was thoroughly understood by all the parties to this suit, and also by plaintiff's wife. (5) That the instrument dated January 22, 1902, and recorded in volume 143, at page 329, is a general warranty deed duly executed by plaintiff John Ellis and his wife, Minnie Ellis, and conveyed the title of the land in controversy to Mrs. E. L. Lehman, and that said deed was executed in furtherance of the agreement mentioned in paragraph 4 of these findings, and that the said E. L. Lehman paid to the said John Ellis the amount he had expended in placing the improvements on said property and the amount he had paid the said Tuck and Scott for said land. (6) Mrs. Ellis is a daughter of defendants. The controversy arises over the validity of a deed executed by Ellis and wife to Mrs. E. L. Lehman, conveying lot 12, block 24, College Park addition to Sherman, Grayson county, Tex.

The contention of Ellis and wife is that the officer taking the acknowledgment of Mrs. Ellis did not explain the deed to her; that the deed did not express the true consideration, or any but a nominal consideration;

\*Writ of error denied by Supreme Court.

that she thought it was a lien; and that it was void, and passed no title. The conveyance was an ordinary warranty deed on its face, the consideration expressed was \$1, and the privy acknowledgment of Mrs. Ellis was legal in form. No fraud was perpetrated upon Mrs. Ellis by the grantee, nor was it shown that Mrs. Lehman or husband were present at the taking of Mrs. Ellis' acknowledgment, or knew anything about the manner of its taking. Under these circumstances the certificate of the officer was conclusive. "No doctrine is better settled in this state than the proposition that a certificate of acknowledgment is conclusive of the facts therein stated, unless fraud or imposition is alleged and in which the grantee participated or had knowledge." *Herring v. White*, 6 Tex. Civ. App. 249, 25 S. W. 1018; *Atkinson v. Reed* (Tex. Civ. App.) 49 S. W. 260; *Miller v. Yturria*, 69 Tex. 549, 7 S. W. 203.

The contention that the deed was intended as a mortgage cannot be sustained. On this point the evidence conflicts, but there is sufficient evidence to sustain the court's finding that the deed was intended as an absolute conveyance of the title.

Appellants contend that the deed is void because it did not express the true consideration or any consideration. The consideration expressed in the deed was \$1. The consideration for a conveyance can be shown by parol. The evidence shows that a valuable consideration was paid for the lot, and neither Ellis nor his wife testified that they did not receive a valuable consideration or a different consideration than that shown to have been paid by the Lehman.

The evidence warrants the conclusion that Mrs. Ellis understood the consideration she was to receive, that she did receive it, and that there is no merit in this contention.

The judgment is affirmed.

#### GRAY v. FUSSELL.

(Court of Civil Appeals of Texas. Dec. 18, 1907.)

##### 1. TRESPASS TO TRY TITLE—QUESTION FOR JURY.

In trespass to try title, whether a deed was executed to plaintiff's husband *held* for the jury.

##### 2. HOMESTEAD—DEDICATION—QUESTION FOR JURY.

Whether lots had been dedicated as a homestead at the time they were conveyed by the husband *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 401.]

##### 3. EVIDENCE—HEARSAY—WRIGHT.

On an issue as to whether lots had been dedicated as a homestead at the time they were conveyed by the husband, evidence by the wife that her husband told her that he was working on the house on the lots, and that, when she was anxious to move into it, he told her that he was letting the one to whom he conveyed have the rents for some material the grantee had let him have, though hearsay, yet having been admitted without objection, is not without probative force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2430.]

##### 4. HOMESTEAD—ABANDONMENT BY HUSBAND IN FRAUD OF WIFE.

A husband cannot, by a sale and abandonment in fraud of his wife, destroy her homestead rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 216-222.]

##### 5. TRIAL—QUESTIONS OF LAW OR FACT—SUFFICIENCY OF EVIDENCE.

Evidence, no matter how weak its probative force, if it has the dignity of evidence at all, is sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 332, 333.]

Error from District Court, Nacogdoches County; James I. Perkins, Judge.

Trespass to try title by Mrs. M. E. Gray against J. D. Fussell. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Ingraham, Middlebrook & Hodges, for plaintiff in error. Mims & Strong, for defendant in error.

REESE, J. Mrs. M. E. Gray in this case sues J. D. Fussell in trespass to try title to recover lots 18 and 19, in block 74, in the town of Cushing. After plaintiff had introduced her evidence the court instructed the jury to return a verdict for defendant. From the verdict and judgment, plaintiff appeals.

Plaintiff in error by proper assignment of error complains of the action of the court in instructing a verdict for defendant in error. Plaintiff's case is that the property in question had been bought by her husband, H. A. Gray, with whom she, with her children, was then living, for the purpose and with the intention of making it their homestead; that this purpose and intention had been carried out by the erection of a dwelling house upon the property; and that H. A. Gray, before they moved into the house, had sold and conveyed it, without her consent or joinder, to defendant. Defendant insists that the undisputed evidence showed that Gray had no title.

Plaintiff claimed title under an alleged deed from Stephens to H. A. Gray. No deed was introduced in evidence to Gray for the property; but certain evidence was introduced by plaintiff which, it is claimed, was sufficient to show that such deed was executed. Previous to June 9, 1904, one L. H. Baines was the owner of lots 18, 19, 20, and 21, in block 74, in the town of Cushing. Gray and wife had owned and had been occupying as a home certain other lots in the town, which on June 6, 1904, they sold and conveyed to one Martindale, but which they continued to occupy as tenants. Baines being a minor and given to trading, for convenience in conveying, the legal title to the lots was in his brother-in-law, Stephens. The lots were unimproved. Gray contracted to buy the lots, and a deed was signed by Stephens and duly acknowledged, dated June 9, 1904, conveying them to him. It is contended by defendant that this deed was never in fact de-

livered, but that after it was signed it was left with one D. C. Baines, a notary public, who testified that the deed was not delivered on account of some trouble about the consideration. Here is where the parties part company so far as the evidence is concerned. The notary testifies that the deed was left with him and not to be delivered. On September 3, 1904, lots 20 and 21 were sold and conveyed by Gray and wife to J. W. Chambers, and D. C. Baines testified that on the occasion of the making of the Chambers deed Stephens and Gray came to him, and by their direction the deed of Stephens to Gray was changed so as to include only lots 20 and 21, sold to Chambers. The witness is not certain whether this change was effected by erasing lots 18 and 19 from the deed, or by destroying the old deed and making another for lots 20 and 21. He has no idea what became of this deed. The evidence, however, shows that L. H. Baines received all of the cash which was to be paid by Gray, and that he also received the two notes, for \$100 each, executed by Gray, secured by the vendor's lien on the four lots, and had disposed of both of them.

There is much confusion in the testimony with regard to the notes given by Gray to Stephens, and about the notes executed by Chambers to Gray for lots 20 and 21; those notes reciting that they are given in part payment of the purchase money of lots 18, 19, 20, and 21, and a vendor's lien is retained thereon. In the deed from Gray and wife to Chambers for lots 20 and 21, Chambers assumes the payment of the two notes given by Gray to Stephens, which, it is recited, "frees from all claim lots 18 and 19." The notes given by Chambers to Gray recite that they are given in part payment of lots 18, 19, 20, and 21. There is no claim by Chambers that he bought, or that there was conveyed, or intended to be conveyed, to him lots 18 and 19. D. C. Baines attempts to explain that this was a mistake, but his explanation merely befogs the transaction. Plaintiff testified that her husband gave her a deed to these lots, which she put in the bottom of her trunk, but which was taken from there without her knowledge; at least, when she looked for it, it could not be found. The force of her testimony is greatly weakened by her statement that she did not read the deed, but only saw that it was signed by Stephens and wife. Her testimony is very indefinite; but it does appear that Gray gave her the paper as a deed to these lots, and that she put it away. Whatever became of it is left in obscurity. In February, 1905, H. A. Gray executed to defendant a deed for the lots in controversy for a recited consideration of \$750 in cash. The deed is drawn to be signed by Mrs. Gray (plaintiff in error) also, and is dated January 31, 1905. It was signed and

acknowledged by Gray, but plaintiff refused to sign, whereupon defendant took a deed from Stephens and wife to the two lots. This deed is not in the record. Immediately thereafter Gray deserted his wife and children, ran away with another woman, and has not been heard of since. Defendant did not testify. We think this evidence raised the issue of the execution of the deed from Stephens to Gray. It may be very slight, and it may be that upon another trial some of the confusion hanging around this transaction may be cleared away; but as it stands now we think that the issue should have been submitted to the jury.

Unless the property had attached to it the character of homestead, the deed of Gray to Fussell effectually conveyed the title. Upon this issue, also, the evidence is unsatisfactory, but, on the whole, we think raises that issue. It is made clear by the testimony of Martindale and plaintiff in error that the property was bought for the purpose and with the intention of making it the homestead of Gray and wife. It appears that in a very short time thereafter a dwelling house was erected on the lots, which was rented by defendant to one Hinsley. Plaintiff testified that Gray told her that he was working on the house, and, when she was anxious to move into it, he told her that he was letting Fussell have the rents for some material he (Fussell) had let him have. The testimony of Mrs. Gray as to what her husband told her was hearsay; but it was admitted without objection, and is not without probative force. *Wigmore on Ev.* p. 35, § 10; *Id.* p. 37, § 11; *Daniel v. Harvin*, 10 Tex. Civ. App. 439, 81 S. W. 421. This evidence tended to show that by some arrangement with Fussell this house had been built by Gray, or for him, and that Gray's purpose was to make it his home, and that this was done immediately after the purchase of the lots. Taking the entire evidence, we think it raised the issue as to whether the lots had been dedicated as a homestead at the time Fussell bought. *Gardner v. Douglass*, 64 Tex. 77; *Barnes v. White*, 53 Tex. 631; *Moreland v. Barnhart*, 44 Tex. 290. Once a homestead, the husband could not, by a sale and abandonment in fraud of his wife, destroy her homestead rights. *Newman v. Farquhar*, 60 Tex. 644; *Smith v. Uzzell*, 56 Tex. 318.

We are of the opinion that the issues should have been submitted to the jury. This was necessary, if there was any evidence to support plaintiff's claim, no matter how weak its probative force, if it has the dignity of evidence at all. *Joske v. Irvine*, 91 Tex. 532, 44 S. W. 1059.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

**NACOGDOCHES & S. E. R. CO. v. BEENE.\***

(Court of Civil Appeals of Texas. Nov. 22, 1907. Rehearing Denied Dec. 19, 1907.)

**1. RAILROADS—NEGLIGENCE—INJURY TO PERSON ON TRACK—DISCOVERY OF PERIL—SUFFICIENCY OF EVIDENCE.**

In an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, evidence examined, and held to authorize a finding that the operatives of the engine discovered plaintiff's peril in time to have avoided the injury and negligently failed to prevent it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1856-1863.]

**2. APPEAL—HARMLESS ERROR.**

Where, in an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, the only ground of recovery submitted to the jury was based on the issue of discovered peril, the error, if any, in overruling exceptions to other portions of the petition, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4089-4105.]

**3. RAILROADS—NEGLIGENCE—INJURY TO PERSON ON TRACK—INSTRUCTIONS.**

In an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, the court instructed that, if defendant knew of plaintiff's peril in time to have avoided it, it was bound to use every means then in its power consistent with the safety of the engine and cars and the persons thereon to avoid striking plaintiff, and failure to use such means would render defendant liable, notwithstanding plaintiff was wrongfully on the track, and, if the jury believed that after plaintiff was discovered on the track defendant's servants negligently failed to use such effort to avoid the collision as they reasonably should and could have done after it became apparent that plaintiff would not get off the track, and plaintiff was injured through such fault of defendant, to find for plaintiff. Held, that the charge was not erroneous, as assuming that plaintiff was in actual peril and that defendant's servants discovered his peril in time to have stopped the train and avoided striking him, or as imposing a duty on defendant not imposed by law and requiring it to keep a lookout for trespassers on its track, or as instructing the jury to find for plaintiff if he was discovered on the track, whether his peril was discovered or not, or as instructing the jury to find for plaintiff if defendant's servants did everything in their power to avoid the collision after the peril was discovered, or as failing to require the jury to find that such negligence was the direct and proximate cause of the injury, or as imposing on defendant the duty to exercise reasonable care to ascertain plaintiff's presence on the track and that he would not get off, a degree of care not required by law, or as shifting the burden of proof on defendant to prove that it did not discover plaintiff's peril and that it used all the means at its command to avoid the collision, or because it did not define "discovered peril" or tell the jury when it would arise.

Appeal from District Court, Nacogdoches County; Jas. I. Perkins, Judge.

Action by Carl Beene, by next friend, against the Nacogdoches & Southeastern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ingraham, Middlebrook & Hodges, for appellant. Henderson & Ford and Blount & Garrison, for appellee.

**PLEASANTS, C. J.** This suit was brought by B. Beene, as next friend of his minor son, Carl Beene, against appellant, to recover damages for personal injuries to said Carl Beene alleged to have been caused by the negligence of the appellant. The petition alleges in substance that Carl Beene, while walking along the track of appellant, was run over by a train operated by appellant on said track, and one of his feet was thereby so mangled and crushed that it became necessary to have same amputated. The negligence alleged was the failure of the operatives of said train to ring the bell, or blow the whistle, or give any warning to said Carl Beene of the approach of the train, and, further, that the employes of appellant who were operating said train, after they discovered the peril of said Carl Beene, failed to use the care required of them by law to prevent his injury. The defendant answered by general demurrer, general denial, and plea of contributory negligence on the part of said Carl Beene, in that at the time of his injury he was a trespasser upon defendant's track, and, knowing that a train was due about that time, failed to use any care whatever to discover the approach of the train and avoid being struck thereby. The trial in the court below resulted in a verdict and judgment in favor of plaintiff in the sum of \$6,000.

At the time he was injured Carl Beene was an employe of the Haywood Lumber Company, which company operates a lumber mill in the city of Nacogdoches. The appellant railway company operates a railroad from the forest to said mill. The railroad track extends from a depot about 600 feet north of the mill in a southerly direction along by the mill into the forest for a distance of 10 or 12 miles. When the mill closed, about 6 o'clock in the evening of the day of the accident, Carl Beene, in company with a number of his co-employes, came out of the mill on the side by which appellant's track ran, and, getting upon said track, were walking thereon in a northerly direction to their homes. Just about this time a train on appellant's road, consisting of an engine and two empty flat cars, came in from the forest. This train blew the whistle for the crossing, which was some 300 or more feet south of the mill, and stopped there a sufficient time to allow a number of employes to get off. It then proceeded on up towards the depot for the purpose of getting on a side track and backing into a shed or roundhouse. After passing the mill going north the track ran under a dolly way in which there was a drawbridge. The evidence shows that the whistle of the engine was blown several times before reaching this drawbridge. After passing the drawbridge the track was straight, and any person walking thereon would be in plain view of the operatives of the engine. The engine was equipped with good brakes, which were in good condition, and the train could have been stopped in a few feet by the

\*Writ of error denied by Supreme Court Jan. 22, 1908.



application of the brakes. The circumstances under which the accident occurred are thus detailed by the witnesses:

J. R. Stevens testified for the plaintiff as follows: "The train whistled at the commissary for the drawbridge, and the bridge was up when we got there. It whistled again just before it struck Mr. Beene. It blew three short jerks. Carl Beene was about 20 or 25, and may be 30, feet from the engine when it whistled. It could not have been over that, and I do not think under 10 feet. I have had some experience running an engine. An engine running 12 miles an hour, with air brakes and emergency applied at once, would not go over 3 or 10 feet, say 10 feet, because, an engine running 12 miles an hour with air fixtures, you can stop her by the time she turns over once. After the engine struck Beene, the rear end of the engine went past him 5 or 6 feet. It went about the length of the engine and tender, which is about 33 feet."

G. R. Feltner, in charge of the engine, testified for the defendant: "I first discovered Carl Beene on the track ahead of the engine about 10 rail lengths. There were 6, 8, or a dozen more persons, some ahead of him, some behind him. All of the people stepped off the track except Carl Beene. I discovered that Carl Beene was in danger of being struck by the locomotive when I got near him. When I discovered his danger, I would say that I was about 3 rail lengths—90 feet—from him. I blew the whistle. When I blew the whistle he was walking down the track, and as the whistle blew he stepped on the opposite side from me. I thought he had gotten off, and the next thing I knew the fireman hollered, 'Look out!' and I thought the boy was off. When the fireman hollered, 'Look out!' I knew there was something wrong, and I applied the air as quick as I could. At the time the fireman hollered to me I was sitting erect on the seat in front of the engine, looking right down the track. The engine was not working steam, but was running by its own gravity. At the time I struck Carl Beene I was running slow, about 4 miles an hour. After I discovered plaintiff, in order to stop the engine, all I had to do was to close my brake lever—just move it—as I usually hold the lever pretty near all the time when the engine is running. I think I had my hand on the lever at the time of the injury. I was within 120 feet of the place that I would have brought the engine to a standstill when it struck the appellee. I was about 700 yards from the place of the injury when I first blew the whistle coming in that evening. The next time I blew the whistle I was between the drawbridge and the commissary, which was about 350 yards from where Beene was injured. When I got to the drawbridge I saw him walking down the track. Men walked up and down the track there a great deal. It is commonly used by the employés. Carl Beene was probably 3 or 4 rail

lengths from me after all the rest had gotten off the track, and Carl Beene was 3 or 4 rail lengths of me when I first discovered he was in a perilous and dangerous condition. I realized that Carl Beene was in a perilous and dangerous condition something like 90 or 120 feet before I struck him. I could have stopped the train after I discovered Carl Beene's perilous and dangerous condition, and I could have stopped it in plenty of time to have kept from striking him after I realized his dangerous condition. After I first realized the perilous and dangerous condition he was in, I kept my eye on him all the time until he passed out of my sight. I had my eye on him when I blew the whistle. I blew the whistle for the purpose of warning him to get off. I was looking right at him at the time when I blew the whistle. He did not turn around to look, but stepped over to the other side out of my sight. He was 90 or 120 feet away when I blew the whistle. There was a path in the middle of the track, and he was in it when the whistle blew, 90 or 120 feet from him. The rails are 4 feet  $8\frac{1}{2}$  inches wide. There was an open window in front of me, and I could see him plainly walking in the middle of the track for a certain distance from the engine; but when I got close I could not, for the position of the engine. I saw him within 30 or 60 feet of the engine after I blew the whistle. Q. After you realized his position, did you blow the whistle any more except that time? A. Not at the time. When the fireman hollered, I blew four or five short blasts of the whistle. Q. At the time you first blew the whistle did you apply the emergency air? A. No, sir. Q. How much further, after you blew the whistle, had you gone before you applied the air? A. I don't know. A short distance. Q. You must have gone 90 or 100 feet. A. No; 90 feet would put me right close to him. The train was running about 4 miles an hour. I never saw the appellee look around to see if we were coming. I don't know how close I was to him when I applied the emergency air. I could not see how close I was to him, as he was out of my view. Q. If he was walking in the center of the track, and stepped to the left, so you couldn't see him, that would make him plainer to Mr. Hill? A. Yes, sir. Q. He could see him all the time? A. I suppose he could. Q. Mr. Hill could have known that he did not get off the track when 120 feet from him? A. I suppose he could. There was nothing to prevent him from seeing from the position he occupied. Mr. Hill could have seen him perfectly plain. He did not tell me that he had not gotten off the track, and the first I heard was to stop—'Look out!' I was watching the track. That was my duty. I knew that people were walking along the track, and saw people still further ahead of Carl Beene. I think all those ahead of Carl Beene had gotten off the track when he was struck. I had the window open, looking out the open window down the track.

It is 12 or 14 feet from the window to the end of the engine. Q. A man on a straight track, if he stays between the rails, he can't possibly get out of the view of the engineer and fireman? A. If he stays in the middle of the track, he would be out of view of both. Of course, if he stepped to one side or the other, he would not. A man in the middle of the track would be out of my view something like two rail lengths. Q. How far would the train run in the time it would take a man to get off the track? A. Possibly a rail's length, or a half a rail's length, at that speed, the best I could judge."

The witness Munsell testified for the plaintiff as follows: "I was working for the Haywood Lumber Company. When the engineer first blew the whistle, before striking Carl Beene, he was 75 or 100 feet from him. He blew 6 or 8 short blasts. Carl Beene was walking right down the center of the track when the whistle was blown. When he was struck he was struck a little to the left coming this way—to the west; but I could not say how far he walked that way. I did not notice particular whether he continued to walk right down the center of the track, or played from one side to the other. When the train whistled the other men that were walking on the track stepped off of the track. I was right on the track, sitting down, waiting for the train to pass. I was sitting on the left-hand side; the same side that Carl Beene was struck on. When I saw that Carl Beene was going to be struck by the engine, I hollered and did everything else trying to notify him that the train was coming, and he never paid any attention to it. I never was able to get his attention. His face was turned towards the left, looking towards the Texas & New Orleans train. When I first saw Carl Beene he was walking the center of the track. He changed a little to the left just before the train struck him. He just stepped a little to the left, and was coming on down the track. When he stepped to the left the whistle had already blown. Q. How long after the whistle had blown before he stepped to the left? A. Just immediately. Q. You say there were 6 or 8 blasts? A. Yes, sir. Q. And just at the instant he stepped 6 or 8 inches to the left? A. Yes, sir. Q. How far did he walk from the time the whistle blew till he was struck? A. About 6 feet, I think. Q. When did you holler at him? A. When I saw he was in danger when the whistle commenced blowing. Q. And you commenced hollering right then? A. Yes, sir. Q. Did he pay any attention to your hollering? A. No, sir. Just about the time the whistle was blowing I saw he was in danger, and was not going to get off, and tried to get him off. A man sitting in the cab of the engine could see a person on the track 25 or 30 feet from the engine. When I first noticed Carl Beene he was on the east side. The whistle blew, and then he started diagonally across and got

close to the west rail; but before he got to the track the engine struck him. I saw George Franklin, 'Look yonder, they are going to hit that boy!'—and about that time he hit him. The engine ran about 200 feet before it began to whistle."

R. B. Hill, fireman, testified as follows: "I was on the engine, firing it, that ran over Carl Beene. When I first noticed him he was about 400 or 500 feet from him. When we struck Carl Beene we would have been about 40 feet farther before we could have stopped. The engine was not working on steam. The throttle was shut off and the engine was running down hill. There were a number of parties walking down the track. I was ringing the bell, and the men were to get off the track along the line, and I saw Carl Beene. There was nothing else on the track besides ringing the bell until we got close to him and the engineer sounded the whistle. We were some 10 or 12 or 15 feet, I presume, something like that, when the engineer blew the whistle. We were running about 5 miles an hour. When the engineer commenced blowing the whistle I could see Carl Beene, but after we got right close to him, he walked either one side or the other so he would go out of our sight. The head of the engine cut off the view. He stepped a little to the left from me, and I could not see him, so I looked over at the engineer to see whether he had discovered him, and I saw from his appearance that he had not, and I looked around and there he was in about 6 feet of us. I hollered to the engineer to look out, but he was, and he tried to stop, but it was too late. The engine ran about 50 or 60 feet after we struck Carl Beene before we could stop. As soon as the engineer blew the whistle I saw immediately that Carl Beene did not hear it, and I knew he did not have much time to get off, and saw that he was not paying any attention to us or did not hear us. When Carl Beene went out of our sight, I thought he had stepped off to the other side, and did not know any better until I saw him on my side again. I saw Carl Beene walking down the track about 400 feet from us, after all the rest had stepped off the track. I kept ringing the bell all that time, and continued to ring the bell he was struck. I watched him all the time and kept my eye on him continuously about 400 feet, and saw him walking down the track. He at no time turned round to look back to see if we were coming. He looked his back to us all the time. I saw, from the way he was walking and not looking back, that he had not discovered or seen us. He was 15 or 20 feet when the engineer blew the whistle. I had spoken to the engineer before he blew the whistle about him being on the track. When we first saw him, he was 400 feet, both of us made mention of it, and he had gone a little ways after the engine blew the whistle before I hollered to him to look out. When the whistle blew

stepped a little east. This put him out of my sight, but would put him in view of the engineer. When he stepped to the east he would be in the engineer's view, and if he stepped to the west in my view. I hollowed to the engineer to call his attention to the fact that the boy was still on the track. The engine, in dry weather, when the air is applied, would stop right at once. It was a dry day on the evening Carl Beene was struck. I saw at the time that he did not know that we were coming and that he was going to be struck. It was a usual, everyday occurrence for the employes to use the track. We have instructions, when we come into the yard, to run slow and to be careful. The engineer told me that he could not see the boy after he blew the whistle, and that he did not know whether he had gotten off the track or not, but supposed he had, and that, after he had discovered him within about 20 feet, he thought he had gotten off the track until I hollowed."

We shall not discuss categorically nor in detail the numerous assignments of error presented in appellant's brief. The propositions submitted under many of these assignments are legally sound; but, in view of the fact that only the issue of discovered peril was submitted to the jury as ground for recovery, they are abstract and immaterial, and it would serve no useful purpose to discuss them. We think the evidence before set out authorizes the finding that the operatives of appellant's train which caused the injury to Carl Beene discovered his peril in time to have avoided injuring him by use of the means at their command, and negligently failed to make use of such means to prevent said injury. This issue was fully and fairly submitted to the jury by the charge of the court, and no error is shown in the proceedings which would authorize this court to set aside the verdict. That the train could have been readily stopped in time to have avoided the injury to appellee after his peril was discovered by the engineer and the fireman is conclusively shown by the testimony before set out. It is equally clear that no effort was made to stop it until it was too late to avoid striking the appellee. The engineer seeks to excuse his nonaction in this regard by the statement that, after he blew the whistle to warn appellee of his danger, he (appellee) changed his course toward the opposite, or fireman's, side of the track, and the witness supposed he had gotten off the track, as he lost sight of him. The fireman contradicts this statement, and says the appellee, after the warning whistle was blown, got from the center of the track over on the engineer's side, and out of his (the fireman's) sight. Under this state of the evidence the jury were warranted in concluding that both the fireman and the engineer were negligent in failing, after having, by their own admission, discovered that appellee was not aware of the approach of the train, to stop the

train without knowing, or having sufficient ground for believing, that appellee had heard the warning and would get off the track. These conclusions dispose of the assignments assailing the verdict on the ground that it is not supported by the evidence, and each of said assignments is overruled.

There is no merit in the assignment complaining of the refusal of the court to sustain a general demurrer to the petition. The contention under this assignment is that the petition shows upon its face that appellee was guilty of contributory negligence in being upon appellant's track and in failing to use any care to discover the approaching train, and fails to allege any facts which would justify or excuse such negligence on his part. It may be conceded that an exception to that portion of the petition which sought recovery on the ground of negligence on the part of the operatives of the train in failing to give appellee warning of the approach of the train should have been sustained on the ground urged under this assignment; but said exception was not valid as to the ground of recovery based on the alleged failure of the operatives of the train to use proper care to prevent the injury after they had discovered appellee's peril, and the general demurrer was properly overruled. The only ground of recovery submitted to the jury being based upon the issue of discovered peril, if any error was committed by the court in overruling exceptions to other portions of the petition, such error was harmless.

The tenth assignment of error is as follows: "The court erred in the following paragraph of the charge, to wit: 'If the defendant, by its servants in charge of the engine, knew of Carl Beene's peril in time to have avoided the same, such knowledge imposed upon it the duty of using every means then within its power, consistent with the safety of the engine and cars and the persons thereon, to avoid running him down or striking him, and failure to use such means would render the defendant liable, notwithstanding plaintiff may have been wrongfully on defendant's track. Therefore, if you believe from a preponderance of the evidence that after Carl Beene was discovered on the track in front of the approaching engine, defendant's servants in charge of the train negligently failed to use such care, attention, and skill and effort to stop or check up the train and avoid the collision with plaintiff as they reasonably should and could have done after it reasonably became apparent to them that plaintiff would not get off the track, and if plaintiff received some or all of the injuries complained of in his petition through such fault of defendant's said servants, then you will find for the plaintiff'—for the reasons: (1) It assumes plaintiff was in actual peril, and that the servants in charge of defendant's train discovered his peril in time to have stopped the train and

avoided striking him. (2) It imposed a duty on defendant not imposed by law, and required it to keep a lookout for trespassers on its track. (3) It instructs the jury to find for plaintiff, if plaintiff was discovered on its track in front of its approaching train, whether his peril was discovered or not. (4) It instructs the jury to find for the plaintiff, if the servants in charge did everything in their power to avoid the collision after the peril was discovered. (5) It does not require that the jury find such negligence was the direct and proximate cause of the injury. (6) It imposes the duty on defendant to exercise reasonable care to ascertain plaintiff's being on the track and that he would not get off, a degree of care not required or imposed by law. (7) It shifts the burden of proof upon defendant to prove it did not discover plaintiff's peril and that it did use all means and agencies at their command to avoid the collision. (8) It does not define discovered peril, or tell the jury when it would arise." We think none of appellant's objections to this charge should be sustained. The charge is, in substance, the same as the one approved by this court in the case of *Railway Company v. Munn*, 102 S. W. 442, and, we think, correctly applied the law to the facts in evidence in this case.

We have duly considered all of the assignments of error presented in appellant's brief, and we think none of them should be sustained, and that the judgment of the court below should be affirmed.

Affirmed.

#### BEAUMONT TRACTION CO. v. BROCK et al.\*

(Court of Civil Appeals of Texas. Dec. 4, 1907.  
Rehearing Denied Dec. 19, 1907.)

##### 1. STREET RAILROADS—USE OF STREETS—LICENSE OR CONSENT OF MUNICIPALITY—NATURE AND EXTENT OF RIGHTS IN STREETS—ERECTION OF ELECTRIC WIRE POLES.

Where, at the time of the adoption of a city ordinance conferring on a street railway authority to use certain streets upon which to construct a street railway system, it was not known where the railway's power house would be located, and the ordinance did not require the railway to construct the plant on any of the streets over which such use was granted, the express authority carried with it the right to make use of such other streets for the transmission of electric power as was essential to the enjoyment of the authority expressly granted.

##### 2. SAME.

Where a city ordinance granted a street railway authority to erect a system of overhead wires for the purpose of conducting electricity to operate motors, and "to properly cross from such electric current generating station as may be required \* \* \* they are hereby authorized to erect poles to place the wires upon," etc., and at the time the ordinance was adopted the location of the generating station had not been determined, the railway was authorized to erect its wires over such streets as might be required to properly conduct the current from the power plant to the motors, although the streets so selected were not any of those designated, for the construction of the railway system.

\*Writ of error denied by Supreme Court.

##### 3. MUNICIPAL CORPORATIONS—USE OF STREETS—ELECTRIC WIRES.

A city has the right to permit the use of its streets for the erection of poles and feed wires for use in connection with a street railway system.

[Ed. Note.—For cases in point, see *Cent. & Co.*, vol. 38, *Municipal Corporations*, §§ 757, 14.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by A. B. Brock and another against the Beaumont Traction Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Crook, Da Ponte & Lawhon, for appellants.  
J. S. Wheless, for appellees.

McMEANS, J. This was a suit by appellants, in which an injunction was sought restraining appellant from digging holes, erecting poles upon which to bring an electric current feed wire on the sidewalk in front of their respective premises fronting Avenue C in the city of Beaumont. Upon the original petition an order was made authorizing a temporary writ to the effect that the case be tried on an amended petition in which it was alleged that the appellants were the owners in severalty of certain lots on Avenue C, a public highway in the city of Beaumont, upon which they resided, and that appellant was a street railway company and was digging many holes in the sidewalk in front of their property, and setting up poles therein for the purpose of carrying the electric current from its power house to its electric cars, without authority to do from the city of Beaumont. Appellant answered by general denial, and specially denied the equities of appellees' petition, pleaded, further, that at the time of the issuance of the temporary writ it was lawfully constructing its feed wire pursuant to authority granted by an ordinance of the city of Beaumont. The case was tried on the agreed statement of facts, and resulted in judgment in favor of appellees perpetually restraining appellant from digging the holes and placing the poles for the erection of feed wire, from which judgment appellant duly perfected this appeal.

We find the following facts:

The Beaumont Traction Company is a corporation owning and operating a street railway road in the city of Beaumont, and propelling its cars by electricity, using the overhead trolley system. This system consists of an electric current generating station, or power house, where the electric current is generated, and is carried thence by feed wires, or feeders, strung on poles erected in the earth, to the trolley wires, and thence through the trolley wires to the motors with which each car is equipped. These feed wires are necessary to carry the power from the power house to the cars.

By a valid and regular ordinance, approved October 7, 1902, the city council of Beaumont

anted a franchise for the construction of electric street railroad to Wm. L. Thompson and others on and over certain designated streets, including Park street, from Ma and Ector streets, the south boundary of the city, in a general northerly direction to Emmett avenue. This franchise was accepted by the grantees, who organized themselves into a corporation and proceeded to build the road as therein provided, and subsequently all of the rights so acquired were transferred to appellant, Beaumont Traction Company, by the corporation organized by the original grantees, which transfer was approved and confirmed by the city council of the city of Beaumont, and the Beaumont Traction Company is now the owner of all the franchises, rights, and privileges granted to Wm. L. Thompson and others by Ordinance No. 81. About the 17th day of April, 1906, the city council of Beaumont passed a valid ordinance granting to the Beaumont Traction Company a franchise to build and operate its road over certain additional streets, including Royal street, and under this authority the company completed the construction of the Royal Street line about the 15th day of March, 1907, and has been operating cars thereon continuously ever since.

The electric current generating station, or power house, was built after the passage and acceptance of Ordinance No. 81, and at the time the ordinance was passed and accepted the site for the power house had not been selected, and it was not known just where the power house would have to run in order to carry the power from the power house to the trolley cars. The location finally selected was the intersection of Crockett street and Avenue C, where the power house was built and still stands, and is not on or in proximity to any part of the line of track; but the current is carried on a feed wire erected on poles set in the ground as is proposed to be done on Avenue C, east on Crockett street to Orleans street, where it connects with the trolley wire, and the power is thence distributed over the various lines, including Park and Royal street lines. The distance from the point where the feed wire connects with the trolley wire at Crockett and Orleans street to the extreme south end of the Park Street line is about three miles, and to the Royal Street line about one mile.

The defendant has never constructed or operated its road on that part of Avenue C on which plaintiffs' property abuts, and does not intend to do so, and has no franchise so to do; nor has it obtained the consent of the city of Beaumont to construct and erect its feed wires and poles along Avenue C in front of plaintiffs' premises, further than it is given that power and right by section 6 of Ordinance No. 81. Neither has the defendant ever built a track from its power house eastwardly on Crockett street, where its feed wire

runs, to Orleans street; nor has it ever had any franchise or right so to do, other than is granted by said ordinances hereto attached.

About the time the injunction was sued out in this cause the defendant was engaged in extending its feed wire from the intersection of College street and Avenue C in a southeasterly direction past plaintiffs' premises to Royal street, and thence to the Park Street line, and for the purpose of setting up necessary poles on which to carry the wire had dug several holes in the sidewalk in front of the plaintiffs' premises, and in some of the holes had set up the poles, and was preparing to place the others and fill in the dirt when stopped by the injunction. The route as selected is the direct route from the power house by way of the streets; a good deal of the country intervening not having ever been cut up into lots and blocks and streets dedicated.

The route of the Park Street line, so far as the same is within the city limits, is prescribed by Ordinance No. 81. Its terminus is the Beaumont Driving Park, which is a place of public amusement, where fairs, races, ball games, and other public amusements are often held, and on such occasions the same is frequented by great crowds of the residents of Beaumont, much the greater portion of whom depend upon the street railroad for transportation to and fro. Ordinarily 2 cars are operated upon this line, but on occasions mentioned above it is necessary to operate 12 or 15 extra cars on this line, and the construction of the proposed new feed line along Avenue C in front of plaintiffs' premises will much increase the power available for the operation of the Park and Royal Street lines, and the operation of the cars on those streets will be facilitated, and the service much improved and rendered more rapid and efficient, and first-class service will be given as required by defendant's franchise.

The city of Beaumont is a municipal corporation chartered by special act of the Legislature, and has such power over its streets, including Avenue C, as is possessed by municipal corporations. By section 6 of Ordinance No. 81 it is provided: "That the grantees herein, and their assigns, be and are hereby authorized to erect a system of overhead wires for the purpose of conducting the electric current to operate motors and to properly cross from such electric current generating station as may be required, and to use the rails and earth for returning circuit, or may use metallic return circuits for the purpose; that they be and are hereby authorized to erect poles to place the wires upon," etc. By Ordinance No. 81 the city of Beaumont conferred on appellant the authority to use certain designated streets upon and over which to construct and operate its electric street railway system. At the time of the adoption of the ordinance it was not known where its electric generating current station or power house would be located, and the

ordinance did not require of appellant that it construct the plant on any of the streets over which such use was granted, but left such location to the determination of the traction company. The express authority carried with it the right to make such use of other streets as was essential to the enjoyment of the authority expressly granted; and, when the Traction Company constructed its power plant at a point remote from any part of the line of its railway, it had the implied right by virtue of the express authority to connect its trolley wires and electric generating plant by properly constructed feed wires, even when to do so streets other than those named necessarily had to be used for that purpose.

But we are not remitted to the question of the implied grant alone. Section 6 of Ordinance No. 81 expressly provides that the grantees should have the authority to erect a system of overhead wires for the purpose of conducting the electric current to operate motors, and "to properly cross from such electric current generating station (power house) as may be required; \* \* \* that they be and are hereby authorized to erect poles to place the wires upon." But for the concluding sentence above quoted, we might conclude that the authority to erect the overhead wires to conduct the current to the motors referred to the trolley wires by which the energy was imparted to the motors through the trolleys; but the language "and to properly cross from such electric generating station as may be required, \* \* \* and to erect poles to place the wires upon," forbids any such construction. In view of the fact that at the time of the adoption of the ordinance the site for the plant had not been selected, and that it might be located off the line of the railway, the language quoted could have no other meaning than it was intended thereby to grant to the traction company the right to erect its feed wires over such streets as might be required to properly conduct the current from the power plant to the motors, although the streets so selected were not any of those designated for the construction and operation of the railway system. It is no answer to this construction to say that feed wires had already been constructed and were in operation in pursuance of the authority referred to, and that the erection of the feed wire which was enjoined would have imposed an additional servitude upon the street not authorized by the ordinance. The language of the ordinance is sufficiently broad to authorize the erection of such wires for conducting the current from the power plant to the motors and to cross from such power plant "as may be required." It was evidently contemplated that, as the city grew in population and territory, traffic would become heavier, necessitating an extension of the railway system and the operation of a greater number of cars, and that more than one feed wire might become nec-

essary to transmit the power. If not, why were the words "as may be required" used in that connection? As to whether other such wires were required, the traction company or the city could determine, and the traction company having determined that the necessity for the additional wire existed, and having undertaken to erect the same in a proper manner, the appellees had no right to interfere. The city had the right to permit the use of its streets for the placing of poles and erection of feed wires, and, having by the ordinance granted such privilege to appellant, the appellees have no right to complain. *Gray v. Dallas, etc., Ry. Co.*, 13 Tex. Civ. App. 158, 36 S. W. 352; *Rosenthal v. Railway Co.*, 79 Tex. 327, 15 S. W. 268; *Aycock v. San Antonio B. Ass'n*, 26 Tex. Civ. App. 341, 63 S. W. 953.

It follows, therefore, that the court erred in perpetuating the injunction, and in not dissolving the temporary injunction as prayed for by appellant. For the error indicated, the judgment of the district court is reversed, and judgment here rendered in favor of appellant dissolving the injunction; and it is so ordered.

Reversed and rendered.

#### NIDAY v. COCHRAN.

(Court of Civil Appeals of Texas. Dec. 18, 1907.)

#### APPEAL—BRIEFS—FILING—TIME—DISMISSAL.

Where appellant failed to file his briefs within the time prescribed by Rev. St. 1895, arts. 1022, 1417, and the delay necessitated a postponement of the submission of the cause in its regular order, appellee being entitled to have the cause submitted in its regular order and to 20 days after notice of the filing of appellant's brief with the district clerk within which to file his own brief, appellee was entitled to a dismissal of the appeal; the only excuse offered being that appellant's counsel was under a mistaken impression that there had been an agreement between his co-counsel and counsel for appellee concerning the filing of briefs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3108-3110.]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by J. B. Cochran against J. E. Niday, guardian ad litem of Alma Mellott and others. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Granted.

See 93 S. W. 1027.

J. E. Niday and C. L. Bradley, for appellant. Ewing & Ring and Tharp & Whitehead, for appellee.

REESE, J. This is an appeal from a judgment of the district court of Harris county. Appellee has filed a motion to dismiss the appeal on account of failure of appellant to file briefs as required by law. The transcript was filed in this court on March 8, 1907, being two days before the expiration of the



allowed by law. No briefs were filed in the district court. On October 24th appellant filed briefs in this court, but no notice thereof was given to appellee or his counsel nor did they have knowledge thereof until November 16th, when they were furnished with a copy. The case was set for submission in its regular order November 21st. Appellant's motion to dismiss was filed November 16th. In his motion appellee sets out the facts with regard to the failure to file briefs, the want of notice, etc., and alleges that on account of other business it will be impossible for his counsel to prepare and file briefs in this cause on or before the day set for submission, or at any time for an indefinite period thereafter. The only excuse offered by appellant's counsel for failure to file briefs required by law is that he was under the impression that there had been an agreement between his co-counsel and counsel for appellee with regard to filing briefs. He admits that no such agreement was in fact made, but suggests that submission be postponed in order that appellee's counsel may have time to prepare and file briefs. Appellant was required to file with the district clerk a copy of his brief 5 days before the time of filing of the transcript in this case. It is made the duty of the district clerk forthwith to give notice of such filing to appellee or his attorney of record, who is required, in 20 days after such notice, to file a copy of his brief with the clerk of the court below, and with the clerk of the Court of Civil Appeals four copies. Article 1022, Rev. St. 1895. It is further provided that causes in this court shall be docketed in the order of their filing, and that they shall be set for submission in the order in which they are docketed, "unless continued to some future time for good cause shown." Article 1022, Rev. St. 1895. Under these provisions of the statute appellee has two substantial rights: (1) To have the cause submitted in its regular order; and (2) to be allowed 20 days after notice of the filing of appellant's brief with the district clerk with which to prepare and file his own brief. Appellant has been no agreement to waive any of these requirements. To overrule his motion to dismiss in the present case will inevitably require him to yield one of these substantial rights. We will have either to postpone the submission or hear and determine the cause without a brief for appellee. Appellant could not have been expected to prepare and file briefs in this court within the limited time from November 16th, when he first received a copy of appellant's briefs filed in this court, and the 21st of November, the day set for submission. We do not think the allegations of appellant's answer to the motion present good cause for the postponement of the submission, thus impairing the substantial right of appellee to have the cause submitted in its regular order. Appellant's excuse for failure to file briefs as

required cannot be considered sufficient to authorize such action.

We are not unmindful of what is said in *San Antonio & Aransas Pass Ry. Co. v. Holden*, 93 Tex. 212, 54 S. W. 751. It has been the rule in this court to refuse to dismiss for failure on the part of appellant to file briefs in strict compliance with the rules, where a relaxation of the rules would not delay a submission of the case, and there was ample time after the filing to allow appellee to prepare and file briefs before submission. This is not such a case. The following authorities will show that our action in dismissing this appeal is in entire harmony with the ruling of other Courts of Civil Appeals, sanctioned by the Supreme Court, as shown by refusal of writ of error in some of the cases referred to: *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548; *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 200; *Booher v. Anderson*, 35 Tex. Civ. App. 436, 80 S. W. 385; *Railway v. Hall*, 32 Tex. Civ. App. 470, 74 S. W. 778; *Elkins v. Kempner* (Tex. Civ. App.) 66 S. W. 576; *Dodd v. Pressly* (Tex. Civ. App.) 81 S. W. 811; *Railway Co. v. Brock* (Tex. Civ. App.) 77 S. W. 953; *Nigro v. Hodges* (Tex. Civ. App.) 85 S. W. 1169. For example of a case, in which strict compliance with the rule will not be required, see *Deaton v. Feazle* (Tex. Civ. App.) 85 S. W. 1167.

The motion to dismiss the appeal must be sustained.

Dismissed.

## HOUSTON ELECTRIC CO. v. GREEN.

(Court of Civil Appeals of Texas. Dec. 16, 1907.)

### 1. DAMAGES—INSTRUCTION—FAILURE TO LIMIT AMOUNT OF RECOVERY.

In a personal injury case, plaintiff alleged that as a result of her injuries she had incurred liability for necessary medical aid of the reasonable value of \$100. She had been attended by three physicians, one of whom testified that his services were worth \$150, and she still owed the other doctors, though she did not know how much. The jury were instructed that they might, in estimating her damages, take into consideration "such reasonable sums as she may have necessarily incurred liability for on account of medical attention in attempting a cure. An unitemized verdict was returned for plaintiff. *Held*, that the instruction was erroneous, since it did not limit the recovery for medical attention to the sum asked in the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 554.]

### 2. APPEAL—DETERMINATION—DAMAGES—REMISSION OF EXCESS—CURING ERRONEOUS INSTRUCTION.

A remittitur of the difference between the amount claimed in the petition and the value which the testifying physician placed upon his services would not cure the error, since plaintiff was liable to others for medical services; and, as the verdict was not itemized, it was impossible to tell how much the jury allowed for medical attention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4466.]

### 3. TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a personal injury case, plaintiff alleged that she was injured on August 31st, and she and her witness testified that she was hurt on the forenoon of that day while boarding a combination car on a certain line of defendant's railway. Defendant offered testimony that on that date it operated but one combination car on that line, and the conductor on that car testified that no such accident occurred on that day. *Held*, that an instruction that if plaintiff was injured as the proximate result of negligence of defendant's employes in charge of the car, so as to render defendant liable, it was immaterial as affecting plaintiff's right to recover whether she was injured on the exact day alleged or not, while perhaps not reversible error, might be criticised as on the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

### 4. DAMAGES—PERSONAL INJURIES—AGGRAVATION OF PREVIOUS DISEASE.

A person negligently injured while boarding a street car, though physically unsound before the accident, is entitled to damages for such injury as aggravated her previously diseased condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 42.]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Anna Green against the Houston Electric Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Baker, Botta, Parker & Garwood and C. R. Wharton, for appellant. Guynes & Colgin and Ewing & Ring, for appellee.

McMEANS, J. Appellee, Anna Green, sued the appellant Houston Electric Company for damages for personal injuries alleged to have been sustained by her, through the negligence of appellant, while attempting to board one of its street cars in the city of Houston. She alleged, among other things, that as the result of her injuries she had incurred liability for necessary medical aid and attention, in attempting a cure, of the reasonable value of \$100. The court, in its charge, informed the jury that in the event the jury found for her, then they might, in estimating her damages, take into consideration, among other things, "such reasonable sums as she may necessarily have incurred liability for on account of medical attention in attempting a cure." By its first and second assignments of error appellant complains of this charge, and asserts the proposition that the court should have limited the amount of the recovery for medical attention to \$100, the sum asked in plaintiff's petition. As to the liability incurred by appellee for medical attention, the witness, Dr. Goss, testified that he had attended Mrs. Green, and that the charges for his services should be about \$150, which was the customary and usual charge. Appellee testified that Drs. Wood, Boyd, and Goss had all treated her, and, further, that she still owed her doctors, and that she owed them so much

that she was afraid she would never pay them; that she sent for Dr. Wood the next day after she was injured, and he treated her about six months; that she did not know how often he came to see her; that Dr. Goss treated her and that Dr. Boyd examined her several times; that the last medical treatment she had was given her by Dr. Boyd, which was about two years before the trial. The charge permitted the jury to allow such sum as they might find appellee had incurred, which might have been greatly in excess of \$100. The assignments are sustained. Appellee admits the error, but insists that positive error in the charge was only to the extent of \$50, as there was no evidence to authorize a recovery for a greater amount than claimed in the petition except in that sum, and that amount plaintiff, in her brief, remits. If there had been no testimony other than that of Dr. Goss, above referred to, the remittitur would cure the error. *City of Dallas v. Jones*, 93 Tex. 47, 49 S. W. 577, 53 S. W. 377. The plaintiff testified that she had been treated by two doctors other than Dr. Goss, and that one of them had treated her for about six months, and that the other had examined her several times; that she did not know how much she owed them, and was afraid to ask what her bills were. The jury had before them the statement of Dr. Goss that the value of his services was \$150, and they may have concluded that if his attention was worth that much the services of Drs. Wood and Boyd were equally or more valuable. It cannot be said, therefore, that the jury, in estimating the amount of appellee's damages, did not take into consideration Mrs. Green's liability to others than Dr. Goss for medical attention. The verdict not having been itemized, we are unable to determine the amount allowed by the jury for medical attention, and the judgment, therefore, must be reversed, and the cause remanded. *Railway Co. v. Pawkett*, 28 Tex. Civ. App. 583, 68 S. W. 327; *Railway Co. v. Shaughnessy* (Tex. Civ. App.) 81 S. W. 1026; *Martin Brown Co. v. Pool* (Tex. Civ. App.) 40 S. W. 820; *Railway Co. v. Durrett*, 24 Tex. Civ. App. 103, 58 S. W. 188.

The court instructed the jury as follows: "The law is that if plaintiff was injured as the proximate result of negligence of defendant's employes in charge of the car in question, so as to render defendant liable, as submitted in these instructions, it is immaterial, as concerning plaintiff's right to recover, whether she was injured on the exact day alleged or not." Appellant, contending that this charge is upon the weight of the evidence, challenges its correctness by the third assignment of error. The petition alleges that plaintiff was injured on 31st day of August, 1903. Plaintiff and her witness, Mrs. Finch, testified that plaintiff was hurt on the forenoon of that date, while attempting to board a combination car on the Houston Heights line of defendant's street railway.



defendant offered testimony to the effect that on said date it operated but one combination car on that line, and the conductor of the car testified that no such accident as alleged by plaintiff and Mrs. Finch occurred on that day. Ordinarily such a charge would be harmless and in some cases proper; but under the peculiar facts of this case it might have had the effect of lessening the weight of the testimony offered by defendant to the effect that no such accident as alleged by plaintiff happened. If the jury believed that such an accident did not occur on that date, then the entire evidence of plaintiff upon that issue would be given no weight, and would be worthless to none; but, since the plaintiff fixed the date in her petition and offered positive testimony that it was the correct date, then the question as to whether she and her witnesses were to be believed, or the testimony offered by defendant that no such accident happened on that date was to be believed, has become important, and, while we have not prepared to say that we would reverse the judgment because of the charge being given, we are not clear that it is not subject to the criticism that it is upon the weight of the evidence.

Appellant's fourth and fifth assignments are as follows: "The court erred in refusing special charge No. 2, requested by defendant, which is as follows: 'If you find from the evidence that the plaintiff, Anna Green, received an injury on defendant's street car on the 31st day of August, 1903, and that this injury was caused by the negligence of the defendant company, or its agents and employees, but yet, if you also find that prior to the time of receiving this injury the plaintiff, Anna Green, was in a diseased condition physically, and that this injury merely had the effect of increasing and aggravating her already existing diseased condition, then your verdict will be for the defendant.' The court erred in refusing special charge No. 3, requested by the defendant, which was as follows: 'Evidence has been introduced tending to show that the plaintiff, Anna Green, is suffering from serious nervous troubles, and that her nervous system is seriously impaired.'"

She charges in her petition that this nervous trouble was caused by an injury received by the hands of the defendant on the 31st day of August, 1903. If, however, you find from the evidence that she suffered from this nervous trouble and nervous condition, prior to the 31st day of August, 1903, then she cannot recover because of any injury to her nervous system caused by the accident of the 31st day of August, 1903, even though there was such an accident.'" The positions presented in these assignments are decided adversely to appellant's contention on the former appeal of this case (80 W. 442), and we see no reason for changing our conclusions therein expressed. We might add, however, that since the former decision was made appellee has amended

her petition so that, as amended, it alleges, as concerns her injury, "whereby she sustained serious and permanent injury in head, body, and limbs, and especially in her back, chest, and sides, and in her hip, ribs, and lungs, and in her abdomen and bowels, and in her nervous system generally." It is not alleged whether this injury was to a physically diseased and nervously troubled person or to one physically sound and unimpaired in her nervous system.

For the error indicated, the judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

#### MISSOURI, K. & T. RY. CO. v. WISE.\*

(Court of Civil Appeals of Texas. Dec. 7, 1907.  
Rehearing Denied Jan. 4, 1908.)

##### 1. MASTER AND SERVANT—FURNISHING SAFE PLACE TO WORK—DELEGATION OF DUTY.

A railroad company must furnish to a brakeman a reasonably safe place in which to work, including a reasonably safe track, and use ordinary care to keep the same in repair, and this duty it cannot delegate to its section men.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 175, 218–223, 385.]

##### 2. SAME — TRIAL — INSTRUCTIONS — INCONSISTENT INSTRUCTIONS.

In an action for injuries to a freight brakeman thrown from an engine in consequence of a defect in the track, an instruction that if there was a defect in the roadbed which rendered it unsafe, and defendant railroad company failed to exercise ordinary care to discover and remedy it, a recovery was authorized, and instructions that if the defect was due to the negligence of the section foreman, or of the section hands, and he or they were fellow servants of plaintiff, a verdict must be rendered for defendant, and that the section men were fellow servants with plaintiff, were not inconsistent, and were not misleading.

##### 3. EVIDENCE — JUDICIAL NOTICE — ACTS OF CONGRESS—LAWS OF SISTER STATES.

The court takes judicial cognizance of the act of Congress which declares that the common law, as construed by the Supreme Court of Arkansas, shall be in force in the Indian Territory, but does not take cognizance of the construction placed on the common law by the Supreme Court of Arkansas.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 49, 50.]

##### 4. SAME—PRESUMPTIONS.

In the absence of evidence of the construction the court of a sister state has placed on the common-law doctrine of fellow servants, it is presumed that the doctrine receives the same construction that is placed on it by the courts of Texas.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101; vol. 10, Common Law, §§ 14–16.]

##### 5. MASTER AND SERVANT—VICE PRINCIPAL.

Employees charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are vice principals of the employer, regardless of their rank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 385, 422–488.]

##### 6. SAME—FELLOW SERVANTS.

Neither a roundhouse inspector charged with the duty of inspecting the pilot of an en-

gine, nor a section foreman and his men, required to keep the track in safe condition, are fellow servants of a brakeman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.]

#### 7. APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

In an action against a railroad company for injuries to a brakeman caused by a defect in the track, an erroneous charge that the section foreman and his men, charged with the duty of keeping the track in a safe condition, are fellow servants of the brakeman, is favorable to defendant, and is not ground for reversing a judgment against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

#### 8. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS—INSTRUCTIONS GIVEN.

Where, in an action for injuries to a brakeman caused by a defect in the roadbed, the court charged that if the section foreman negligently failed to keep the track in repair, and the railroad company had no notice of the defect in time to repair the same, a verdict for the railroad company must be returned, etc., and stated that the foreman and the brakeman were fellow servants, the refusal to charge that if there was a defect in the track where the brakeman was injured, and the defect was caused by the negligence of the section hands required to keep the track in repair, the brakeman could not recover, etc., was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 851-859.]

#### 9. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

A railroad company failing to use ordinary care to discover the defective condition of the standing place on the pilot of its locomotives and remedy the same is negligent, and it is liable for injuries to a brakeman falling from a locomotive in consequence of the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 214, 214½.]

#### 10. SAME—NEGLIGENCE OF MASTER—CONCURRENT NEGLIGENCE OF FELLOW SERVANT.

A master is liable for the injuries received by an employé in consequence of the master's negligence concurring with the negligence of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515-534.]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Action by Harry C. Wise against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke and Smith & Wall, for appellant. J. H. Wood and C. B. Randell, for appellee.

BOOKHOUT, J. On June 9, 1905, appellee Harry C. Wise filed suit in the district court of Grayson county against appellant alleging that on July 20, 1904, he was in the employ of appellant as a brakeman on one of its freight trains; that in the performance of his duties as such brakeman near Gibson, Ind. T., it was necessary for him to throw a switch in order that his train could take a siding and allow a train going in an opposite direction to pass; that it was early in the morning and dark; that he got upon the pilot of the engine drawing his train for the pur-

pose of throwing the switch; that as his train approached said switch he was thrown, slipped and fell from the pilot of said engine, was run over, and sustained serious, permanent, and painful injuries. He alleges as negligence, among a great many other things, that the steps on the pilot were worn slick, were sloping and out of repair, that the roadbed at the point of his injury was out of repair, rough, and had low joints in it; that the engineer in charge of it was careless in the operation of the engine and in stopping it with a jerk; and alleged that he had sustained damages in the sum of \$40,000. Appellant pleaded a general denial, contributory negligence, assumed risk, and that appellee's injuries were received in the Indian Territory, and that appellee's right to recover and appellant's liability are governed by a law passed by the Congress of the United States on May 2, 1890, 26 Stat. 81, c. 182, entitled "An Act to Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, and for Other Purposes," which act put in force in the Indian Territory certain laws and statutes of the state of Arkansas, and that under said act and laws, and under the decisions of the courts of the United States and the Supreme Court of Arkansas construing the rules of the common law applicable to the facts in this case, appellee has no cause of action against the appellant. The cause was tried before a jury on November 15, 1906, and resulted in a verdict and judgment for appellee for \$18,000. Appellant's motion for a new trial was presented and denied on December 10, 1906, and appellant brings said cause to this court for review.

#### Conclusions of Fact.

The appellant on the 20th of July, 1904, was the owner of and operating a line of railroad from Parsons, Kan., through the Indian Territory into the state of Texas. The appellee was in its employ as a brakeman on one of its freight trains. As the train upon which appellee was brakeman approached the town of Gibson, in the Indian Territory, from the north, it had orders to take a siding to let a north-bound passenger train pass. Just after the whistle was sounded for the station the conductor ordered the appellee, who at the time was head brakeman, to go ahead and open the switches to let the train take the siding. The appellee was at the time in the cab on the fireman's side. For the purpose of throwing the switches he went out on the running board and went forward to the pilot of the engine. He got down on the steps of the pilot. The train, which was at the time running, gave a jerk forward and then jerked back, the pilot went down by reason of the low joint in the track, and appellee's feet slipped from the step and he was thrown off and both of his legs run over by the wheels of the engine

and cut off. There was a low joint in the track which made the track at that point defective. The pilot step was worn and slippery, and sloping down, which rendered the same defective and unsafe, and the engineer was guilty of negligence in causing or permitting the engine to be jerked forward and then backward. All these matters—the sudden jerking of the engine, and the worn, slippery, and sloping condition of the pilot step, the negligent handling of the engine, and the low joint in the track—and by reason of one or all of these acts, or the concurring cause of two or more of them, the appellee was thrown off the pilot and injured. The defendant was negligent in the failure to furnish a safe track and engine, and in the failure of the engineer to handle its engine with proper care as above set forth. The appellee was at the time he was injured in the performance of his duties as brakeman, and not guilty of negligence, and did not assume the risk of the injury. By his injury he sustained damages in the amount of the verdict and judgment.

#### Opinion.

The seventh paragraph of the court's charge is assigned as error. This paragraph reads: "If you find and believe from the evidence on the occasion when plaintiff was injured that defendant's roadbed or track had that is called in railroad parlance a 'low joint,' which rendered the track or roadbed not reasonably safe at or near the place where plaintiff was injured; and you further believe from the evidence that the defendant knew of the same, or by the exercise of ordinary care could have discovered the existence of said low joint, if any, a sufficient length of time prior to plaintiff's injury to have remedied said track or roadbed at said place, and rendered the same reasonably safe; and you further believe from the evidence that defendant failed to exercise ordinary care in discovering said low joint, if any, in its track or roadbed; and you further believe from the evidence that the failure of the defendant to exercise ordinary care, if it did, and thereby discover and remedy said low joint was an act of negligence on the part of the defendant and was the cause of plaintiff's injury—you will return a verdict in favor of the plaintiff, unless you find for the defendant under other instructions given you." It is contended that this charge is erroneous in that it in substance gives appellee a right of recovery, if the jury should believe from the evidence that there was a low joint" which rendered the track or roadbed not reasonably safe at or near the place where appellee was injured, of which low joint appellant had knowledge, or by the exercise of ordinary care might have had knowledge, in time to have remedied the same prior to the accident, regardless of whether appellant's knowledge of and failure to remedy same or its want of knowledge of

the same, was due to the negligence of appellee's fellow servant or fellow servants. There was testimony that it was the duty of the section men to look after and keep the track in repair. It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to perform his work, which embraced the duty of furnishing a reasonably safe track, and to use ordinary care to keep the same in repair. The duty being upon the railway company to provide a safe track, this duty could not be delegated by it to its section men, so as to relieve the company from the consequences resulting from its failure to perform its duty in these respects. *Railway v. George*, 85 Tex. 155, 19 S. W. 1036; *Railway v. Marcelles*, 59 Tex. 337; *Railway v. James* (Tex.) 10 S. W. 332; *Railway v. O'Fiel*, 78 Tex. 489, 15 S. W. 33.

It is also insisted that this paragraph of the charge directly conflicts with special charges Nos. 19 and 20 requested by defendant and given by the court and was misleading to the jury; and further that there is a direct conflict between it and the instruction given by the court to the jury in answer to the question propounded in writing by the jury after they had retired to consider of their verdict. Special charge No. 19 is as follows: "In this case you are instructed that if you believe from the evidence there was a defect in the track which caused plaintiff's injuries, and that such defect was due to the negligence of the section foreman, and that but for such negligence plaintiff's injuries would not have been received, and that such section foreman was a fellow servant of the plaintiff, then you will return a verdict for the defendant." Special charge No. 20 is as follows: "In this case you are instructed that if you believe from the evidence that there was a defect in the track which caused plaintiff's injuries, and that such defect was due to the negligence of the section hands, and that but for such negligence plaintiff's injuries would not have been received, and that such section hands were fellow servants of the plaintiff, then you will return a verdict for the defendant." After the cause had been submitted to the jury, and they had retired to consider of their verdict, the jury propounded to the court in writing the following question: "To the Court: There being so many instructions in the charge in regard to the fellow servants law, we, the jury, wish to know what that includes, or want specific instructions as to whether section men and roundhouse men are to be considered. *Jake Epstein, Foreman.*" To which the court answered as follows: "The jury are instructed in answer to their question that it is immaterial whether section men and roundhouse men are fellow servants with each other, but in this connection you are instructed that section men are fellow servants with the plaintiff." To this action defendant took a bill of exception. Paragraph 7 of the court's charge correctly

states the law as to the duty of the railroad company in reference to its track, but says nothing as to a fellow servant. Special charge No. 19 instructed the jury, in substance, that if the condition of the track was due to the negligence of the section foreman, and if the section foreman was a fellow servant with appellee, the railway company would not be liable. Special charge No. 20 instructed the jury that if the condition of the track was due to the negligence of the section hands, and if they were fellow servants with appellee, then to return a verdict for defendant. The answer of the court to the question of the jury as to whether section men and roundhouse men were fellow servants only stated to the jury that section men were fellow servants and that roundhouse men were not fellow servants with appellee. There is no contradiction in these instructions which could have misled the jury. Special charges Nos. 19 and 20 left it to the jury to determine whether or not the section foreman and his men were fellow servants with appellee, and the answer of the court to the question propounded by the jury found the fact as a matter of law that they were fellow servants with appellee. This in no way changed the instructions given in the charge, but had the effect to simplify the findings in that it withdrew the issues as to whether the roundhouse men and the section foreman and his men were fellow servants with appellee, and found them, as matters of law.

Again, it is contended that the court's answer to the question propounded by the jury was erroneous in that the court thereby instructed the jury that roundhouse men were not fellow servants of appellee. It is argued that the injuries to appellee were inflicted in the Indian Territory, in which territory the common law as construed by the Supreme Court of Arkansas is in force, and that the courts of Arkansas construe roundhouse men and brakemen operating a train to be fellow servants. There was no evidence whatever introduced upon the trial as to the construction of the common law by the courts of Arkansas, or of the Indian Territory, applicable to the facts of this case. We take judicial cognizance of the act of Congress, and that by its terms the common law as construed by the Supreme Court of Arkansas is in force in the Indian Territory. While we take notice of the act of Congress, we cannot in the absence of proof take cognizance of the construction placed on the common law by the Supreme Court of Arkansas. *Pac. Ex. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312; *Railway v. Thompson*, 11 Tex. Civ. App. 658, 33 S. W. 723; *Goddard v. Reagan*, 8 Tex. Civ. App. 275, 28 S. W. 352; *Railway v. Cox*, 145 U. S. 606, 12 Sup. Ct. 905, 36 L. Ed. 829. In the absence of evidence as to how the Supreme Court of Arkansas construes the common law applicable to the facts involved in a case like this, it will be pre-

sumed that it receives the same construction in that state as is placed upon it by the courts of Texas. *Orosby v. Houston*, 1 Tex. 231; *Armendiaz v. Serna*, 40 Tex. 290; *James v. James*, 81 Tex. 381; 16 S. W. 1087; *Railway v. Thompson*, supra; 4th Wig. Ev. § 2536. The courts of Texas, in construing the common-law doctrine of fellow servants, hold that employes charged with the duty of keeping a safe place to work and safe tools and machinery and with inspection of the same are vice principals of the master, regardless of the rank of the servant to whom the duty is intrusted. *Railway v. Marcelles*, supra; *Railway v. George*, supra. Such is also the holding of the Supreme Court of the United States. *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590, 29 L. Ed. 755; *Union Pac. Ry. v. Daniels*, 152 U. S. 689, 14 Sup. Ct. 756, 38 L. Ed. 597; *Hough v. T. & P. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612. It is clear under the decisions of this state that a roundhouse inspector, whose duty it is to inspect the pilot of the engine, is not a fellow servant of a brakeman assisting in the operation of trains. Nor do we think that the section foreman and his men, whose duty it is to keep the track in safe condition, are to be considered fellow servants of a brakeman. The instruction given by the court in answer to the question propounded by the jury that they were, while error, was favorable to appellant, and can furnish no ground for reversing the judgment.

Complaint is made of the court's action in refusing to give to the jury special charges Nos. 2 and 12 requested by appellant. These charges are as follows: "(2) If you believe from the evidence that there was a defect in the track of defendant commonly known as a 'low joint' at the point where plaintiff was injured, and that the same caused or contributed to plaintiff's injury, and you further believe that such defect was caused by the negligence of the section hands provided by defendant to keep said track in repair, you are instructed that said section hands and plaintiff were fellow servants and that plaintiff cannot recover on account of such defect; and if you so find that there was such defect, and that the same was caused by the negligence of defendant's section hands, you will find for the defendant." "(12) In this case you are instructed that if you believe from the evidence the defendant had furnished a reasonably safe track at the point where plaintiff was injured, and section hands to keep such track in proper condition, but that said section hands failed to do so, and were negligent in so failing, and permitted a low joint or defective place in said track which a person of ordinary care would consider dangerous to employes passing over the same as plaintiff was, and the same caused plaintiff's injuries, uncontributed to by negligence on his part, and that the defendant had received no notice of such defect in its track in time, by the exercise of ordinary care, to



end the same, or that the defendant did not know, or by the exercise of ordinary care could not have known of the same in such time, you will return a verdict for the defendant." The court at the request of appellant gave its special charge No. 15 reading: "In this case you are instructed that if you believe from the evidence that defendant had furnished a reasonably safe track at the point where plaintiff was injured, and section foreman to keep such track in proper condition, but that said section foreman failed to do so, and was negligent in so failing and permitted a low joint or defective place in said track which a person of ordinary care would consider dangerous to employes passing over the same as the plaintiff was, and the same caused plaintiff's injuries uncontributed to by any negligence on his part, and that the defendant had received no notice of such defect in its track in time, by the exercise of ordinary care, to mend the same, or that if the defendant did not know, or by the exercise of ordinary care would not have known, of the same in such time, you will return a verdict for the defendant." This special charge, in connection with the court's charge and special charges 19 and 20, and the court's answer to the question propounded by the jury, made it plain to them that plaintiff could not recover for any act of the section foreman or the section men, and was sufficient, without giving special charges Nos. 2 and 12. There was no error in refusing them.

By the fifth, sixth, seventh, and eighth assignments, error is assigned to the court's action in refusing to give at the request of appellant its special requested charges Nos. 4, 6, and 17. Special charge No. 3 is as follows: "In this case you are instructed that if you believe from the evidence that the defendant furnished a reasonably safe engine and pilot, and furnished inspectors to inspect such engine and discover and report defects in the same so that they might be mended, and if you further believe that there was a defect in the engine upon which plaintiff was riding at the time of his injuries, and that such defect caused him to fall therefrom and be injured, and if you further believe that such defects had not been discovered and reported to the defendant, or that the defendant did not know of the same at such time to have remedied the same and prevented the accident, and that its failure to know of the same in such time was caused by the negligence of such inspectors, and that but for this negligence plaintiff would not have been injured, then you are instructed to return a verdict for the defendant." Charges 4, 6, and 17 are along the same line. It is insisted that under the laws of the Indian Territory at the time appellee was injured an engine inspector of appellant was a fellow servant with a brakeman assisting in operating one of its trains as was appellee. We have already held that we cannot take judicial cognizance of the laws of the

Indian Territory, and that in the absence of proof we will presume that they are the same as the laws of this state. One upon whom devolves the duty of inspection in Texas stands in place of the master, and the negligence of such inspector is the negligence of the master. We must presume that the construction placed upon the common-law doctrine of fellow servant by the Supreme Court of Arkansas is the same as that placed upon it by the courts of Texas. Assignments 5, 6, 7, and 8 point out no reversible error.

The ninth assignment assails paragraph 6 of the court's charge, which reads as follows: "Now, bearing in mind the above and foregoing instruction, if you find and believe from the evidence that on the occasion when plaintiff was injured that the standing place on the pilot of the locomotive was slick and slippery and sloping forward and downward, and was not a reasonably safe place on which to stand, and you further believe from the evidence that the slippery and sloping condition of said standing place on said pilot was known to the defendant, or by the exercise of ordinary care could have been known to the defendant, for a sufficient length of time prior to the time when plaintiff was injured to have enabled defendant to have remedied same, and you further believe from the evidence that the defendant failed to use ordinary care to discover the defective condition of the standing place on the pilot of the locomotive, if it was defective, and remedy the same, and that the failure on the part of the defendant to use such care in discovering the condition of said standing place and correct the same was an act of negligence on the part of the defendant, as the word 'negligence' has hereinbefore been defined, and you further believe from the evidence that the failure of the defendant to discover and remedy the said defect in said standing place, if any, on the pilot of the locomotive, was the cause of plaintiff being thrown from the locomotive, or the cause of his falling from the locomotive to the ground, then you will find in favor of the plaintiff, unless you find in favor of the defendant under other instructions given you." This charge announced the law correctly as far as the duty of the railway company is concerned. The charge relating to the duty of a fellow servant was fully covered, and explained in the special charges asked by appellant and given by the court.

Error is assigned to the giving of the eighth paragraph of the main charge reading as follows: "If you find and believe from the evidence that on the occasion when plaintiff was injured that H. E. Palmer, the engineer in charge of defendant's locomotive at the time, was guilty of negligence in the mode and manner in which he handled said locomotive, and that such negligence on the part of the engineer, if any, concurred with

the negligence of the defendant in failing to provide a proper and reasonably safe standing place on the pilot of the locomotive, if you find from the evidence it did so fail, or concurred with its negligence in failing to provide reasonably safe roadbed and track at said place, if you find from the evidence it did so fail, and that the negligence of the engineer as aforesaid, if any, caused the plaintiff to fall or to be thrown from said locomotive and thereby injure him, you will find for the plaintiff, unless you find for the defendant under other instructions given you." The court charged the jury that the engineer in charge of the train was a fellow servant with appellee. The charge complained of, in substance, is that if negligence of the engineer concurring with the negligence of the railroad company caused the injury, then the jury could find for plaintiff. This charge announced a correct proposition of law. It is clear that the master is liable for the concurring negligence of a fellow servant with that of the master. *Railway v. McLain*, 80 Tex. 85, 15 S. W. 789; *Railway v. Bonatz* (Tex. Civ. App.) 48 S. W. 767; *Railway v. Warner* (Tex. Civ. App.) 36 S. W. 118; *Railway v. Kelly* (Tex. Civ. App.) 35 S. W. 878; *Railway v. Maupin*, 26 Tex. Civ. App. 385, 63 S. W. 346; 4 *Thomp. Neg.* § 4856.

The eleventh, twelfth, and thirteenth assignments of error complain of the admission of certain testimony of the witness Covey. There was no error in the admission of this evidence; and these assignments are overruled. The remaining assignments have been carefully considered, and because they fail to point out reversible error the same are overruled.

Finding no reversible error in the record, the judgment is affirmed.

## THOMPSON v. PLANTERS' COMPRESS CO.

(Court of Civil Appeals of Texas. Dec. 14, 1907.)

### 1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé operating a gin stand, in consequence of his hand being carried into the saws, evidence held to justify a finding of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 987-996.]

### 2. SAME—ASSUMPTION OF RISK.

An employé in charge of a gin stand, and required to watch the machinery, look out for defects, and unchoke the same on it becoming choked up with cotton seed, assumed the risk of injury resulting to him in consequence of his hand being carried into the saws while unchoking the machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 552, 553.]

### 3. SAME—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé operating a gin stand, evidence held to justify a finding that there were no defects in the machinery.

### 4. TRIAL—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

Where the court in one charge applied the law to the facts, and pointed out specifically the facts on which contributory negligence could be predicated, error in a charge defining contributory negligence was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

### 5. SAME.

The instructions must be construed as a whole, and a defect in one paragraph rendered harmless by another paragraph is not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

### 6. MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—INSTRUCTIONS.

Where an employé based his claim for recovery for injuries on the ground of defective machinery, it was not error to charge that as a matter of law he could not recover, if he knew at the time that the machinery was defective and dangerous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1175.]

### 7. SAME.

Where, in an action for injuries to an employé while operating a roll breast to a gin stand, the evidence showed that lugs were not attached to the roll breast, but were placed to prevent the roll breast dropping down in its operation, a charge which connected the lugs with the roll breast was not misleading.

### 8. SAME—ASSUMPTION OF RISK.

An instruction in an action for injuries to an employé which confused assumed risk and contributory negligence is not ground for reversal, where the facts preclude a recovery, whether on the ground of assumed risk or contributory negligence.

### 9. SAME.

Where, in an action for injuries to an employé while operating a roll breast to a gin stand, the evidence showed that in the construction of the roll breast the lugs, knuckles, and castings were necessary for its proper operation, and had such intimate connection with it as to be a part of it, a charge that if the employé knew that the roll breast was defective, he, in attempting "to use said roll breast," assumed the risk, was not misleading, the quoted words embracing all parts of the machinery.

### 10. SAME.

In an action for injuries to an employé, a charge directing a verdict for the employé if he did not know that the machinery was defective was not prejudicial to him, though there were two defects in the machinery and he knew of but one, for if either defect was unknown a recovery was authorized.

### 11. APPEAL—INVITED ERROR—RIGHT TO COMPLAIN.

A party cannot complain of an error in an instruction given by the court after he had requested a similar charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3610.]

### 12. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse a requested charge in substance embodied in the main charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 651-659.]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by H. R. Thompson against the Planters' Compress Company. From a judgment for defendant, plaintiff appeals. Affirmed.

A. Stanford, for appellant. Alexander Thompson, for appellee.

DAINEY, C. J. H. R. Thompson sued defendant, appellee, for personal injuries, in district court of Johnson county, alleging plaintiff was injured at defendant's gin the city of Cleburne while operating a breast to the gin stand; that his injuries were due to the negligence of defendant in that the knuckles attached to the roll breast and the grooves into which they fit were badly worn, were defective, and too old and wholly unfit for use, by reason of which plaintiff's hand was caught in the jaws of the gin and mutilated, to his damage the sum of \$2,000. Defendant answered plaintiff's petition with a general denial, and in the plea that at the time and place in question plaintiff was the superior representative of this defendant in the immediate charge of said machinery; that he was familiar with same, having been in charge of it for a number of years; that it was his duty as foreman to take notice of the condition of the machinery and appliances, and if they became defective or out of repair it was his duty to repair the same, or in case the repairs were of such a nature that he as foreman could not make, it was his duty to report the same to the superintendent. Defendant specially plead that plaintiff assumed the risks incident to the handling of the machinery in the condition in which it was, and that such injuries as he received were caused ultimately by his own want of care in the use and operation of the machinery. A trial before a jury resulted in a verdict and judgment for the appellee, from which an appeal was taken.

The complaint is made that the verdict is contrary to the evidence, because the defects in the gin stand, which were the proximate cause of the injury, were unknown to plaintiff and were not open and patent to observation. The evidence shows: That defendant's gin plant has four gin stands. That they were what was known as the "Munger stands." That each gin stand was about eight feet long, and each stand had what was known as a "huller board" in front, which was a plank or board about 4 feet long and about 18 inches wide. This board was placed in an upright position. The roll breast was about 4 feet long and was semicircular in form, and on the ends of the roll breast were the castings that were all the way around the circular end of said roll breast and extended about 6 inches above the upper edge of said roll breast, and at the end of the castings on each end of the roll breast, there was a knuckle attached to the upper end of each of said castings the size of a man's fist, and extending off from said casting at right angles, and these knuckles fit in the grooves that were cut in the edges of the jaws of the gin stand, and said roll breast was supported or hung by said knuckles

which fit in the grooves, and when said roll breast was in position it would stand or hang in almost an upright position. When the roll breast was in place, there was a space of about 5 inches between the huller board and the roll breast, and it was about 18 inches from the top of the huller board to the lower edge of the roll breast. About 4 inches from the lower edge of the roll breast and near each end was a handhold. Back of the roll breast, and some 4 or 5 inches back from the roll breast, were the gin saws. Under the roll breast at each end, and some 4 inches above the lower edge of it, was what was known as the "lugs." These lugs were projections from the smooth surfaces on each side of the gin stand, and put there to hold up the roll breast and to keep it from falling down on the gin saws. Each end of the 5-inch space between the huller board and roll breast was closed up. The two sides of the gin stand were surfaces that fit up snugly to the ends of the roll breast, just giving it room enough to work back and forth. The knuckles at the end of the castings on the end of the roll breast and the grooves into which they fit were in plain view; but when the roll breast was in position the castings could not be seen, except that part extending above the roll breast, and the lugs could not be seen at all, except when the roll breast was removed. It was plaintiff's duty to watch the gin stands and see that they were receiving and ginning the cotton properly, to keep them oiled, and in case the gin stands got choked up to unchoke them, and he would do this by putting his hands down between the huller board and the roll breast and take hold of the handhold on the lower edge of the roll breast and move the roll breast back and forth and cause the seed to fall out. The company had inspectors who came around occasionally and inspected the machinery and repaired anything that needed repairing. Sometimes they would come around once a month, and sometimes not more than two or three times during the ginning season. During the summer of 1905, and before the gin started up about September 1, 1905, the company's inspector came here and remained about 10 days inspecting and repairing the gin machinery. They were supposed to have given the entire gin plant a thorough inspection and general overhauling, and to have repaired everything that needed repairing.

H. R. Thompson testified on direct examination as follows: "We began the operation of the plant about 1st of September, 1905, and on the 21st of September, 1905, the gin stand next to the press became choked up with cotton seed. I put my left hand down between the huller board and roll breast and took hold of the handhold and began moving it back and forth to make the seed fall out, when the knuckles at the upper end of the castings flew out of the grooves and caused the roll breast to roll back on my arm, and the lower part of the roll breast passed the



lugs that were designed to hold it up off the saws and caused my hand to be carried right in on the saws. The cause of my hand coming in contact with the saws was the roll breast passed the lugs. My hand could not have been caught on the saws if the lugs had been long enough to hold the roll breast up off the saws, but the lugs were defective in that they were so worn off that they were too short and allowed the roll breast to pass them. At the time I was injured I was trying to unchoke the gin stand in the same way I had always done it before. In fact, I was doing it in the only way it could be done. I could not use both hands without taking off the huller board. Three of my fingers were cut off, and the front finger so mangled as to make it stiff. I have never known of the roll breast passing the lug before. I did not know that the lugs were defective. Did not know they were worn off and too short. Did not know that said machinery was in any way defective, and I was acting in a careful and prudent way, and was doing the work just like I have always done it before, and the only way I could do it." On cross-examination he testified as follows: "I have had about 12 years' experience running gin stands. At the time of this injury I had been operating the gin stand for the past three seasons. During this time I had charge of the four gin stands of the defendant. The defendant had six or seven men employed in its plant at Cleburne. Mr. Ready was the superintendent. He came to Cleburne, I think, about the 8th of August, as well as I remember. He took charge, and employed me to continue on here. I don't think he had been here previous to that time. As manager he had entire charge here, looked after the office work, made his office in the little frame building on the ground. These gin stands were on the second floor. He would come up here once in a while. I don't remember his missing a day. I suppose I know as much about the gin stands as he did. We had an engineer and fireman and two suction feeders. I had been cleaning out the gin stands about three weeks, as well as I remember, at the time of the injury, that season. This diagram that you present to me correctly shows the appearance of the gin stands with the huller board and roll breast off. I don't remember how many times I had the breast off that season, from the beginning up to the time I was hurt. I have not any idea, and could not give an estimate. I do not know whether I had it off a dozen times or not. I could not say. I do not know whether I had it off at all or not. Yes; I have had it off during the time I worked there, but I cannot say I had it off a dozen times during that season. I do not know whether I had it off at all, or not, during that season. Sometimes a wad would collect in between the ribs, and I would have to take them off and get the wad out. A man will have to take them off once in a while to

remove these wads. I was attempting to operate the inside breast at the time I was hurt. It rests on a socket, or rather on lugs on the ends. It is hung on knuckles, attached to the end of the roll breast. There are handholds on the roll breast. They are about four inches from the bottom of the breast. I don't see how a man could use both hands in that close place. I never could. I think I have tried it. I had my hand in the handhold when it was caught. The breast turned over, and the bottom went in and caught my hand. I did not have hold of the lower edge of the breast at the time I was caught, but had hold of the handhold. I knew Mr. Lawson, the traveling inspector, did not live there, but I was expecting that he would be back during the season. I never saw him from the time I commenced work up to the time I was hurt. There was no one there at the time to find defects except myself. My knowledge as to the construction of the gin stand depends upon what I knew at the time. I have had no additional experience or observation. I don't believe I knew any one in Cleburne that knew as much about that gin stand as myself at that time. I am not satisfied that any one in Cleburne knew as much about it as myself. I don't know who all was here. I never had any trouble with this gin stand before in taking the breast off and in unchoking it. The condition was such if a man was looking for it he would find it. I did not know what time Mr. Lawson was coming. He sometimes came when he was not called. I don't know that with my knowledge in the operation of that gin I would have acquired more information about it than one coming in casually inspecting it. I don't suppose I am an expert ginner. The saws struck the lower edge of the breast and cut it up some. I don't know that it is a fact that when you take hold of the ends of the breast and shake it that it has a tendency to throw the knuckles out of socket. I have done that many times the same way. I am working at the Santa Fé shops now for \$1.70 a day, 10 hours' work. You commence at a certain place there and work up. That work extends all through the year. My employment with defendant was just through the ginning season. I am bonus timekeeper with the Santa Fé. My right hand was not hurt."

Y. S. Ready testified as follows: "My name is Y. S. Ready. I am superintendent of a gin plant at Lewisville, Tex., but am not in the employment of defendant. At the time plaintiff was injured I was superintendent of defendant's gin plant at Cleburne, Tex., and first took charge there in August of that year. I employed plaintiff as ginner for that season. It was plaintiff's duty to run the gin stands, to look after the gin stands, keep them oiled, keep them unchoked, to see that they were ginning the cotton properly, to look out for any defects that would prevent the gin stands from properly ginning the cotton, and to repair any defects that he might dis-



er, if he could, and if he could not, then report to me. He was in a better position than any of the other employes about the gin stand at the time he was injured to know what was the true condition of the gin stands. The company had no inspectors here the time plaintiff was hurt. The inspector had not been here since some time in the summer, I think about June, previous to the time plaintiff was hurt, about September 1st. We started up that season about September 1st. Plaintiff was present at the time we started up, and I suppose he saw how the machinery started off. I was in the office at the time plaintiff was hurt, and the first I knew of it was when he came to the office with his fingers mangled. There were no repairs made on the gin stand that hurt plaintiff during that season. We run the stand the remainder of that season without any repairs being made. I run it myself a part of the time. I tried the roll breast several times afterwards to see if it would make the lugs, and I found it would not. The handholds at the bottom of the roll breast are put there for the purpose of taking hold of to move the roll breast up and down to make the seed fall out. The proper way to unchoke it is to take hold of both handholds to move it up and down. I took the roll breast off several times while I run it. When the breast off, the lugs are plainly to be seen. The knuckles and grooves were worn, and if they were worn, such condition was plainly to be seen; but I had no trouble with the breast whatever. If you take hold of only one handhold, it has a tendency to kink the breast, like pulling the drawer of a dresser by one hold thereof."

John L. Chase testified, in substance, that he was a gin repairer, repaired the gin mentioned in June, 1905, and left it in first-class condition, did not inspect the gin in September, 1905, nor until the spring of 1906, did not live in Cleburne at that time. Under the foregoing facts the jury were justified in rendering a verdict for the defendant. They were warranted in finding that plaintiff was negligent in handling the roll breast, which contributed to his injury. He had charge of the gin, and it was his duty to look out for defects, and he assumed the risks of being injured in the manner he was. The testimony conflicts as to the existence of any defect, but it was sufficient for the jury to find that one existed.

The court, in defining contributory negligence, charge the jury as follows: "Contributory negligence, as used in this charge, means that where the plaintiff does some negligent act, or omits to perform some act co-operating with some negligent act or omission on the part of the defendant, contributes and is the proximate cause of the injury." This charge is assigned as error. In the case of *Selman v. Railway Co.* (Tex. Civ. App.) 1 S. W. 1030, we held such a charge error and reversed the case. While the charge in

this case is error, yet, in view of another paragraph of the court's charge, it becomes harmless.

The eighth paragraph of the court's charge reads: "On contributory negligence, you are instructed that it was the duty of the plaintiff during the time he was in the employment of the defendant company to use such care and prudence as a reasonably prudent person would have exercised under the same circumstances to prevent any injury to himself, and as to what ordinary care was under the circumstances is for you to determine, taking into consideration all the facts and circumstances surrounding and known to the plaintiff at the time of his alleged injury. You are instructed that if the plaintiff knew that said roll breast of the said gin stand, as to said lugs and as to the cast iron on the end of the same, were so worn as to make them defective and dangerous at the time he undertook to use the same, then in law he is guilty of contributory negligence and cannot recover; and if the plaintiff in using said roll breast did so in a negligent manner, and by the way in which he used the same the accident was caused, then in that event the plaintiff would be guilty of contributory negligence and could not recover, and if you so find, your verdict should be for the defendant." This paragraph of the charge applied the law to the facts, and pointed out to the jury specifically the facts, if found true, upon which they could find plaintiff guilty of contributory negligence. So the definition of contributory negligence being an abstract proposition, though incorrect, was not calculated to influence the jury, where, as in this case, their minds were directed by the court to the specific facts that would constitute contributory negligence. The court's charge must be construed as a whole, and defects in one paragraph that by another paragraph are rendered harmless, will not be cause for reversal. *Railway Co. v. Carter* (Tex. Civ. App.) 71 S. W. 73; *Railway Co. v. Scott*, 30 Tex. Civ. App. 496, 71 S. W. 26. But the appellant insists that the eighth paragraph of the court's charge as above quoted is error, and presents the following propositions: "That it instructs that plaintiff would be guilty of contributory negligence as matter of law, if he used the roll breast knowing that the lugs and castings were so worn as to be defective and dangerous. (2) Said paragraph of the court's charge is erroneous in that it confuses and confounds the lugs with the roll breast, when the lugs are no part of the roll breast and in no way connected with it. (3) Said paragraph of the court's charge is erroneous in that it confuses the doctrine of assumed risk and contributory negligence." As to the first proposition—the plaintiff basing his claim for a recovery on the ground of defective machinery—it was not error for the court to tell the jury that as a matter of law he could not recover if he knew at the time that it was defective and dangerous. (2)

There could be no confusion in the use of the words, "roll breast" and "lugs," as used. It is true the lugs were not attached to the roll breast, but were placed to prevent the roll breast dropping down in its operation, and in that sense are so connected that as used by the court could not have been misleading to the jury. (3) The confusing of the doctrine of assumed risk and contributory negligence could not have misled the jury. If the facts existed, whether constituting assumed risk or contributory negligence, the plaintiff could not recover, and the use of one for the other should not cause a reversal. *Horton v. Packing Co.*, 33 Tex. Civ. App. 150, 76 S. W. 211.

The third assignment of error presented is as follows: "If you find from the evidence that the plaintiff at the time of his injury knew that the said roll breast to the said gin stand was at that time defective and dangerous, or if he must necessarily have known such fact in the ordinary discharge of his duties, then in such case the plaintiff, in attempting to use said roll breast to the said gin stand, with such knowledge, would in law assume the risk of being injured thereby, and in that event your verdict should be for the defendant company. On the other hand, if you find that the plaintiff at said time did not know of said defect, if you have found that the same was defective, or that in the ordinary discharge of his duties he did not necessarily acquire such knowledge, then in that event you should find for the plaintiff on the issue of assumed risk." The proposition is, where there are two or more defects in machinery, and the servant knows of one, but does not know of the others, he does not assume the risk of being injured by reason of the unknown defects. The evidence, we think, shows that in the construction of the roll breast the lugs, knuckles, and castings were all necessary for its proper operation, and had such intimate connection with it as to be considered a part of it. The words "use of said roll breast" in the charge embraced all the parts, and therefore the jury were not misled. Besides, the charge is as favorable to plaintiff as to defendant, for it tells the jury to find for plaintiff on this issue if he did not know of the defect. So, according to plaintiff's contention, if either defect was unknown the plaintiff could recover.

The complaint is that the court erred in its charge where in effect, the burden was placed on plaintiff to show that he was not guilty of contributory negligence and did not assume the risk before he could recover. The plaintiff cannot avail himself of this error, because he requested a charge involving the same language, and therefore it is invited error, the record failing to show that said special charge was requested after the court had given its charge. *Railway Co. v. Selin*, 89 Tex. 63, 33 S. W. 215, 558. There was no error in the court refusing special charge No. 1 requested, because the court had embodied

it in substance in the main charge. The court did not err in charging upon assumed risk, as complained of.

The judgment is affirmed.

## RIPY et al. v. REDWATER LUMBER CO. et al.

(Court of Civil Appeals of Texas. Dec. 21, 1907.)

### 1. APPEAL—RECORD—TIME FOR TRANSMISSION AND FILING.

Joint receivers for two corporations were appointed April 13, 1907. On May 21, 1907, one of the receivers having resigned, the court entered an order appointing the other sole receiver. Creditors gave notice of appeal, and within 20 days from May 21, 1907, filed a transcript in the Court of Civil Appeals. A motion to dismiss the appeal was made on the ground that the transcript was not filed within 20 days after the appointment of the receivers. *Held*, that the order appointing a receiver was properly brought up for review, the order of May 21, 1907, being the one to which the sole receiver must look for his authority to act.

### 2. RECEIVERS—ACTIONS—JURISDICTION.

Where a petition for a receiver for a corporation, whose principal place of business is in another county, alleged that the note upon which the suit was instituted was, by its terms, payable in the county in which the suit was brought, it gave the district court of the latter county jurisdiction of the subject-matter, and to appoint a receiver, such receiver being ancillary to the main action.

### 3. SAME—WAIVER OF OBJECTIONS.

In an action for the appointment of a receiver for a corporation whose principal place of business is in another county, the waiver of issuance of service and the appearance in the case by its officers and directors constitute a waiver of the corporation's right to have a receiver appointed for its property in the county where its principal office was located.

### 4. SAME—PROCESS AND APPEARANCE.

Joint receivers for a corporation were appointed without notice, and thereafter its directors entered an appearance, after which the court made a second order appointing one of the joint receivers sole receiver. *Held*, that such appearance before the second order cured any error in the appointment without notice.

### 5. APPEAL—REVIEW—QUESTIONS BROUGHT UP.

Where two suits by separate creditors against two corporations were consolidated, and joint receivers were appointed on an appeal by a creditor of one of the corporations from the appointment of the receiver, the propriety of the consolidation will not be considered.

### 6. RECEIVERS — APPLICATION — NOTICE — WAIVER BY APPEARANCE.

In proceedings for the appointment of a receiver, the notice mentioned, unless otherwise specified, applies only to defendant, and an appearance by defendant without objection to the appointment is conclusive as to creditors, unless there is collusion or fraud in the appearance.

### 7. SAME — APPOINTMENT — GROUNDS — PRESERVATION OF PROPERTY.

A petition for the appointment of a receiver of a lumber manufacturing corporation alleged that substantially all its property was either mortgaged or pledged to creditors who were threatening foreclosure, and that there was a large unsecured debt, that judgments had been recovered against it on which execution sales were threatened, that taxes on its property were in default, that the company's sawmill had been so damaged by fire that it had to shut down, and that there was neither money nor credit to

repairs, that the care of live stock and logs is a heavy expense, that the plant was deteriorating and was uninsured against fire for want of means. *Held*, that the petition showed the company was in great danger of insolvency, though it admitted that the full value of its assets, if realized, would cover all liabilities and warranted the appointment of a receiver.

*Note*.—For cases in point, see Cent. Dig. § 42, Receivers, §§ 24–25.]

#### CORPORATIONS—RECEIVERS—GROUNDS FOR APPOINTMENT.

Under Rev. St. 1895, art. 1465, which provides that a receiver may be appointed for a corporation which has forfeited its corporate rights, the court was warranted in placing in a receiver's hands the property of a corporation which had failed to pay its franchise tax.

#### RECEIVERS—PROPERTY VESTING IN RECEIVERS IN GENERAL.

Plaintiff obtained judgment against a corporation establishing a lien on and ordering the sale of certain of its property, but the order of sale was not issued until about 18 months thereafter, during which time the property remained in the possession of the corporation. The value of the property exceeded the amount of the judgment. *Held*, in an action for a receiver for the corporation begun on the date the order of sale was issued, that it was proper to include the property in the receivership granted.

*Talbot, J.*, dissenting in part.

Appeal from District Court, Dallas County; *J. H. Muse*, Judge.

Appeal by Mrs. Minnie Mork against the Redwater Lumber Company, consolidated with an action by V. E. Burton against the Northeast Texas Railway Company, both actions being brought for the benefit of all creditors who wish to join. From an interlocutory order appointing a receiver for both corporations, *J. W. Rippy* and others, intervening creditors of the Redwater Lumber Company, appeal. Affirmed.

*B. Templeton and Chilton & Chilton*, for appellants. *Cockrell & Gray, Todd & Hurley, R. W. Rodgers*, for appellees.

*DAINEY, C. J.* This is an appeal from an interlocutory order appointing a receiver. On April 13, 1907, Mrs. Minnie Mork filed suit in the district court of Dallas county against the Redwater Lumber Company, a private corporation, of Bowie county, to recover on a promissory note for \$7,500, and claiming a legal mortgage as a second lien upon the property of said company, and praying for a receiver. At the same time, on April 13, 1907, V. E. Burton filed suit in the district court of Dallas county against the Northeast Texas Railway Company, a corporation, the principal office and place of business of which is in Bowie county, Tex., seeking to recover the sum of \$900 for salary as general manager, and praying for a receiver. Both suits were brought for the benefit of all creditors who wished to join. On the same day, April 13, 1907, *Hon. E. B. Muse*, judge of Forty-Fourth district, appointed *W. J. Moroney* and *H. J. Munz* joint receivers of the properties of both corporations. On April 15, 1907, *G. Munz*, president of both corporations, appeared and filed a waiver of service as to both cor-

porations. An order was entered appointing the same parties joint receivers with same powers as before. On April 18, 1907, an order was made consolidating the Burton case with the Mork case. On May 10th *Rippy* and others presented a motion in vacation to vacate the receivership, alleging that they held a lien on the property of the Redwater Lumber Company to secure their claim, which amounts to \$70,000. Various grounds were alleged for the vacation of the receivership. On May 18th *B. C. Barrier* filed his plea of intervention setting up a judgment for \$2,691.65 against the Redwater Lumber Company in the district court of Bowie county, dated October 19, 1905, and foreclosing a mortgage on and ordering to be sold 65 mules and horses, of which the receiver had taken possession. On May 21st *Mork* and *Burton* amended their petitions, repeating in substance the allegations in original petitions, and further that the Redwater Lumber Company and the railway company had on May 10, 1901, forfeited their corporate rights to do business in Texas by failure to pay their franchise tax, and made *G. Munz*, *Harry Munz*, and *Herman Munzshelmer*, who constituted their board of directors, parties. On same last-named day *Harry Munz* filed his resignation as one of the receivers, which was accepted, and the court appointed *W. J. Moroney* as the sole receiver of said property. The directors of both companies entered their appearance without objection. On May 30th the *Ripps* filed a supplemental motion to dissolve the receivership, alleging that the orders of May 10th were made without notice to them, questioning the sufficiency of the amended petition and that said corporations were at least de facto corporations. On same day (May 30th) *B. C. Barrier* filed his first supplemental petition and motion to vacate the appointment of receiver, which was his first objection to the receivership. On same day (May 30th) numerous creditors intervened in opposition to the motion to vacate the receivership. On May 31st there was a hearing in open court, and the motions to vacate the receivership and set aside the consolidation of the two cases were overruled. *Barrier* and the *Ripps* excepted and gave notice of appeal.

A motion was made to dismiss this appeal, which on a former day of this term was overruled, *Justice Talbot* dissenting. The ground made for dismissal was that the transcript was not filed within 20 days after the appointment of the receivers. The appointment was first made by the district judge on April 13, 1907, the order including two—*Harry Munz* and *W. J. Moroney*—as receivers to act jointly. On May 21, 1907, *Harry Munz's* resignation was accepted, and the court then entered another order appointing *W. J. Moroney* sole receiver, with the sole power to perform the functions of receiver. The order appointing *W. J. Moroney* as sole receiver was a distinct and separate order from the



first order appointing the joint receivers, and within 20 days from the making of the last order the transcript was filed in this court. This, in the opinion of the majority of this court, brought the order appointing a receiver to this court for review. This appeal is similar in principle to the case of *Luck v. Hopkins*, 92 Tex. 426, 49 S. W. 300, where the Supreme Court held that a writ of error sued out from a judgment entered reforming a judgment within 12 months from the date of reformation was in time, though the original judgment was rendered more than 12 months before the writ of error was sued out. The court said: "It does not matter that the judgment last entered was similar to or in fact the same as the first judgment, for the reason that the first judgment no longer existed after that of July 9th was rendered by the court." So in this case the first order appointed two receivers. After this that order was changed, and one receiver was appointed. The last order did away with the first. The first order no longer existed, and the last one was the order to which Moroney had to look for his authority to act.

On the merits of the controversy the question is raised that the district court of Dallas county had no jurisdiction to appoint a receiver of the property of the Redwater Lumber Company, because the principal office of said corporation was in Bowie county. This question is one of venue. The right of having a receiver appointed for the property of a corporation in the county where the principal office of the corporation is located can be waived. The original petition, on which the court took jurisdiction of this case, alleged that the note on which suit was instituted, by its terms, was payable at Dallas. This gave the district court of Dallas county jurisdiction of the subject-matter, and the appointment of a receiver being ancillary to the main action, the court had jurisdiction to make the appointment. *Mercantile Co. v. Plow Co.* (Tex. Civ. App.) 71 S. W. 292. But the allegation in the amended petition omits to aver that the note was payable at Dallas, which omission the attorneys for the plaintiffs say was inadvertently made. This ground of want of jurisdiction was made in the court below by exception, but it seems no action therein was taken by the court. It appears from the record that the officers and directors of the corporations waived the issuance of service and appeared in the case, which settles the question of venue. The objection to the consolidation of the two cases is not a matter that calls for a ruling from us in this proceeding. This is an appeal from an interlocutory order appointing a receiver in the Redwater Lumber Company proceeding, and to that only will we direct our attention.

Error is urged in the appointment of the receiver without notice. If this would annul the appointment in any case, the error has been cured by the appearance of the cor-

poration directors before the second order of the court, by which W. J. Moroney was made sole receiver. We do not understand that when a receiver is applied for all creditors have to receive notice of such application. Where notice is mentioned, unless otherwise specified, it applies only to the defendant in the action, and an appearance by the defendant without objection to the appointment is conclusive as to creditors, unless there is collusion or fraud in such appearance. There is no proof of any such fraud or collusion in this case as would justify us in holding the appointment invalid on that ground. Was the appointment warranted under the allegations of the petitions? We think there is no question that the allegations as to the railway company are fully sufficient to show that it was insolvent, and that it has a statutory cause for the appointment of a receiver. We think the allegations of the petition as to the lumber company show that it was in imminent danger of insolvency. It is true the petition alleges that if the full value of the assets of the lumber company could be realized therefrom they would exceed the liabilities considerably, but existing conditions of said assets make it probable that without the aid of a receiver they would be dissipated and nonsecured creditors left unpaid. It alleges, among other things, that said corporation was chartered to manufacture lumber; that its assets are covered by first mortgages, and there is a large unsecured indebtedness; "that all or practically all of said indebtedness is now past due, and if any of the same is not yet due, it will all soon become due; that said ostensible corporation has practically no cash resources and no assets which can be readily converted into cash to meet said debts; that practically all of said assets are pledged or mortgaged to different creditors who are threatening foreclosure or who were threatening foreclosure at the time receivers were appointed herein; that sundry judgments have been rendered against said ostensible corporation upon which execution sales are threatened, and there are no means of preventing the same except through a receivership; that a large amount of taxes is in default, and that, unless protected by a receivership, it is reasonably certain that the assets of said ostensible corporation will be speedily dissipated and sacrificed and that plaintiff's debt will be lost; that a recent fire has so damaged said sawmill that it cannot be operated; that said lumber company has neither money nor credit through this to make the necessary repairs; that as a result its income has been practically suspended; that until receivers were appointed herein great expenses were constantly accruing in caring for said mules and protecting said other properties; that unless said logs are speedily converted into lumber or sold they will decay and become a total loss; that for want of necessary means to

the plant proper attention it is rapidly depreciating in value; that it is in serious danger of further loss by fire, and said lumber company is not able to protect its property by any insurance; that under existing circumstances, but for a receivership insurance could not be obtained, if at all, except at very high rates, which would merely add to the liabilities without increasing the assets; and that by reason of the premises it is utterly impossible to protect the interest of plaintiff and all other parties except through a receivership." These allegations warranted the action of the court in appointing a receiver. But there is another ground described by the statute, set forth in the constitution, which we think unquestionably warranted the court in its action in placing the property in a receiver's hands, which is that corporations had forfeited their corporate rights by the failure to pay their franchise tax. Rev. St. 1895, art. 1465. The forfeiture of corporate rights being designated by the statute, a ground for a receiver is exclusive on this question.

Barrier claims that in October, 1905, he obtained a judgment against the Redwater Lumber Company, establishing and foreclosing a lien on 65 head of mules and horses, ordering said property sold, and that on April 13, 1907, an order of sale was issued under said judgment from the district court of the county; that said mules and horses were included in the order empowering the receiver to take possession, and charges the opinion of the court in this respect is wrong; that the receivership to the extent of the mules and horses should be vacated. The mules and horses constituted but a small portion of the lumber company's assets, and Barrier's judgment lien would not be sufficient to prevent the appointment of a receiver of the estate. But should the court be excluded said mules and horses from the receivership? It appears that about 18 months had expired from the rendition of the judgment until the order of sale was made on April 13, 1907. The order of sale appeared on its face to be an original, and, so, the said judgment was dormant, and being so the execution thereof was subject to be enjoined, though the sale would not be absolutely void, but voidable, and the property was not liable to sell for its value by reason thereof. During the delay in the execution of the judgment the mules and horses had not been actually seized but remained in the possession of the corporation. While this condition existed they were liable for the claims of other creditors, subject to the rights of Barrier. The value of the mules and horses exceeds the amount of the judgment, and the excess should be administered for the best interest of the estate. Of course, the rights of Barrier should be protected, which will be done accordingly, as the nature of the case demands, and this can be done under the receivership.

Believing the appointment of a receiver was proper, the judgment is affirmed.

TALBOT, J. I concur in the affirmance of the judgment of the court below; but, as stated in the opinion delivered by Chief Justice RAINEY, I dissented from the order overruling appellees' motion to dismiss the appeal, and I now desire to state my reasons therefor. Our statute (Rev. St. 1895, art. 1383) provides that an appeal may be taken from an interlocutory order of the district court appointing a receiver in any cause, provided said appeal be taken within 20 days from the entry of such order. The record shows that after W. J. Moroney and Harry Munz were appointed joint receivers of all the property of the lumber and railway companies on April 13, 1907, they promptly qualified and entered upon the discharge of their duties, and that on April 18, 1907, the suits, upon motion of plaintiffs, were consolidated. On May 10, 1907, appellants, J. W. Rippy and O. P. Rippy, filed in the consolidated suits a motion to vacate the receivership. On May 21, 1907, the directors of the companies were made parties to the suit. Harry Munz, who had been on April 13, 1907, appointed one of the receivers, was one of these directors, and upon being made a party to the suit he requested the court, in writing, to determine whether or not he was disqualified to further act in the capacity of receiver, and, in the event he was so disqualified, tendered his resignation. The court held that Munz was disqualified to act as receiver, his resignation accepted, and he was removed. An order was also made on said 21st day of May that W. J. Moroney be continued and appointed as sole receiver of all the properties of said companies. Appellant Barrier, on May 30, 1907, filed his motion to set aside the appointment of receivers and to vacate the receivership. On May 31, 1907, both motions to vacate the order appointing a receiver and the receivership were overruled. Appellants gave notice of appeal, and on June 8, 1907, filed their respective appeal bonds. The majority of this court hold, as I understand, that the order continuing and reappointing W. J. Moroney as sole receiver on May 21, 1907, constitutes the order of appointment from which appellants were authorized or required to appeal, if they wished to have the action of the court in appointing a receiver reviewed, and that inasmuch as the appeals were perfected within 20 days from that date, they were taken within the time prescribed by law. With this view of the matter I do not agree. I am of the opinion that the existence of the receivership dates from the appointment of W. J. Moroney and Harry Munz as receivers on April 13, 1907, or the entry of the order of such appointment on April 16, 1907, and that in order to secure a revision of the court's action in appointing a receiver, by this court, it was necessary to perfect an appeal there-

from within 20 days from the date of said appointment, or the entry of the order to that effect; that inasmuch as the appeal bonds of appellants were not filed until June 8, 1907, their appeals were not perfected within the time prescribed by the statute quoted and should have been dismissed. The acceptance of Munz's resignation and his removal did not have the effect to vacate the receivership or discharge Moroney. The latter's appointment, as originally made on April 13, 1907, remained unaffected by the removal of Munz, and would have continued in full force after Munz's removal without the order of the court reappointing him. The order of May 21, 1907, recites, "that W. J. Moroney be and he is hereby continued and appointed as sole receiver," etc. This is but a precautionary measure or order of the court, not actually necessary to a continuation of the receivership and Moroney's appointment, and cannot be construed as an appointment of Moroney as receiver separate and distinct from his original appointment, and from which an appeal would lie. The order made May 21, 1907, simply removed Munz because of his disqualification on account of interest in the litigation and did not terminate the receivership. This would have been true, even if Munz had been at that time the only receiver; for a clear distinction is drawn between the removal and the discharge of a receiver. "A receiver is removed when it is made to appear that the interest of the parties concerned require it, and a receiver is discharged when the objects sought to be obtained by his appointment have been accomplished. In the one case the property in litigation continues in the possession of the court, subject to the final decree, while in the other case it passes, pursuant to the decree, to the party entitled. The term 'removed,' as applied to a receiver, means simply a change in the personnel of the receivership, which continues unaffected. The 'discharge' of a receiver relates to the termination of the receivership," etc. Beach on Receivers, pp. 847, 848. So that if Munz had been at the time of his removal the sole receiver of the lumber and railway companies, and Moroney had then, by appointment, been substituted in his stead as receiver, it seems an appeal could not have been prosecuted therefrom. The substitution in such case would not have been such an appointment as is contemplated by our statute authorizing appeals from interlocutory orders appointing receivers. It logically follows, it seems to me, and with stronger reason, that where two receivers have been appointed and one is removed for cause, the continuation of the other as sole receiver, by an order of the court, is not the appointment within the meaning of the statute, from which an appeal may be prosecuted. The reason is stronger in such case because the removal of the one does not abrogate or materially affect the original order appoint-

ing the other, and because the order continuing or reappointing such other person as receiver was unnecessary for the purpose intended. The case of Luck v. Hopkins, 92 Tex. 426, 49 S. W. 360, cited in the opinion of the court, is not applicable. In that case the original judgment was reformed at the same term of the court at which it was rendered, and although as reformed was similar to or the same as the first judgment, yet it was held that the entry of the last judgment had the effect to vacate and set aside the first; hence the last was the only existing judgment, and the only one from which the writ of error could be prosecuted. Here the effective order appointing a receiver was the one made April 13, 1907, and the unnecessary order continuing Moroney as receiver did not have the effect to set aside and vacate it.

There is another reason why I think the appeals ought to have been dismissed. The appellants, as has been shown, made motions to set aside the orders appointing the receivers and to vacate the receivership, and said motions were by the court overruled. The record discloses that it was from the judgments denying these motions that the appeals were taken. The appeals do not purport to be taken from either the order appointing Moroney and Munz joint receivers, or from the order continuing or appointing the said Moroney as sole receiver. Separate appeals by Ripy and others and Barrier were taken, and the only thing in the record that can be construed as indicating that an appeal from the order appointing a receiver was intended, or being prosecuted, is found in Barrier's appeal bond. This bond, after describing the judgment overruling Barrier's motion to vacate the receivership, simply recites: "And whereas said intervenor, B. C. Barrier, desires to appeal from said orders overruling and denying said motion to vacate said orders, and to appeal from said orders appointing and continuing said W. J. Moroney as receiver," etc. Ripy's appeal bond does not even contain this recital, and neither of the judgments overruling the motions to vacate show any exception to the court's action in appointing receivers, or otherwise refer to such action. Each simply states that the motion to vacate the orders appointing receivers as originally made and as further made on May 21, 1907, making W. J. Moroney sole receiver, was overruled, to which interveners excepted and gave notice of appeal, etc. These orders show, and they should control, that the appeals were simply taken from the judgment overruling the motions to vacate the receivership, and not from the orders appointing the receiver. Now we have no statute which authorizes an appeal from an order refusing to vacate a receivership and discharge the receiver, and it is only by such authority that such right of appeal could exist in this state. The statute referred to

authorizes an appeal from an intermediary order appointing a receiver, and not an order overruling a motion to dissolve the receiver. It has been so held by the Court of Civil Appeals for the Third District in the case of *Fidelity Funding Co. v. Welford*, 91 S. W. 246. I am not expressing any opinion as to whether or not it is necessary, in order to confer jurisdiction on the appellate court, that the record should show that notice of appeal was given to the order appointing a receiver. I hold that the record in this case shows affirmatively that notice of appeal was given from the orders overruling the appointments to set aside the order appointing a receiver and to vacate the receiver; that the appeals were prosecuted from the orders alone, and could not be entered by this court. The mere recitation in the appellant's appeal bond that "he desires to appeal from the orders appointing and continuing said W. J. Moroney as receiver," does not show there is nothing else in the record indicating that he has done so, and when the record does expressly show that the appeal was taken from an order overruling a motion to vacate the appointment of a receiver, it is sufficient, in my judgment, to show an appeal from such order of appointment. I am of the opinion that both appeals should be dismissed.

# EMERSON v. TOWN OF McNEIL.

Supreme Court of Arkansas. Dec. 9, 1907.)

## CONSTITUTIONAL LAW—PROHIBITION OF UNLAWFUL OCCUPATION—DUE PROCESS OF LAW.

An ordinance prohibiting the soliciting of customers for any hotel, etc., on a depot platform while passenger trains are stopping cannot be considered a prohibition of a lawful business, if it only covers the period of stops by such trains; the same being from two to five minutes.

**MUNICIPAL CORPORATIONS—CONSTRUCTION OF CHARTERS AND STATUTORY PROVISIONS.** Under Kirby's Dig. § 5438, conferring on a town the power to regulate soliciting persons arriving on trains for hotels, etc., and section 5439, granting the power to regulate omnibuses, drays, etc., and hotels, a town was empowered to pass an ordinance prohibiting the soliciting of customers for any hotel, etc., on a depot platform while passenger trains were stopping.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1351.]

## EMERSON v. TOWN OF McNEIL.

**THE POWER CONFERRED ON TOWNS BY KIRBY'S DIG. § 5438, TO REGULATE SOLICITING PERSONS WHO ARRIVE ON TRAINS FOR HOTELS, ETC., AND BY SECTION 5439, GRANTING THE POWER TO REGULATE OMNIBUSES, DRAYS, ETC., AND HOTELS, A TOWN WAS EMPOWERED TO PASS AN ORDINANCE PROHIBITING THE SOLICITING OF CUSTOMERS FOR ANY HOTEL, ETC., ON A DEPOT PLATFORM WHILE PASSENGER TRAINS WERE STOPPING, IS NOT AN INTERFERENCE WITH ANY PERSON'S RIGHT, BUT A PROPER EXERCISE OF THE POLICE POWER.**

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1351.]

**AN ORDINANCE PROHIBITING THE SOLICITING OF CUSTOMERS FOR ANY HOTEL, ETC., ON A DEPOT PLATFORM WHILE PASSENGER TRAINS ARE STOPPING IS NONE**

the less valid because the platform on which the soliciting is prohibited is the property of the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1351.]

## 5. SAME—CRIMINAL PROSECUTIONS—REVIEW—BOND FOR COSTS—STATUTORY PROVISIONS.

Kirby's Dig. § 2476, providing that, in prosecutions in cases less than felony in courts of justices of the peace and in other inferior courts, the prosecutor shall give a bond for costs, does not apply to a prosecution in a municipal court for violation of an ordinance.

## 6. CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS.

Objections to instructions given and to the refusal to give others will not be considered, where the abstract fails to set out the instructions sought to be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2943.]

Error to Circuit Court, Columbia County; Charles W. Smith, Judge.

J. W. Emerson was convicted of a violation of an ordinance of the town of McNeil, and he brings error. Affirmed.

The ordinance is as follows:

"Section 1. Be it ordained by the council of the incorporated town of McNeil, that it shall be unlawful for any person or persons drumming or soliciting customers or patronage for any hotel, boarding house, restaurant, or hack line or passage, or for any other business, to stand upon or to occupy the gravel platform belonging to railroad company and drum or solicit customers or patronage for any hotel, boarding house, restaurant, or hack line or passage or other business, while the passenger trains are stopping at the depot in said town of McNeil.

"Sec. 2. Every person violating this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one nor more than five dollars for each offense."

Stevens & Stevens, for appellant.

HILL, C. J. The town of McNeil passed an ordinance making it unlawful for any person to drum or solicit customers for any hotel, boarding house, restaurant, or hack line upon the depot platform belonging to the railroad company while passenger trains were stopping there. The ordinance will be set out in the statement. The evidence shows that prior to the enactment of this ordinance there had been serious annoyance to the traveling public by hackmen and hotel porters gathering at the steps of the train coaches and importuning passengers alighting therefrom. Whether this conduct had become dangerous or a public nuisance is not certain; but it is certain that it was a serious annoyance to the traveling public and the railway employes and to remedy the mischief the ordinance in question was passed. Trains only stop at this town from two to five minutes, and the ordinance only covers this period of time. Therefore it cannot be considered a prohibition of a lawful business

and offensive to the rule announced in *Thomson v. City of Hot Springs*, 34 Ark. 553, 36 Am. Rep. 24.

Section 5438 of Kirby's Digest confers upon cities and incorporated towns the power "to regulate drumming or soliciting persons who arrive on trains, or otherwise, for hotels, boarding houses, bath houses or doctors." Section 5454 empowers them "to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire, and all livery stables," and "to regulate hotels and other houses for public entertainment." Under these powers, the municipality had the right to pass the ordinance in question. *City of Fayetteville v. Carter*, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; *Hot Springs v. Curry*, 64 Ark. 152, 41 S. W. 55. And the power conferred and as exercised is not obnoxious to, or an interference with, any common right, but is a proper exercise of the police power, and is universally sustained. *McQuillan on Municipal Ordinances*, §§ 28, 184; *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100. The fact that the platform upon which they were forbidden to solicit customers at this interval was the property of the railroad company does not affect the power. *McQuillan* says: "Ordinances regulating hackmen, etc., while they are in and about landings, depots, and stations, are valid, although the property of such places is not that of the city, or, strictly speaking, public property of any kind." *McQuillan on Municipal Ordinances*, § 28.

The deputy town marshal made affidavit charging the appellant with having violated the ordinance in question, and it was insisted in the mayor's court, in the circuit court, and here that the action should have been dismissed because the prosecutor did not make bond for costs as required by section 2476 of Kirby's Digest. The question is whether said section applies to actions for violations of town ordinances in municipal courts. A similar question was twice before the Supreme Court of Illinois, and each time it was held that such a statute did not apply to prosecutions for violations of municipal ordinances. *Town of Lewiston v. William Proctor*, 23 Ill. 533; *City of Quincy v. Ballance*, 30 Ill. 185. *McQuillan* says: "Violations of municipal police regulations are not usually regarded as crimes as that term is used in our law." *McQuillan on Municipal Ordinances*, § 333. The whole statute on this subject (sections 2476-2480) shows that it is intended for the prosecutions under the criminal laws of the state. There is nothing in its terms to support the theory that it applies to prosecutions for violations on municipal ordinances, and it cannot be extended to them by analogy or construction. Violations of municipal ordinances are only quasi crimes, and the distinction between them and violations of the State's criminal laws may be found in *Mc-*

*Quillan, Municipal Ordinances*, § 333, and 1 Dillon (4th Ed.) 411, 412.

Appellant objects to certain instructions given, and to the refusal to give certain instructions asked by him; but he fails to set out in his abstract the instructions sought to be reviewed. As stated by Chief Justice Cockrill in *Koch v. Kimberling*, 55 Ark. 547, 18 S. W. 1040: "His exception on that score has not impressed him as being serious enough to require him to point out the error by setting out the prayers in his abstract in accordance with the rules. We therefore take it as a waiver of the objection." See, also, similar applications of the same principle in *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, 974, and *Carpenter v. Hammer*, 75 Ark. 347, 87 S. W. 646.

Judgment affirmed.

### MORPHEW v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. SLANDER—INDICTMENT.

An indictment which charges that, in a conversation with a certain person at a certain time, defendant used language which in its ordinary acceptation amounted to charging that a certain person had been guilty of fornication with him, declared by Kirby's Dig. § 1854 to constitute slander, is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 417-424.]

#### 2. SAME—CHARGING FORNICATION—EVIDENCE.

A conviction of slander, in charging that prosecutrix committed fornication with defendant, may be had on evidence that in a conversation he described in detail familiarities that he had taken with her person, and stated that she consented to have intercourse with him, and that he then left, and that, on being asked if he had intercourse with her, he replied, "Dor't ask me such a question."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 403, 437.]

#### 3. CRIMINAL LAW—APPEAL—REVIEW—REFUSAL OF CONTINUANCE—DISCRETION.

On a trial for slander in charging that prosecutrix committed fornication with defendant, the testimony showing that in the same conversation he stated he took certain liberties with her person, he having admitted that he did not have intercourse with her, but stated that he did take the liberties with her, and denied that he charged her with fornication, and she having denied that he took any liberties with her, it was not an abuse of discretion to refuse continuance for a witness who would testify to having seen him take liberties with her; the contradiction of prosecutrix, which was sought, being on an immaterial and collateral issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1323-1327.]

#### 4. SAME—APPEAL—OBJECTIONS BELOW—ADMISSION OF EVIDENCE—ABSENCE OF OBJECTION.

Defendant may not complain of testimony admitted without objection, the exclusion of which was not sought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2639-2642.]

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Hugh Morpew was convicted of slander, and appeals. Affirmed.



William F. Kirby, Atty. Gen., and Danl. Taylor, Asst. Atty. Gen., for the State.

HILL, C. J. Appellant, Hugh Morpew, was indicted for slander in four counts. A nurrer was sustained to three of the counts, leaving the indictment only effective to the second count, which charged that a conversation with Frank Kennedy, on 15th of November, 1906, he used language which, in its ordinary acceptation, amounted to charging that one Anna Morrow had been guilty of fornication with him. The indictment was returned on the 21st day of September, he was arrested and gave bond the same day, and on the 25th he filed motion for continuance in order to enable him to obtain the testimony of a young lady living in Scott county. He alleged that this young lady saw the prosecutrix and himself together in the early part of 1905, and saw him take indecent liberties with her person with her consent; that he did not know this evidence until he arrived at court on the 25th of September; that he then had subpoena issued for her, and made efforts to communicate with her over the telephone, but failed; that the facts set forth are true; and that he could prove said facts by no other witness whom he could then produce. His motion was overruled, the cause ordered for trial on the 26th, and he was convicted, and his punishment assessed at six months' imprisonment in the state penitentiary. He has appealed, but has not presented any brief to show wherein there was error in his trial. The court, therefore, turns to the question for new trial to ascertain the errors complained of.

The first three grounds attack the sufficiency of the evidence; but there can be no doubt of its sufficiency to sustain the verdict, and it would serve no useful purpose to review it.

The next ground is an attack upon the indictment, alleging that it does not state facts sufficient to constitute a public offense. The indictment in plain, intelligible language sets forth the conversation with Frank Kennedy in which the slander is predicated, and the facts alleged constitute the offense charged within the definition of section 1854 of Kirby's Digest, and are sufficiently certain to enable the court to pronounce judgment according to the right of the case. The indictment contains all the elements required by section 2228 of Kirby's Digest.

The next ground is the refusal of the trial court to grant the defendant a continuance, and this has given the court some hesitation. In the conversation for which he was convicted he described in detail certain familiarities that he had taken with the person of the prosecutrix, and then added that she consented to have sexual intercourse with him, and that he then left; and he was asked by the witness if he had had intercourse with her, and he replied, "Don't ask me such a ques-

tion." Taken in connection with what he had just told the witness, his refusal to answer this question could have no other meaning than to charge that the prosecutrix had submitted her person to him, and the jury evidently so understood it. He admits on the trial that he did not have intercourse with her, but says that he did take the liberties, and admits telling of them, and denies that he charged her with fornication. The prosecutrix denied that any liberties had been taken with her, and that she had ever had intercourse with the defendant. The evidence of the young lady in Scott county would not have been admissible for any other purpose than to contradict the prosecutrix's evidence that she had not permitted liberties from him. The material question is not whether, in the early part of 1905, when they were sweethearts, he took liberties with her, but is whether, in November, 1906, he charged her with fornication. He admits she was not guilty of fornication. Therefore this evidence could not be valuable as tending to prove she committed fornication, as that was not an issue. Both parties deny the fornication, and the sole question is whether he charged the prosecutrix with it. Therefore the contradiction of the prosecutrix upon the point sought would be upon an immaterial and collateral issue, and the court cannot say that it was an abuse of discretion for the trial court to refuse the continuance in order to obtain such evidence.

The next ground alleged is that the court refused to instruct a verdict for the defendant. In this the court was clearly right.

The next ground is that the court refused to give instruction No. 4 requested by the defendant. This instruction charged upon the weight of the evidence, and was properly denied.

The next ground is as follows: "Because the court erred in allowing defendant to be contradicted by the testimony of Morris and Brown." It is not clear just what is meant by this assignment of error. As stated, the indictment was in four counts, each of which was based upon conversations with different persons, who testified to the conversations as charged in the indictment. The testimony of these four witnesses was admitted without objection. But at the request of the defendant the court gave an instruction telling the jury that they could only consider the testimony of Frank Kennedy and Odessie Kennedy. This excluded the testimony of Brown and Morris. Just why the defendant did not ask that the testimony of Odessie Kennedy be likewise excluded is not shown. The fourth count is based upon his testimony, and it should have gone out with the first and third counts. No objection was made to it, however, and no exclusion of it was requested.

The last ground is another attack upon the indictment; but, as shown, it was sufficient.

The judgment is affirmed.

**STUCKEY v. LINDLEY.**

(Supreme Court of Arkansas. Dec. 16, 1907.)

**APPEAL—WHO ENTITLED TO ASSESS ERROR—WANT OF PREJUDICE.**

On appeal in an action for the price of and to declare a lien on logs, defendant may not complain that the court erred in declaring such lien, where he does not claim any interest in the logs and could only be affected by the costs that accrued through an attachment of the logs which could have been retaxed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by J. W. Lindley against Charles Hunter, the East St. Louis Walnut Company interpleading. From a judgment for plaintiff, defendant and interpleader appealed to the circuit court; and from a judgment of that court for plaintiff, defendant appealed, and on his death the cause was revived by M. M. Stuckey, special administrator. Affirmed.

Appellee instituted this action before a justice of the peace by filing his affidavit that Charles Hunter was indebted to him in the sum of \$67.70 for some walnut logs sold by appellee to Hunter, and that the purchase money therefor was due and unpaid, and asking judgment for said sum, and that it be declared a lien on the said logs, and at the same time gave a bond to procure the issuance of the order of seizure. Appellee also filed an itemized statement of an account with Hunter, which showed a balance due from Hunter to appellee of \$2.45. Upon the affidavit which was filed the justice issued an order directing the constable to attach and safely keep the said walnut logs, or so much thereof as would be necessary to satisfy a debt of the appellee against Hunter for \$67.70 for purchase money of said walnut logs, and also to summon the defendant (Hunter), which writ was returned duly served by the constable taking possession of the said walnut logs, and also upon defendant as an ordinary summons. Hunter filed an answer in which he denied the indebtedness, and denied that the appellee had any right or interest in said logs in any manner whatever, or that he was entitled to any lien on the same or any part thereof. The East St. Louis Walnut Company interpleaded, and set up that it was the absolute owner of said logs. There was a trial in the justice of the peace court, which resulted in a judgment against both Hunter and the interpleader, and an appeal of both causes was duly prosecuted to the circuit court.

On a trial of the attachment suit in the circuit court, the appellee, to sustain his cause of action, introduced the following testimony, to wit: J. W. Lindley, appellee, stated: "I am the plaintiff. Charles Hunter is the defendant. He was, at the beginning of this suit, indebted for \$63 for logs and \$2.40 on account. The \$63 was due for some walnut logs. They are the same logs attached in

that suit by the constable. I do not know who had possession of these logs when they were attached, but they had been sold. I understood they had been branded, and that was notice to me that they had been sold." This was all the evidence in the case. Whereupon Hunter requested the court to instruct the jury that there can be no lien on the logs in this case, under the pleadings and the evidence, which motion was overruled, and Hunter duly excepted. Thereupon the court directed the jury to return the following verdict, to wit: "We, the jury, find for the plaintiff [appellee] in the sum of \$65 debt, and that \$63 of it is a lien on the logs in controversy." The motion for a new trial was filed and overruled, exceptions duly saved, time granted to file bill of exceptions, and appeal granted.

After this cause was docketed in this court, and appellee had entered his appearance hereto, Charles Hunter, the original appellant, died intestate, and by agreement of parties this cause was revived in the name of M. M. Stuckey as special administrator.

Campbell & Suits, for appellant. Phillips & Boyce, for appellee.

HART, J. (after stating the facts as above). Appellant does not question the correctness of the amount of the judgment, but claims that the court erred in declaring a lien on the walnut logs attached. This only affects the interpleader, and his rights are not before the court. Appellant does not claim any interest in the logs, and was not prejudiced by the declaration of law, if erroneous. *Kelly v. Keith*, 77 Ark. 81, 90 S. W. 150. He could only be affected by the trivial amount of costs that accrued by reason of the attachment, and that could have been reached by motion to retax the costs, instead of by appeal. *Thompson v. Baxter*, 76 Ark. 327, 88 S. W. 985.

Affirmed.

**REMLEY v. MATTHEWS.**

(Supreme Court of Arkansas. Dec. 16, 1907.)

**COUNTIES—SHERIFF AND COLLECTOR—SUSPENSION OF SHERIFF—FAILURE TO QUALIFY AS COLLECTOR—APPOINTMENT—TENURE.**

Though a sheriff is suspended, under Kirby's Dig. § 7992, on indictment being filed against him, he is still sheriff, and entitled to qualify for the separate office of collector; and, on his failure to do so in the time limited, section 7042, providing that, if the sheriff fail to qualify as collector within a certain time, the Governor shall, on being notified, appoint a person to perform the duties of collector, which appointee section 7044 provides shall hold the office till the next general election, applies.

Appeal from Circuit Court, Chicot County; Henry W. Wells, Judge.

Suit by C. M. Matthews against E. P. Remley. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions.

This is a suit brought by C. M. Matthews against E. P. Remley to obtain possession of the office of collector of Chicot county. The facts are undisputed, and are as follows: M. C. Strong was appointed sheriff and ex-officio collector of Chicot county, Ark., on the 1st day of July, 1905, and served until the 10th of October, 1906. Upon said date he was suspended from office by an order of the circuit court, there being 18 indictments filed against him charging him with malfeasance in office. The defendant, E. P. Remley, was appointed sheriff to fill the vacancy caused by the said suspension of M. C. Strong, by the Governor, on the 20th day of October, 1906, and filed his bond, and took the oath of office, and entered upon the duties of said office. M. C. Strong did not qualify as collector. E. P. Remley failed to make the collector's bond prior to the first Monday in December, 1906, and the county clerk certified said failure to the Governor, and E. P. Remley was appointed collector on the 7th of December, and made his bond on the 12th of December, 1906. M. C. Strong resigned his position as sheriff while under indictment on the 8th day of March, 1907. On March 1, 1907, E. P. Remley was again appointed sheriff by the Governor of this state, and filed his bond, and qualified on the 13th of March, 1907. E. P. Remley filled the office of sheriff until the election and qualification of C. M. Matthews. The appellee, C. M. Matthews, was elected sheriff at a special election held on the 15th day of April, 1907, and was commissioned on the 24th day of April, 1907, and qualified as sheriff on the 30th day of April, 1907, and demanded of E. P. Remley the office of collector of Chicot county and the books and papers thereto belonging, and was refused. The books and papers of the office of sheriff were turned over to the appellee by the appellant on the 30th day of April, 1907."

The defendant moved the court to give the following declarations of law: "(1) E. P. Remley is entitled to the office of collector of Chicot county, under the appointment received by him from the Governor on December 7, 1906; he having given bond within ten days after said appointment and qualified as required by law as collector of Chicot county. Such declaration of law the court refused to give, to which refusal the defendant at the time excepted, and asked that his exceptions be noted of record, which was then and there accordingly done. (2) The plaintiff, C. M. Matthews, is not entitled to the office of collector of Chicot county, Ark., by virtue of his election to the office of sheriff in April, 1907; the office of collector having previously been filled by appointing E. P. Remley." Such declaration of law the court refused to give and declare, to which ruling and judgment of the court the defendant at the time excepted, and asked that his exceptions be noted of record, which was then and there accordingly done. The court of its

own motion gave the following declaration of law: "The plaintiff, C. M. Matthews, is entitled to the office of collector of Chicot county by virtue of being elected sheriff under the special election in April, 1907"—and gave judgment for the possession thereof, to which ruling and judgment of the court, in so declaring the law to be, defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done. Judgment was thereupon entered in favor of the plaintiff. Defendant filed his motion for a new trial, and, upon it being overruled, has appealed.

E. A. Bolton, William Kirten, and N. B. Scott, for appellant. J. R. Parker, for appellee.

HART, J. (after stating the facts as above). M. C. Strong was suspended from office under section 7992, Kirby's Digest, which reads as follows, to wit: "Whenever any presentment or indictment shall be filed in any circuit court in this State against any county or township officer, for incompetency, corruption, gross immorality, criminal conduct amounting to felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer be suspended from his office until such presentment or indictment shall be tried: Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause is continued on the application of the defendant." Section 7993 provides for the removal of such officer upon conviction. It will be observed that Strong was not removed from the office of sheriff, but was only suspended pending the indictments against him. Remley was appointed sheriff on the 20th day of October, 1906, under section 7995 of Kirby's Digest, authorizing the Governor to temporarily appoint an officer in the place of the suspended officer. This presents for our consideration the question: Who was entitled to qualify as collector of the revenue of Chicot county in 1906, Strong or Remley?

In the case of *Crowell v. Barham*, 57 Ark. 197, 21 S. W. 34, Cockrill, C. J., said: "The offices of sheriff and collector, though usually exercised by the same person, are as separate and distinct as though held by different incumbents. *Ex parte McCabe*, 33 Ark. 396; *Falconer v. Shores*, 37 Ark. 386. If the sheriff become collector by reason of qualifying as sheriff, there would be strong ground for contending that his general deputy was also deputy collector, as was held in the case of *People v. Otto*, 77 Cal. 45, 18 Pac. 869. But under our statute the sheriff becomes collector only when he qualifies as collector. He has the right by virtue of his office to become collector, but he may forfeit the right without forfeiting the office of sheriff. In that event, the law authorizing the substitution of another in the office." It seems clear, then, that Strong, and not Remley, had the right to

qualify as collector, for the reason that Strong was still sheriff. He did not cease to be sheriff because of his suspension pending the indictments against him. Strong's suspension from the office of sheriff only disabled him from discharging the duties of the office, and did not take away the office itself. Only a removal from office could do that. He was still the sheriff, and by virtue of holding that office had the right to qualify as the collector of revenue. Strong failed to give the bond of collector within the time prescribed by law, and upon a certificate by the clerk to that effect the Governor appointed Remley to that office, pursuant to section 7042 of Kirby's Digest. This was a valid appointment; for section 46, art. 7, of the Constitution leaves the office of collector under legislative control. *Falconer v. Shores*, 37 Ark. 386. In that case the court said: "Upon the failure of a sheriff to give bond as collector of revenue within the time prescribed by law, the Governor is required, upon notice of such failure from the county clerk, to declare the office vacant and fill it by appointment."

We are now brought to consider the length of his term. As we have seen, appellant was appointed pursuant to section 7042 of Kirby's Digest. Section 7044 provides that he shall hold the office until the next general election and until his successor is elected and qualified. In the case of *Alston v. Falconer*, 42 Ark. 114, it is held that, where a person is appointed collector pursuant to the statutes, *supra*, he is by law entitled to hold it until the next general election and until his successor is elected and qualified. See, also, *Falconer v. Shores*, *supra*.

Reversed and remanded, with direction to enter judgment in accordance with this opinion.

#### ST. LOUIS, I. M. & S. RY. CO. v. MILLER.

(Supreme Court of Arkansas. Dec. 9, 1907.)

DAMAGES—LOSS OF PROPERTY—EVIDENCE—SUFFICIENCY—IDENTITY OF PROPERTY.

In an action for the killing of a mare, evidence held to sustain a verdict that it was plaintiff's mare that was killed.

Appeal from Circuit Court, Clay County; Frank Smith, Judge.

Action by W. S. Miller against the St. Louis, Iron Mountain & Southern Railway Company for the killing of a mare. From a judgment for plaintiff, defendant appeals. Affirmed.

T. M. Mehaffy and J. E. Williams, for appellant.

HILL, C. J. Miller sued for a black mare which he alleged was killed by a definitely described train of the appellant railroad company at Lenson Crossing. He recovered judgment, and the railroad company has appealed.

The sole question is whether the evidence is sufficient to identify the black mare sued

for as the animal struck by the train at the time and place alleged. Mr. Miller did see her killed, but testified that he last saw her when she was near the Lenson Crossing, that she was a black mare, three years old. Subsequently he stated that she had gray or white hairs around the root of her tail, and her mother was a flea-bitten mare. He heard of the killing the day after the killing and went to the place to see after the mare, but found that she had been burned in the night, and he did not see her and did not identify the mare that he heard was killed and burned as his. Another witness described the animal which was killed at Lenson Crossing on account of her injuries from the train and burned, to have been a bay filly, very dark, and not very light." This witness stated that he knew a herd of horses belonging to Mr. Miller; that the mare killed was one of that herd, which was generally recognized to be owned by Mr. Miller. He does not know the individual animals belonging to the herd, but knows the herd collectively. He says that the bay filly that was killed was about three years old. Another witness testified that he was present when the mare was killed. He describes her as a nice large iron gray to the best of his knowledge. Miller further testified that he had not seen a black mare since the animal was killed by the train, and she was missed from the herd in the herd with which she ran.

This is all the testimony on the subject, and it is earnestly insisted that the allegations and probata do not agree. It is true that the descriptions as to color do not agree, but these facts are established: That it was a mare about three years of age which was injured by the train, and was killed to her suffering, and burned by the section at the time and place alleged in the complaint, and that the mare killed was one of the herd of mares which ran together and were owned by Miller, and Miller had counted for the balance of his bunch and his black mare. These facts certainly tend to prove that it was his mare that was killed. Whether she was a black, bay, or iron gray is a matter of difference of opinion or reflection among the witnesses. But there is sufficient evidence to sustain the verdict that it was Miller's mare that was killed, that is the sole question on this appeal. Affirmed.

#### STATE ex rel. GOING v. HIGGINBOTHAM.

(Supreme Court of Arkansas. Dec. 9, 1907.)

COUNTIES—OFFICERS—"COUNTY OFFICERS"

A director of a levee district created by Feb. 15, 1893 (Acts 1893, p. 24, as amended Acts 1893, p. 119), creating a levee district embracing all or parts of several counties providing for the appointment by the Governor of directors thereof, is not a county officer. In Kirby's Dig. § 7984, requiring prosecuting attorneys to institute proceedings against persons usurping a county office; a county officer.

being one performing functions only within the county.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1663-1666.]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by the state, on the relation of L. C. Going, prosecuting attorney for the Second Judicial District, against Walter Higginbotham. From a judgment of dismissal on sustaining a demurrer to the complaint, the relator appeals. Affirmed.

The complaint alleged that under the act of the General Assembly, which became a law without the approval of the Governor on February 15, 1893 (Acts 1893, p. 24, as amended by Acts 1893, p. 119), there was created and established the St. Francis levee district, embracing all of the counties of Mississippi and Crittenden and parts of the counties of Craighead, Poinsett, Cross, St. Francis, Lee, and Phillips; that said act provided for the creation of a board of directors, to be appointed by the Governor, to control and manage the affairs of said district, and provided that said directors should be appointed, three each from the several counties named; that in March, 1905, the Governor appointed defendant a member of said board of directors from Craighead county; that defendant is a citizen and resident of Craighead county, but does not live within the bounds of said district, in fact living more than ten miles from the western boundary of said district; that defendant, notwithstanding his disqualification to serve as an officer and director of said district, has undertaken to usurp said office and to serve as an officer and member of said board of directors of St. Francis levee district, contrary to section 4 of article 19 of the Constitution of Arkansas—and prayed that he be ousted from office, etc.

L. C. Going, Lamb & Caraway, and A. B. Shafer, for appellant. J. F. Gautney and N. V. Norton, for appellee.

HILL, C. J. This is an action brought by the prosecuting attorney under section 7984 of Kirby's Digest against a director of the St. Francis levee district, seeking to have him declared ineligible to hold and keep the office of director, or act as a member of said board of directors, on the ground that the said Higginbotham did not reside within the boundary of the St. Francis levee district. The complaint, the substance of which will be found in the statement of facts, sets forth fully the position of the appellant. In brief, the appellant contends that the directors of the St. Francis levee district are officers within the meaning of section 4, art. 19, of the Constitution, providing that "all civil officers of the state at large shall reside within the state, and all district, county and township officers within their respective districts, counties and townships." This case primarily involves two questions: First, is a member of

the board of directors of the St. Francis levee district a public officer? and, second, if so, is he a county officer? Before the prosecuting attorney can call for a decision of the question as to whether it is a public office, he must show that he has a right to question the authority of the director. He has no such right unless the director is a county officer, because it is only against county officers that the prosecuting attorney is authorized, under section 7984, to proceed.

Let it be conceded, without being decided, that a director of the St. Francis levee district is a public officer within the meaning of that provision of the Constitution; still the question remains paramount whether the prosecuting attorney can oust him. Therefore the first duty of the court is to ascertain what is a county officer within the meaning of section 7984. In the Matter of Whiting, 2 Barb. (N. Y.) 513, the court said: "There are certain officers that are very readily understood to be county officers, such as sheriffs, coroners, surrogates, etc., for they are appointed or elected for a county, must reside in the county, and can perform their functions only within the county. So there are officers clearly and easily known, for the same reason, as city officers, such as mayor, recorder, alderman, and the like, and village officers, such as village trustees, and town officers, such as town clerk, constable, collector, etc. But there is a large number of officers, both judicial and administrative, whom it is difficult to classify under either of these denominations." This definition of a county officer was followed in the Matter of Carpenter, 7 Barb. (N. Y.) 30. The Supreme Court of Georgia said: "A county officer, then, is a public officer whose duties are limited by law to a single county." *Massenburg v. Commissioners*, 96 Ga. 614, 23 S. E. 998. The Supreme Court of the United States said: "An officer of the county is one by whom the county performs its usual functions—its functions of government." *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93, 18 L. Ed. 33. In *Knox v. Board*, 58 Cal. 59, a superintendent of irrigation for a district composed of parts of a county was held not a county officer, but an officer of the district.

Applying these principles defining a county officer, it is apparent that a member of the board of directors of the St. Francis levee district is not a county officer, even if it be conceded that he is a public officer. He performs no functions in or for his county. He performs none of the duties pertaining to the executive or judicial departments of his county, and he exercises none of the political functions of it. He is a member of a quasi corporation, serving as an "agency of the state government," composed of members from various counties and parts of counties constituting a large district. *Carson v. Levee Dist.*, 59 Ark. 513, 27 S. W. 590. If he is an officer, he is an officer of that district, and not of the county; and whether this position is a

public office within the meaning of the Constitution, or whether it is a mere agency of the landowners composing the district, is a question which the court will determine when a case arises which calls for a decision thereof.

Judgment affirmed.

#### SLUDER v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)  
INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—QUESTIONS FOR JURY.

Whether accused sold wine in quantities less than five gallons held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 324-330.]

Appeal from Circuit Court, Johnson County; Hugh Barham, Judge.

W. D. Sluder was convicted of violating the local option law, and appeals. Reversed and remanded.

Cravens & Covington, for appellant. William F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for the State.

HILL, C. J. Sluder was indicted for selling a quart of wine within three miles of the Knoxville public school, contrary to the local option order of the county court of Johnson county. The court directed the jury to find the defendant guilty, which the jury did, and assessed his fine at \$25, and he has appealed.

The evidence shows that the wine was made by Sluder from grapes grown upon his own premises, and he had a right, under section 5100 of Kirby's Digest, to sell the same in original packages of not less than five gallons; and the question in the case was whether he had made such sale. The state's witness testified that he had bought a five-gallon keg from Sluder and left it with him; that he purchased on credit, and that from time to time he carried away a quart, or half gallon, or gallon, until his keg was exhausted; that he paid from time to time money on his purchase, and at the time of the trial he had not made full payment; that the sums paid were not for the amount of wine received by him at the time, but were credits upon his purchase of five gallons of wine; and that some of these payments were made in work and the remainder in cash. Sluder's testimony was practically to the same effect.

Whether the transaction amounted to the sale of an original package of five gallons, or whether it was really a sale of such quantities as the purchaser wanted from time to time, was fairly a jury question. What was said in Robinson v. State, 59 Ark. 341, as to whether there was a sale or loan of whisky, is equally applicable here: "The law will not tolerate subterfuges of any kind; and if the defendant, under pretense of making a loan of whisky, to be returned in kind, actually sold the whisky, as alleged, he should

be punished. But whether he sold it or exchanged it for other liquor of the same kind is a question of fact, and it is his right to have that question submitted to a jury, to be determined by them after a consideration of all the facts and circumstances surrounding the transaction." In State v. Brown, 102 S. W. 394, this court held under the facts there that the evidence established beyond question a sale, and the court should have so instructed the jury, but differentiated it from the Robinson Case, as there were circumstances in it which would tend to prove a real loan, while the undisputed facts in the Brown Case proved the transaction to be a sale. In the one it was a question for a jury; in the other, for the court. This case falls within the Robinson Case, and the good faith of the "five-gallon sale" should be determined by a jury.

Reversed and remanded.

#### WESTERN UNION TELEGRAPH CO. v. WENISKI.

(Supreme Court of Arkansas. Nov. 25, 1907.)

1. TELEGRAPHS—FAILURE TO DELIVER TELEGRAM—ACTIONS—MENTAL SUFFERING—EXCESSIVE DAMAGES.

In an action for damages for mental suffering caused by failure to deliver a telegram notifying plaintiff of the burial place of her brother, where it appeared that plaintiff's brother was a full-grown man, that he and plaintiff had not resided together for several years, and that his funeral arrangements were properly attended to by his father, a verdict for \$1,354 was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 74.]

2. SAME—PERSONS ENTITLED TO DAMAGES—NECESSITY FOR COMPANY'S KNOWLEDGE OF INTEREST.

A telegraph company owes a duty in the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources; hence, unless a telegraph company knew that a telegram addressed to plaintiff's sister was for the purpose of enabling plaintiff to attend her brother's funeral, or defendant was notified of such purpose, plaintiff could not recover for failure to deliver the telegram.

3. SAME—ACTIONS—SPECIAL DAMAGES—NECESSITY FOR COMPANY'S KNOWLEDGE OF PURPOSE.

A telegraph company is liable for special damages occasioned by failure to deliver a message only where notice of the facts giving rise to the special damage is received either from the face of the telegram or from other sources; hence plaintiff could not recover for failure to deliver a message conveying information intended to enable her to attend her brother's funeral, unless defendant could tell from the message itself the purpose thereof, or otherwise received notice of that fact.

4. SAME—NOTICE OF OBJECT OF TELEGRAM.

A telegram, addressed to plaintiff's sister, reading, "If you can, come at once, Clara," signed "Pa." does not on its face disclose facts leading to any information of any special injury to plaintiff by reason of nondelivery; hence, in an action for mental suffering resulting from failure to deliver, a request to so instruct should have been granted.



**SAME—FACTS CONSTITUTING KNOWLEDGE.**

Though a telegraph company would be chargeable with information which several messages, taken together, would afford, if they were added by the same agent or operator, the doctrine of imputed knowledge will not charge an agent of a telegraph company in all cases with notice of matters of which other agents may have knowledge; hence, where a day message is received at an office, where there were many employes working during different hours, notifying plaintiff's sister of the death of a brother, and it was answered by a day message asking plaintiff should go or the brother be brought here, and a night message was sent to plaintiff's sister, requesting plaintiff to come if she could, the telegraph company was not chargeable with information which the messages, taken together, would afford, so as to render them liable for special damages on account of failure to deliver the night message.

Appeal from Circuit Court, Pulaski County, E. W. Winfield, Judge.

Action by Clara Weniski against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Geo. H. Fearons and Rose, Hemingway, Trentell & Loughborough, for appellant. Marshall & Coffman, for appellee.

**MCCULLOCH, J.** This is an action to recover damages alleged to have been caused by the negligent failure of defendant's employees to promptly deliver a telegram from her father, in Toledo, Ohio, addressed to her sister in Little Rock, Ark., which was intended to inform plaintiff of the place of burial of her brother, so that she could attend. She alleged in her complaint that by reason of being thus prevented from attending the funeral of her brother she suffered mental anguish, to her damage in the sum of \$1000. The jury awarded her the sum of \$334, and the defendant appealed to this court.

Plaintiff's father, Valentine Weniski, and her brother, John, lived in Toledo, and she resided in Little Rock with her widowed sister, Mrs. Joe Smelzer. John Weniski died in Toledo on December 7, 1905, and his father immediately sent the following telegram over defendant's wire to Mrs. Smelzer: "John is dead. Died at 12 a. m." This message was promptly delivered to Mrs. Smelzer in the early part of the afternoon on the same day, and she immediately filed with the employees in charge of defendant's office the following message to her father: "Shall Clara come, or do you wish to bring John here. Answer at once. [Signed] Lula." Her father sent in reply the following message, addressed to Mrs. Joe Smelzer: "If you can, come at once, Clara. [Signed] Pa." This message was not delivered at all, and damage is claimed on account of the omission. It was on Friday night, and plaintiff's brother was not buried until the following Monday. It is shown that she could have traveled from Little Rock to Toledo in about 12 hours.

We deem it proper to say in the outset that the assessment made by the jury of damages so grossly in excess of the amount warranted by the evidence, if the plaintiff is entitled to recover any damages at all, calls for a reversal of the judgment, regardless of any other error in the proceedings. The element of mental anguish allowed by the statute in the assessment of damages for nondelivery of a telegram is so indeterminate in its nature that it must be left to some extent to the sound judgment of the trial jury; but there is a limit to the power and discretion of the jury in that respect, and it becomes our duty to set aside an assessment which is palpably excessive. We think the verdict in this case clearly presents such a situation. Plaintiff's brother was a full-grown man about 25 years of age, and he and plaintiff had not resided together for several years. He lived with his father in Toledo, and plaintiff lived with her sister in Little Rock. Her father and his friends in Toledo looked after all necessary arrangements for the funeral, and she had no duty to discharge in that respect; so there could have been no humiliation resulting from an omission to provide such arrangements as were suitable to show proper respect for the memory of the dead. Her only deprivation on account of the failure to deliver the telegram was the melancholy pleasure of attending the funeral of her deceased brother, and the satisfaction of having fully discharged her duty to the dead. It may be that such a bereavement produces mental injury distinct from that resulting naturally from the death of a brother or other loved one, which would justify the assessment of some pecuniary compensation; but we feel sure that a far less sum than that assessed by the jury in this case would, under the circumstances shown by the evidence, suffice to afford full compensation to the plaintiff for her injury in this respect. We are unwilling, therefore, to permit this verdict to stand, even if no other error was found in the record.

The defendant requested the court to give the following, among other instructions to the jury, which was refused: "(5) If you find from the evidence that a message was sent from Toledo, Ohio, addressed to Mrs. Joe Smelzer, 1000 Barber avenue, Little Rock, reading, 'If you can, come at once, Clara,' signed 'Pa,' and that this message was not delivered through defendant's negligence, and you further find that, had said message been promptly delivered to Mrs. Smelzer, plaintiff would have gone to Toledo and would have attended the funeral of her brother, still said message does not on its face show either that plaintiff's brother would be buried in Toledo or that the message was for the purpose of enabling plaintiff to attend his funeral; and unless you further find that defendant was notified that this was the purpose of the message she is

not entitled to recover for any mental anguish she may have endured because she was prevented from attending her brother's funeral, and your verdict will be for the defendant." The court erred in refusing to give this instruction. A telegraph company owes a duty in the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources; and it is liable for special damages only where notice of the facts which give rise thereto is received either from the face of the telegram or from other sources. *W. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700; *Same v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *McCormick v. W. U. Tel. Co.*, 79 Fed. 449, 25 C. C. A. 35, 88 L. R. A. 684; *Morrow v. Same*, 107 Ky. 518, 54 S. W. 853; *W. U. Tel. Co. v. Bell* (Tex. Civ. App.) 90 S. W. 714; *W. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Same v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37.

The message which defendant's agents failed to deliver did not on its face disclose facts leading to information of any special injury to plaintiff by reason of nondelivery; hence the jury should have been so told. Nor could this message, which was received at defendant's office in Little Rock at night, be connected with the other messages passing through the office during the daytime, when an entirely different force of men were at work, without proof of actual knowledge on

the part of the persons through whose hands the last message passed of the contents of the earlier messages. It would be carrying the doctrine of imputed knowledge too far to say that each agent of a telegraph company must in all cases be charged with notice of what other agents have knowledge. Of course, it would be different when both messages were handled by the same agent or operator. In such case the company would be chargeable with information which both messages, taken together, would afford. *Erie Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Herron v. W. U. Tel. Co.*, 90 Iowa, 129, 57 N. W. 696. But in a city office, where there are many employees working during different hours, and where it would be impracticable to devise a system whereby each employee could be conveniently given notice of all the business which passes through the office during the day, it would be not only unreasonable, but very unjust to the company, to charge each employee with constructive knowledge of the contents of all messages. For all practical purposes it would be no more unreasonable to charge a night operator or agent in the Little Rock office with information of the contents of a message passing through the New York office than to charge him with information of a message known only to a day operator or agent in the same office.

There are other assignments of error; but, as those already discussed call for a reversal, it is unnecessary to pass upon others.

Reversed, and remanded for a new trial.



## DUELL et al. v. LESLIE et al.

Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

## APPEAL — SCOPE OF REVIEW — TRIAL ON AGREED STATEMENT OF FACTS.

An agreed statement of facts on which a case is submitted stands in lieu of a special verdict and must be treated as such on appeal.

d. Note.—For cases in point, see Cent. Dig. § 3, Appeal and Error, § 3344.]

## MORTGAGES—ABSOLUTE DEED AS MORTGAGE REDEMPTION BY GRANTOR.

A court of equity may declare a deed absolute on its face to be a mortgage and permit grantor to redeem.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, §§ 60-66.]

## SAME—RELATION OF DEBTOR AND CREDITOR.

A deed absolute on its face will not be held mortgage unless the relation of debtor and creditor exists between the grantor and grantee, and was the intention of the parties to secure payment of such debt.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, §§ 60-66.]

## SAME.

There can be no mortgage without a debt; leaving out of view agreements for the performance of obligations other than the payment of money, it is essential to constitute a mortgage that there be an agreement either expressly implied on the part of the mortgagor to pay the mortgagee a sum of money, either on account of a pre-existing debt or a present loan.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, § 1.]

## SAME—CONDITIONAL SALE.

Where the grantee, in an absolute conveyance, by an agreement executed at the same time, stipulating that the conveyance was made to pay a certain sum of money, and stipulates that he will not convey the premises within a specified time without the consent of the grantor, and if the grantor within that time shall find a purchaser, the grantee will convey on receiving the amount with interest for which the land has been conveyed to him, the transaction is not a mortgage, but is a conditional sale, giving the grantee the right to recover the land after the expiration of the specified time.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, § 5.]

## SAME—ABSOLUTE DEED AS SECURITY.

The ultimate fact which converts an absolute deed into an equitable mortgage is that it was given merely as a security.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, §§ 60-66.]

## DEEDS—CONDITIONS—PERFORMANCE.

Where a grantor executes a warranty deed with the understanding that the grantee will extinguish the grantor's debt to a third person, the grantee, to perfect his title and give force to the conveyance, must pay the debt.

d. Note.—For cases in point, see Cent. Dig. § 10, Deeds, §§ 480, 487.]

## MORTGAGES — ABSOLUTE DEED AS MORTGAGE OR CONDITIONAL SALE.

Where a debt is extinguished by a conveyance, and the grantor has the privilege of re-conveying by a given time and thereby entitle him to a reconveyance, the transaction is a conditional sale, but if the relation of debtor and creditor remains, and the debt subsists, it is a mortgage.

d. Note.—For cases in point, see Cent. Dig. § 35, Mortgages, § 5.]

## 9. SAME.

A grantor conveyed real estate by deed absolute on its face after the premises had been sold by a trustee in a deed of trust. The grantor and grantee entered into a contract, which recited that the grantor was desirous to save what he could, that the grantee had agreed to redeem, and that if either of the parties had an opportunity to sell at not less than a fixed price within a specified time a sale should be made, and out of the proceeds should first be paid the amount expended in redeeming the premises, etc., and the surplus should be equally divided between the grantor and grantee. Held, that the transaction was not a mortgage.

Appeal from Circuit Court, Scotland County; Chas. D. Stewart, Judge.

Action by Joseph P. Duell and another against G. E. Leslie and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

This is a proceeding in equity, which was begun by the plaintiffs in the Scotland county circuit court on July 5, 1900, by which it is sought to have an accounting taken and ascertain the amount due on a certain mortgage of record, and authorizing the plaintiff to redeem the land embraced in the mortgage from an incumbrance by paying the balance due, and for the further relief of reforming a contract made between the parties, and that the warranty deed as executed by the plaintiffs be declared a mortgage, and for other general relief.

We deem it unnecessary to reproduce the pleadings in this cause; but it is sufficient to state that the main issue presented is as to whether or not the warranty deed as executed by the plaintiffs to N. V. Leslie and F. M. Cowell was in fact executed simply as a security for debt, and amounted to nothing more than an equitable mortgage. The cause was submitted to the trial court upon an agreed statement of facts, and such statement fully indicates the issues presented in the pleadings. Such agreed statement of facts was as follows: "For the purpose of a decision of the rights of the parties to the above-entitled cause upon all issues except the issue of the value of the rents and profits and the issue of the value of the improvements put upon the lands in question, the parties, plaintiffs and defendants, submit said cause upon the following agreed statement of facts: The value of the rents and profits and the improvements may be determined by further stipulation, or by evidence taken by the court, each party to the cause reserving the right to appeal from the decision that may be rendered in the cause. It is agreed that on December 22, 1892, plaintiff, Joseph P. Duell, was the owner of the north three-fourths ( $\frac{3}{4}$ ) of the east fourth ( $\frac{1}{4}$ ) of section sixteen (16) and the northeast fourth ( $\frac{1}{4}$ ) of the northwest quarter ( $\frac{1}{4}$ ) of section twenty-two (22), all in township sixty-four (64), range eleven (11) west, in Scotland county, Mo., and occupied the same with his family, and on said date borrowed of Eli Seeley \$2,500, bearing 7 per cent. compound annual interest from

date, to secure which he and his wife on said day executed their deed of trust upon all said lands to one William B. Seeley, trustee, the said Eli Seeley, being the beneficiary therein, which deed of trust was in the usual form and is recorded in Deed Record 21 at page 245 of the deed records of Scotland county, Mo.; that on the 4th day of March, 1896, no interest had been paid on said deed of trust and the principal with the accrued interest amounted to over \$3,100, and that on said 4th day of March all the said land having been duly advertised was sold by said trustee, the 40 acres in section twenty-two (22) being bid off by Lackey at \$1,100, and the land in suit being struck off to Eli Seeley, the beneficiary; that on the 6th day of March, 1896, Joseph P. Duell with N. V. Leslie and F. M. Cowell as his sureties executed to Eli Seeley their bond to redeem the 120 acres, which was tendered to said Seeley and by him refused, whereupon said N. V. Leslie paid Seeley the amount due on said trust deed remaining after the application of the net proceeds of the said \$1,100, to wit, \$2,152.85, and took up said note and deed of trust on about March 21, 1896; that on said 6th day of March, at the time of the execution of said bond to redeem, said Joseph P. Duell and his wife executed and delivered to N. V. Leslie and F. M. Cowell their general warranty deed in the usual form conveying the lands in question to said Leslie and Cowell for the expressed consideration of \$2,500, which deed is of record in book 56 at page 332 of aforesaid deed records. And at the same time Joseph P. Duell, N. V. Leslie, and F. M. Cowell entered into the written contract set forth in plaintiffs' petition, a copy of which marked 'Exhibit A' is hereto attached; that at the time said Leslie took up the note and deed of trust aforesaid about the 21st day of March, 1896, said F. M. Cowell conveyed his interest in the lands in question to N. V. Leslie by quitclaim deed of record in book 48 at page 442 and being in the usual form; that neither Joseph P. Duell, nor said Leslie or Cowell, found a sale for said land before March 1, 1897, and that the said Joseph P. Duell occupied said farm from March 6, 1896, until the 27th day of April, 1897, and he then with his family moved away and delivered possession of said farm to said N. V. Leslie; that said N. V. Leslie paid back taxes on said farm to the amount of \$87.62 and that in 1900 said N. V. Leslie conveyed the lands in question together with other lands to his son, G. E. Leslie, by a general warranty deed in the usual form for the expressed consideration of \$1, the lands so deeded being a gift, which deed is of record in book 67 at page 305; that said N. V. Leslie and G. E. Leslie have been in the possession of said lands ever since said Joseph P. Duell moved away from same and have received the rents and profits, paid taxes thereon and made improvements; that said G. E. Leslie is the sole heir to N. V. Leslie and the administrator of the estate of said N. V. Leslie,

now deceased, and that final settlement of said estate has been made; and that N. V. Leslie and G. E. Leslie during all the time mentioned were solvent. All the instruments referred to in this stipulation shall be considered in evidence. 10th August, 1900. J. P. Duell et al., by His Attorneys, Smith, Boyd & Smoot. N. V. Leslie et al., by Messrs. & Pettingill and J. M. Jayne, Their Attorneys.

Attached to said stipulation and referred to therein as Exhibit A and read in evidence as follows: "Exhibit A. Memphis, March 6, 1896. This agreement made and entered into by and between J. P. Duell, of Scotland county, Mo., party of the first part, and N. V. Leslie and F. M. Cowell, of Memphis, Mo., Scotland county, parties of the second part, witnesseth: That whereas J. P. Duell has had his land sold at trustee's sale to wit, the north three-fourths (N.  $\frac{3}{4}$ ) east fourth (E.  $\frac{1}{4}$ ), section sixteen (sec. 16), township sixty-four (Twp. 64) north, range eleven (N. R. 11), west fifth (W. 5th) principal meridian (P. M.) in Scotland county, Mo., the 4th day of March, 1896, and whereas said Duell is desirous to save what he can out of the same, and whereas he is desirous to give to redeem said land as provided by law, whereas said Leslie and Cowell have signed his bond to redeem given said Eli Seeley, whereas said Duell has deeded said land to said Leslie and Cowell, they are to furnish the necessary money to redeem said land within the year 1896, and to pay off taxes and claims against said land to an amount in all not to exceed \$2,500, including Seeley's debt. It is agreed that either said Leslie and Cowell or said Duell, may find a chance to sell said land at not less than \$27.50 per acre within the year 1896, and on said sale said Duell will give peaceable possession on March 1, 1897, to the purchaser or purchasers. Out of the proceeds of said sale shall first be paid the amount of money expended in redeeming said premises, all taxes, judgments, and liens on said premises, and all costs incurred by Leslie and Cowell in redeeming or defending said land, and the per cent. interest thereon from time paid by them; said Duell to be charged rent of \$250 per year, which he agrees to pay to Leslie and Cowell. Then, on said sale, the surplus proceeds of sale, after paying off claims, interest, and costs, shall be equally divided, one-half to said J. P. Duell and the other half to said Leslie and Cowell; the said Duell to include rent aforesaid. Should either party fail to find a sale for said land before March 1, 1897, then this contract shall stand at an end, and said land to be considered deeded absolutely to said Leslie and Cowell, and said Duell to give possession without further notice on March 1, 1897, delivering the place in as good condition as it is at present. Witness our hands on the day and date above written. [Signed in duplicate.] J. P. Duell. N. V. Leslie. F. M. Cowell."

Subsequently, and before the cause was

ted, the further stipulation and agreement to facts was submitted: "In the circuit court of Scotland county, August term, 1905. Now at this day, August 29, 1905, come the parties hereto in person and by attorneys, and file by leave of court their further stipulation and agreement of facts in the above-titled cause, to wit: It is agreed that the early value of the rents and profits of the lands in question is \$250 from 1897 to 1904 inclusive. It is agreed that the defendants have expended in repairs and improvements on the lands in question since May 17, 1897, \$4.69, and that said expenditures were made at the times and on the dates set out in the itemized account hereto attached and marked 'Exhibit B.' J. A. Whiteside and Smoot, Boyd & Smoot, Attorneys for Plaintiffs. J. M. Jayne and Mudd & Pettingill, Attorneys for Defendants." There was attached to this stipulation Exhibit B, as designated in the stipulation, embracing an itemized account of the expenditures, amounting to the sum as set forth in the foregoing stipulation. It is not essential that this itemized account be here reproduced.

As before stated, this cause was submitted to the court without the aid of a jury upon the facts as agreed statement of facts, and the court rendered judgment dismissing plaintiff's bill and denying the relief sought by such bill. Time-motions for new trial and in arrest of judgment were filed and by the court overruled. From the order and judgment dismissing plaintiff's bill and denying the relief, this appeal is prosecuted to this court, and the record is now before us for consideration.

Smoot & Smoot, for appellants. J. M. Jayne, N. M. Pettingill, and Silver & Brown, respondents.

FOX, P. J. (after stating the facts as above). The record in this cause which is now before us in effect propounds to this court the question as to what its conclusions of law are upon the agreed statement of facts enclosed by the record. The agreed statement in effect stands in lieu of a special verdict, and must be treated as such, and we are properly confronted with the proposition to give expression to our conclusions of the law applicable to such agreed statement of facts. It is manifest that upon the agreed statement of facts that the overshadowing question to be determined in this proceeding is as to whether or not the warranty deed, to which reference is made in the agreed statement, executed by the plaintiffs to Leslie and Cowell, upon the facts as recited in such agreed statement, should be declared a mortgage. From the very inception of the consideration in this proposition we find that upon the subject that deeds absolute on their face may be shown by a separate instrument or contract to be a mortgage, and as to the essential requisites of a mortgage and the distinguishing

features between a mortgage and a conditional sale there is practically no dispute between learned counsel for appellants and respondents as to the rules of law applicable to that subject. This controversy thereof is narrowed down to the question of the proper application of the rules of law about which there is no dispute to the facts embraced in the agreed statement. In other words, we have on the one side the contention that the facts as recited simply make this warranty deed a mortgage under the well-settled rules of law applicable to that subject. On the other side, we have the equally earnest contention that the facts recited in the agreed statement clearly make the conveyance involved in this controversy a conditional sale upon the well-settled rules of law applicable to that subject, and also that the facts agreed upon negative any intention on the part of the parties to the contract of conveyance at the time of the execution of it that it should be treated as a mortgage to secure an indebtedness due from the plaintiff Duell to Leslie and Cowell.

1. In equity, a deed, although absolute on its face, may be shown to be a mortgage, and courts in the exercise of their equity powers may declare it to be a mortgage and permit the grantor to redeem. About this proposition there can be no doubt. In *Brant v. Robertson*, 16 Mo. 129, *Wilson v. Drumrite*, 21 Mo. 325, *Slowey v. McMurry*, 27 Mo. 113, 72 Am. Dec. 251, *Worley v. Dryden*, 57 Mo. 228, *Reilly v. Cullen*, 159 Mo. 322, 60 S. W. 126, *Gerhardt v. Tucker*, 187 Mo. 48, 85 S. W. 552, and many other cases, this equitable doctrine is fully recognized.

2. A conveyance absolute upon its face will not be held to be a mortgage, unless the relation of debtor and creditor exist between the grantor and grantee. In order to warrant the conclusion that the warranty deed in the case at bar was a mortgage, it is essential that the facts as agreed upon should show the existence of a debt due from the plaintiffs to Leslie and Cowell, and that it was the intention of the parties to the contract of conveyance in the execution of such warranty deed to secure the payment of such debt, or at least the facts agreed upon should be of that nature and character from which the legitimate inference might be indulged that such was the intention of the parties at the time of the execution of the warranty deed. In the recent case of *Jones v. Hubbard*, 193 Mo. 147, 90 S. W. 1137, it was expressly ruled by this court that in order to convert a deed absolute upon its face into a mortgage it was essential that it should be alleged in the petition that there was a loan and that both parties so understood it at the time of the execution of the deed, and that it was not sufficient that one of the parties to an instrument of conveyance absolute in its terms intended it only as a mortgage. It was also ruled in that case that the allegation as above indicated was essential in order

to form a basis for the introduction of the proof of such averment. The conclusion finally reached in that case was that there was none of the usual concomitants of a mortgage, such as a loan, an obligation on the part of the grantee, a promise to allow the grantee to redeem, which appeared in the petition; and Judge Gantt, speaking for this court, in finally announcing the conclusions in that case, said: "Again and again it has been ruled that the one sure test and essential requisite of a mortgage has ever been the continued existence of a debt from the grantor to the grantee in the deed. If there is no debt, the instrument cannot be a mortgage, whatever else it may be. *Bobb v. Wolff*, 148 Mo. 344, 49 S. W. 996. In *Bailey v. St. Louis Transit Company*, 188 Mo., loc. cit. 492, 87 S. W. 1005, it was pertinently said: 'If this absolute deed is a mortgage, it is not so because of anything contained in it or in the agreement, but because of something outside of both by which the natural force and effect of these instruments must be controlled and varied. There is but one thing that can be shown under all the authorities that could have that effect, and that is that the deed, though absolute in form, was in fact given as a mere security.'" Mr. Jones, in his treatise on Mortgages (3d Ed., § 269), in discussing the subject now under consideration, says: "There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but, leaving these out of view, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money either on account of a pre-existing debt or a present loan." This is the universally recognized doctrine applicable to the essential requisites of a mortgage; hence with this conclusion of what are the essential requisites of a mortgage and the necessity of such requisites being established by the facts in proof, we are then confronted with the proposition as to whether the agreed statement of facts upon which this cause was submitted establishes the relation of debtor and creditor between the plaintiff Duell and Leslie and Cowell to whom the warranty deed was executed, and whether or not the facts recited in the agreed statement are of such a nature and character from which the legitimate inference may be indulged that at the time of the execution of the conveyance they intended it only as a mortgage.

Measured by the rules of law as herein indicated, we see no escape from the conclusion that the agreed statement of facts upon which this cause was submitted absolutely fails to establish the ultimate fact which is sought to be reached by this proceeding, that is, that the warranty deed executed by the plaintiff was executed for the purpose of securing a debt due by the plaintiff, and therefore was insufficient to warrant the court in treating

the conveyance as simply a mortgage to secure a debt due by the plaintiff to Leslie and Cowell. On the other hand, a careful analysis of the agreed statement of facts demonstrates that the conveyance of this land by the plaintiffs to Leslie and Cowell was a sale of it, burdened with and qualified by the condition contained in the agreement embraced in the agreed statement of facts which was entered into contemporaneously with the execution of the conveyance. It will be observed that the warranty deed is executed for the express consideration of \$2,500, and the agreement recites the facts that Leslie and Cowell were to furnish the money to redeem this land from Mr. Eli Seeley, and this agreement in its last analysis amounts to nothing more than this, that the plaintiff, J. P. Duell, was unable to redeem this land from Mr. Seeley, and as indicated by the agreement he did not expect that he could save the land itself, but as recited in the agreement he was desirous of saving what he could out of the land; therefore, for the purpose of giving the plaintiff, Mr. Duell, an opportunity of saving something out of this land, it was agreed that either said Leslie or Cowell or said Duell might find a chance to sell said land at not less than \$27.50 an acre within the year 1896, and on said sale said Duell was to give peaceable possession on March 1, 1897, to purchaser or purchasers. Then follows the agreement that "out of the proceeds of said sale shall first be paid the amount of money expended in redeeming said premises, all taxes, judgments, and liens on said place and all costs incurred by Leslie and Cowell in redeeming or defending said land and 8 per cent. interest thereon from time paid out by them; said Duell to be charged rent at \$250 per year, which he agrees to pay said Leslie and Cowell. Then on said sale, the surplus proceeds of sale after paying off all claims, interest, and costs shall be equally divided, one-half to said J. P. Duell and one-half to said Leslie and Cowell; the term 'surplus' to include rent aforesaid. Should either party fail to find a sale for said lands before March 1, 1897, then this contract to be at an end, and said land to be considered as deeded absolutely to said Leslie and Cowell, and said Duell to give possession without further notice on March 1, 1897, delivering the place in as good condition as it is at present." It is manifest that the terms of the agreement as above recited absolutely negative the theory that the warranty deed as between these parties was to be treated as a mortgage. There is not a word embraced in the entire agreement which indicates that Mr. Duell, the plaintiff, might redeem this land and have it reconveyed by Leslie and Cowell to him, and if it was understood that this was a mortgage, taken as a security for a debt, we are unable to comprehend why it was that Mr. Duell was agreeing to divide the proceeds with Leslie and Cowell over and above the amount of



money they furnished in the extinguishment of his debt; for if it was understood that his warranty deed was simply to be held as mortgage and security for the repayment of the money furnished by Leslie and Cowell, then clearly it should have simply provided that Mr. Duell should have the right to pay the amount of money furnished for the extinguishment of his debt and take a reconveyance of the land to him, or, if the land was sold during the year 1886 for not less than \$27.50 an acre, then the proceeds over and above the amount necessary to repay Leslie and Cowell for the amount of money furnished in redeeming the land from Seeley, together with all expenses incurred, should be paid over to Mr. Duell. The agreement embraced no such terms, nor does it embrace any language from which a legitimate inference might be drawn that it was the intention of the parties in the execution of the warranty deed that it should be held and treated as a mortgage. This agreement manifestly was intended to give Mr. Duell a last chance to save something out of this land and postpone for at least a year the evil day when he would be required to give possession of it under his conveyance, and allow him the opportunity of at least trying to effect a sale of the land for a sum not less than \$27.50 an acre, and thereby secure some of the proceeds, as is indicated by the terms of the agreement. Jones, in his work upon Mortgages (section 270, 3d Ed.), thus states the rule of law as applicable to the case at bar. He says: "Where the grantee's covenant, executed at the same time with an absolute conveyance to him, recited that this was made for the purpose of paying a certain sum of money, and stipulated that he would not convey the premises within one year without the consent of the grantor, and, if the grantor, within that time, should find a purchaser, the grantee would convey the land on receiving the amount with interest for which the land had been conveyed to him, and that in case such sale should not be made within the year it should then be submitted to certain persons named, to determine what additional sum the grantee should pay for the land, which sum he covenanted to pay, the transaction was held not to be a mortgage, but a conditional sale giving the grantee the right to recover possession of the land, after the expiration of the year, in ejectment against the grantor. In like manner an agreement by the grantee, made as a part of the transaction whereby he is to account to the grantor for a portion of the profits which may be realized on a resale of the premises if made within a specified time, and requiring him to sell if a specified price can be obtained, is not inconsistent with the vesting of the title." It must not be overlooked, as was said in *Walley v. Trust Co.*, 188 Mo., loc. cit. 492, 87 W. 1003, that the ultimate fact in all the cases which converts an absolute deed into

an equitable mortgage is that it was given merely as a security.

The plaintiff, Mr. Duell, executed his warranty deed to the land involved in this controversy doubtless with the understanding that Leslie and Cowell would extinguish his debt to Mr. Seeley. It follows that Leslie and Cowell, in order to perfect their title and give force and vitality to the conveyance executed to them by Mr. Duell, did pay to Mr. Seeley the amount of money due by the plaintiffs, thereby extinguishing his debt. This court, in *Bobb v. Wolff*, 148 Mo., loc. cit. 348, 49 S. W. 999, in discussing the law applicable to this subject, said: "The distinction was fairly made by this court in *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251, in which Judge Scott adopts Chancellor Kent's text with approval to the effect 'that if the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage, but if the debt is extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding if he pleases by a given time, and thereby entitling himself to a reconveyance, it is a conditional sale.' As already said, when Wolff surrendered his note and unconditionally assumed the \$4,000 mortgage to another person, the debt was extinguished. There was left no basis for a mortgage, and it is far more consonant with reason and common business experience to say that if this evidence tends to prove any agreement with certainty, it was no more than an agreement to permit Bobb within a limited time which had expired prior to November 17, 1886, to repurchase the lot, and having failed and not having brought himself within his agreement, he has lost that right"—citing *Turner v. Kerr*, 44 Mo. 433; *Forrester v. Moore*, 77 Mo. 651.

We have been unable in any of the adjudications to find the proposition now under consideration more logically and clearly presented than in the case of *Turner et al. v. Kerr et al.*, 44 Mo. 429, and what was said by this court in treating of the question now under consideration is so appropriate to the case at bar that we will be pardoned for making such a lengthy quotation. It was there said: "In considering the subject, it is at once to be admitted that a conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the deed, or however absolute it may appear upon its face. It is also true that, where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of a mortgage. But it is not true, as a result of the adjudged cases, that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein (the creditor) gives a coterminous stipulation

binding him to convey on being reimbursed, within an agreed period, an amount equal to his debt and the interest thereon. In passing on transactions of this class, the understanding and purpose of the parties thereto are to be considered and respected as in other cases. If they intended an extinguishment of the debt and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms, as a payment of an amount equal to the canceled debt and interest, the objects of the arrangement are not to be defeated by turning the transaction into a mortgage, when the parties intended no such result. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of the debt and interest is a circumstance of no controlling importance. It settles nothing. It may often happen that a creditor would consent to take an absolute stipulation for a reconveyance, when he would reject a mortgage because of the delay and expense to which he might be subjected upon a foreclosure. Such arrangements operate beneficially to the debtor, securing to him additional time and renewed opportunities to extricate himself from embarrassment. Where the parties intend a conditional sale, and not a mortgage, and make their contracts in accordance with their intentions, it is not the province of the courts to circumvent and frustrate their intentions. It is nevertheless true that neither the intention of the parties nor their express contracts can change the essential nature of things. A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, a subsequent or cotemporaneous stipulation in the interest of the debtor, securing to him an opportunity to reacquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale."

In *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251, the question in judgment before the court was as to whether or not the conveyance was to be construed as a mortgage or a conditional sale. The facts in that case were substantially as follows: Slowey owned a lot in St. Louis, subject to a deed of trust to secure \$616, due in 12 months, and \$682, due in 24 months. McMurray loaned Slowey \$300, and Slowey gave McMurray \$316 and the money thus loaned, and with it McMurray paid off the \$616 note when it became due, and took the note up and kept it. Slowey paid \$200 on the McMurray debt. When the \$682 became due Slowey failed to pay it, and the trustee advertised the same for sale. Before the sale it was agreed between Slowey and McMurray that McMurray should bid the same off in his own name

for the benefit of Slowey, pay the said \$682, and if Slowey would pay back to said McMurray within one year the \$682 and \$150, balance due on the \$300 loaned by McMurray, that McMurray would reconvey the lot to Slowey. McMurray bid in the land for \$1,005 August 14, 1855, and by agreement Slowey occupied the property in the meantime. McMurray sold the lot to Ackerman November 17, 1855, who bought the lot with knowledge of the above facts, and Slowey sued to annul the deed to Ackerman, and if the court should not cancel the deed, then he asked judgment for \$323, the overplus, and \$995, the value of the land and improvements over \$1,005. After the year passed by, Slowey tendered to McMurray the full amount which was due him, with interest. Judge Scott, speaking for this court, after an exhaustive review of all the authorities applicable to this subject, said: "Making an application of these principles to the case before us, it will be seen that the contract or promise made by McMurray, even if binding in law, constituted the transaction a conditional sale and not a mortgage; that the party plaintiff not having complied with the terms of the sale, he cannot insist on a reconveyance of the lot."

In *Macaulay v. Porter et al.*, 71 N. Y., loc. cit. 176, it was claimed as in the case at bar that a deed though absolute in form was in effect only a mortgage. The facts in that case upon which the claim was predicated were substantially as follows: That Miss Tracy applied to defendant Porter to make a sale of the land for her, which he was not able to do; that she then applied to him to purchase the land himself, which he agreed to do, and pay therefor \$2,500—\$1,200 by assuming the existing mortgage, and \$1,300 in cash—and further agreeing that he would sell the property within one year, at the discretion of Miss Tracy and himself, and divide the profits equally with her, and if not sold within the year, Miss Tracy's interest in the premises to cease; that before the arrangement was consummated Miss Tracy ascertained that she needed more money, and Porter agreed to loan her \$500 on her note, at one year; that in pursuance of this agreement Miss Tracy executed and delivered the deed in question, and the parties at the same time executed a written agreement, under seal, as follows: "In consideration of the sale and conveyance of a lot, 44 feet front by 408½ feet deep, on the east side of Alexander street, by Miss L. Tracy to S. D. Porter, I, S. D. Porter, agree to take said property subject to a mortgage to the Rochester Savings Bank of \$1,200, all other incumbrances and taxes to be paid off by Miss Tracy; and I will pay her in cash \$1,300, and I will sell the property, at her discretion and mine, within the year, and divide the profits equally. I will loan her \$500, and take her note, to be paid within the year, or sooner, if the property is sold. If the prop-

ty shall be sold for \$4,000 within four months, I will cancel the note and surrender to her. The premises may be sold at the option of either party for not less than \$4,000. If not sold within one year from date, the interest of Miss Tracy in the premises shall cease." Responding to that state of facts, it is said by the court in that case: "Upon these facts the court held that the defendant Porter under his deed took the fee in the land, subject to no other condition than that he should account to Miss Tracy for one-half of the profits on a sale thereof, made within the year, and that the plaintiff's mortgage was void as to him. It is difficult to see how the court could have arrived at any other conclusion. The agreement was not a defeasance, which was to render the deed void on the payment of any sum of money, nor was there anything in the transaction in the nature of a mortgage. Porter was not a creditor, taking the land to secure any debt. No debt existed or was created in respect of the \$2,500 paid for the property. If the land had depreciated, Porter would have had no claim for reimbursement, nor was any privilege reserved to Miss Tracy to deem it on payment of any sum. These circumstances are of great importance in determining the character of the transaction. There was no condition attached to the grant upon which it was to become void and the property revert to the grantor. The agreement clearly shows that the title was to pass to Porter, that he should have power of disposition over it, and that all he undertook to do was to account to his grantor for one-half of the profits which might be realized by him on a resale, if made within the year, and that he would not sell within the year for less than \$4,000 without the consent of Miss Tracy. Such an agreement is not inconsistent with the vesting of the title in him, and to record such a deed and agreement as a mortgage would have been clearly proper." To the same effect is *Glover et al. v. Payn*, 19 Wend. (N. Y.) 518.

In *Baker v. Thrasher*, 4 Denio (N. Y.) 493, substantially the same legal propositions are involved as in the case at bar. There was an absolute deed executed, which was qualified by a covenant executed on the same date, reciting that the conveyance was made for the purpose of paying a sum of money which was unsatisfied, and covenanting that he would not convey the premises within one year without the consent of the grantee in the absolute deed, and if the grantee within that time found a purchaser the grantee would convey to such purchaser, on receiving the amount with interest for which the land had been conveyed to him, and it was further recited that in case such sale could not be made within a year it should be submitted to certain persons named to determine what additional sum the grantee should pay the grantor for the land contained in the absolute deed, which sum the

grantee covenanted to pay. It was held in the case that the transaction did not amount to a mortgage, and that the grantee was entitled to recover in judgment against the grantor for the land. Chief Justice Bronson, speaking for the court, in discussing the absolute deed and the contemporaneous instrument qualifying it, said: "These two instruments must undoubtedly be read and construed together, but they do not make a mortgage. A mortgage is a conveyance of lands, upon a condition in the deed, or a defeasance out of it, that on the grantor's paying a sum of money, or doing some other act, the conveyance shall be void, and performance of the condition, without any other act, puts an end to all title and interest in the grantee. Some modern cases have held, and such are cited at the bar, that although there be no condition or defeasance under which the deed may be voided, but only a collateral agreement that the grantee will reconvey to the grantor on payment of the money, the transaction amounts to a mortgage. But this is not a case of that kind. There was no condition or agreement under which the title could ever become revested in the grantor. It was to remain in the grantee, or the person to whom he should convey, in pursuance of the covenant. And besides, the conveyance to the plaintiff was not by way of security for the debt which the defendant owed the plaintiff, but in payment of the debt. No debt or duty of any kind remained upon the defendant. It was in any and all events a sale of the land. It was a sale for the consideration of \$1,160.25, which the defendant then owed the plaintiff, and which debt was satisfied by the conveyance, and the further consideration of the covenants which the plaintiff made to pay off the judgment, and give the defendant any better price which could be obtained for the land within a year, and if the land should not be sold within the year, then to pay the defendant such further sum for the land as might be determined by the award of arbitrators. It is impossible to hold that this is a mortgage, or anything in the nature of a mortgage."

We see no necessity for pursuing any further the consideration of the propositions disclosed by the record. We are clearly of the opinion that the agreed statement of facts does not establish one of the legitimate facts to be alleged, that is, that the relation of debtor and creditor existed between Mr. Duell and Leslie and Cowell, and the facts agreed upon are insufficient to warrant the conclusion that the warranty deed executed by Mr. Duell to Leslie and Cowell was only a mortgage, or that the parties to the warranty deed, at the time of its execution, intended that it should only be treated as a mortgage. It is manifest that upon the agreed statement of facts that Leslie and Cowell, or the grantees of their interest in this land, could not have successfully maintained a proceeding to foreclose the transac-

tion respecting the warranty deed as an equitable mortgage, and it is equally clear that had this land depreciated in value, and upon a resale of it had failed to realize the amount that they had expended in the extinguishment of Mr. Duell's debt to Mr. Seeley, that a recovery could not be had against Mr. Duell for the difference between the amount realized from the sale and the amount paid in the extinguishment of Mr. Duell's debt. This could not be done for the reason that upon the agreed statement of facts the relation of debtor and creditor is not shown to exist. In reaching the conclusions upon the propositions presented to our consideration in this cause, we have not been unmindful of the authorities cited by learned counsel for appellant. We have carefully considered the cases cited, and it is sufficient to say of those cases that the facts upon which the conclusions were announced distinguish them from the case at bar.

We have given expression to our views upon the questions presented by this record, which result in the conclusion that the judgment of the trial court in denying the relief sought by the plaintiffs and dismissing their bill should be affirmed, and it is so ordered. All concur.

**JOHN K. CUMMINGS REALTY & INV. CO.  
v. DEERE & CO.**

(Supreme Court of Missouri, Division No. 2,  
Dec. 10, 1907.)

**1. MUNICIPAL CORPORATIONS—OBSTRUCTING  
STREETS—PUBLIC NUISANCES—RIGHTS OF  
INDIVIDUALS TO ENJOIN.**

An action to prevent defendant from building on part of a street, the ordinance vacating which is alleged to be void, and as a result of which acts it is alleged such part of the street could not be used by the public generally, is one to enjoin a public nuisance, which cannot be maintained by a private corporation, whose property does not abut on the part of the street in question; it not alleging that its property fronting on the street several blocks away will be specially damaged, but merely that it will be greatly damaged, and will depreciate in value more especially than the general property in the city, being located near the threatened obstruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1503.]

**2. SAME—ORDINANCES VACATING STREET—EN-  
JOINING ENFORCEMENT.**

One whose property does not abut on the part of a street vacated by a valid ordinance under a power in the city charter may not maintain an action to enjoin enforcement of the ordinance, though he, in common with all others, may be inconvenienced by enforcement of the ordinance.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by the John K. Cummings Realty & Investment Company against Deere & Co. Judgment for defendant. Plaintiff appeals. Affirmed.

This cause is brought to this court by appeal on the part of the plaintiff from a judgment of the circuit court of the city of St.

Louis dismissing its bill in equity praying for injunctive relief against the defendant. To fully appreciate the nature of this proceeding and the legal propositions involved, it is well to reproduce the petition and answer.

The petition, omitting formal parts, is as follows: "Plaintiff states that it is a corporation duly incorporated under the laws of Missouri; that the defendant is also a corporation incorporated under the laws of the state of Illinois. Plaintiff further states that Wm. Chambers, W. Christy, and Thomas Wright were joint owners in fee simple of a large tract of land which was then located in the county of St. Louis, but which is now, by the extension of the limits of the city of St. Louis, lying and being in the said city of St. Louis, Mo.; that on the 29th day of June, A. D. 1816, the said owners caused the same to be platted and laid out in lots, streets, and alleys, and filed a plat of said lands and lots and streets and alleys, and dedicated the said streets and alleys to public use, and more especially for the use of those who would become purchasers and owners of lots or parcels of land in said lands so laid out and platted; that the said owners caused the said plat and dedication to be duly recorded in the recorder of deeds' office of the then county of St. Louis in Plat Book 1, vol. 1, p. 40, to which plat reference is made for the purpose of locating the property owned by the plaintiff and the streets and alleys as laid out and dedicated by the said owners to public use for the especial benefit of the prospective purchasers of said lots in said tract of land. Plaintiff further states that it is the owner in fee simple of a part of said lands so laid out by said owners in their said addition and sold after the dedication of the streets on said plat; that it acquired said lots by mesne conveyances from the said owners and improved the same for dwelling purposes, which lots are more particularly described as follows, to wit: A lot fronting on Monroe street, 52 feet and 6 inches, by an irregular depth of 137 feet 8½ inches on the west line of Eleventh street, bounded on the north by Monroe street, formerly Washington street, designated on said plat, and east by Eleventh street, formerly designated on said plat as Sixth street. Plaintiff further states that Monroe street as dedicated by the said Wm. Chambers, W. Christy, and Thomas Wright has been used as a public highway for more than 30 years last past from Second street up to and past the plaintiff's property, it being as dedicated by said persons 60 feet in width; that the defendant is now claiming the right to divert a portion of Monroe street from the uses and purposes to which it was dedicated for a public highway, and threatening to appropriate it to its private use and place permanent obstructions thereon, so that it cannot be used by the public generally on the following part of said Monroe street, to wit: A strip of ground 15 feet in width, extending along the south side of Monroe street



from the east line of Broadway to the west line of Second street. Plaintiff further states that, if the defendant be permitted to carry out its purpose and convert said part of said street to its private use and benefit and to other and different uses and purposes than those designated and intended by the said Wm. Chambers, W. Christy, and Thomas Wright, the plaintiff's property will be greatly damaged and will also depreciate in value, more especially than the general property in the city of St. Louis, being located on said Monroe street, near to where the obstruction and permanent diverting is threatened to occur and be placed by the defendant. Plaintiff further states that it is entirely remediless at law; that the city of St. Louis, the trustee upon which rests the duty to preserve the street as aforesaid for public use, is now aiding and attempting to further the defendant in its unlawful purpose and contemplation of diverting the said part of said street to its private use. Wherefore, your petitioner prays for a decree that the defendant be enjoined and restrained from exercising any right or authority over the said part of Monroe street, hereinbefore described, which would be inconsistent with the uses and purposes for which it was dedicated, and that it be enjoined and restrained from erecting or placing any obstruction on said street or any part thereof which will in any manner interfere with the use of all parts of said street, as it was laid out, by the public generally, and for its costs in this behalf incurred."

To this petition the defendant interposed the following answer:

"Comes now the defendant in the above-entitled cause, and, for answer to plaintiff's petition herein, denies each and every allegation therein contained. Further answering, this defendant avers that it is the owner in fee simple of all that part of city block No. 318, fronting northward upon Monroe street, extending from the east line of Broadway to the west line of Second street, in the city of St. Louis, and state of Missouri; that the property in said locality has become greatly deteriorated for residence purposes, or for any other purpose other than manufacturing business, and has been in that condition for several years last past; that in the year 1903 defendant was about to erect, and did begin the erection of, a large manufacturing establishment upon said block, extending to the south line of said Monroe street, between said Broadway and Second street, which manufacturing establishment, when completed, will furnish employment for several hundred employes, thereby building up said part of the city, and thereby enhancing the value of defendant's property for revenue purposes, and increasing the income of the city of St. Louis, by reason of enhanced taxes upon its said property; that, in order to utilize defendant's said land and the manufacturing establishment which it is erecting thereon, it became necessary to lower the grade of a 15-

foot strip immediately north of defendant's said property, and which before the passage of the ordinance hereinafter specified was a part of said Monroe street mentioned in plaintiff's petition; that in the month of November, 1903, the municipal assembly of the city of St. Louis passed a city ordinance vacating a strip of ground 15 feet in width, extending along the south side of Monroe street from the east line of Broadway to the west line of Second street, which ordinance was to take effect upon the payment of \$3,000 into the city treasury by the owners of the property on the south side of Monroe street from said east line of Broadway to the west line of Second street, and that subsequent to the passage of city ordinance this defendant did pay into said city treasury said sum of \$3,000 in pursuance of the terms of said ordinance, and thereupon said 15-foot strip, being the one mentioned in plaintiff's petition, became vacated and became the property of this defendant; that said city ordinance is in words and figures as follows, to wit:

"Ordinance 21,285.

"An ordinance to vacate fifteen feet on the south side of Monroe street between Broadway and Second street.

"Be it ordained by the municipal assembly of the city of St. Louis, as follows:

"Section 1. A strip of ground fifteen feet in width, extending along the south side of Monroe street, from the east line of Broadway to the west line of Second street, is hereby vacated as a public thoroughfare and surrendered to the owners of the land in city block three hundred and eighteen respectively, contiguous to said strip.

"Sec. 2. This ordinance shall not take effect unless and until the sum of three thousand dollars is paid into the city treasury by the owner or owners of the property on the south side of Monroe street from the east line of Broadway to the west line of Second street, said sum to be the absolute property of the city of St. Louis.

"Approved November 17, 1903."

"Defendant further avers that power and authority existed in the municipal assembly of the city of St. Louis, with the approval of the mayor, to pass said city ordinance, and that the sum paid by said defendant was the full value of said strip of ground, and said \$3,000 inured to the benefit of said city of St. Louis. Wherefore, having fully answered, defendant prays to be hence dismissed with its costs."

The plaintiff filed a demurrer to certain portions of the answer of the defendant, designating the grounds of such demurrer. This demurrer was overruled by the court, and the plaintiff filed an amended reply, denying each and every allegation and new matter set up in defendant's answer as a defense to plaintiff's cause of action, and, as a further reply to defendant's answer, it was averred that the pretended ordinance was

ultra vires and void, assigning, among the reasons, that the title to the ordinance contained more than one subject, and the subject of the title of the ordinance was not clearly embraced in the title. It was further charged that the ordinance was fraudulently procured under the guise of vacating a street or part of a street, and that the purpose of the ordinance was to sell and dispose of the part of the street heretofore indicated. For the purpose of shortening the proof at the trial of this cause the following state of facts was admitted: "First. That William Chambers, W. Christy, and Thomas Wright were joint owners in fee simple of a large tract of land which was then located in the county of St. Louis, but which is now, by the extension of the limits of the city of St. Louis, a part of the city of St. Louis, and state of Missouri, and that on the 29th day of June, 1816, the said owners caused the same to be platted and laid out with streets and alleys, dedicated to the public use, and that said plat was duly recorded in the office of the recorder of deeds of the then county of St. Louis, in Plat Book 1, vol. 1, p. 40, and that the certified plat hereto annexed as 'Exhibit A' is a true copy of said plat and dedication. It is further admitted that both the plaintiff and defendant are corporations, as alleged in the petition filed in said case. It is further admitted that the plaintiff is owner in fee simple, and in possession of, the following described lots or parcels of land, which are a part of the land covered by said plat and dedicated, to wit: A lot fronting on Monroe street, fifty-two feet and six inches (52' 6"), by an irregular depth of one hundred and thirty-seven (137) feet, eight and one-half inches, on the west line of Eleventh street, bounded on the north by Monroe street, formerly Washington street, designated in said plat, and east by Eleventh street, formerly designated on said plat as Sixth street, but said Sixth street, as shown by said plat, is now known and designated as Eleventh street, in the city of St. Louis and state of Missouri. It is further admitted that Monroe street on said plat, as dedicated, was called Washington street, but is now known as Monroe street, and that the same has been used as a public highway for more than 30 years last past from Second street up to and past the plaintiff's property, and that said Monroe street was a street 60 feet in width. It is further admitted that the defendant was the owner in fee simple of all that part of city block No. 818, fronting northward upon Monroe street, and extending from the east line of Broadway to the west line of Second street, of the city of St. Louis, and state of Missouri, and was at the time of the passage of the ordinance mentioned in the pleadings, and it had been, such owner for a period of about two years before the passage of said ordinance. It is further admitted that both plaintiff and defendant herein obtained their title by mesne conveyances from William Chambers, W. Christy,

and Thomas Wright, who were the owners of said property at the time of the laying out and dedicating the same on the 29th day of June, 1816."

In addition to this agreed statement of facts, the plaintiff introduced John K. Cummings, who testified that he was living on Monroe street; that it was only three blocks west of the block where the strip was to be taken off Monroe street by vacating that width on Monroe street. He also stated that by the taking off of said street his property would be depreciated in value. There were other witnesses introduced whose testimony tended to show that, if the 15 feet of the street as heretofore mentioned was vacated, there would hardly be room for a wagon going either way, and after the necessary space would be used for sidewalks large stake wagons could hardly pass each other. There was other testimony tending to show that there was a good deal of travel on Monroe street, and that the vacation of it as sought by the ordinance would inconvenience those who were in the habit of using it, or wanted to use it. The defendant introduced the ordinance as set forth in the answer; also introduced testimony showing the payment of the \$3,000 into the city treasury; then introduced in evidence a deed dated February 28, 1903, by which the defendant acquired title to the real estate extending from Broadway to Second street and fronting north on Monroe street contiguous to the 15 feet vacated on the south side of Monroe street by the ordinance in question.

This was substantially all the evidence introduced at the trial. The cause was submitted to the court, and on August 24, 1904, the court rendered its judgment and entered an order dismissing plaintiff's bill for an injunction. Timely motion for new trial was filed, and on the 26th day of October, 1904, this motion was overruled. From the order and judgment made in this cause, plaintiff in due time and proper form prosecuted its appeal to this court and the record is now before us for review.

M. M. McKeag and C. S. Cummings, for appellant. Seneca N. & S. C. Taylor, for respondent.

FOX, P. J. (after stating the facts as above). In this cause, as indicated by the record, plaintiff seeks to enjoin the defendant from placing any obstruction or building upon a strip of ground which formerly constituted a part of Monroe street, which the city of St. Louis by the ordinance as heretofore indicated undertook to vacate. This proceeding is mainly predicated upon the theory that the plaintiff is a property owner in the city of St. Louis, and that the 15 feet of ground sought to be used by the defendant constitutes a part of a public thoroughfare, and that the ordinance passed by the city council and approved by the mayor is void, and that the vacation of that portion

of the street and the occupancy of it by the defendant is injurious and depreciates the value of the property of the plaintiff. It is conceded that the plaintiff is not an abutting property owner upon the street a part of which was sought to be vacated; that this property which is alleged to be damaged by reason of the placing of the obstructions and buildings upon the strip of 15 feet, which was vacated, is situated a distance of three blocks from the part of the street which was sought to be vacated by the action of the city council with the approval of the mayor. At the very threshold of the consideration of this cause, we are confronted with the proposition as to whether or not under the allegations in the petition and the disclosures of the facts upon the trial the plaintiff is in a position to maintain this proceeding for injunction to restrain the occupancy of the strip of land which formerly constituted a part of Monroe street, which the city council by ordinance, duly approved by the mayor, sought to vacate.

1. That the mayor and municipal assembly of the city of St. Louis possessed the power to establish, open, vacate, or alter the streets and avenues, etc., in said city, cannot be questioned. Section 28 of article 3 of the charter (Rev. St. 1899 [Ann. St. 1906, p. 4807]) provides that "the mayor and assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of the state or of this charter, \* \* \* to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed."

2. That the mayor and municipal assembly, by the enactment of Ordinance No. 21, 285, as heretofore indicated in the statement of this cause, undertook and sought to vacate the strip of ground involved in this proceeding, also cannot be questioned. Section 1 of that ordinance expressly provides that "a strip of ground fifteen feet in width, extending along the south side of Monroe street, from the east line of Broadway to the west line of Second street, is hereby vacated as a public thoroughfare and surrendered to the owners of the land in city block three hundred and eighteen respectively, contiguous to said strip." It is not contended in this proceeding that the plaintiff is an abutting owner of property, or that his property is subjected to special injury different to that of other property in the neighborhood, similarly situated, is subjected to. In our opinion, upon the disclosures of the record, the plaintiff is not entitled to the injunctive relief prayed for in its petition. If the plaintiff seeks to maintain this equitable proceeding to restrain the threatened unlawful acts alleged in the petition, it must be upon the theory that, according to the earnest conten-

tion of the appellant in the brief before us, the ordinance vacating the strip of ground in Monroe street is void, and that the defendant threatens to do such acts respecting the occupancy of such street and place such permanent obstructions upon such public thoroughfare as would in law constitute a public nuisance. In fact, we see no escape from the conclusion from the allegations in the petition that appellant intends to charge that the defendant is threatening to do such unlawful acts respecting such street as would constitute a public nuisance. The petition upon this subject avers that "the defendant is now claiming the right to divert a portion of Monroe street from the uses and purposes to which it was dedicated for a public highway, and threatening to appropriate it to its private use and place permanent obstructions thereon, so that it cannot be used by the public generally on the following part of said Monroe street, to wit: A strip of ground 15 feet in width, extending along the south line of Monroe street from the east line of Broadway to the west line of Second street."

It must be conceded that, if the insistence of the appellant is correct and that the ordinance undertaking to vacate part of Monroe street is void, then there can be no dispute that the acts complained of in the petition, in which it is averred what the defendant is threatening to do would, under the well-settled rules of law applicable to the subject of nuisances, constitute a public nuisance. In effect the charge is that the defendant threatens to take possession of part of a public thoroughfare dedicated to the public and place thereon permanent obstruction. This beyond question, if the allegations are true, would constitute a public nuisance. But, aside from this, conceding for argument's sake that the ordinance which undertakes to vacate the 15 feet of ground in Monroe street is void, and that the defendant is threatening to commit such unlawful acts as would amount to a public nuisance, does the plaintiff's bill embrace all the essential allegations necessary to constitute a cause of action and entitle it to the equitable relief sought? We have reached the conclusion that it does not. Upon that theory now under discussion that this proceeding is to restrain the commission of such acts respecting a public thoroughfare as would in law amount to a public nuisance, the plaintiff in its petition does not show that it has suffered or will suffer any damage peculiar to itself. The rule of law applicable to the maintaining of actions by individuals respecting injuries or threatened injuries resulting from public nuisances is no longer an open question in this state, and in the case at bar the plaintiff must be treated as an individual, for it is under the law an artificial person. In *Nagel et al. v. Lindell Ry. Co. et al.*, 167 Mo. 89, 66 S. W. 1090, the plaintiff sought to enjoin defendants from

constructing a street railway in Hamilton avenue, in St. Louis. An analysis of the petition in that case demonstrates its similarity to the petition in the case at bar. It was charged in the petition that the ordinance was illegal and void, on the ground that it was fraudulently and corruptly passed by the municipal assembly of said city. Then followed the allegation that the defendants were about to unlawfully and forcibly enter in and upon said Hamilton avenue adjacent to and in front of the said real estate property of plaintiff, for the purpose of constructing and operating a street railway in and upon said Hamilton avenue, and have hauled and deposited rails and ties, or are about to deposit rails and ties upon the surface, and have dug up or about to have dug up the surface and tear up and remove the paving from said Hamilton avenue, and have or about to threaten to occupy and obstruct said avenue with horses, men, timbers, street car tracks, street cars, electric wires, and poles, and other obstructions, and that the accomplishment of such purpose would temporarily and permanently impair the use of said Hamilton avenue as a public thoroughfare, thereby preventing these plaintiffs from going to and from their respective real estate property over and along said Hamilton avenue, and thereby greatly depreciating the value and damaging their respective real estate property and their personal property, to the great and irreparable injury to plaintiffs' said property. It is manifest under the petition in that case that the plaintiffs were proceeding upon the theory that the doing of the threatened acts by the defendants would constitute a public nuisance. This court, speaking through Vallant, J., adhering to the well-settled rule that in cases of that character the petition should allege that by reason of the acts about to be committed that the plaintiffs would suffer some damage peculiar to themselves, thus stated the law applicable to the sufficiency of the petition in that case: "The plaintiffs in their petition do not show that they have suffered or will suffer any damage peculiar to themselves. They do say that the defendants, preparatory to constructing the railroad, are depositing rails and ties and are tearing up the street and obstructing its use, etc., and 'thereby preventing these plaintiffs from going to and from their respective real estate property over and along said Hamilton avenue,' etc. But those statements relate to the inconvenience resulting in the necessary work of construction and are such as result in every street construction. The damage resulting from the condition does not entitle the plaintiffs to an injunction of the kind sought in this suit."

In *Baker v. McDaniel et al.*, 178 Mo. 447, 77 S. W. 531, there was in judgment before this court the proposition of the right of an individual to maintain an action for injuries

resulting from a public nuisance, and it was there expressly ruled by this court that to enable plaintiff to maintain an action of that character, resulting from a public nuisance, it was necessary to establish that there was special damages sustained by reason of such nuisance over and above the injury which the community at large suffered. All of the authorities upon the subject of actions concerning private and public nuisances were reviewed, and it was announced that the true rule to be deduced from all the authorities was that as to private nuisances there is no question as to the proper exercise of the power of courts of equity in affording full and complete relief, but, as to a public nuisance it was essential, and should be made clear, that some special injury was occasioned to the individual, and it was there announced that in cases of a public nuisance, where the injury complained of was a continuing one and that some special injury was occasioned to the individual, courts of equity might exercise their power and afford relief, but that this power in cases of public nuisances was usually exercised at the instance of the public, and not private individuals. In *Smiths v. McConathy*, 11 Mo., loc. cit. 522, Judge Napton in discussing this question said: "In an action for a private nuisance it is not necessary to allege or prove any special damage. In a private action for a public nuisance, such allegations and proofs are necessary. No one individual can maintain an action for a public nuisance, unless he has sustained some special damage from such nuisance over and above the injury which the community at large suffer." In *Thompson & Son v. Macon City*, 106 Mo. App. 84, 80 S. W. 1, a similar ruling was made, and it was there held in a suit by individuals for damages resulting from obstructions in a public street that it was essential to show that plaintiffs had sustained damages of a different kind from that suffered by others along the street within the limits of the work, and the mere fact that they may have suffered more than some others did not alter the rule that, in order to entitle them to damages, they must have sustained injuries special to themselves and different in kind from others, citing in support of such holding *Fairchild v. St. Louis*, 97 Mo. 85, 11 S. W. 60; *Canman v. St. Louis*, 97 Mo. 92, 11 S. W. 60; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Ruckert v. Railway*, 163 Mo. 260, 63 S. W. 814; *Nagel v. Railway*, 167 Mo. 89, 66 S. W. 1090.

It may be said as to the cases of *Baker v. McDaniel*, *Smiths v. McConathy*, and *Thompson & Son v. Macon City*, heretofore cited, that those were actions concerning the commission of acts which constituted a nuisance and where the nuisance was in existence, and that in the case at bar this action is to prevent the doing of acts, which in law would amount to a nuisance. In our opinion it must logically follow that the same prin-

ciple applicable to the cases cited must govern and control the case at bar. If it is essential where an individual seeks a recovery for injuries resulting from an existing public nuisance to allege and prove that he has suffered special damages of a different kind and character to those similarly situated, we are unable to see how it is not equally essential, if he undertakes to prevent the doing of acts, which in law would amount to a public nuisance. In *Nagel v. Railway Co.*, supra, the averments in the petition proceeded upon both theories—that is, that the defendant was committing certain acts or was threatening the commission of certain acts which in law would constitute a nuisance—and in that case this court held that it was essential that the plaintiffs should allege in their petition that they had suffered some damage peculiar to themselves. Applying these rules as heretofore indicated applicable to the subject of pleading, where an individual seeks to maintain an action concerning a public nuisance, we see no escape from the conclusion that the allegation in the petition of plaintiff in the case at bar is manifestly insufficient. The allegation in respect to the damages are embraced in these words: "The plaintiff's property will be greatly damaged, and will also depreciate in value more especially than the general property in the city of St. Louis, being located on said Monroe street near to where the obstruction and permanent diverting is threatened to occur and be placed by the defendant." That allegation simply amounts to a statement, not that its property will be specially damaged, but that it will be damaged more than the general property in the city of St. Louis, and that is not a sufficient allegation under the rules of law as has been announced by the courts of this state. As was said by Judge Ellison in *Thompson & Son v. Macon City*: "It may be that he suffered more than some others, but that will not alter the rule that, in order to entitle him to damages, he must have sustained injury special to him and differing in kind from others."

Our conclusion upon this proposition is that plaintiff's petition does not state facts sufficient to entitle it to the relief sought, for the reason, assuming the truth of the allegations of the petition, that the ordinance vacating this street was void, then it necessarily follows that the acts which it is alleged the defendant was about to commit would amount in law to a public nuisance, if committed, and this proceeding not being instituted by some public officer authorized to maintain it in behalf of the public, but by an individual, or, in other words, an artificial person, it is essential to allege that the plaintiff will suffer some damage peculiar to itself, and, not having made such allegation, it must be held that the petition is insufficient. If, on the other hand, it is sought to maintain this action upon the theory that by reason of the action of the municipal assembly

of the city of St. Louis vacating a part of Monroe street, which resulted in injury to the property of plaintiff, the enforcement of the city ordinance vacating such street may be restrained, then we are confronted by the repeated announcements by this court of the rule of law that an injunction will not lie to restrain the enforcement of a city ordinance vacating a street on which plaintiff's property does not abut, although an inconvenience in common with all other persons may be entailed by reason of the action of the municipal assembly in adopting the ordinance. This court in *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, speaking through Judge Black, said in discussing the subject now under consideration: "The charter of the city of St. Louis gives the mayor and assembly power, by ordinance, 'to establish, open, vacate, alter, widen \* \* \* all streets, sidewalks, alleys,' etc. Under such a power the municipal assembly may vacate a street or part of a street without any judicial determination. And such a power, 'when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.' 2 Dillon, Mun. Corp. (4th Ed.) § 666. There is no doubt but a property owner has an easement in a street upon which property abuts which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. *Bailey v. Culver*, 84 Mo. 531."

In *Knapp, Stout & Co. v. St. Louis*, 153 Mo., loc. cit. 572, 55 S. W. 104, the principle and rule of law announced in the *Glasgow Case* as heretofore cited was unqualifiedly approved, and Judge Gantt in discussing the subject of the essential averments in cases of this character to entitle plaintiff to the relief sought used this language: "Moreover, to entitle plaintiff to relief as an adjoining proprietor, it devolved upon it to allege and prove that it owned property fronting or abutting on the part of the street which the ordinance in question vacated. In a word, it must aver facts which show it will suffer a special or peculiar injury, and not merely such inconvenience as is cast upon all other persons of that neighborhood"—citing in support *Glasgow v. St. Louis*, 107 Mo., loc. cit. 205, 17 S. W. 743; *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 29 Am. St. Rep. 396; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Fairchild v. St. Louis*, 97 Mo. 85, 11 S. W. 60. In *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102, the doctrine announced in the previous cases of

*Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, and *Knapp, Stout & Co. v. St. Louis*, 153 Mo. 560, 55 S. W. 104, that, to entitle a plaintiff to injunctive relief, it was necessary to allege that the property owned by the plaintiff fronted or abutted on a portion of the vacated street, was fully approved. That the municipal assembly by the ordinance as herein indicated sought to vacate a part of Monroe street there can be no dispute, and in *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490, it was expressly decided that the city of St. Louis had the power to vacate streets and alleys, and that it was for the municipal assembly, and not the courts, to say when that power was to be exercised. Judge Black in the *Glasgow Case*, heretofore referred to, in discussing the intentions of the municipal assembly in passing the ordinance, said: "There is no doubt but the municipal assembly in enacting the ordinance intended to aid and foster a large manufacturing industry; but it is equally clear that the ordinance was passed with due regard to the public interests. The evidence entirely fails to show any fraud on the part of the city authorities, or any combination to injure any one. Nor does the evidence show that the ordinance was an unreasonable one. Whether the street should be kept open or vacated was purely a matter of expediency, and that was a question for the municipal assembly and not for the courts to decide"—citing numerous authorities.

Learned counsel for appellant directs our attention to the case of *Cummings v. St. Louis et al.*, 90 Mo. 259, 2 S. W. 130, and insists that the conclusions announced in that case are decisive of the controverted legal propositions involved in the case at bar. We are unable to agree with learned counsel upon this insistence. The same learned and esteemed judge that wrote the opinion in the *Cummings Case* also wrote the opinion in the *Glasgow Case*, and in the *Cummings Case* it is expressly recited that there could be no claim by the city that it was acting in the exercise of the power conferred upon the assembly to vacate streets, and Judge Black expressly stated in the *Glasgow Case* that "it must be remembered that the city is here pursuing a power to vacate streets conferred upon it in express terms, so that *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130, and some other cases cited by the appellant, have no application to this controversy." The law as announced applicable to the disclosures of the record in the *Cummings Case* was not criticised or even discussed in the subsequent cases of *Knapp, Stout & Co. v. St. Louis*, 153 Mo. 560, 55 S. W. 104, and the case between the same parties in 156 Mo. 343, 56 S. W. 1102, and in the *Glasgow Case*, Judge Black who wrote both opinions, disposes of that case by saying that it has no application to the disclosures of the record in the case he had in hand. Therefore we see no escape from the conclusion that the rule announced

in the *Cummings Case* has no application to the disclosures of the record in the case now before us. However, we deem it unnecessary to pursue this subject further, for in our opinion the allegations contained in the petition that the ordinance vacating part of Monroe street was void and of no effect negatives the theory that plaintiff is seeking by this action to restrain the enforcement of an ordinance vacating a public street, and this cause as presented must stand or fall upon the first theory of this case discussed; that is that, the ordinance vacating the street being void, the defendant threatening to take possession of a part of a public thoroughfare and place thereon permanent obstructions, which in law, if the threatened acts were consummated, would amount to a public nuisance, and by this action it is sought by injunction on the part of an individual or an artificial person to prevent the commission of such acts as would constitute a public nuisance. We have heretofore fully discussed that particular theory of this case, and pointed out the insufficiency of the petition.

Hence there is nothing remaining to be said except to announce the result of our conclusions which is that the judgment of the trial court should be affirmed; and it is so ordered. All concur.

#### SQUIRES v. KIMBALL et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—POSSESSION.

A person who buys property in the visible possession of a third person is chargeable with notice of the title and right of that person to the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 540.]

#### 2. APPEAL — REVIEW — FINDINGS OF TRIAL COURT.

Findings of fact by the trial court on conflicting testimony will not be disturbed on appeal.

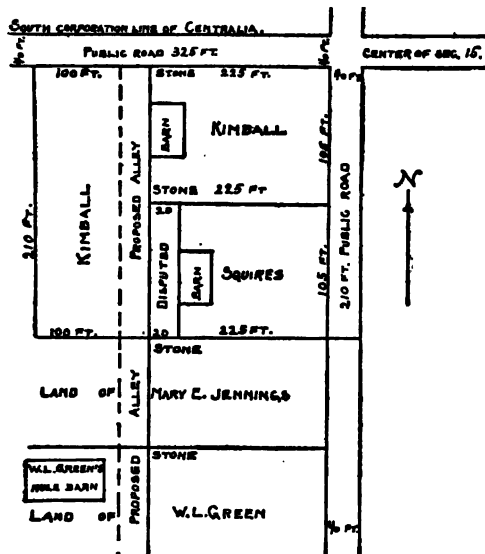
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Boone County;  
A. H. Waller, Judge.

Action in ejectment by James M. Squires against Margaret J. Kimball and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This cause is now before this court upon appeal by the plaintiff from a judgment of the circuit court of Boone county in favor of defendants in an ejectment proceeding. The petition is in the usual form, and need not be reproduced. This is a suit to recover possession of a small piece of ground, 20 feet east and west, by 150 feet north and south, and situated in the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 15, township 51, range 11, in Boone county, Mo. The case was tried before the judge of the circuit court of said

county sitting as a jury, and a verdict and judgment was rendered for respondents. Both parties claim title under George N. Johnson. The following plat, which is here reproduced, indicates the strip of land in dispute, as well as that embraced in the numerous deeds introduced in evidence:



On August 3, 1897, George N. Johnson and wife conveyed to Mary E. Jennings (now Mary E. Williamson) a tract of 105 feet from north to south, and 225 feet, more or less, from east to west, and extending from the middle of the road on the east "to corner stone on proposed alley"; the land conveyed being described on plat as "Squires." Mary E. Jennings conveyed the same land on February 22, 1898, to A. L. Cox, trustee, to secure the payment of a certain note due James W. Green. The next conveyance was one executed by George N. Johnson and wife to William A. Parks on August 17, 1900, and conveyed the balance of the land that he (Johnson) owned, the tract conveyed being situated on the north and west sides of appellant's land, and being described on the plat as "Kimball." The land conveyed by Johnson and wife to Parks by deed last above mentioned is described in said deed as follows: "To obtain the point or corner of beginning, commence at the corner of section (15) fifteen, township number (51) fifty-one, range number (11) eleven and run south forty feet to a stake as the point or corner of beginning; thence run south (105) one hundred and five feet to a stake; thence run west (225) two hundred and twenty-five feet; thence run south (105) one hundred and five feet; thence west (100) one hundred feet; thence run north (210) two hundred and ten feet to a stake; thence east (325) three hundred and twenty-five feet to the point or corner of beginning, be the same more or less. An alley (18) feet wide, running through said premises from north to south is reserved,

and same to be opened when adjoining owners open up their said alley." On March 6, 1901, William A. Parks and wife conveyed the land last above described to defendant Margaret J. Kimball, making the same reservation with reference to the alley as was made in the deed from Johnson and wife to Parks. Mrs. Jennings, to whom Johnson and wife made the conveyance, having made default in the payment of the note secured by the deed of trust as heretofore mentioned, the land was sold by the trustee in pursuance of the provisions of the deed of trust, and on the 12th day of April, 1902, the trustee executed his trustee's deed to James W. Green, the purchaser at such sale. There was also introduced in evidence, over the objections of plaintiff, a quitclaim deed executed by James W. Green on March 11, 1903, by which he conveyed the land in dispute to the defendant Margaret J. Kimball. This deed, however, had never been recorded, and was not recorded for some months after the trial of this cause. Plaintiff introduced in evidence a deed executed on May 30, 1903, by James W. Green, who was unmarried, conveying the land purchased at the trustee's sale as heretofore mentioned. This deed, it will be observed, was executed and delivered subsequent to the quitclaim deed heretofore referred to.

This constitutes substantially the paper title of the respective parties. There was a great deal of oral testimony introduced, which was very much in conflict. On the part of the plaintiff, testimony was introduced tending to show that at the time the defendants purchased this land from Parks that Parks showed them the lines, which they recognized, and that the land in dispute was not intended to be included in such conveyance. On the other hand, defendants' testimony tended to show that Parks did not point out the lines of the land conveyed in this deed. There was other testimony introduced on the part of the plaintiff which tended to show conversations with the defendants, in which they said that they knew they did not buy the land, but their deeds covered it, and they would claim it. This testimony is also contradicted by the defendants testifying that no such conversation occurred. There was testimony introduced on the part of the defendants tending to show that, after James W. Green acquired his title, there was some talk about the eastern boundary of the land in dispute, and the defendants and said Green agreed that the west side of the barn on plaintiff's land should be the line, and that, in accordance with such agreement, in February defendants put their fence on said line and took possession of the land in dispute, and that in accordance with such agreement on March 11, 1903, executed the quitclaim deed as heretofore indicated, by which he conveyed the land in dispute to the defendant Margaret J. Kimball.

There was also a disputed question as to whether on the sides of the contemplated alley there were stones or stobs placed indicating the line. Upon this question there was testimony both ways—on the one side that the stones or stobs were placed there, and on the other that there were no such stones or stobs found along the line of the alleyway. The plaintiff in this cause admitted while on the witness stand that the fence of the defendants inclosing this disputed land was there when he bought it, and that the defendants were in possession of this disputed land when plaintiff bought, and that he saw the fence on the east side of the land in controversy. There was testimony offered on the part of the defendant that, before plaintiff purchased his land, the defendants pointed out to him the boundary; that they showed plaintiff the iron stakes at the corners on the east side of the disputed strip; further, told plaintiff that they had had the land surveyed and the line was on the east side of the 20-foot strip in controversy; that defendants had possession of the disputed land at that time, and that the fence was placed on the east side of the lot in dispute in February, 1903. The defendant Cash Kimball testified that he told the plaintiff prior to his purchase that his wife had a quitclaim deed from Green to the land in dispute, and that he had all the papers to show their right and title to the same. The defendant further told plaintiff about the agreement between Mr. Green and defendants, when he owned the land, that the boundary line should be on the east side of the land in dispute, and that defendants placed their fence, and took possession of the strip in accordance with said agreement. In rebuttal, plaintiff testified, denying any knowledge as to the existence of the quitclaim deed until a short time before the trial, and denied that Mr. Kimball, one of the defendants, had ever told him anything about the deed before he bought the land, and contradicted testimony as offered by the defendants as to conversations, except it was conceded that the defendants were in possession of this disputed strip of land at the time plaintiff bought from Mr. Green.

This is sufficient to indicate the nature and character of the testimony upon which this cause was submitted to the court sitting as a jury. The cause being submitted under the pleadings and evidence, the court sitting as a jury found the issues for the defendant, and rendered judgment denying a recovery to the plaintiff. Timely motions for new trial and in arrest of judgment were filed and by the court overruled, and, from the judgment rendered in this cause, the plaintiff prosecutes his appeal to this court, and the record is now before us for consideration.

Harris & Bruton, J. H. Cupp, and N. T. Gentry, for appellant. Thos. J. Tydings and E. C. Anderson, for respondents.

FOX, P. J. (after stating the facts as above). The record in this cause discloses but one legal proposition for our consideration. That is predicated upon the assignment of error by learned counsel for appellant that the court improperly admitted in evidence the quitclaim deed from James W. Green to Margaret J. Kimball. The record discloses that this quitclaim deed at the date of the trial had never been recorded in the office of the recorder in the county where the land was situated. Upon this state of the record, appellant bases the contention that the plaintiff was an innocent purchaser without notice of this quitclaim deed, and, notwithstanding the quitclaim deed was executed prior to the conveyance to the appellant, that the appellant is not to be affected by it by reason of the absence of any notice. The quitclaim deed executed by James W. Green to respondents speaks for itself. It embraced and conveyed the land in dispute. It was executed some months prior to the conveyance by Green to the appellant by which he claims title to the land in controversy. The proposition now confronting us is narrowed down to the simple question of notice of the claim and title of the respondents to the land involved in this suit. The record discloses and it is practically conceded that the defendants at the time the appellant made the purchase of this land from James W. Green were in possession of the strip of land involved in this controversy. The appellant while on the stand admitted that the defendants, at the time of his purchase, had a fence which inclosed this strip of land.

It is no longer an open question in this state that a person who buys property in the visible possession of a third person is chargeable with notice of the title and right of that person to the premises. In the case of Wigenhorn v. Daniels, 149 Mo. 160, 50 S. W. 807, this court, speaking through Valliant, J., announced the rule that "he who buys a piece of property in the open and visible possession of a third person is chargeable with notice of the title and right of that person in the premises"—citing in support of such rule *Leavitt v. La Force*, 71 Mo. 353; *Davis v. Briscoe*, 81 Mo. 27; *Insurance Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656. To the same effect is *Davis v. Wood*, 161 Mo., loc. cit. 33, 61 S. W. 695, where it was said: "The plaintiff, who acquired a half interest of the Galloway heirs just upon the eve of the institution of this suit, did so in the face of the adverse possession of the defendants, and with notice of their claim, and hence there is no innocent purchaser in the case." A similar ruling was made in the case of *Desteiguer v. Martin & Kenney*, 162 Mo. 417, 63 S. W. 107. In the recent case of *Myers v. Schuchmann et al.*, 182 Mo. 159, 81 S. W. 618, the rule of law as announced in the cases heretofore cited was fully recognized by Judge Burgess, speaking for this court, on the sub-



ject of notice to persons contemplating the purchase of property.

Applying the well-settled doctrine as announced in the cases heretofore indicated, we see no escape from the conclusion that the appellant must be held to have made his purchase from James W. Green with notice of the claim and title of respondents. But, aside from this, there was testimony by the respondent that actual notice had been given the appellant respecting the execution of the quitclaim deed introduced in proof. While upon that question there was a conflict of testimony, the respondents testifying one way and the appellant the other, still that was a question to be determined by the court, and, even upon that proposition, if the court found that the appellant had actual notice, this court, in accordance with the well-settled rules in such cases, would defer to the finding of the trial court, and would not be warranted in undertaking, from the disclosures of the record to settle the conflict in the testimony. It is not disclosed by the record upon which theory the trial court admitted the quitclaim deed in evidence, whether upon the ground that the respondents were in possession of the strip of land in dispute at the time appellant made his purchase and that appellant had notice of such open and visible possession, or whether it was found that there was actual notice given of the existence of such deed as testified to by respondents. However, that may be, it is clear that this court would not be warranted in interfering with the findings of fact of the trial court.

There were no instructions requested on either side at the trial of this cause, and it is manifest from the record, conceding for the sake of argument the contention of appellant in respect to the conveyances from Johnson and wife to Mrs. Jennings and Parks, that James W. Green, through whom both the appellant and respondents claim title, conveyed and embraced the strip of land in dispute in the quitclaim deed introduced in evidence, this deed was executed and delivered some time prior to the deed under which appellant claims, and, as heretofore stated, appellant made his purchase and accepted his deed with notice of the claim and title of the respondents.

We have carefully analyzed the disclosures of the record in this cause, and, being unable to find any reversible error, the judgment of the trial court should be affirmed; and it is so ordered. All concur.

#### STATE v. SPEYER.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—MATTERS OTHERWISE ESTABLISHED.

In a criminal prosecution, admission of evidence referring to an alleged prior crime is not prejudicial where the accused, in a voluntary

written statement, alluded to the same matter, and the statement was read in evidence by the state without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 8139.]

#### 2. SAME—TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

On objection to a question, on cross-examination of an expert, on the ground that the question was not in proper form, and that it was not an examination of anything drawn out in chief, held properly overruled, since it did not really amount to an objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1633-1638.]

#### 3. SAME—APPEAL—PRESENTATION OF OBJECTIONS AT TRIAL—TIME FOR OBJECTION.

An objection to the admission of evidence cannot be raised for the first time in a motion for new trial or on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2639-2642.]

#### 4. SAME—ADMISSION OF EVIDENCE—RELEVANCY—FACTS IN ISSUE.

In a prosecution for homicide in killing the son of accused, where the only evidence as to accused's having abandoned his wife was that he had told a witness that, at the time he killed his son, the son was all in the world he had, and that his son was the only thing on earth for his wife to get, and that he had a great deal of trouble in life, letters offered to show that accused had not abandoned his wife were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 764-773.]

#### 5. SAME—TESTIMONY OF ACCUSED ON FORMER TRIAL—REBUTAL OF EVIDENCE OF INSANITY.

To rebut evidence as to accused's insanity, the state may introduce in evidence the testimony of accused on former trials.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 760, 1231.]

#### 6. SAME—STATEMENT OF ACCUSED—STATUTORY PROVISIONS.

Rev. St. 1899, § 3149 [Ann. St. 1906, p. 1788], providing that when evidence has been preserved in a bill of exceptions in a cause it may be used thereafter in the same manner and with like effect as if it had been preserved in a deposition in said cause, has no application to a defendant in any case, criminal or civil, and statements made by an accused on a former trial of a criminal case are admissible against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1231-1235.]

#### 7. HOMICIDE—MURDER IN FIRST DEGREE—NECESSARY ELEMENTS.

In the absence of either deliberation or premeditation, there can be no murder in the first degree, for both are necessary elements of that crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 36-38.]

#### 8. SAME—PREMEDITATION—LENGTH OF TIME.

A killing may be premeditated, though the purpose is formed but a moment before it is executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 19.]

#### 9. SAME—DELIBERATION.

Deliberation is prolonged premeditation, and as used in the statutes defining murder in the first degree implies a cool state of the blood, and is intended to characterize murders such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 19.]

**10. SAME—DELIBERATION—EVIDENCE.**

In a prosecution for homicide in killing the son of accused where it appeared that he had cherished the warmest affection for his child, and had scrupulously cared for all his wants, and there was no evidence of any criminal purpose beyond that which the law presumes from the act itself, and the only explanation of the deed was that given by accused, that he had no thought of killing the child until he entered the place where it was sleeping, and that all at once the thought struck him to kill the child to prevent its being left alone and disgraced, and perhaps mistreated on account of the father's arrest on a criminal charge, *held* that the killing was not deliberately done, and was not murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 480, 518-538.]

**11. SAME—TRIAL—INSTRUCTIONS—MURDER.**

On trial of an information for murder in the first degree, in killing the child of defendant, an instruction that if defendant knew the right from the wrong of the particular act with which he stands charged, and if he committed the act because he feared that he would be separated from his child, and that the child would fall into the hands of persons who would mistreat it, such reasons would not justify or excuse him in killing the child, and the jury will find the defendant guilty as charged in the information, is erroneous, since it did not require the jury to find that the killing was done with deliberation and premeditation, and made no reference to a prior instruction covering the whole case, thus leaving it to the jury to conjecture which instruction should guide them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 642-648.]

**12. CRIMINAL LAW—DEFENSE OF INSANITY—NECESSITY FOR SPECIAL PLEA.**

Under the Code, a special plea is not required, where insanity is relied upon as a defense, but insanity may be shown on a plea of "not guilty," or where the accused declines to plead and the court orders the plea to be entered for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 662.]

**13. SAME—DEFENSE OF INSANITY AS ADMISSION OF ACT CHARGED.**

The defense of insanity admits nothing more than that the accused committed the act with which he is charged, and does not admit that it was a crime, nor the grade of offense charged in the indictment or information.

**14. SAME—INSANITY AS AN ISSUE.**

Insanity is not an issue to be passed on separately from the other issues, but like any other issue, is involved in the defense of "not guilty," upon which the burden of proof is upon the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 742-744.]

**15. HOMICIDE—DEGREE OF OFFENSE—INTENTIONAL KILLING WITHOUT DELIBERATION.**

An intentional killing without deliberation is either murder in the second degree, or manslaughter in the fourth degree, under Rev. St. 1899, § 1834 [Ann. St. 1906, p. 1269], which in effect covers intentional killing without malice aforethought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 35-40.]

**16. SAME—EVIDENCE—SUFFICIENCY—INSANITY.**

A conviction for murder in the first degree, *held* not sustained in view of the evidence as to insanity.

Appeal from Circuit Court, Jackson County; John A. Rich, Special Judge.

John M. Speyer was convicted of murder

in the first degree, and appeals. Reversed and remanded.

W. F. Riggs, for appellant. The Attorney General and John Kennish, for the State.

**BURGESS, J.** This is the third appeal by defendant in this cause. On the first trial defendant was convicted of murder in the second degree, and, upon appeal, the judgment was reversed, and the cause remanded. *State v. Speyer*, 182 Mo. 77, 81 S. W. 430. On the second trial defendant was convicted of murder in the first degree, and, upon appeal, the judgment was reversed, and the cause remanded. *State v. Speyer*, 194 Mo. 459, 91 S. W. 1075. Upon the third trial the defendant was again convicted of murder in the first degree, from which judgment, after unsuccessful motion for new trial and in arrest of judgment, he appeals.

The facts are fully and fairly stated by Gantt, P. J., in 182 Mo. 77, 81 S. W. 430. If, however, it be thought necessary, other facts developed at this trial will be stated in the course of the opinion. On the second trial of this cause one Margaret Tennis, a young girl upon whom defendant was charged with having made an assault, and for which he was under arrest at the time of the homicide, was permitted to testify over the objection of the defendant, and in passing upon the admissibility of her testimony this court said: "We will say that any testimony by this witness as to what occurred between her and the defendant prior to the killing of Freddie Speyer has absolutely nothing to do with the case. The effect of such testimony can only have the tendency to unjustly prejudice the minds of the jury against the defendant upon an issue not involved in the trial of this case, and upon its retrial all references of this witness having met the defendant prior to the time of the killing, and the length of time that she was with him, should be promptly excluded. While this witness, Marguerite Tennis, in her examination in chief, cross-examination, and redirect examination, says but little which has any bearing upon the issues involved in this case, yet there is in her testimony some insinuations or statements from which the jury might draw inferences that the defendant had committed some unlawful act in respect to this witness, and it is not uncommon that a mere insinuation of the commission of a wrong is about as injurious as a positive and broad statement that the wrong was committed; therefore, it is highly important that no such testimony be permitted to go to the jury." 194 Mo., loc. cit. 471, 91 S. W. 1079. This witness did not testify upon the last trial; but it is contended by defendant that this direction of the court was violated in numerous instances by the prosecuting attorney, and that the court erred in permitting John Martin, the police officer in whose custody defendant was at the time of the kill-

ing, to testify, over defendant's objections, that upon the evening he placed defendant under arrest upon the charge of assaulting the girl, "there was a couple of ladies come up to me \* \* \* So, then I asked this little girl \* \* \* I asked this party [meaning the girl] if this was the man, and she said, 'Yes.'" The defendant insists that, under the rule announced, the girl would not have been permitted to testify with reference to anything which might have occurred between her and defendant prior to the homicide, and that these remarks of the officer have reference to the same occurrence, and come under the ruling of this court on the last appeal. We are inclined to take the same view of the matter; but as the defendant himself, on July 24, 1902, in a voluntary written statement with reference to the homicide and the attending facts and circumstances, which statement was read in evidence by the state without objection, alluded to the same charge "as this woman had made against him," we do not think the judgment should be reversed on that ground. But we do not intend to be understood as holding that the facts and circumstances connected with said assault should be admitted in evidence upon another trial, should such be had.

It is also claimed by defendant that the court erred in permitting the state to ask Dr. Glasscock, an expert witness, the following question: "Doctor, if that man killed the boy because he feared that he was to be put in jail on a serious charge, and the boy would be neglected and abused, and he killed him for that reason, would you regard that as an evidence that he did not know that it was wrong to kill him?" The only objections interposed by defendant to this question were that it was not in proper form, and that it was "not an examination of anything drawn out in chief." It is clear that there was no error in overruling these objections, as they do not, under our rulings, really amount to such. Complaint is also made of the court's action in permitting the state to ask these further questions of the same witness: "You do not know whether there was any trouble between him and his wife over the boy?" and "Would the fact that he told the police officer that he and his wife had trouble?" etc. An examination of the record fails to show that defendant made any objection whatever to these questions, and an objection cannot be raised for the first time in the motion for a new trial or on appeal.

In the fourth and fifth assignments of error defendant complains of the action of the court in sustaining an objection made by the state to the introduction in evidence by the defendant of certain letters which purported to have been written by defendant to his wife before the commission of the homicide. These are the same letters whose admissibility was fully discussed by Judge Fox on the last appeal. The court held upon that appeal that the letters were properly excluded

as being incompetent for the purpose of proving the affection of defendant for his child. The defendant now contends that, although not admissible for that purpose, yet, as the state upon the last trial introduced some evidence tending to show that defendant had abandoned his wife, they were admissible for the purpose of showing that he had not done so. There was really no evidence that could be called such that defendant had abandoned his wife, such supposition having no further support than the testimony of the policeman, Martin, who testified that, in a conversation had with defendant in the jail where he was confined, the defendant told him that "at the time he killed his son he was all in the world he had. He said when he went in there his intention wasn't to do anything, but there was a cloud came over him, and he was afraid he was going to be mobbed, and that his son was the only thing on earth for his wife to get, and he said he didn't want to leave the boy." Being asked to tell the jury all that was said about the wife, as near as he could recall it, witness said: "He simply made the remark that that was all on the earth he had, and his intention was to kill the boy and himself; in words, that is the way he put it." Being again asked to tell all that defendant said about his wife and the boy, witness replied: "Well, he said he had a great deal of trouble in life, and he was just getting on his feet, and this coming up he didn't know what was going to be the outcome." To say that by defendant's statement to the policeman that "his son was the only thing on earth for his wife to get" he meant that he did not want his wife to have the boy for the reason that he had separated from her is a bare and unwarranted assumption; and how the further remark of the defendant, that he "had a great deal of trouble in life," could be tortured into meaning that he had trouble with his wife and had separated from her, is beyond comprehension. It is clear, we think, from the evidence, that the defendant's greatest concern at the time he was placed under arrest upon the charge made by the girl was the welfare of his little son, whom he did not want to leave, in a large city, among strangers who might mistreat him, the child's mother being many hundreds of miles away, and rather than be separated from him, under the circumstances as they appeared to his bewildered brain, he preferred taking his life as also his own. That he did not succeed in accomplishing his purpose to take his own life was only due to the quick action of the police officer who struck him with his club and took his knife away. There being no evidence that the defendant and his wife had had trouble, and had separated, his motive in killing the boy could not have been revenge upon the mother, but rather apprehension of illtreatment of the boy by others. Besides, the case was submitted to the jury upon this latter theory. There was thero-

fore no error in sustaining the objection to the letters being read in evidence.

It is also asserted that error was committed in admitting as evidence, on rebuttal, the testimony of defendant given upon the two former trials. This evidence it seems was introduced by the state to negative the defense of insanity. The objection interposed by defendant to its introduction was that it was "incompetent, immaterial, and irrelevant, for the reason that it is not rebuttal." The law presumes that every man is sane; and, defendant having interposed his insanity as a defense, the burden rested upon him to show by the weight of the evidence that he was insane at the time of the homicide, and the defendant having introduced evidence to establish that defense, it was entirely proper for the state, in rebuttal, to introduce in evidence the testimony of the defendant on the former trials. Underhill on Crim. Evidence, § 235. In *Com. v. Reynolds*, 122 Mass. 454, it is held that statements made by a defendant while testifying at a former trial are competent either as admissions or for the purpose of contradicting him. They were voluntary statements explanatory of his connection with the transaction, and it was immaterial when or where they were made. To the same effect is *State v. Oliver*, 55 Kan. 711, 41 Pac. 954. There was no objection made at the time as to the mode of proving the defendant's former testimony, nor was objection made to the reading of the testimony beyond the part identified by the stenographer, and cannot be made for the first time in the motion for a new trial or upon appeal. As supporting his contention in this respect, defendant relies on section 3149, Rev. St. 1899 [Ann. St. 1906, p. 1788], which provides that when evidence has been preserved by bill of exceptions in any case, the same may thereafter be used in the same manner as if such testimony had been preserved in a deposition. But that statute has no application to a defendant in any case, criminal or civil. The deposition of a defendant in a felony case is never taken, because the law requires his presence during the entire trial. Even if the deposition of a party to a civil action be taken and filed in the case, and he be present at the trial, any statements made by him affecting the merits may be shown against him by the adverse party, notwithstanding his presence. *Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613. So, with respect to the defendant in a criminal case, any statements made by him as to the facts of the case are admissible against him.

Defendant insists that the evidence did not justify the giving by the court of an instruction for murder in the first degree. As we have said, there was no evidence tending to prove that defendant killed his son to prevent his wife from getting possession of him him, and the evidence relied upon by the state as tending to establish such fact falls far short of it. When the case was before

us upon the first appeal (182 Mo. 77, 81 S. W. 430), Gantt, P. J., speaking for the court, said: "This record presents a case exceptional in all its features. A father is charged with the murder of his innocent, unoffending, and sleeping child. That he cut the little boy's throat with a knife is conceded. The evidence discloses that up to the fatal moment when he plunged the knife into the little one's throat he had cherished the warmest affection for his child, and had scrupulously cared for all his wants. There is not the slightest evidence of any criminal purpose in taking the child's life beyond that which the law will presume from the act itself. The very enormity of the act suggests a doubt of the sanity of the defendant. The child himself did not and could not have been guilty of anything which the law would regard as a provocation either just or unlawful. The evidence tends to show that the warmest affection existed between the father and the little one. We are compelled to look for an explanation of this most unnatural deed in the circumstances detailed by the witnesses. The killing of the child is traceable to the circumstances surrounding the defendant at the time and just prior to the fatal act. The defendant was a skilled horseman, and was giving exhibitions of his horsemanship for the Karnival Krew Company of Kansas City, by whom he was employed, and the little boy had become proficient in riding, and accompanied his father, the mother and little sister remaining at home in New Orleans. Only a few minutes before the homicide occurred, two ladies, with a little girl, had appeared in front of the tent in which defendant was to give an exhibition that night, and an officer, pointing to the little girl, inquired of him if he knew her or had seen her, and defendant said that he had seen her around the tent, and had given her a dime to get her some ice cream, whereupon one of the ladies began to upbraid him, and the other, the mother of the little girl, charged him with the ruin of her daughter, and began to cry. A crowd commenced to collect, and the officer told defendant he must take him to the station, to which defendant assented, but asked the privilege of getting his coat which was in the tent. As he went into the tent in charge of two policemen, there were threats of lynching or mobbing him heard by him. He went in, got his coat, and, seeing his little boy asleep, asked to be allowed to undress him, and when the officers learned that he had no one else to look after the child they consented. He began to undress the child, and had removed his shoes and stockings. Suddenly, and before the officers could prevent it, he drew a knife and cut the child's throat, and then cut his own throat. The stroke killed the child, but failed to kill the defendant. The explanation, and the only explanation for this deed, was that given by the defendant, namely, that, knowing of the charge

just made against him, and believing he would be mobbed, and, seeing the child before him, and feeling that the little one would be left alone and disgraced and perhaps mistreated on his, defendant's, account, he madly determined to kill him rather than leave him to such a fate, and instantly executed the thought which he says oppressed and overcame him at that moment, and that he was powerless to resist it." Later on, in the course of the same opinion, it is said: "When we come to measure the conduct of defendant as a criminal act, we find all of the ordinary concomitants absent. We must discard at once all idea of malice in the popular sense of ill-will, hatred, or revenge, because the evidence demonstrates that up to the very moment of the unnatural deed he had displayed nothing but the natural affection of a father for a dutiful child. Likewise all semblance of provocation moving from the child is negatived. On the other hand, we find nothing in the facts which would permit us to ascribe the homicide to accident, or misadventure, because all the testimony shows the deed was intentional. Those motives which ordinarily impel men to commit a crime of this character are not to be found in the case. We are therefore to test the defendant's homicidal act by old and settled principles of law, and apply them as best we can to these new and startling conditions. While it is a settled principle of criminal law that without a criminal intent there can be no felony, it is equally well settled that a man is presumed to intend the natural, necessary, and probable consequences of what he intentionally does. The act of the defendant, then, in intentionally killing his child with a deadly weapon is presumptively murder, unless at the time he committed the act his reason and mental powers were so deficient that he had no conception of the right or wrong of the act he was about to commit."

Both deliberation and premeditation are necessary constituents of murder in the first degree; and, while it devolves upon the state to prove both, they may be shown by either facts or circumstances. The purpose to kill may be formed the moment before it is executed, as well as for an hour or a day, and still the act be premeditated. *State v. Dunn*, 18 Mo. 419; *State v. Jennings*, 18 Mo. 435; *State v. Star*, 38 Mo. 270; *State v. Holme*, 54 Mo. 153. In the absence of either constituent there can be no murder in the first degree. The question, then, is, was there deliberation by defendant before killing his son? We think not. In *State v. Kotovsky*, 74 Mo. 247, it is said: "Deliberation is but prolonged premeditation. In other words, in law, deliberation is premeditation, in a cool state of the blood, or, where there has been heat of passion, it is premeditation continued beyond the period within which there has been time for the blood to cool, in the given case. \* \* \* Deliberation is also premeditation, but is something more. It is not only to think

of beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon for such a length of time after a provocation is given as the jury may find was sufficient for the blood to cool. One in 'a heat of passion' may premeditate without deliberating. Deliberation is only exercised in a 'cool state of the blood,' while premeditation may be either in that state of the blood or in 'heat of passion.'" *State v. Speyer*, 182 Mo. 77, 81 S. W. 430. The evidence shows that at the time defendant entered the tent, found his little boy asleep, and attempted to wake him, he had no thought of killing him, but that all at once the thought struck him to kill the child, and he jerked out his knife and did so. If deliberation means prolonged premeditation, as before defined, it is clear that the killing was not deliberately done, and was not murder in the first degree. In *State v. Curtis*, 70 Mo. 594, it is said: "In *State v. Wieners*, 66 Mo. 20, it was said: 'Premeditation and deliberation are not synonyms, and a homicide may be premeditated without being deliberately committed.' It was further held in that case that 'murder in the second degree is such a homicide as would have been murder in the first degree, if committed deliberately.' If these views be correct, it must necessarily follow that all intentional homicides committed with premeditation and malice, but without deliberation, must be murder in the second degree. The word 'deliberation,' as used in the statute, implies a cool state of the blood, and is intended to characterize what are ordinarily termed 'cold blood murders,' such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain. These are classed as murders in the first degree. On the other hand, premeditation may exist in an excited state of mind; and, if the passion or excitement of the mind be not provoked by what the law accepts as an adequate cause, so as to rebut the imputation of malice, an intentional killing under the influence of such a passion will be murder in the second degree." The same rule is announced in *State v. Ellis*, 74 Mo. 207. If, then, as ruled in these cases, only such murders are deliberate as proceed from deep malignity of heart, or are prompted by motives of revenge or gain, no instruction for murder in the first degree should have been given in this case, for it is perfectly clear from the facts in evidence that no malignity existed in the heart of the defendant toward the child at the time he killed him, and that the deed was not prompted by motives of revenge.

This court has never held that an instruction for murder in the second degree should not be given in this case, but, on the first appeal, condemned an instruction upon that degree which had been given, for the reason that it drew a distinction between defendant's mental capacity to deliberate and his capacity to premeditate, and in effect, told

the jury that defendant might be so insane that he could not be guilty of murder in the first degree, and yet sane enough to premeditate, and therefore might be guilty of murder in the second degree. The opinion, however, contained no intimation that a proper instruction for murder in the second degree should not be given.

But even if an instruction for murder in the first degree should have been given, the sixth instruction upon that offense is fatally defective. It tells the jury that "if they find and believe from the evidence that the defendant knew the right from the wrong of the particular act with which he stands charged, to wit, the killing of Freddie Speyer, by cutting his throat with a pocket knife, and if they further believe that he committed the act because he feared that he would be separated from his said child, Freddie Speyer, and that the child would fall into the hands of persons who would mistreat it, such reasons would not justify or excuse him in killing said child, and the jury will find the defendant guilty as charged in the information." This and the first instruction given for the state each attempted to cover the whole case. The first was correct, but this was not, since it did not require the jury to find that the killing was done with deliberation and premeditation, thus ignoring entirely two necessary ingredients of the offense. It makes no reference to the first instruction, thus leaving the jury to conjecture which should guide them in their deliberations; and it is probable that the verdict was made upon this very instruction rather than the one which the court gave defining murder in the first degree. That it is erroneous is apparent at a glance; and, standing alone as it does, independent of the first instruction, it is no surprise that the defendant was found guilty of murder in the first degree. A similar instruction was condemned in *State v. Lentz*, 184 Mo. 223, 83 S. W. 970. It is, however, claimed by the state that, under the rulings of this court, the plea of insanity tendered by the defendant, both by testimony and instructions, was in itself an admission that the act charged against him in the information was truly charged. In support of this contention are cited the cases of *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337. The three last-named cases simply follow the *Pagels* Case, wherein it is said: "Indeed, the plea of insanity is of itself, and of necessity, a plea of confession and avoidance, the courts differing as to the quantum of evidence to sustain such plea. 1 Whart. Crim. Law (9th Ed.) § 61. Such plea is but a bare denial of a part of the government's case. It admits the act charged, but avers that there was no criminal intent accompanying the act, and, therefore denies the crime charged. 2 Bish. Crim. Proc. (3d Ed.) § 669."

Under our Code, a special plea of insanity is not required where insanity is relied upon as a defense, but may be shown on a plea of not guilty (*People v. Olwell*, 28 Cal. 456), or where the defendant declines to plead, and the court orders the plea of not guilty to be entered for him. He may make as many defenses as he has under such circumstances; but in no event does the defense of insanity admit the grade of offense as charged in the indictment or information, nothing more than that he committed the act with which he is charged, but not that it was a crime. "Insanity is not an issue by itself, to be passed on separately from the other issues" (2 Bish. Crim. Proc. [3d Ed.] § 673), but, like any other issue, it is involved in the defense of not guilty, upon which the burden of proof is upon the state. Of course, if insanity is the only defense, the homicide is confessed, "but the guilt, the crime of that homicide, denied, and this is all that is denied; for it stands to reason that on no other ground could the plea of insanity have pretense of relevance in it." *State v. Soper*, 148 Mo. 217, 49 S. W. 1007. This is as far as our decisions on this subject go, with the exception of *State v. Stubblefield*, supra, in which it was inadvertently said that "the plea of insanity tendered by defendant both by testimony and instructions was in itself an admission that the act charged against him in the indictment was truly charged." But that expression is somewhat qualified by the words, "the very plea of insanity admits the doing of the act, but only denies its guilt because of such insanity." To the extent herein indicated we understand the decisions under consideration to go, and no further. As the killing in this case was intentional, it is murder in the second degree, or manslaughter in the fourth degree, under section 1834, Rev. St. 1899 [Ann. St. 1906, p. 1269], which declares that an intentional killing, without malice aforethought, is manslaughter in that degree. *State v. Dierbeyer*, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; *State v. Edwards*, 70 Mo. 480; *State v. Curtis*, 70 Mo. 600; *State v. Watson*, 95 Mo. 412, 8 S. W. 383.

We cannot conclude this opinion without expressing our surprise at the conviction of defendant of any offense, under his defense of insanity and the evidence in support thereof, which shows, as we think, that he was insane at the time of the homicide. That his act in taking the life of his son, under the circumstances disclosed by the record, was that of an insane man, hardly admits of a doubt. Yet, in the face of the facts as detailed and the insane motives that prompted the deed, the defendant has, by three different juries composed of the best citizens of the county in which the offense was committed and the cause tried, been found guilty of murder. With due deference to the men who composed these juries, and especially the last one, we must say that we are not satisfied with their verdict, and feel constrained to

say that we do not think it ought to be permitted to stand. In the former opinions of this court it is clearly intimated that the court was of the opinion that defendant was insane at the time of the homicide, but deferred to the finding of the juries upon that question.

For these considerations, the judgment is reversed and remanded. All concur.

### DICKEY v. HOLMES et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

#### COURTS—APPELLATE JURISDICTION.

Where a section of the city charter has been declared unconstitutional, the question cannot be raised in a subsequent action, in order to give the Supreme Court jurisdiction on an appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 658.]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Walter S. Dickey against James T. Holmes and others. From a judgment for defendants, plaintiff appeals. Transferred to the Kansas City Court of Appeals.

Karnes, New & Krauthoff, for appellant. Gage, Ladd & Small, for respondents.

**BURGESS, J.** This is an action for the enforcement of the liens of two special tax bills against the properties of the defendants in Kansas City. The judgment in the trial court was for the defendants, from which judgment, after the filing and overruling of a motion for a new trial, plaintiff appeals.

Although the amount of the tax bills sued on is insufficient to give this court jurisdiction of this appeal, it is claimed by plaintiff that the Supreme Court has jurisdiction because of a constitutional question being involved. This question, if properly before this court, involves the validity of section 23, art. 9, of the charter of Kansas City, by which it is provided that the owner or owners of any tract or parcel of real estate charged with the payment of installment bills shall, within 60 days from the date of issue of the tax bills, file with the board of public works a written statement of each and all objections which he or they may have to the validity of the tax bills, the doing of the work, the furnishing of the materials charged therefor, the sufficiency of the work or materials therein used, and any mistakes or error in the amount thereof. It is further provided that in any suit on any tax bill issued pursuant to section 23, art. 9, no objection shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid. The only way this question is raised, if at all, is by the replication to the defendant's answer. It is not raised by the answer, instructions, or motion for new trial; but plaintiff contends that it is necessarily involved in the decision in the

case. The same question was raised in the same way in *State ex rel. Curtice v. Smith*, 177 Mo. 69, 75 S. W. 625, and must be held to be properly raised in the case at bar.

This identical section of the charter of Kansas City has been before this court on several different occasions and has as often been held unconstitutional and void. *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043; *State ex rel. v. Smith*, supra. It was before this court in *Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062, in which Gantt, P. J., speaking for the court, said: "We have been urged to reconsider our ruling in that case (*Barber Asphalt Co. v. Ridge*, supra), and to hold said provision of the charter a valid one. We have carefully considered the argument and authorities pressed on behalf of the plaintiff; but, without repeating what was said in *Ridge's Case*, we see no reason for departing from the views then expressed and conclusions reached in that case. We are still of opinion that it is in conflict with the fundamental principles of our state Constitution and out of harmony with our whole judicial system. *Richter v. Merrill*, 84 Mo. App. 150; *Winfrey v. Linger*, 89 Mo. App. 161." It was again before division 1 of this court in *Curtice v. Schmidt et al.*, 202 Mo. 708, 101 S. W. 61, and again in *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 108 S. W. 93, and in both cases held to be unconstitutional; and the question must, therefore, be considered as settled. Plaintiff, however, says that the fact that this court may have heretofore decided that the charter provision in question is invalid does not prevent the question from being involved in this appeal. It is true that the Supreme Court decided in *State ex rel. Dugan v. Kansas City Court of Appeals*, 105 Mo. 290, 16 S. W. 853, that where one, prosecuted for violating the local option law, defended on the ground that the law was unconstitutional, the Court of Appeals had no jurisdiction on appeal by defendant, notwithstanding the Supreme Court had already declared the law unconstitutional; and also in *State ex rel. Curtice v. Smith*, supra, "that the rule of practice in this state is that, when a constitutional question has once been decided in a case, it can be raised in a subsequent case, and when so raised in the trial court it is so far in the case as to direct the course of the appeal to the Supreme Court." The same rule is announced in *Schafstette v. St. L. & M. R. R.*, 175 Mo. 142, 74 S. W. 826. But this is not an iron-clad rule to which there are no exceptions.

In the very nature of things, the constitutional question involved must be a live one, not expressly foreclosed by prior decisions of this court; otherwise, no such question could ever be settled, no matter how often adjudicated upon by this court. In *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891, it was held that the amendment to the Constitution allowing nine jurors to return a verdict was legally adopted and was constitutional, and

the Supreme Court has always since declined and refused to consider cases where appeal was taken solely on the ground of the alleged unconstitutionality of that amendment, except where the appeal was taken prior to the date of that decision, December 24, 1902. In *Murray v. St. Louis Transit Co.*, 176 Mo. 183, 75 S. W. 611, plaintiff received a judgment for \$500 damages for personal injuries sustained by him in a collision with one of the defendant's street cars, caused by the alleged negligence of the servants of defendants. Valliant, J., wrote the opinion of the court, in which all the other members of that division concurred. He said: "Defendant appeals from the judgment, and as the appeal was taken before this court had passed on the question of the validity of the constitutional amendment authorizing nine jurors in a civil case to return a verdict, and as that question was raised in the trial court in this case, the appeal was brought to this court. Since the appeal in this case was taken, however, that constitutional question has been decided by this court, and it is no longer in doubt. *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891." The same rule was announced by the court in banc in *Tandy v. St. Louis Transit Co.*, 178 Mo. 240, 77 S. W. 994, and by division 1 of the Supreme Court in *Portwright v. St. Louis Transit Co.*, 183 Mo. 72, 81 S. W. 1091. In *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596, there was a verdict for the plaintiff for \$1,500, upon which there was judgment rendered, and the defendant appealed. Valliant, J., speaking for the court, said: "The appeal was taken to the St. Louis Court of Appeals; but when the attention of that court was called to the fact that only nine of the jurors concurred in the verdict, and that the constitutionality of such a verdict was challenged in the circuit court, the Court of Appeals transferred the cause to this court. At the time the appeal was taken this court had not passed on the question of the constitutionality of a verdict by three-fourths of the jurors in a civil case in a court of record. Therefore there was a constitutional question in the case which gave this court jurisdiction, and the action of the Court of Appeals transferring the cause to this court was right. This court, having jurisdiction when the appeal was taken, will retain it. But since then we have decided that under our Constitution three-fourths of the jurors in a civil suit in a court of record may render a valid verdict, and therefore that is no longer a constitutional question in this state."

Again, in *Franklin v. Railroad*, 188 Mo. 533, 87 S. W. 930, the defendant appealed from a judgment for \$2,500 against it for damages. Defendant in its motion for a new trial made the point that an instruction given the jury by the court to the effect that nine of their number could return a verdict was in violation of defendant's right to trial by jury as guaranteed by the Constitution of this state and of the United States. Valliant,

J., speaking for the court said: "In *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891, decided December 24, 1902, that subject was put at rest, and since then a question as to the validity of our constitutional amendment authorizing three-fourths of the jury to render a verdict in a civil case in a court of record has not been regarded by us as a live question; but, as the appeal in this case was taken before the decision in that case, it was properly taken to this court, and we will entertain jurisdiction of it." In passing upon the same question in *Carpenter v. Hamilton*, 185 Mo. 603, 84 S. W. 863, Gantt, P. J., speaking for the court, said: "It will be observed that the judgment in this case was for \$800; but the jurisdiction of this appeal vests in this court because of the constitutional question raised in the trial court, which was that the verdict was concurred in by eleven jurors only, and the point was made and urged that the amendment to the Constitution of this state, adopted at the general election in 1900, authorizing three-fourths of a jury to render a verdict in courts of record, had never been duly submitted to the people of this state and adopted by them as required by the Constitution of 1875. This point was decided by this court in banc adversely to this contention in *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891, December 24, 1902, and that decision has since been uniformly followed; but, where it has appeared that the point was made in good faith prior to the decision of this court in the *Gabbert Case*, we have retained jurisdiction. Inasmuch as this appeal was taken at the February term, 1902, of the Andrew circuit court, and filed in this court July 16, 1902, this case falls within the class of which we have retained jurisdiction on the ground that a constitutional question is involved. But in cases appealed since the promulgation of our decision in *Gabbert v. Railroad*, which would otherwise go to one of the Courts of Appeals, we have refused to entertain the appeals on the ground that the claim of unconstitutionality is not made in good faith, and because it is an attempt to compel this court to consider cases which justly fall within the jurisdiction of the Courts of Appeals. While as a general proposition it is the settled doctrine in this court that the decision of a constitutional question in one case does not foreclose the same question between the parties to another suit, we think it is intolerable that, where the proposition is that an amendment to the Constitution has not been duly submitted and adopted, and the point has been fully considered, and a ruling made that it was adopted, the very existence of a part of the Constitution should be questioned merely for the purpose of vesting jurisdiction in this court. Case after case has been certified to this court on this same ground, when it was apparent that the point was not made in good faith; and we have accordingly refused to entertain jurisdiction. But, as already



said, as this case falls within the class of appeals taken before the question of the validity of the amendment was settled, we will entertain jurisdiction; otherwise, we would not. *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596."

*Boling v. Railroad*, 189 Mo. 219, 88 S. W. 35, was an action for tort wherein plaintiff recovered a verdict and judgment for \$125 damages. Defendant appealed to the Supreme Court on the sole ground that the amendment to section 28 of article 2 of the Constitution [Ann. St. 1906, p. 162] permitting nine jurors in a civil case to return a verdict was never legally adopted. This court, speaking through Gantt, J., said: "Under the recent decisions of this court in banc and of both divisions, had this appeal been taken to or transferred to this court after the decisions in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, and *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891, \* \* \* this appeal should be remanded to the St. Louis Court of Appeals, as the sole ground upon which it is transferred to this court is that the amendment to section 28 of article 2, permitting nine jurors in a civil case to make a verdict, was never legally adopted. But inasmuch as the appeal, when taken, fairly raised the constitutional question whether such amendments had in fact become a part of the Constitution, and was taken prior to the settlement of that question by this court in the cases above cited, we will retain the appeal as properly in this court; otherwise, we would not. *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; *Carpenter v. Hamilton*, 185 Mo. 603, 84 S. W. 863."

The case of *Barber Asphalt Co. v. Ridge*, supra, was decided in division 2 on June 18, 1902, and *Paving Co. v. Munn*, supra, on December 24, 1904, while the appeal in the case at bar was granted on the 23d day of January, 1905; so that before the appeal in this case was taken division 2 of this court had twice decided the charter provision in question unconstitutional and void, and both divisions a number of times since. In view of these repeated adjudications, can there be any merit in this appeal? If there is, we fail to appreciate it, and are forced to the conclusion that the constitutional question is not raised in good faith.

We therefore decline to take jurisdiction of this case, and order the record and papers transferred to the Kansas City Court of Appeals, to whose jurisdiction it rightfully belongs. All concur.

#### DICKEY v. HOLMES et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

Appeal from Circuit Court, Jackson County.  
Action by Walter S. Dickey against James T. Holmes and others. From a judgment  
106 S.W.—33

for defendants, plaintiff appeals. Transferred to the Kansas City Court of Appeals.

Karnes, New & Krauthoff, for appellant.  
Gage, Ladd & Small, for respondents.

BURGESS, J. This case is in all material respects like the case of *Dickey v. Holmes et al.* (No. 12,914) 106 S. W. 511; and for the same reasons assigned in that case this court declines to take jurisdiction of this appeal, and orders the record and papers transferred to the Kansas City Court of Appeals. All concur.

#### DICKEY v. ORR et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 12, 1907.)

Appeal from Circuit Court, Jackson County.  
Action by Walter S. Dickey against John M. Orr and others. From a judgment for defendants, plaintiff appeals. Transferred to the Kansas City Court of Appeals.

Karnes, New & Krauthoff, for appellant.  
Gage, Ladd & Small, for respondents.

BURGESS, J. This is a companion case to *Dickey v. Holmes et al.* (No. 12,914) 106 S. W. 511; and for the same reasons assigned in that case this court declines to take jurisdiction thereof, and orders the record and papers transferred to the Kansas City Court of Appeals. All concur.

#### DICKEY v. ORR et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

Appeal from Circuit Court, Jackson County.  
Action by Walter S. Dickey against John M. Orr and others. From a judgment for defendants, plaintiff appeals. Transferred to the Kansas City Court of Appeals.

Karnes, New & Krauthoff, for appellant.  
Gage, Ladd & Small, for respondents.

BURGESS, J. This case is on all fours with the case of *Dickey v. Holmes et al.* (No. 12,914) 106 S. W. 511; and for the reasons assigned in that case this court declines to take jurisdiction of it, and orders the record and papers transferred to the Kansas City Court of Appeals. All concur.

#### STATE v. MISPAGEL.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. EMBEZZLEMENT — INFORMATION — REQUISITES—DESCRIPTION OF PROPERTY—PROOF.

In an information for embezzlement, as in an information for larceny, the property embezzled must be described, and the proof must be in substantial accord with such description. [Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, § 56.]

## 2. SAME—PLEADING, PROOF, AND VARIANCE.

A charge of embezzlement or larceny of money is not sustained by proof of the embezzlement or larceny of a draft or check.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, § 56.]

## 3. SAME—JURISDICTION.

Defendant, as cashier of a bank in St. Charles county, fraudulently drew a draft on a bank in the city of St. Louis, which was indebted to defendant's bank, and the money was paid in St. Louis to defendant's agent and by the agent applied to the satisfaction of defendant's individual account. *Held*, that the conversion of the money occurred in St. Louis, and that defendant could be prosecuted for embezzlement in that jurisdiction only, it being immaterial that defendant was not personally present in St. Louis at the time of the conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 223.]

## 4. SAME—ELEMENTS OF OFFENSE—STATUTORY PROVISIONS.

The statute defining embezzlement does not make a failure to account for a trust fund or a fund received by an agent or officer an offense, but the essence of the offense is the wrongful conversion of the fund, and while failure to account therefor may constitute evidence tending to establish the act of conversion, the failure to account does not constitute the offense of embezzlement of the fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, §§ 9, 10.]

Appeal from Circuit Court, St. Charles County; James D. Barnett, Judge.

Anton Mispagel was convicted of embezzlement, and appeals. Reversed.

Defendant was tried and convicted in the circuit court of St. Charles county, and was by said court sentenced to serve two years in the penitentiary on an information in this language:

"Theodore C. Bruere, prosecuting attorney within and for the county of St. Charles, in the state of Missouri, upon his oath, informs the court that Anton F. Mispagel, late of the county of St. Charles aforesaid, on the 28th day of December, 1903, at the county of St. Charles aforesaid and state aforesaid, being then and there an officer and agent, to wit, the cashier of and for a certain incorporated company, to wit, the St. Charles Savings Bank, and the said Anton F. Mispagel being then and there not a person under the age of sixteen years did then and there by virtue of his said employment as such officer and agent as aforesaid of the said incorporated company have, receive, and take into his possession and under his care certain money to a large amount, to wit, to the amount of four thousand dollars, lawful money of the United States and of the value of four thousand dollars, of the property and moneys belonging to the said incorporated company; and the said Anton F. Mispagel did afterwards the said money then and there feloniously embezzle, and fraudulently and feloniously convert the same to his own use, without the assent of his employer, the said incorporated company, the owner of the said money; and so the said Anton F. Mispagel did then and

there, in manner and form aforesaid, the said money, of the property of the said incorporated company, feloniously steal, take, and carry away, and converted the same to his own use contrary to the form of the statute in such case made and provided and against the peace and dignity of the state Theodore C. Bruere.

"And Theodore C. Bruere, prosecuting attorney within and for the county of St. Charles, in the state of Missouri, upon his oath informs the court that Anton F. Mispagel, late of the county of St. Charles aforesaid and state aforesaid, on the 28th day of December, 1903, at the county of St. Charles aforesaid, being then and there an officer, to wit, the cashier of and for a certain incorporated company, to wit, the St. Charles Savings Bank, and the said Anton F. Mispagel being then and there not a person under the age of sixteen years, certain money to the amount and value of four thousand dollars, the same being then and there lawful money of the United States, but the description of which said money is to the prosecuting attorney unknown, and which said money was then and there the money and personal property of the said St. Charles Savings Bank, a corporation, as aforesaid, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use, without the assent of the said incorporated company, his employer, which said money had then and there come into the possession and under the care of him, the said Anton F. Mispagel, by virtue of his said employment as such officer, as aforesaid, of said incorporated company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state. Theodore C. Bruere, Prosecuting Attorney."

It appears that there were 11 other similar informations pending in that court against the defendant and those with this one charged embezzlements in the aggregate sum of \$77,752.37. There were also two indictments in the city of St. Louis, charging in each the embezzlement of \$1,000. It also appears that the bank had demanded of defendant and his bondsmen an alleged shortage of \$90,326.15, and later in three separate suits had sued defendant and his bondsmen for the aggregate sum of \$106,769.52. The information hereinabove set out is known as "Information No. 10." To this information defendant interposed the following motion: "Comes now the defendant, by his attorneys, and moves the court to quash the information filed herein because: (1) The facts alleged therein constitute no defense. (2) The allegations are duplicitous in alleging in the first count that the defendant was both an officer and an agent of the incorporated company, and in the second count that he was simply an officer of said incorporated company. (3) Said information fails to identify the incorporated company by an allegation

of the state or county by virtue of which it was incorporated, or by alleging the place of business of said incorporated company. (4) Because at the time of filing the information, and long time prior thereto, and at the time of the alleged embezzlement, Theo. C. Bruere, the prosecuting attorney, was an officer, to wit, a member of the board of directors of the St. Charles Savings Bank, and interested in the funds and properties thereof." On this motion it was admitted that the prosecuting attorney filing the information was a director and stockholder in the St. Charles Savings Bank during the years 1903, 1904, and 1905. The court overruled the motion and this is assigned as error.

Thereupon the defendant filed a motion to require the state to elect upon what transaction it would stand, in which motion is set out all the facts above stated as to the number of informations, the amount of the total alleged embezzlements, the amount of the claim or demand of shortage as made by the bank against defendant and his bondsmen, the amount sued for in the three several suits, and also further alleging that the demands aforesaid were in writing and covered a period of 14 years, including numerous transactions and items, and that no such sum as \$4,000 appeared in said items. On this motion were offered in evidence the informations and indictments aforesaid, the itemized demand aforesaid, and the petitions in the three several suits. This motion was overruled, and the action of the court thereon assigned as error in motion for new trial.

To prove the alleged embezzlement of \$4,000 named in the information, the state introduced drafts as follows: Draft for \$500, drawn October 28, 1903, in favor of Edwards & Sons, a brokerage firm in St. Louis, on the American Exchange Bank; draft for \$1,000, drawn February 12, 1903, in favor of Edwards & Sons, on the Mechanics' National Bank; draft for \$200, drawn June 3, 1903, in favor of Edwards & Sons, on the Mechanics' National Bank; draft for \$1,000, drawn November 20, 1902, in favor of the Orthwein Investment Company, a brokerage concern doing business in St. Louis, on the American Exchange Bank; draft for \$500, drawn July 1, 1902, in favor of the Orthwein Investment Company, on the Mechanics' National Bank. These were described by the prosecuting attorney in his opening statement to the jury, and it was further stated that he expected to show the embezzlement of the \$4,000 by these said six drafts. When the first described draft was first offered in evidence, the defendant again renewed his motion to require the state to elect upon what transaction it would proceed. This was overruled, and defendant excepted.

Upon the close of the evidence offered by the state, the defendant demurred in this language: "Comes the defendant at the conclusion of the evidence on behalf

of the plaintiff, and demurs to the same as insufficient to sustain the allegations of the information, and moves the court to instruct the jury to acquit, on the ground, and for the reasons, as follows: (1) The allegation is the embezzlement of money and the evidence tends to show the embezzlement, if any, of drafts or commercial paper. (2) The allegation is embezzlement in the county of St. Charles, and the evidence shows that any conversion of drafts or money that did occur occurred in the city of St. Louis. (3) The money alleged to have been converted to his own use by the defendant was in the city of St. Louis and not in the county of St. Charles. (4) The money alleged to have been converted by defendant was not in his possession at all. (5) The proof fails to show that defendant had in his possession any money whatsoever, at the times of drawing the drafts, or at any other time, or that there was any money in his custody in the bank of which he was cashier or belonging to said bank. (6) The evidence is insufficient to show a prima facie case, and there is a fatal variance between the allegations of the information and the proof offered in support thereof. (7) The evidence fails to show that such moneys as the St. Charles Savings Bank had in the St. Louis banks was not placed there and to the credit of the St. Charles Bank by the defendant in sufficient amount to meet the drafts offered in evidence. (8) The evidence fails to show the cash on hand in the St. Charles Bank at the time of the drawing of the alleged drafts, or that the money to meet said drafts was not placed in said bank by defendant, and fails to show that the defendant did not give value for said drafts when drawn. (9) The evidence fails to show the status of the account between the St. Charles Savings Bank and this defendant, as its cashier, at the times of drawing said drafts, and that at said times he as such cashier did not have a credit to his balance to justify him in drawing said drafts and converting them to his own use."

This demurrer was overruled, and exceptions saved, the six drafts and other evidence having been introduced. The defendant thereupon moved the court to require the state to elect upon which of the said six transactions it would stand, which motion the court sustained and the state elected to stand on the draft of November 20, 1902, numbered 97,985, drawn in favor of the Orthwein Investment Company for \$1,000, and drawn on the American Exchange Bank of St. Louis, which draft was in the usual form of a bank draft and signed, "A. F. Mispagel, Cashier." This election necessarily shortens a statement to be made from an exceedingly voluminous record. This draft was in defendant's handwriting and signed by him. He sent it to the Orthwein Investment Company at St. Louis, which company collected \$1,000 thereon and placed \$600 to the credit

of defendant on his individual local account in St. Louis, and \$400 to the credit of defendant on his individual New York account. Defendant was speculating in stocks and grain through this and other brokerage companies. The evidence shows that while this draft on its face was drawn in favor of the Orthwein Investment Company, the defendant, on the stub kept in the draft book of the bank in St. Charles, had entered said draft as payable to one Dan Stevens. Stevens was the holder of a time deposit certificate given by the St. Charles Savings Bank, and on the day this draft was issued defendant had an entry made on the books to the effect that \$1,000 had been paid Stevens on his time certificate. No such payment had been made at that time as testified to by Stevens and in effect admitted by defendant. Stevens testified that he sent no money to the Orthwein Investment Company. By the payment of this draft the credit balance of the St. Charles Savings Bank with the American Exchange Bank was reduced by the amount of the draft. Defendant, on the day he issued said draft, gave the American Exchange Bank credit for the \$1,000 on the books of the St. Charles Savings Bank, thus reducing the balance due from the American Exchange Bank to the St. Charles Savings Bank by the sum of \$1,000. By a mass of testimony defendant undertook to explain away the alleged shortage to the bank. He also undertook to explain away the single transaction finally involved in this case by reason of the election by the state. He claimed to have placed money in the vault of the bank sufficient to cover the transaction, although his personal account with the bank, as shown by the books, did not show it. Several errors as to the giving and refusal of instructions are urged, but with the views we entertain of the law of the case it is not essential that such instructions should be here reproduced. The trial court's attention was directed to them in the motion for new trial, and they are fully preserved in the record.

This is a sufficient statement to indicate what this case is, and the nature and character of the testimony upon which it was submitted to the jury. At the close of the evidence the court instructed the jury in accordance with its views applicable to the testimony developed at the trial, and the cause was then submitted to the jury upon the evidence adduced and the instructions of the court, and as before stated they returned a verdict finding the defendant guilty and assessing his punishment at imprisonment in the penitentiary for two years. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Sentence was pronounced and judgment entered in conformity to the verdict, and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

Thos. B. Harvey and William L. Mason, for appellant. N. T. Gentry, Atty. Gen., and Theodore C. Bruere, for the State.

FOX, P. J. (after stating the facts as above). The record before us presents a number of very important legal propositions. Some of them are exceedingly close, and are entitled to be classed among the many complicated legal propositions with which courts are frequently confronted. We take it that it is not out of place to say, at the very inception of the consideration of this cause, that counsel representing the state as well as those representing the appellant have materially aided us in our efforts in seeking a correct solution of the questions presented to our consideration by a clear and able presentation of them in their respective briefs.

1. It is contended by learned counsel for appellant that the evidence fails to establish the material allegations in the information. In other words, it is insisted that the charge in the information of embezzlement of money is not sustained by the proof, which shows that he converted to his own use in St. Charles county a draft. Upon this proposition we take it that the rule is well settled that in an information for embezzlement, like an information for larceny, the property embezzled must be described and the proof must be in substantial accord with such description. Embezzlement is an offense against property and property rights, and the correct value and description in charging such offense are essential and material averments. In treating this subject McLain, in his work on Criminal Law, § 652, thus states the rule: "As a general proposition, the money or property should be described with the same certainty as in an indictment for larceny, and if there has been a change in form of property between the time of receipt and time of embezzlement, it should be described as of the form at the time of embezzlement." After a careful consideration of the adjudicated cases in which this question was in judgment before the appellate courts, as well as the text writers treating of this subject, we are lead to the conclusion that a charge of embezzlement or larceny of money is not sustained by proof of the embezzlement or larceny of a draft or check. Mr. Bishop, in his work on Statutory Crime, § 346, thus states the rules of law applicable to this subject in the following language: "The word 'money' means, in these statutes, only what is legal tender. It was even adjudged in Texas to extend simply to metallic coin, and not to include our national greenbacks. Therefore it does not comprehend bank bills, though they pass current, or United States treasury warrants, or county claims, or orders of a railroad company on its treasurer, or mere promissory notes, or bills of exchange, or bank checks, or ordinarily anything which is a mere representation of money." In Walker et al. v. State, 104 Ala., loc. cit. 56, 16 South. 7, which was a

case of embezzlement, the court, in discussing the propositions now before us, said: "Each count of the complaint charges the defendant with having received, in one form or another, money from Mrs. Rice. On one aspect of the evidence, he received only a check from her directly or indirectly. Obviously a check is not money, and obviously also, unless he did receive money of hers, the court should have acquitted him. Charge 20, asked by the defendants, asserts this, and should have been given." Charge 20, referred to in the Alabama Case just cited, which the court said should have been given, told the jury that "a check is not money, and if you believe from the evidence that the defendant received from Mrs. Rice no money, then you must find him not guilty." A similar ruling was made by the appellate courts of Texas. In *Lancaster v. State*, 9 Tex. App. 393, the defendant Lancaster was charged with the larceny of \$142 current money of the United States. The proof adduced upon that charge was that he received from the prosecuting witness checks on a bank, drawn by the prosecuting witness and payable to defendant, aggregating \$138, and \$3 in cash. The court, in discussing the legal propositions disclosed upon that state of facts, said: "We are of opinion that proof of having obtained checks or orders on a bank for money will not support an allegation charging the theft of lawful money of the United States. There was proof of the receipt of \$3 in money, it is true, but this proof alone would not support a conviction for felony." So in the case of *Commonwealth v. Wood*, 142 Mass. 459, 8 N. E. 432. The indictment in that case charged that by false pretenses the prosecuting witness was induced to part with and deliver to the defendant \$556.50 in money. It was expressly held that the charge was not sustained by proof of the delivery of a check or draft. The same court in *Commonwealth v. Howe*, 132 Mass., loc. cit. 256, in discussing the proposition now under consideration, said: "The third count charges that the defendant obtained by false pretenses the sum of \$1,000 from one Bailey, and the proof was that Bailey paid and delivered to the defendant 'the sum of \$760, and that in the form of a certificate of deposit of a bank in Philadelphia.' It is objected that this was a variance, and this objection must prevail. We must assume that defendant obtained from Bailey a certificate of deposit of a bank in Philadelphia for the sum named. The variation in amount is immaterial; but an averment of obtaining a sum of money by false pretenses is not supported by proof of obtaining a certificate of deposit of a bank." In *Goodhue v. People*, 94 Ill., loc. cit. 47, the indictment charged the embezzlement of money, and the proof adduced upon the trial established the embezzlement of county warrants or orders. It was held by the Supreme Court of that state that the charge was not sustained by such proof. The doctrine an-

nounced in the authorities heretofore cited finds full support in numerous other cases. *People v. Lelpslc*, 130 Cal. xviii, 62 Pac. 311; *Block v. State*, 44 Tex. 620; *Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653; *Com. v. Merrifield*, 45 Mass. 468. This precise question has never been passed upon by the Supreme Court of this state. In *State v. Dodson*, 72 Mo. 283, where the charge was the embezzlement of three horses, it was held improper to admit evidence showing the embezzlement of the proceeds of such horses. In *State v. Crosswhite*, 130 Mo., loc. cit. 366, 32 S. W. 991, 51 Am. St. Rep. 571, the charge was the embezzlement of potatoes. It was held that evidence of the embezzlement of the proceeds and an instruction thereon was improper. In *State v. Schilb*, 159 Mo., loc. cit. 142, 60 S. W. 82, the charge was embezzling money. It was held that such charge was not sustained by proof of the embezzlement of a cow and calf. Now, while it must be frankly conceded that these cases are not applicable to the proposition now under discussion, and are of little value in the solution of the propositions now being considered, however, they are important as showing the tendency of this court to sustain the general doctrine that in cases of embezzlement and offenses against property there must be a reasonably fair description of the property, and that upon the trial the proof must conform to such description. In the case of *State v. Wissing*, 187 Mo., loc. cit. 106, 85 S. W. 557, it was urged by the appellant that an instruction was erroneous because it assumed that the charge of embezzlement of money was satisfied by the proof of embezzlement of checks. Judge Burgess, who wrote the opinion in that case, did not discuss the proposition for the reason doubtless that there was no necessity for such a discussion. He clearly pointed out that the evidence in that case sustained the charge of the embezzlement of money by abundant proof which established beyond question that money in fact had been embezzled. Therefore it was simply held that there was no error in the instruction because the proof shows that in fact money had been embezzled.

Applying the rules of law as heretofore indicated in the authorities cited, we are of the opinion, even conceding that the draft as identified in this case was one which could be made the subject of embezzlement, still the proof of the conversion of such draft does not sustain the charge in the information that the defendant converted to his own use \$1,000 in money of the property of the bank of which he was cashier. In other words, where an indictment or information charges the embezzlement or stealing of money, it is not sustained by proof of embezzlement or stealing of a check, draft, bond, or other property. The proof must be in substantial accord with the charge in the information. The conclusion reached upon this proposition is in no way in conflict with

the doctrine announced in *State v. Mysenburgh*, 170 Mo. 1, 71 S. W. 229. The offense in that case was statutory bribery, and the essence of the offense was the corrupt agreement, not the character of the property which passed by reason of the corrupt agreement. In the case at bar, the very essence of the offense is the conversion of property; hence a reasonably fair description of the property is an essential averment in the indictment or information, and the proof must sustain the averment, and the statute of jeofails can in no way relieve the necessity of such essential requirement. Aside from all this, the draft as designated and identified by the proof in this case did not in fact constitute any part of the assets of the St. Charles Savings Bank. It was entirely unlike drafts, checks, and bonds which are frequently deposited in banks and become a part of their assets. Under the facts of this case it was not entitled, in the ordinary sense and understanding in commercial usage, to be classified as piece of commercial paper constituting a part of the assets of the bank. As applied to this case it was simply the agency and means employed by the defendant to get possession of money which was owing his employer, and was of no more significance than any other instrument in the form of a receipt or in any other form by which the same evil purpose could have been accomplished. Under the facts in this case it is clear that the St. Charles Savings Bank had no specific money in the American Exchange Bank, but it was simply a creditor of the American Exchange Bank, and had a chose in action as against such bank. In other words, the simple relation of creditor and debtor existed, and if the defendant, instead of using this so-called draft, had used an ordinary receipt, and either presented it in person or through his agent, and by this means obtained the \$1,000, the offense would have been the same. It is clear that the defendant, as cashier of the St. Charles Savings Bank, having authority to collect indebtedness due such bank, when this \$1,000 was paid to his authorized agent in the city of St. Louis, or if paid to the defendant himself in the city of St. Louis, such money, when so paid, was the property of the St. Charles Savings Bank. Under the facts of this case such property was received by defendant through his agent in the city of St. Louis, and it appearing from the evidence adduced that defendant's agent made application of such money under the directions of the defendant, to the satisfaction of his (defendant's) individual account, it must be held that the conversion of this money occurred in the city of St. Louis through the authorized agent of the defendant. In *State v. Bacon*, 170 Mo. 161, 70 S. W. 473, the defendant was intrusted with a pension check for \$36 in Douglas county, which he was authorized to take from that county to Norwood in Wright county and cash and return with the money to Cheney,

the owner of the check, in Douglas county. An information was filed against the defendant in Douglas county charging him with embezzlement of the check, and upon that charge he was tried and acquitted in the circuit court of Douglas county. He had collected the amount of money due upon the check in Wright county, and converted the same to his own use, and an information was filed against him in Wright county charging him with the embezzlement of the money so converted. To the information filed in Wright county the defendant filed a plea of autrefois acquit, in which he alleged that he had been tried and acquitted of the same offense in Douglas county. It was held in that case, Judge Burgess speaking for the court, that the defendant was properly convicted of the crime in Wright county and properly acquitted of the charge in Douglas county. In that case, in view of the embezzlement of the money in Wright county collected upon the pension check which was intrusted to the defendant in Douglas county, it would not be a violent indulgence of inference, in view of his subsequent acts, that when he was intrusted with the check in Douglas county he then and there formed the intent of collecting the money in Wright county and embezzling it. However, as before stated, Judge Burgess held, and correctly so, that the conviction was proper in Wright county where the conversion actually took place.

In the case at bar it makes no difference, so far as the commission of the offense of embezzlement is concerned, that the defendant was not present in person in the city of St. Louis. As cashier he had the authority to collect the chose in action held by the St. Charles Savings Bank against the American Exchange Bank; and whether the money was collected by his agent in the city of St. Louis and there applied to the defendant's personal account, thereby converting the money to defendant's use under the defendant's directions, or whether he had gone in person and collected such money in the said city of St. Louis and converted the same to his own use, in the same manner as was done by his agent, by applying it to the satisfaction of his own individual account, the offense would have been the same, and the conversion of the money would have occurred in the city of St. Louis. In *State v. Bailey*, 50 Ohio St., loc. cit. 647, 36 N. E. 237, the court, in discussing the proposition now under consideration, said: "That the presence of the offender within the county where a crime is committed is not always necessary to give jurisdiction is a settled principle" citing in support of the doctrine *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291. The *Norris* Case, as cited above, was one involving the obtaining of property under false pretenses. The defendant in that case resided in Springfield, Clark county, Ohio. The company with which the defendant did business was resident in Akron, Sum-

mit county, the same state. The false pretenses by which the defendant obtained the property were embraced in a letter written by the defendant at Springfield to the company at Akron, and in the letter he directed them to ship the goods by freight. In compliance with the request of the defendant contained in such letter the company delivered the goods to the railroad company, and upon such state of facts the court held that such railroad company was the agent of the defendant to receive the goods, and that the crime was completed and committed in Summit county and not in Clark county, where the defendant resided, and this doctrine was announced, notwithstanding the fact that defendant had not been in Summit county. This case of *Norris v. State* has been expressly approved by this court in two cases—*State v. Schaeffer*, 89 Mo. 271, 1 S. W. 293, and *State v. Lichliter*, 95 Mo., loc. cit. 408, 8 S. W. 720. Mr. Works, in his treatise on Courts and Their Jurisdiction, page 470, thus states the proposition: "Nor is it necessary that the party committing the offense should, at the time of the commission of it, be actually within the state. For example, a party in one state may, through innocent agents, commit an offense against the laws of another state, and within its borders, and thus render himself amenable to prosecution in the latter state."

2. Having reached the conclusion, as heretofore indicated, that the actual conversion of the money charged in the information as shown by the evidence in this case occurred in the city of St. Louis, and that such act of conversion was done in said city by and through the defendant's authorized agent, we are next confronted with the exceedingly interesting as well as important proposition in this case as to where the venue of the commission of the offense by the defendant should be laid. The record sharply presents the question as to whether the embezzlement of the money as charged in the information should have been charged to have occurred in the city of St. Louis or in St. Charles county. Defendant's place of employment was in St. Charles county, and it must be conceded that it can be reasonably inferred that the criminal intent was formed in St. Charles county, but the criminal act of conversion was in the city of St. Louis. Ordinarily the venue would be in the city of St. Louis. To illustrate: If I form an intent while in Cole county to steal a horse, which I know I can find in Callaway county, and pursuant to that intent cross the river, and actually steal the horse, the crime is complete in Callaway county, and that is the only jurisdiction for prosecution, unless I take the stolen animal to some other county, where, by force of our statute, I may be prosecuted elsewhere. The learned Attorney General representing the state insists that in the case at bar there are two jurisdictions, and the state may elect, as it has in this case. It is manifest that the defendant Mis-

pagel did not convert any money of the St. Charles Savings Bank which he had in his possession in St. Charles county. Directing our attention to the proposition urged by the state—that in this case there was jurisdiction either in the county of St. Charles or in the city of St. Louis—will say at the very inception of the consideration of that question that the evidence shows the existence of the relation of bank and cashier, and the by-laws, which were introduced in evidence, gave the cashier of this bank, who was the defendant, the right to exercise certain powers, and imposed upon him certain duties which are ordinarily performed by cashiers of banks, without specifically mentioning what the powers or duties are. The defendant had to account for the moneys and other property received by him belonging to the bank, and presumably at the place of business of said bank, and it is urged by the state that having formed the intent in St. Charles county, and having to account for the money to his employers in said county, this conferred jurisdiction upon the circuit court of St. Charles county, notwithstanding the fact that the actual money was both received and converted in the city of St. Louis, and we frankly confess that this contention is not wholly without some weight. It must, however, be observed that our statute does not make a failure to account for a trust fund or a fund received by an agent or officer an offense, but the essence of the offense is the wrongful conversion of the fund, and while failure to account for such fund may constitute very material evidence tending to establish the act of conversion, yet the failure to account by no means constitutes the offense of embezzlement of the fund. In *Works on Courts and Their Jurisdiction* (page 471) it is announced that the general rule is that where no statute on the subject prevails, the jurisdiction exists where the crime is consummated or completed. In this state we have no special statute fixing jurisdiction in embezzlement cases. "At common law an indictment can be found in that county only in which the crime has been committed." 12 Cyc. 229. In the same volume and on the same page of the cyclopedia above cited the American rule as applicable to this subject is thus stated: "In the United States most of the state constitutions and declarations of rights expressly provide in substance that all criminal prosecutions shall be brought to trial in the county in which the crime shall have been committed. These provisions are strictly construed in favor of the accused, and with a recognition of the principles of the common law, and the Legislature cannot authorize a trial in any county."

This court has announced in no uncertain or doubtful terms the rule that the Legislature cannot, under our statute, arbitrarily place the jurisdiction of a criminal cause in a county other than the county in which the offense was committed, and it has been expressly ruled by this court that where the

lawmaking power undertakes to indicate and enforce such laws it is the province of the court to declare them unconstitutional and void. *State v. Smiley*, 98 Mo., loc. cit. 607, 608, 12 S. W. 247, and cases cited; *State v. Hatch*, 91 Mo. 568, 4 S. W. 502; *State v. Anderson*, 191 Mo. 134, 90 S. W. 95. The case of *State v. Hatch*, above cited, furnishes express authority upon the proposition now before us. The charge involved in that case was one of embezzlement, and the provisions of section 1698, Rev. St. 1879, were invoked in aid of the proposition that the jurisdiction of said cause was in the circuit court of the city of St. Louis. This section provided: "Where there is a matter of doubt in the opinion of the court in which of two or more counties the offense was committed, the court of either in which the indictment was found shall have jurisdiction of the offense." It was held in that case that there was no jurisdiction in the city of St. Louis, and section 1698, Rev. St. 1879, was declared void. It was urged in that case by the distinguished counsel, Attorney General Boone, representing the state, citing many of the English cases which are embraced in cases now cited by the state in the case at bar, that the embezzlement was in fact committed in St. Louis, and the jurisdiction was there irrespective of this statute. The opinion in the *Hatch Case* does not fully state the facts, at least it is not very explicit upon the facts; so, making an independent examination, we have examined the original record with a view of ascertaining the facts in judgment in that case. We find them about as follows: Hatch was the general collecting agent for J. E. Hayner & Co. of St. Louis, which firm was selling mowers and reapers throughout the state. He resided at Sedalia. By his contract he was to receive a salary and expenses. He was to report collections and make settlements in St. Louis. When he collected he should remit at once, and his salary and expenses were to be paid or remitted to him. He collected the sum of \$6,000 or more belonging to his firm in Pettis and other western counties in Missouri. After so doing he was in St. Louis, drew \$100 of \$280 then due on salary and expenses, over the protests of his employer, assuring them that he had made no collections not reported. As a fact he had prior to this denial collected over \$6,000 and had appropriated it at different times in Sedalia and other places to his own use in grain speculations. The indictment was in several different counts covering each collection, and also in one omnibus count charging the entire sum. There was no question under the evidence but what the defendant had to account for his collections in St. Louis either by remittance and report, or in person. This was his contract, and the foregoing as recited were substantially the facts of that case. Sherwood, J., speaking for the entire court, said: "The evidence shows very clearly and conclusively that the offense was not committed

in the city of St. Louis." In *State v. Fraker*, 148 Mo., loc. cit. 160, 49 S. W. 1021, this court, in discussing the correct rule as applicable to the question now under consideration, said: "When, as here, a crime consisting of a series of acts, part done in one county and part done in another, it is punishable at common law in either, unless enough be done in one county to amount to a completed and punishable criminal act"—citing 1 Bishop's New Cr. Proc. §§ 54, 55, and cases cited—"and this rule holds in the absence of statutory enactment to the contrary."

Applying the rules as announced in the case last cited, we are lead to inquire what element of the offense in the case at bar is wanting in order to constitute a complete offense in the city of St. Louis. The relationship of the parties, that of banker and cashier, existed in the city of St. Louis as well as in St. Charles county. The receipt of the money, as well as the conversion of it, was in the city of St. Louis, and not in St. Charles county. The conversion itself furnishes the most satisfactory evidence of the intent to convert and consummate the crime, and there is an entire absence of any fact tending to show that the employer consented to the conversion of this money which was received and converted in the city of St. Louis; hence we have every element of this statutory crime present in the act committed by the defendant in the city of St. Louis. In Michigan there is practically the same constitutional guaranty that we have in this state as to the place of trial of an individual charged with the commission of a criminal offense. In that state the lawmaking power enacted a statute which authorized a prosecution for embezzlement in certain cases in the county where the complainant's principal place of business was located. A man by the name of Hill was arrested on complaint of one Taylor on a warrant issued for embezzlement. Following this Hill instituted his suit against Taylor for false imprisonment, and in the case of *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899, Judge Campbell, in discussing the law applicable to the subject now in hand, said: "Hill prosecuted Taylor for false imprisonment in being concerned in an unlawful arrest, and obtained a judgment against him for damages, which is brought upon writ of error. The proceeding under which he claims to have been arrested was on a complaint made before a justice of the peace in Washtenaw for an alleged embezzlement in Wayne county. This action was based on section 7605 of the Compiled Laws, which authorizes embezzlement by various public agents or by private agents under instructions or agreements as to the disposal of property to be prosecuted in the county where the complainant's principal place of business may be. Although there are some cases where by the rules of law that might be deemed the locus delicti, it cannot be seriously claimed that the prosecution can be had in a county where



the crime was not actually or in contemplation of law perpetrated. The constitutional guaranty upon this subject is too plain to be controverted. *Swart v. Kimball*, 43 Mich. 444, 5 N. W. 635. And the warrant in this case was on its face invalid as issued for an offense beyond the jurisdiction of the justice who issued it." In the case of *Swart v. Kimball*, cited by Judge Campbell in the foregoing quotation, the opinion was written by Judge Cooley, in which he held a statute possessing some of the features of the one treated of by Judge Campbell to be void as being violative of the Constitution. Judge Black, in *State v. Smiley*, 98 Mo., loc. cit. 607, 12 S. W. 247, in discussing this question, thus stated the rule applicable to it. He said: "Now, under the Constitution of 1875, the indictment for a felony must be found by a grand jury of the county where the offense was committed. It was so ruled, after mature deliberation in *Ex parte Slater*, 72 Mo. 102, and that case has been followed in subsequent cases. *State v. McGraw*, 87 Mo. 161, and *State v. Briscoe*, 80 Mo. 644. It follows that the clause of section 1536, Rev. St. 1899 [Ann. St. 1906, p. 1164], just quoted, is void, because in conflict with the Constitution of 1875, and it matters not that it might have been upheld under the Constitution of 1865. The indictment is worthless, for the Madison circuit court had no jurisdiction of the offense." We find in volume 7 *Ency. of Plead. & Prac.* p. 412, the general rule is stated thus: "The defendant cannot be prosecuted for embezzlement in a county where the crime was not actually or in contemplation of law perpetrated. Where the entire transaction constituting the embezzlement occurred in one county only, the venue, as a matter of course, should be laid in that county." Our attention is directed by the Attorney General to Bishop's *New Criminal Procedure*, § 61, in which the author in the text says: "Embezzlement may, in various circumstances, be deemed committed in any one of several counties, at the election of the prosecuting power." Upon an examination of Mr. Bishop upon that subject, it will be noted that in the footnote the authorities were cited, upon which doubtless the learned author based the rule as heretofore announced. We find that the cases noted are English cases and some cases from the state of Texas. The Texas cases are not in point, and furnish no authority for the application of the rule in the administration of the laws in this state, for the reason in Texas there is a statute in reference to embezzlement similar to our statute respecting the asportation of stolen property, which is that the offense of larceny may be charged in any county where the stolen property may be taken. Our attention is also directed to cases from Iowa, Washington, Texas, Massachusetts, Ohio, and Illinois. It is sufficient to say as to these authorities that Iowa, Massachusetts, and Washington have statutes more or less like

the Texas statute as above referred to. In the Illinois Case of *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115, the conclusion was announced before the question now under consideration was reached, hence there was no decision of that question. The Ohio Case, *State v. Bailey*, 50 Ohio St. 644, 36 N. E. 233, seems to be in point, and no statute is discussed.

We have indicated our views upon the propositions disclosed by the record before us. We frankly confess that the question is a very important one, and by no means one in which the reason and logic is all on one side; but we have carefully analyzed the authorities upon the propositions presented, and have indicated the result of our review of such authorities. With all of the elements of the offense present in the city of St. Louis, and none of them present in St. Charles county, except the inferentially formed intent to convert the money to be obtained in St. Louis, we feel constrained to hold that the crime charged in this information, as shown by the proof disclosed in the record, was committed in the city of St. Louis and not in St. Charles county. Entertaining the views to which we have herein given expression, it results in the conclusion that the defendant's demurrer to the testimony should have been sustained. This conclusion having been reached renders unnecessary the discussion of other questions presented to our consideration by learned counsel for appellant.

The judgment in this cause is reversed, and the cause remanded to the end that the trial court may dispose of it in accordance with the views herein expressed. All concur.

#### WHITE v. SCHROETTER et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

#### 1. EJECTMENT—TITLE OF PLAINTIFF—SUFFICIENCY OF EVIDENCE.

Plaintiff in ejectment claimed title under an execution sale and sheriff's deed. Defendant claimed under a warranty deed from his father, the judgment debtor, executed and recorded eight years prior to the rendition of judgment, which deed recited consideration of love and affection and \$1, and the assumption of \$500 indebtedness secured by deed of trust on the 40 acres in question. *Held*, that the plaintiff could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 60.]

#### 2. SAME—EVIDENCE—ADMISSIBILITY.

Oral evidence was inadmissible to show an agreement to support as a further consideration for the deed, and payment of the assumed indebtedness, or to show that defendant was a minor at the time of the alleged contract, and that the land, in connection with that on which the grantor resided as his homestead, was worth more than \$1,500, and that the grantor was in debt.

#### 3. FRAUDULENT CONVEYANCES—FORM OF REMEDY—EJECTMENT.

A plaintiff cannot recover in ejectment on the ground that a deed valid on its face, under

which defendant claims title, was in fact made to defraud creditors, since it could not be attacked collaterally, or otherwise than in a proceeding in equity.

Appeal from Circuit Court, Barry County; H. C. Pepper, Judge.

Ejectment by A. L. White against Frank Schroetter and another. From a judgment for defendants, plaintiff appeals. Affirmed.

French & Mayhew, for appellant. George & Landis, for respondents.

**VALLIANT, P. J.** Plaintiff sues in ejectment for the possession of 40 acres in Barry county. Defendant's answer was a general denial, except that he admitted possession. At the trial a jury was waived and the cause was tried by the court. The judgment was for the defendant, and the plaintiff appealed.

It was admitted that Adam Schroetter, the father of defendant, was the common source of title. The plaintiff's evidence was as follows: A judgment rendered in the circuit court of Barry county, in favor of one Sheets against Adam Schroetter, September 4, 1902, for \$681.34; execution on that judgment; levy and sale of this land by the sheriff February 12, 1903, at which sale the plaintiff became the purchaser and received the sheriff's deed, which was in due form. The evidence for defendant was a warranty deed from Adam Schroetter and wife to defendant, conveying this land, dated February 13, 1894, duly acknowledged and recorded. The consideration mentioned in the deed was love and affection and \$1, subject to a debt of \$1,000 secured by deed of trust on 80 acres, of which the 40 so conveyed was one-half, and the assumption by defendant of \$500 as the one-half of that debt applicable to his 40 acres. Then defendant introduced oral evidence to the effect that a further consideration for this deed was an agreement by himself and his brother John on the one part, and his father on the other, that they would take care of their father and support him during the rest of his life; and there was testimony tending to show that they were carrying out that agreement, and that defendant had executed a new mortgage on the 40 acres, and with proceeds of that had paid his share of the original \$1,000 mortgage. Contra, the plaintiff introduced evidence to show that defendant and his brother were at the date of the alleged agreement minors and could not make such a contract; also that the land was, when taken in connection with 40 acres on which Adam Schroetter resided and which constituted his homestead, worth more than \$1,500, and that the old man was in debt. There was some other testimony as to paying taxes, etc.; but it is unnecessary to mention it. All the oral evidence was incompetent. The title to this 40 acres passed to the defendant by the deed from Adam Schroetter and wife in February, 1894, more than eight years before the Sheets judgment,

under which plaintiff claims, was rendered, and the record so showed.

Appellant in his brief refers to "suits in equity," and as if this were such a suit, and argues that the deed from father to son should be set aside as having been made to defraud creditors. But this is not a suit in equity. It is an action at law. There is not a trace of equity in the pleadings. The defendant's deed cannot be attacked collaterally. It cannot be assailed, except in a proceeding in equity. We do not mean to imply that the evidence would have justified the setting aside of this deed, even if this had been a suit in equity. In the face of the defendant's record title, the court could have rendered no other judgment than it did.

The judgment is affirmed. All concur.

**LANYON et al. v. CHESNEY et al.**

(Supreme Court of Missouri, Division No. 2. Dec. 10, 1907.)

**1. DISMISSAL AND NONSUIT—RIGHTS OF DEFENDANT—SET-OFF AND COUNTERCLAIM.**

Under Rev. St. 1899, § 632 [Ann. St. 1906, p. 654], giving a plaintiff right to dismiss or take a nonsuit any time before final submission, section 797 [Ann. St. 1906, p. 761], giving him the right to dismiss in vacation on payment of costs, and section 4499 [Ann. St. 1906, p. 2463], providing that such dismissal shall not operate to dismiss or discontinue set-off or counterclaim which shall have been filed in the action, a vacation dismissal by plaintiff, on payment of costs, while not affecting defendant's right to prosecute any set-off or counterclaim pleaded before the dismissal, leaves defendant no right to file an amended answer, or to have the case reinstated, where the answer merely attempts to vary or put a different construction on the contract which the suit was instituted to specifically enforce; such matter constituting a defense, and not a set-off or counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal, §§ 33-36.]

**2. APPEAL—REVERSAL—DISMISSAL OF ACTION—RIGHTS OF DEFENDANT.**

Defendant, on reversal of a judgment under which plaintiff has obtained possession of property, is entitled to be restored to the possession thereof, notwithstanding plaintiff's dismissal of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4701-4704.]

**3. SAME—REVIEW—WEIGHT OF EVIDENCE.**

There being nothing in the finding as to the rental value by the court, which saw and heard the witnesses, that does not indicate the utmost fairness and impartiality, such finding will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3912-3924.]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by Robert Lanyon and others against Frank O. Chesney and others. From the judgment, defendants appeal. Affirmed.

George Hubbert and E. E. Chesney, for appellants. J. D. Harris, E. O. Brown, and R. A. Mooneyham, for respondents.

**BURGESS, J.** This case was before this court upon a former appeal by defendants,

and will be found reported in 186 Mo. 540, 85 S. W. 568, where a full and fair statement of all the facts of the case upon, to, and including the first trial, is given by Judge Fox, who wrote the opinion in the case. The judgment was then reversed, and the cause remanded. The cause was then pending in the circuit court of Jasper county, but after the filing of the mandate of the Supreme Court in the circuit court of that county the venue of the cause, on the application of defendants, was changed to Greene county. After the transcript of the record of the cause was filed in the office of the clerk of the circuit court of Greene county, plaintiffs, in vacation, May 5, 1905, upon the payment of all costs which had accrued in the cause, with the consent of the clerk of said court, dismissed the cause, and the clerk made a minute on the record to that effect. On May 17, 1905, during the May term, 1905, of the Greene county circuit court, defendants filed their motion to set aside said order of dismissal to reinstate the cause, and for restitution of the premises and damages for the taking and detention thereof, and asking that plaintiffs be enjoined from enforcing their claims against said premises until such restitution should be made. Upon the presentation of this motion the court appointed a commissioner to take depositions therein, which depositions were returned to and filed in the Greene circuit court on January 8, 1906. While said motion was pending, on June 23, 1906, defendants tendered and offered to file their "joint and amended answer and cross-bill." Plaintiffs resisted the said motion upon the ground that the cause had been disposed of by vacation dismissal, and that the court had no jurisdiction in the premises as to any feature of the motion. After amendment of the motion by the addition of a supplemental claim for direct injuries to the mill by Mink pending the motion, a final hearing was had on March 14, 1907; the court awarding restitution of the possession of the property in question by plaintiff Mink to defendants, with damages in the sum of \$500 and costs incident to the motion, on account of the fact that Mink had taken and held possession of the premises in question by virtue of the erroneous and vacated decree. The motion, as to all other matters mentioned therein, was overruled by the court, and the judgment for possession was combined with an order that the writ of possession must contain an execution clause for \$500 damages, so that defendants could not sue out execution of the writ of possession without thereby waiving appeal from the adverse parts of the judgment, to all which defendants excepted. Mink continues in possession of the Quaker Mills premises and property. From the judgment of the court, defendants appeal.

Counsel for the defendants present a number of propositions of law respecting errors alleged to have been committed by the trial

court prejudicial to defendants. The first is that the vacation dismissal of the suit by plaintiffs on May 5, 1905, did not finally dispose of the case or the subject of the action, nor cut off defendants' rights or remedies with relation thereto. Under the provisions of section 632, Rev. St. 1899 [Ann. St. 1906, p. 654], a plaintiff has the right to dismiss his suit or take a nonsuit at any time before final submission to the jury, or to the court sitting as a jury, or to the court; and by section 797 [Ann. St. 1906, p. 761] the right is conferred upon the plaintiff in any suit in any court of record to dismiss such suit in the vacation of the court, upon the payment of all costs that may have accrued. By section 4499 [Ann. St. 1906, p. 2463] it is provided that such dismissal shall not operate to dismiss set-off, and "the dismissal or any other discontinuance of the plaintiff's action, in which such set-off or counterclaim shall have been filed, shall not operate to dismiss or discontinue such set-off or counterclaim." Prior to the revision of 1889, when section 8172, now section 4499, Rev. St. 1899 [Ann. St. 1906, p. 2463], was added, it was several times in effect ruled by the Supreme Court that, when the defendant answered and pleaded a set-off or counterclaim, he could not, if plaintiff failed to appear at the trial or take a nonsuit, take a verdict and judgment against him for the amount of his set-off and counterclaim. *Nordmanser v. Hitchcock*, 40 Mo. 178; *Fink et al. v. Bruhl*, 47 Mo. 173; *Martin v. McLean*, 49 Mo. 361. But, in order to remedy this seeming injustice to defendants who had and pleaded set-offs and counterclaims in their answers to actions against them, said section 4499 was added, and since that time the dismissal or nonsuit of plaintiffs no longer carries with it the set-off or counterclaim of a defendant, but such is proceeded with as an independent suit instituted by the defendant. The consequence is that the cases above referred to are no longer the law in cases where the defendant files a set-off or counterclaim. *Pullis v. Pullis*, 157 Mo. 565, 57 S. W. 1005. This same question was before the St. Louis Court of Appeals in the case of *Atkinson v. Carter*, 101 Mo. App. 477, 74 S. W. 502. The court said: "The general rule in respect to a plaintiff's right to dismiss before final submission is that, where the answer sets up new matter demanding affirmative relief for which the defendant might maintain a separate action against the plaintiff, the defendant, as to such new matter, is deemed a plaintiff, and cannot thereafter be deprived of his right to a trial of his cause by a voluntary dismissal or nonsuit by the plaintiff. 6 Ency. Pl. & Pr. p. 848, and cases cited in the notes. But this rule has never obtained in this state. On the contrary, the Supreme Court, except in special proceedings, has construed the right of a plaintiff to dismiss or take a nonsuit under section 632, *supra*, before final submission, to be

absolute and unconditional. With this construction before it, the Legislature in 1889 enacted section 8172, *supra*. This section does not interfere with or in the least abridge a plaintiff's right to dismiss a suit or take a nonsuit before final submission, but it insures to a defendant who has filed a counterclaim a new right; that is, it retains the counterclaim or set-off in court after the dismissal of plaintiff's cause of action, and authorizes a trial and judgment thereon. It does not modify or qualify section 632, *supra*, in the least, and it is apparent that the Legislature did not intend, by section 8172, *supra*, to abridge plaintiff's right to dismiss a suit or take a nonsuit as that right had been theretofore defined by the Supreme Court; and we think the rule prevails in this state that in all ordinary actions at law or in equity the plaintiff has the right before final submission to dismiss his suit or take a nonsuit, irrespective of the fact that matters are pleaded in the answer which would entitle the defendant to affirmative relief, and for which he might maintain a separate action against the plaintiff."

The dismissal of the suit did not affect defendants' right to prosecute any set-off or counterclaim they might have pleaded in their answer before the dismissal of the suit. A critical examination of the answer, however, satisfies us that no set-off or counterclaim is pleaded therein. It does not deny the execution of the contract, but avers that the contract is not set out in the petition, but a different contract; or, more strictly speaking, the averments of the answer merely attempted to vary the terms of or put a different construction on the contract which the suit was instituted to specifically enforce. Matter which is merely pleaded as a defense, or which shows that plaintiff never had a cause of action, cannot be said to be either a set-off or counterclaim. *Jones v. Moore et al.*, 42 Mo. 413. With relation to the nature of the defense sought to be set up by this answer, Judge Fox, on the former appeal, said: "We express no opinion upon the allegations of the answer as to the false and fraudulent representations, for the reason that the defendant has indicated no purpose in making them. It was not for the purpose of reducing the amount of the purchase money by damages sustained; for no amount of damages are claimed, and no such relief is sought. It cannot be for the purpose of disaffirming or rescinding the contract, for to do that the possession of the premises must be restored or an offer made to do so." It follows that the court did not err in refusing to set aside the dismissal and reinstate the cause, nor in refusing to permit defendants to file their joint and amended answer after the suit had been dismissed, for there was no petition pending to answer. We entertain no doubt as to the right of defendants to have restored to them, as against the other parties to this action, any proper-

ty or property rights of which they were deprived and which plaintiffs acquired under the first judgment, whether by execution or otherwise, and that such right will not in any way be affected by plaintiffs' dismissal of their suit after obtaining possession of such property. *Gott v. Powell*, 41 Mo. 416; *Vogler v. Montgomery*, 54 Mo. 577; *Jones v. Hart*, 60 Mo. 362; *Colburn v. Yantis*, 176 Mo. 670, 75 S. W. 653; *Ming v. Suggett*, 34 Mo. 364, 86 Am. Dec. 112. And this, too, without regard to the merits of the original cause of action or grounds of defense.

Plaintiffs contend, however, that Mink did not obtain possession of the property by virtue of the reversed judgment, but under the deed from Lanyon to Mink dated July 26, 1901, and that, therefore, the defendants are not entitled to restitution. But both the evidence and the finding of the court are to the contrary. The court in its findings expressly says "that plaintiff Mink did enter upon and into the premises in question and possess and hold the same by reason of the reversed and vacated decree of the circuit court herein, as entered in Jasper county, and that he has continued to occupy and possess the same, as yet he does, by reason thereof, and that the reasonable and just rental value of the said premises during such possession, which was lost to defendants by reason of said vacated decree, is to the present date \$500." Besides, under the facts disclosed by this record, Mink is in no position to say that he did not acquire possession of the premises in question through and under the erroneous and vacated judgment.

The vital question in the case at bar is as to what matters should have been included in the order and judgment of restitution from which this appeal is prosecuted. Notwithstanding the court ordered restitution of the land in question to defendants and allowed them damages in the sum of \$500 for the loss of said premises during the possession and occupancy thereof by plaintiff Mink under said decree and deed, as well as costs incurred in the matter of the motion and assessment of rent values and damages, and ordered that "in execution of the foregoing judgment there be issued out of this court and by its clerk a writ of restitution addressed to the sheriff of Jasper county, in due form, and commanding the said plaintiff Mink yield, and that the defendants be given, possession of the said premises peaceably and fully and without delay, and that there be inserted in said writ a general execution clause for the levy of the damages and the costs hereby adjudged against the property and effects of the said plaintiff Mink," the defendants insist that this court should place them in immediate possession if the property in question and specifically adjudge the plaintiff Mink to pay to defendants the full and fair rental value of the premises, and ask that this court proceed to ascertain the same. The court below did not refuse to restore to

defendants the possession of all the property of which they had been deprived through the vacated decree, but defendants claim that the court did not adjudge and order that plaintiff Mink pay to defendants the full and fair rental value of the premises. This was, it seems to us, a matter peculiarly within the province of the trial court, who saw the witnesses on the stand and heard them testify. That court was in a much better position to pass upon the weight of the testimony relative to the rental value than we are, and there is nothing in the court's finding that does not indicate the utmost fairness and impartiality. We must, therefore, decline to interfere with the finding and judgment.

The judgment is affirmed. All concur.

### HACH v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907.)

#### 1. TRIAL—DEMURRER TO EVIDENCE—EFFECT.

A demurrer to the evidence admits, as true, every fact and legitimate inference which the jury might draw from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 352-356.]

#### 2. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a railroad engineer by the derailment and overturning of his engine owing to a broken rail, evidence held to require submission to the jury of the question of defendant's negligence in permitting the track to become defective at the point where the accident occurred.

#### 3. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for the death of a railroad engineer caused by the derailment of his engine, the real issue was whether the road at the point in question was in a reasonably safe condition, and the jury found that it was not, defendant was not prejudiced by the admission of evidence that defendant did not furnish a sufficient force of men nor sufficient materials to keep the road in a proper and safe condition, the reason why the road was not in a safe condition being immaterial.

#### 4. SAME.

Where there was no intimation that evidence that defendant did not furnish sufficient men and materials to keep its road in a reasonably safe condition was offered to influence the jurors and increase the verdict, and such objection was not raised at the trial, defendant could not object on appeal that the evidence, which was otherwise harmless, might have been prejudicial for that reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1258.]

#### 5. MASTER AND SERVANT—INJURIES TO SERVANTS—ASSUMPTION OF RISKS—PRESUMPTION OF PERFORMANCE OF DUTY.

A railroad company owes a duty to its employees to use ordinary care to keep its track and roadbed in a reasonably safe condition for the passage of trains, and the employees, in the absence of evidence to the contrary, are entitled to presume in the performance of their work that the duty has been properly discharged, and therefore do not assume risks of injury resulting from the master's omission or neglect of such duty.

#### 6. SAME—INSTRUCTIONS.

An instruction that if deceased was killed while in the discharge of his duty as defendant's locomotive engineer by the overturning of his engine, caused by the breaking of a rail, and defendant failed to use ordinary care to keep its roadbed and track in a reasonably safe condition, and at the time and place of the accident the road was out of repair and unsafe, because of the unsound ties under the rail which broke, which facts could have been ascertained by the exercise of ordinary care, etc., and the breaking of the rail and derailment of the engine were due to such condition of the road and unsound ties, plaintiff was entitled to recover, was proper.

#### 7. DEATH—ACTION FOR CAUSING DAMAGES.

In an action for death of plaintiff's husband, she was entitled to recover such sum as would justly and fairly compensate her for the necessary injury resulting from such death, considering decedent's age, health, and earning capacity, not exceeding \$5,000.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Death, §§ 120-122.]

Appeal from Circuit Court, Butler County: J. C. Sheppard, Judge.

Action by Ida Hach against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 93 S. W. 825.

The plaintiff instituted this suit in the circuit court of Butler county to recover the sum of \$5,000 damages for the death of her husband, caused by the alleged negligence of the defendant "in permitting the roadbed of its railroad to be in an unsafe and dangerous condition, and in failing to replace the decayed and rotten ties upon which the broken rail rested by sound and sufficient ties, and having the same properly ballasted," and that in consequence thereof, while her husband, an engineer in the employ of defendant, was running his engine and train of cars over said defective place on said road, it was derailed and turned over, and he was caught underneath thereof and crushed and scalded to death by the escaping steam. The answer was a general denial, and a plea of assumed risks. There was a trial before the court and jury, and a verdict and judgment for plaintiff for the sum of \$5,000, and defendant has duly appealed the cause to this court.

The facts are practically undisputed, and are substantially as follows: The plaintiff and deceased were husband and wife at the time of his injury and death, and he was an engineer, in the employment of defendant. The accident occurred on a branch line of defendant's road, running from Cairo, Ill., to Poplar Bluff, Mo., about one mile west of Sikeston. The train was running west with deceased in charge of the engine, and when it reached the point above indicated the engine and some 10 or 12 of the cars were derailed, and the engine turned over and caught and crushed deceased, and before he could be released he was scalded to death by escaping steam. All the evidence shows that at the point of the accident, and immediately thereafter, it was discovered from 2 to 6 feet of the east end of a rail was broken off, and

that from 2 to 20 ties were rotten, some of them very badly, and several of them were broken in two, and that one tie rested under the east end of the broken rail and that it was very rotten, so much so that it had been crushed by the weight of the engine and cars, and had left a depression where it should have been. The evidence also showed that at the point of the break in the rail it rested upon and was spiked to a sound tie, and that the break was slantingly from the top of the rail downward. There was also evidence tending to show that the roadbed was not properly ballasted, that is, there was too much earth and sand in the center of the bed and not enough at each edge thereof, which prevented the ends of the ties from resting on the ground. We will permit three of defendant's employes to describe the accident in their own language, which is as follows:

C. C. Hardy, who had been a railroad man for 24 years, a conductor for the defendant company 6 years, and in its employ for 16 years, testified: "Q. I will ask you if you made an examination then to see what caused the wreck, and, if so, I will get you to state what you found and what you did? A. Yes, sir; I made an examination, looked to see what caused the wreck and how it occurred, and, in my opinion—. Q. What did you see there? A. I saw that there were broken and rotten ties there and a broken rail. Q. A broken rail? A. Yes, sir; a broken rail. Q. Describe to the jury this broken rail you saw. A. Well, from indications, that rail had been broken by a train west-bound, as the ball of the rail was battered and torn as though the flange of the engine wheel had cut down through the rail. It looked like the flange of the engine wheel had cut down in there and thrown the engine over. Q. What is the ball of the rail? A. It is the top. Q. What do you call the bottom of the rail? A. It is the base. Q. And what do you call the space between the bottom and top? A. The web. Q. How much of the rail was broken off? A. About 6 or 7 feet. Q. You saw that rail broken? I mean, what was the character of the break, describe it to the jury? A. Well, it was not a square break of the rail. The rail was cut under; a jagged break. Q. What indications, if any, did you see on the long part of the rail? A. The web of the rail was cut as though it had been done by the flange of an engine or car running down it. Q. Did you notice anything else besides that cut? A. Not on the web of the rail. Q. Notice anything on the ball of the rail? A. Yes, sir; the ball of the rail was battered. Q. Which end of it was battered? A. The east end of the rail. Q. At what part of the ball? A. Top. Q. Top? A. Yes, sir; top. Q. Did you fit the two pieces of rail together? A. Mr. Mulkey, roadmaster, Mr. Garner, the bridge foreman, and myself did. Q. Was there any indication of the short piece of rail being battered? A. No, sir; there was none. Q. If I understand you correctly, the batter was on

the top of the east end of the broken long part? A. On the long part; yes, sir. Q. By what, in your opinion, was that end battered? A. My opinion is that it was battered by the wheels of the engine or cars striking it of a west-bound train. It could not have been done by an east-bound train, because the short part would have been battered, instead of the long. Q. Now, Mr. Hardy, I will get you to state if you noticed the ties there? A. The ties immediately where the wreck occurred were all broken and torn up. Q. Did you notice the condition of the tie at the place where this broken rail had been connected to the rail immediately east of it? A. That was a rotten tie. Q. Did you notice the fish plates? A. Yes, sir; they were broken. Q. Attached to the short piece, were they? A. Broken parts of them were. Q. I will get you to state what, in your opinion, caused that rail to break? A. Well, there was a weak spot there. The joint tie and the fish plates, or angle bars, being broken, allowed the engine to go down and break the rail. Q. Was that rotten tie still there under the east end of the rail? A. The rotten tie was there. The roadmaster showed it to me."

Cross-examination: "Q. Then, in your opinion, the weight of the west-bound engine striking that rail caused the rail to break? A. Yes, sir. Q. You said it was a west-bound engine, and in your opinion the rail was not broken till that west-bound engine struck it. A. That is my opinion. Q. You know, don't you, that a train passed over that same piece of track about 10 or 15 minutes before No. 79? A. I guess they met at Sikeston, that is their meeting place. Q. This rail that was there was a standard steel rail, was it, that is, it was a medium weight steel rail? A. Yes, sir. Q. What is that, a 60-pound rail or 75-pound? A. I think it is about a 56-pound rail. Q. And on that rail freight trains were running every day? A. Yes, sir. Q. And over that piece of track freight trains were running every day? A. Yes, sir. Q. How many passenger trains? A. A daily passenger train every day."

George Beard, conductor of the wrecked train, testified: "Q. How soon after the wreck did you go to the place of the wreck? A. I was on the rear end of the train. It was some four or five minutes before I got there; not later than that. Q. Did you see any broken rails there? A. Yes, sir. Q. Tell the jury what you saw in the way of a broken rail? A. Well, there were some six or seven feet of the west rail broken off, which joined the east rail, after the wreck occurred. Q. Which rail was broken, on which side? A. On the north side. Q. What kind of break was that in the rail? A. Well, it was not exactly a square break. It was a little bit under from the ball; down to the bottom of the rail. Q. The break was a little bit slanting, was it? A. Yes, sir. Q. Where was the long part of the rail at the time you saw it? A. It was lying just in

front of the other part of the rail, turned on its side. Q. Turned on the side? A. Yes, sir. Q. Did you notice the ties there? A. A little bit; yes, sir. Q. Tell the jury what you saw about the ties at that place. A. I noticed there was some good ties and some bad ones. I noticed one bad one in particular. Q. Where was that bad one that you noticed in particular? A. It was placed under the joint of the rails where they come together. Q. Under which rail? A. The north rail. Q. The one that broke? A. It was under the joint where the two rails connect. Q. What was the matter with the tie? A. I don't know. It was decayed. Q. I will ask you to state, Mr. Beard, what, in your opinion as a railroad man, caused that rail to break? A. I cannot possibly explain that. You can give an idea; but you cannot say what caused it to break. Q. I am asking you for an opinion as an experienced railroad man? A. I think the pressure of the engine broke the rail, there not being sufficient ties under it to hold it up, and it being at a joint where there is an extension between the two rails. When it hit that, it broke the end of the rail off. Q. What do you mean by the quarter in the rail? A. A quarter is something like 4 or 5 feet from the joint. Q. Did you notice this rail? Whether the quarter was still fastened to any other tie or not? A. Yes, sir; it was. Q. Now, explain to the jury, if you can, how that break was made, in your opinion. A. Well, there was some sound ties in the quarter. Some three, four, or five feet from the joint there was a sound tie there. The rail was spiked to a sound tie, and the bad tie was under the joint, and my opinion is that an engine, either this engine or some other one that used this track, possibly broke the tie and caused the joint to have play to go down, and the weight being in the quarter, that broke off the rail. Q. The giving way of the place under the joint and the rail being fastened to a sound tie caused it to break, is that correct? A. In my opinion, yes, sir. Q. What caused the engine to leave the track? A. I cannot say that. The rolling stock or machinery—we cannot tell when that will leave the track. Q. I know, but I am asking you your opinion. From the condition of things you found there, what caused the engine to leave the track? A. A broken rail. Q. At what rate of speed was your train going? A. I judge about 12 or 15 miles per hour."

Cross-examination: "Q. The part of the rail that was broken, Mr. Beard, was some 6 or 8 feet west of the joint, was it not? A. Yes, sir. Q. And the place where the joint of that rail connected with the rail east of it was still connected with the angle bars, was it not? A. Yes, sir. Q. That is, they were together? A. Yes, sir. Q. Now, the bad tie you speak of was not at the place where the rail broke? A. No, sir; it was not. Q. There was a good tie there? A. Yes, sir; a good tie. Q. And the place where

you say there was a bad tie, or defective tie, was over there further east, under that joint? A. Yes, sir. Q. And at that place the angle bars connected the two rails? A. Yes, sir; they were still connected. Q. So that the break did not occur at that point, that is, the rail was not broken there? A. No, sir; not at the joint. Q. But some 6 feet or more west of that? A. Yes, sir; west of that. Q. Then there was still a portion of rail west of where the break was, was there not? A. Yes, sir. Q. To refresh your memory, Mr. Beard, I call your attention to a part of your testimony given in the former trial. I call your attention to this question to you and this answer given by you: 'Q. Then you have been working on the railroad for 22 years? A. Yes, sir. Q. Tell the jury whether or not, in your judgment, the railway roadbed at the place of this wreck was in a reasonably safe condition? A. Yes, sir; I think so.' That question was asked and answered by you? A. Yes, sir. Q. That was your judgment at that time? A. Yes, sir. Q. You were running a train over that road every day? A. Yes, sir; every day."

Redirect examination: "Q. What is the roadbed, Mr. Beard? A. The roadbed is the part of the road that we call 'ballast,' made of cinders, gravel, sand, and such as that. Q. In the term 'roadbed' you do not include ties and rails, do you? A. No, sir; not in the roadbed."

El. E. Arthur, defendant's section foreman in charge of the section on which the accident occurred, testified as follows: That he had been section foreman for defendant for 4 years; that his section was 87, and was 8 miles in length, and extended 4 miles each way from Sikeston; that he noticed one broken rail at the wreck on north side of road; and that the engine was on the north side also. "Q. Now, you may tell the jury how that rail was broken, I mean, describe how it looked? A. It was broken about something like 6 feet off of the east end. The short piece was still fastened by the angle bars to the good rail. The other piece was lying on its side. Q. The long piece? A. The long piece was turned on its side. Q. What do you call the top of the rail? A. Ball. Q. The bottom of the rail? A. Base. Q. And the part between the two? A. Stem or web. Q. Well, now this long piece was lying on its side, did you notice any marks on the web of the long piece? A. I noticed a mark the full length of the long piece. Q. What kind of a mark? A. Looked like it might have been made with the flange of a wheel. Q. Did you examine the long piece of rail? A. Yes, sir. Q. You may tell the jury what kind of a break it was in that rail? A. Well, it was not exactly a square break. It was something of an angling shape. Q. Was it broken in a slanting direction like that? [Witness shown tracing on paper.] A. Something like that; hardly so much of a slant. Q. Now, if you noticed the ball of the long piece of the

rall, I will ask you to state what you saw on that, if anything—any marks? A. I did not notice anything except that the end was battered. Q. Tell the jury where the end was battered? A. Right on top of the ball of the rail. Q. Where was that battered part with reference to the break? A. I do not understand you. Q. Well, if this pencil is the ball of the rail, and the break is here [indicating] where was the battered part? A. Right at the top—right at the end of the long piece. Q. Where the break had occurred? A. Right at the break. Q. I will ask you to state to the jury by what that battered condition of the ball of the rail was produced, if you know? A. Well, I do not know, but I think it was caused by the train going west battering the end of the rail. Q. How long have you been a railroad man? A. About 17 years, since I first began. Q. Seventeen years? A. Yes, sir. Q. Have you been continuously in the employ of the Iron Mountain? A. No, sir. Q. But for the last 4 years you have been in the employ of the Iron Mountain? A. Yes, sir. Q. I will get you, Mr. Arthur, to describe to the jury the condition of the short piece of the rail, which you said was about 6 feet long, did you not? A. Yes, sir. Q. Tell them where that was lying, and what appearance that presented? A. The short piece of the rail was setting workway on its base; still fastened by the angle bars. The angle bars were broken in two. Q. What do you mean by workway? A. Setting upon its base. Q. Still fastened to the angle bars? A. Yes, sir. Q. Were the angle bars fastened to anything else? A. Fastened to the good rail east of that. Q. What are the angle bars? A. The angle bars are the fasteners that fasten the rails together. Q. How are they put on? A. With bolts. Q. What are they; describe them to the jury? A. I do not know whether I can exactly; two pieces of iron with holes through them, and we use bolts to fasten the rails together. Q. One on each side of the rail where they join, and bolts fasten through them? A. Yes, sir. Q. Those are what you call angle bars? A. Yes, sir. Q. This short piece of the rail was still fastened to the rail east of the broken one? A. Yes, sir. Q. Were the angle bars broken? A. Yes, sir. Q. I will ask you to state what, in your opinion, from what you saw there, caused the breaking of the rail? A. I do not know what caused the breaking of the rail. Q. Well, your opinion? A. They break in various ways. It might have been caused by a flaw in the rail, or by a bad tie. Q. From what you saw, what was your opinion? A. I cannot say. Q. What was the condition of the tie under the joint? A. Tie was bad. Q. What was the matter with it? A. Well, it was broken in two, and it was partially decayed. Q. That partially decayed and broken tie was under the joint? A. Yes, sir. Q. I will ask you to state what, in your opinion, caused the engine to leave the track at that place? A. I do not know. Q. Well, you have

an opinion about it, have you not? A. I never formed an opinion. Q. You formed no opinion about what caused the engine to leave the track? A. No, sir. Q. Have you not expressed the opinion before, that the breaking of the rail caused the train to leave the track? (Objection by defendant, because he said he had formed no opinion. Objection overruled by the court, to which ruling defendant then and there duly excepted.) Q. Do you remember? A. No, sir. Q. Now, then, I will ask you to state, Mr. Arthur, what your duties were as section foreman? A. Keep the track in repair and fences, and telegraph lines to a certain extent. Q. What do you mean to a certain extent? A. Keep the track in repair altogether, so far as we are able to; telegraph lines, whenever we find a broken wire, to repair it, and notify the linemen. Q. I will ask you to state to the jury how long before this wreck you had done any work on this particular place of the road where the accident occurred? A. I do not remember. Something like 6 or 7 months, I suppose. Q. Had you put any new ties in there at any time within 6 months before this accident? A. I do not think I had; do not remember. Q. Now, Mr. Arthur, I will get you to state to the jury what the condition of the railroad was at the place of this wreck on the 25th day of February, 1904? A. I do not know whether I can answer that question satisfactory or not. The road at that point, so far as ties and rails go, was in about as good condition as it was any place on that end of the section. Q. I am not asking you about that. I am asking you what the condition of the track was at that place on the 25th day of February, 1904? A. That is all the answer I can give you. Q. What was the condition of the other part of the road? A. I cannot say it was good. Q. Tell the jury, Mr. Arthur, why this road was not in good condition? A. Well, if we were allowed the material and men that we should have had, I guess the road would have been in better condition than it is in. Q. If I understand you, then, you did not have material and men to put the road in better condition, is that correct? A. Yes, sir. Q. Who is your immediate superior, or was your immediate superior, on your road? A. Mr. Mulkey is the roadmaster. He was at that time. Q. You was the section foreman working under the roadmaster? A. Yes, sir. Q. Now, I will ask you again how many men you had on that 8 miles of road? (Objection by defendant as incompetent, for the reason that there is no averment in the petition as to any defect of track, due to the failure of not having a sufficient number of men. Objection sustained.) Q. Did you have at that time, or previous to this wreck, a sufficient force of men and a sufficient amount of material to keep that road in proper and safe condition? (Objection by defendant; for the reason that there is no averment in the petition as to having an insufficient number of men or an insufficiency of



supplies on that part of the road. Objection overruled, to which ruling of the court the defendant then and there excepted.) Q. State whether you had a sufficient number of men and a sufficient quantity of material to keep that road in as good condition as it should have been? A. No, sir. Q. Was this decayed tie you saw there still under the rail that was immediately east of the broken rail, do you remember, at the time you saw it? A. I think it was; I am not sure."

Cross-examination: "Q. The part of the rail that you saw was broken off—assuming this pencil to be lying east and west, the east end towards Charleston and the west end towards Poplar Bluff—the break in the rail, you say, was some six feet from the east end? A. Yes, sir. Q. And the long part of the rail was the part that you think was struck by the engine going west, that is, the long part here [indicating]? A. Yes, sir. Q. You think that the engine ran over this part [indicating], and that the weight of the engine broke the rail, as you say? A. I did not mean to say it broke the rail. I say the rail was broken. Q. You found the rail broken? A. Yes, sir. Q. You don't know what caused the rail to break? A. No, sir. Q. And have you never formed an opinion to this time? A. No, sir. Q. Now, this part [indicating], the east end you say, was still attached by the angle bars to the rail immediately east of that? A. Yes, sir. Q. That part of the broken rail then was still attached to the rail next to it, and connected by the angle bars which fastened the two rails at the point of intersection? A. Yes, sir. Q. You say these angle bars were broken? A. Yes, sir. Q. But the two rails were still attached by portions of the angle bars? A. Yes, sir. Q. And the rail broke beyond the angle bars? A. Yes, sir. Q. Now, that is the condition you discovered when you got there about an hour after the wreck? A. Yes, sir. Q. In that connection, Mr. Arthur, for the purpose of refreshing your memory, I call attention to this question to you and the answer given by you on the former trial of the case: 'Q. What kind of ties were there at that place of the wreck? A. The ties were sound where the rail was supposed to be broken.' You made that answer did you? A. As well as I remember, I did. Q. That was correct? A. Yes, sir. Q. Now, you had gone over that road from day to day, had you not, Mr. Arthur, as section foreman? A. Yes, sir. Q. Could you, and did you, in going over that piece of track, noticing the rails as you went along there, discover that there was such a piece of track there as would justify you, as foreman, in saying that a train could not run over it? A. No, sir. Q. You did not detect anything of that kind? A. No, sir. Q. And it was your duty as section foreman to go over the track and inspect it? A. Yes, sir. Q. Now, Mr. Arthur, you say you had not discovered any defect in that track? A. No, sir; I discovered no defect.

Q. Were trains running over it every day—passenger and freight trains? A. Yes, sir. Q. Was that track, then, such as you would say, as a railroad man, in a reasonably safe condition for trains to run over it, and did not trains run over it day after day—what they did, did they not? A. Yes, sir. Q. What train had passed over that portion of track just a few minutes before this No. 79? A. No. 78, local freight. Q. In which direction was it going? A. East. Q. About how many minutes before this accident occurred did it pass over the road? A. Something like 15 or 20 minutes. Q. I will call your attention to this question to you and answer given by you on the former trial, Mr. Arthur: 'Q. I will ask you, if the ties on each side of the broken one at the joint was sound or not? A. To the best of my recollection they were both sound.' Is that correct? A. Yes, sir."

At the close of plaintiff's evidence the defendant asked a demurrer thereto, which was, by the court, overruled, and defendant duly excepted. And thereupon the court, at the request of plaintiff, gave to the jury the following instructions: "(1) The court instructs the jury that if they find from the evidence that William Hach was a locomotive engineer, and was employed as such by the defendant railroad corporation to run freight trains over the Cairo Branch of its road leading from Cairo to Poplar Bluff, then the defendant owed him, as such employé, the duty of using ordinary care to keep the track and roadbed of its said railroad in a reasonably safe and secure condition for the passage of such trains; and the court further instructs you that in the absence of knowledge to the contrary, the servant, while in the performance of his work, has the right to presume that the master has properly discharged his duty, and does not assume risks, which may be shown by the evidence to have resulted from any omission or neglect of duty on part of the master. (2) And the court further instructs you that if you find from the evidence that Ida Hach, the plaintiff in this cause, was the wife of William Hach, and that he was killed on the 25th day of February, 1904, while in the discharge of his duty as a locomotive engineer for defendant, by the derailment and overturning of his engine, and that such derailment and overturning of his engine was caused by the breaking of one of the rails of said railroad, and you shall further find from the evidence that the defendant railroad company failed to use ordinary care to keep its roadbed and track in a reasonably safe condition for the operation of trains, and that at the time and place of the accident said railroad was out of repair and was unsafe, by reason of their being unsound and decayed ties under the rail which broke, and you further find from the evidence that the defendant knew, or by the exercise of ordinary care might have known, these facts, then, if you find from the evidence that the breaking of said rail and the

derailment of said engine were due to such condition of the road and such unsound and decayed ties, your verdict should be for the plaintiff. (3) If you find the issues for the plaintiff, you should assess her damages at such sum, not exceeding \$5,000, as you may deem just and fair under the evidence of this cause, with reference to the necessary injury resulting to her from the death of her husband; and in estimating such damages, you may take into consideration his age, the condition of his health, and his earning capacity at the time of his death, as shown by the evidence." To the giving of which instructions, on part of the plaintiff, defendant at the time objected and excepted. The court then gave eight instructions at the request of defendant; but as they are not involved in this appeal they will be noticed no further.

As before stated, the judgment was for the plaintiff, and defendant appealed, and it assigns the following errors, to wit: "First. The court erred in refusing to give the demurrer to the plaintiff's evidence. Second. The court erred in giving instructions 1, 2, and 3 for plaintiff. Third. The court erred in admitting improper testimony offered by the plaintiff."

Martin L. Clardy, James F. Green, and E. A. Green, for appellant. Wilson Cramer, for respondent.

WOODSON, J. (after stating the facts as above). 1. The first assignment of error presented by defendant is that the trial court committed error in refusing to give its demurrer to plaintiff's evidence. The law of this state is too firmly established to need the citation of authorities to show that the demurrer admitted as true every fact and legitimate inference which a jury might infer from the evidence before it. *Barth v. Kansas City Ry. Co.*, 142 Mo. 535-549, 44 S. W. 778. This rule of evidence calls for a brief summary of the evidence in order that we may determine what facts and inferences the jury was warranted in drawing therefrom. The following facts are undisputed: The engine was going west and turned over to the right. A piece of the rail about six feet in length was broken off of the east end thereof. That there was a decayed tie just underneath the joint of the east end of the broken rail, and the rail lying just east of it. That the rail rested upon a sound tie at the point where it broke. That the decayed tie was broken and mashed, which left a depression where it should have been. That the east end of the long piece of the broken rail was battered on the ball or upper side as if struck with a sledge hammer or some heavy weight. The long piece of the rail was turned over on the side and had a crease along the entire web, that is, on the thin part between the ball and base, and that the road had been in bad condition for several months. From these

facts we think it was clearly inferable, and that the jury was warranted in finding that when the engine struck the joint of the two rails just over the rotten tie that it broke and gave way, thereby permitting the end of the rail to sink down into the said depression, and thereby caused the rail to break or snap at the point just over the sound tie, which acted as a fulcrum upon which the rail rested. This conclusion is irresistible, when we consider the point of the break, the sound tie at that point, the size of the rail, and the great weight of the engine. This inference, taken in connection with the undisputed fact that the ball of the east end of the long piece of the rail was battered as if struck with a heavy sledge, demonstrates almost conclusively that the train was going west and when it struck the point of the rotten tie it gave way, thereby causing the east end of the rail to snap or break, and when the wheels of the engine struck the east end of the long piece of the broken rail they beat and pounded the ball as with a sledge, which tore it loose from the ties and caused it to turn over on its side, and was passed over in that prostrate form by some of the wheels of the engine, which is indicated by the crease on the web thereof, and when the end of the displaced rail was reached the engine must have left the track as if passing over and off of an open switch. These inferences are not only legitimately and logically deducible from the facts of the case, but they are expressly corroborated in every detail by two of the witnesses, who were experienced railroad men and were in the employment of defendant. We are not only of the opinion that there was sufficient evidence to carry the case to the jury, but are unable to see how their verdict could have been otherwise; and we must therefore hold that the court properly refused the demurrer asked, and committed no error in submitting the case to the jury.

2. It is next insisted by defendant that the court erred in admitting in evidence the following question and answer of witness Arthur, the section foreman of defendant, to wit: Q. Did you have at the time, or previous to this wreck, a sufficient force of men and a sufficient amount of materials to keep the road in proper and safe condition? A. No, sir. The ground assigned by defendant for its objection to the admission of this evidence is based upon the fact that there is no issue made by the pleadings in the case that defendant was negligent in failing to furnish sufficient men and material with which to keep the road in safe condition. It is true no such allegation is contained in the petition, and, speaking for the writer and Graves, J., only, we think the court erred in the admission of that evidence. It was wholly immaterial and irrelevant to any issue presented by the pleadings, and on that account should have been excluded from the jury; but we are all of the opinion that even though the admission of that evidence was erroneous,

yet we are unable to see in what possible way it operated to the prejudice or injury of the defendant. The real issue in the case was whether or not the road was in a reasonably safe condition or not, and the jury found it was not, and it is wholly immaterial why that was true. Whether it was caused from the failure to supply sufficient men and materials with which to keep it in good condition, or whether it was the negligence of the company in failing to have the men actually furnished to do the work and make the repairs, is entirely immaterial in so far as the issues of this case are concerned. The road was found to be out of repair and in a dangerous condition, and the cause thereof is not an element which entered into the liability or nonliability of defendant. Especially are we unable to comprehend in what manner the defendant was injured by that evidence, when the record discloses the fact that practically the same question had been asked and answered by the witness, without objection, just prior to the admission of the evidence complained of. The evidence was then before the jury, and the repetition of the question and answer under the facts and circumstances clearly produced no prejudicial effects upon defendant's case. If we correctly understood counsel for defendant in his oral argument, he laid much stress upon the fact that such evidence might or would have a tendency to so influence the minds of the jurors against defendant as to induce them to increase the amount of the verdict. In reply to that contention, it is sufficient to say that there is no intimation shown by this record that such a thing was done, or that any such thought ever entered the minds of the court, counsel, or jury, until after the case reached this court. If any such question had been submitted or argued to the jury, quite a different proposition would be here for consideration; but under the present state of the record no court would be justified in disturbing the verdict of the jury.

3. The last assignment of error regards the instructions given for the plaintiff. The objection to them is general, and no specific criticism is pointed out by counsel for defendant. We have carefully read all of them, and have been unable to detect any error in them; but, upon the other hand, we are of the opinion that they fully and fairly presented the issues to the jury, and, finding no error in the record, the judgment is affirmed. All concur.

#### In re SPRING VALLEY PARK IN KANSAS CITY.

BUCHANAN et.al. v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

#### 1. MUNICIPAL CORPORATIONS—ASSESSMENTS—DATE OF LIEN.

Even if Kansas City Charter 1889, art. 10, § 20, declaring the assessments for benefits liens

from the passage of the ordinance in pursuance of which they are made and the condemnation proceedings for a parkway instituted, be unconstitutional, the judgment relates back to the commencement of the proceedings, and from that time the assessments are a lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1224.]

#### 2. SAME—PROPERTY SUBJECT TO LIEN.

Where land, on which assessments for benefits from a parkway are a lien, is condemned for a park, the lien of the assessments continues against the land till title thereto is divested out of the owner by payment of the award for the condemnation thereof, and on this being paid into court, in the condemnation proceedings, attaches thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1224.]

#### 3. SAME—ENFORCEMENT OF RIGHTS.

Where the award for condemnation of land, on which assessments for benefits are liens, is paid into court, in the proceedings for the benefit of whoever may be entitled to it, such court may enforce the lien of the assessment against such fund.

#### 4. SAME—ASSESSMENTS—ABATEMENT.

An assessment for benefits from a parkway does not abate because of the land against which it is assessed being years afterwards condemned for a park.

Appeal from Circuit Court, Jackson County; Jas. H. Slover, Judge.

Intervening petition by Elizzle W. Buchanan and another against Kansas City, filed in the matter of the condemnation of land for opening and establishing a public park in the South Park district in Kansas City, known as "Spring Valley Park," under Ordinance of said city No. 18,269. From an adverse judgment, the city appeals. Reversed and remanded.

Edwin O. Meservey, Wm. A. Knotts, and Ed. E. Yates, for appellant. Scarritt, Griffith & Jones, for respondents.

GANTT, J. This is an action on the part of Elizzle W. Buchanan and Bettie P. Turner commenced in the circuit court of Jackson county on the 24th day of June, 1903, to obtain an order on the clerk of the said court to pay over to them a certain fund of \$350, which had been deposited with him by order of the court for the use of the petitioners, or whoever might be entitled thereto, being a part of the certain sum of \$8,000 which had been adjudged to the said plaintiffs for a certain tract of land that had been taken and condemned for public use as a park by Kansas City under Ordinance 18,269 of Kansas City. It appears by the petition of the plaintiffs that a proceeding to condemn a parkway in South Park district in Kansas City, Mo., was instituted on the 12th day of December, 1899; that under this proceeding the property in controversy herein was assessed and taxed, and the fund representing such assessment and tax was afterwards paid into court. As alleged in the petition, a proceeding was instituted on the 11th day of March, 1902, to open and establish a park in said South Park district, under which latter proceeding the

property described in the petition was condemned and taken, and the title thereof subsequently confirmed and vested in the city. The petition alleges that the earlier proceeding to open and establish a parkway, which is known as the "South Paseo extension," was carried through the court to a conclusion thereof, and the property of respondents assessed for benefits therefor, and the tax in controversy, to wit, \$301.48, represented by the fund paid in the court, apportioned against the property described in said petition; that the latter proceeding was for establishing a park in South Park district known as "Spring Valley park." In the latter proceeding the value of the property was assessed at \$8,000, \$7,650 of which was paid to the plaintiffs herein, and the balance of \$350 was paid into court on account of the claim of the defendant (Kansas City) that it should be applied to the payment of the South Paseo extension park tax. After the payment of the said fund into court, the plaintiffs filed their said intervening petition in said cause, asking the court to direct the clerk to pay the said fund to them. Kansas City filed its demurrer to said petition, alleging as grounds therefor that the petition did not state facts sufficient to constitute a cause of action, and that petition was otherwise insufficient in law. This demurrer was heard and overruled by the circuit court; and, Kansas City refusing to plead further and electing to stand upon its demurrer, final judgment was rendered in favor of the plaintiffs, and from that judgment Kansas City in due form appealed, and the court allowed the appeal to the Kansas City Court of Appeals, and that court has certified the appeal to this court on the ground that the cause involves the construction of article 2, §§ 20, 21, and 30, of the Constitution of Missouri [Ann. St. 1906, pp. 146, 148, 166], and the fourteenth amendment of the Constitution of the United States.

1. The only question before this court is whether or not the petition of the plaintiffs states facts sufficient to sustain the order and judgment of the circuit court awarding them the fund of \$350. It appears from the petition that prior to the commencement of the condemnation proceeding under Ordinance 18-269 to establish a park in the South Park district in Kansas City, Mo., which is known as "Spring Valley park," on the 8th of October, 1901, another proceeding had previously been begun, to wit, a condemnation proceeding commonly known as the "South Paseo extension," whereby the tract of land belonging to the plaintiffs, and referred to as tract No. 93 in said proceeding, was assessed and charged with \$301.48 payable in 20 annual installments, to pay, in part, the purchase price of the parkway known as the "South Paseo extension," the first installment of which became due and payable on the 31st of May, 1903. It appears that the verdict in this last-named proceeding was filed and confirmed on September 14, 1901, and that motions for new

trial and in arrest of judgment were filed by various parties in said proceeding which were overruled and an appeal duly prosecuted to this court; that afterwards the judgment of said circuit court was affirmed on or about June 20, 1902; and that none of the assessments for benefits in the said South Paseo extension proceeding were paid until after the affirmance of the judgment in this court. It also appears that the ordinance to establish the Spring Valley park was approved October 8, 1901, at which time the petitioners were the sole owners of the said tract No. 93 mentioned and described in the South Paseo extension proceeding. It also appears that the condemnation proceeding to condemn the Spring Valley park was commenced in the circuit court under the charter of Kansas City on the 11th of March, 1902, and notice of the said proceeding was given to all persons concerned, and the 19th day of April, 1902, was the day fixed for the impaneling of the jury to ascertain the compensation for the property to be taken or condemned under said ordinance, and the amount of benefits, if any, to be assessed against the property within the benefit district; that a jury was impaneled in said cause and instructed to view the lands affected on April 25, 1902; and that thereafter the jury filed their award in said cause and assessed the value of the said tract No. 93 in favor of the petitioners at \$8,000, and of that sum Kansas City, on June 12, 1903, deposited with the clerk of the circuit court the sum of \$350 for the use of the petitioners, or for the use of whoever might be entitled thereto as the court might order. Section 18 of article 10 of the Kansas City charter provided that during the time of the appeal from the assessments in the South Paseo extension proceeding the judgment should be "suspended until the appeal was disposed of." By reference to the dates in the petition therefor, it appears that while the judgment in the Paseo extension case was suspended by the appeals, the Spring Valley park case was tried. The insistence of the plaintiffs is that, although the condemnation proceeding to condemn the parkway for the South Paseo extension had been commenced in the circuit court pursuant to the charter, and had ripened into a verdict assessing the plaintiffs' tract No. 93 with benefits to the amount of \$301.48, and this verdict had been confirmed on September 14, 1901, and this judgment afterwards affirmed in this court June 20, 1902, verdict and judgment was not a lien upon their said lands, because they say Kansas City had not paid for and was not entitled to the possession to said Paseo extension until February 12, 1903. On the other hand, it is the contention of the city that, both at the time of the commencement of the Spring Valley condemnation proceeding and at the time of the payment of the money into court, the special assessment tax for the Paseo extension parkway was a lien on the tract No. 93 designated in said proceeding, and that under the deci-

sions of this court in *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107, this lien continued against the fund adjudged to the plaintiffs in the Spring Valley park proceeding in lieu of their lands which were taken by that proceeding; that the change of the form of the res does not change the rights of the owner and the lienor. In *Ross v. Gates*, 183 Mo., loc. cit. 347, 81 S. W. 1107, this exact point was in judgment in this court. In that case, as in this, it was insisted that while the contractor might have had a lien on the land he would have no right to the fund in court which represented the land in a condemnation proceeding. But this court said in that case: "When the money was paid into court, it represented and stood in place of the land condemned, and the claimants had the same right to and interest in the money that they had in the land."

It is to be noted that plaintiffs plead the condemnation proceeding in the South Paseo extension and the assessment of the benefits against their tract of land No. 93 therein, and that the verdict was filed and confirmed September 14, 1901. By the charter of Kansas City, "the said assessments for benefits are a lien from the date of the taking effect of the ordinance in pursuance of which assessments are made, and said proceedings instituted and attach to the several lots or parcels of land so assessed, and this lien continues until said assessment is paid or collected in full. Section 20, art. 10, Charter of Kansas City 1880." There is no allegation in plaintiffs' petition assailing the regularity or validity of the assessment against plaintiffs' property in the South Paseo extension condemnation proceeding, and it must be assumed it was entirely valid. It is true it is now asserted in the brief of plaintiffs that said section 20 of article 10 of the charter is unconstitutional under the federal Constitution, because a denial of due process of law, and section 53 of article 4 of the Constitution of Missouri [Ann. St. 1906, p. 197]; but conceding for argument's sake, without so deciding, that the making the passage of the ordinance the beginning of the lien might render it obnoxious to the constitutional provisions invoked by plaintiffs, still it remains true that the proceedings to condemn the parkway for the South Paseo extension had been commenced and had ripened into a verdict and judgment on September 14, 1901, after the notice to all parties, and this court in *Ross v. Gates* held that the judgment related to the institution of the suit. Upon what was it a lien? Not upon property of the city, because under the charter and the Constitution of this state the title to plaintiffs' tract No. 93 still remained in them until the payment of the award for the condemnation thereof under the Spring Valley park condemnation proceeding. In *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600, it was ruled by this court that "the Constitution leaves neither to the Legislature

of the state, nor to any municipality, nor to the courts, the power to say when compensation for private property taken for public use shall be paid. It must be paid before the property is taken, and the preliminary proceedings by which the amount to be paid is ascertained, in the manner required by law, amount to nothing unless they culminate in actual payment, and until they do so culminate the owner's rights remain unimpaired," and in *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107, the same principle was announced, this court saying: "The title to the land was duly vested in *Gates* and *Kendall* until it was divested by the judgment in condemnation." Until June 12, 1903, then, the plaintiffs were the owners of the tract No. 93; since, according to their petition, it had not been paid for prior to that time, and during all the time from the judgment confirming the verdict, to wit, from September 14, 1901, until June 12, 1903, plaintiffs' said lands were bound by the lien of the South Paseo extension special assessment, and when by the payment of the \$7,650 to plaintiffs and the remaining \$350 of the award into court for plaintiffs or whoever should be entitled thereto, the title vested in the city for a park, the lien continued on the money paid into court as ruled in *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107, and this is the general doctrine. 2 *Lewis on Eminent Domain*, §§ 629, 629a; *Thompson v. R. R.*, 110 Mo., loc. cit. 163, 19 S. W. 77; *Railroad v. Brown*, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84. That this lien could be enforced by the judgment of the court in whose register the fund was deposited, we have no doubt whatever. This was settled, and rightly we think, in *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107. We can see no valid reason for holding that the special assessment for benefits, which afterwards culminated in a judgment, has abated. Surely it cannot, upon any recognized legal or equitable principle, be held to abate ipso facto, because years afterwards the lands upon which it is a lien are wholly appropriated to another public use; since, as we have seen, the lien follows the fund paid into court, and binds it just as it did the land. We think the circuit court erred in overruling the demurrer. The demurrer should have been sustained, and the \$301.48 awarded to Kansas City for the use of the special fund for which the benefits were assessed.

Judgment reversed, and cause remanded.

FOX, P. J., and BURGESS, J., concur.

STEPHENS et al. v. SMITH et al.  
(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

DESCENT AND DISTRIBUTION—ADVANCEMENTS  
—PRESUMPTION AND BURDEN OF PROOF.

Where one of two or more children receives for his own use money from his parent, and the

evidence does not disclose what occurred at the time, resort must be had to the surrounding circumstances to determine whether it was an absolute gift, a loan, or an advancement, and the presumption is that an advancement was intended; but, where a daughter receives money from her mother, and there is no evidence to show in what capacity it was received, the presumption cannot obtain, since a legal presumption cannot rest upon another presumption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Descent and Distribution, § 426.]

Appeal from Circuit Court, Saline County; Saml. Davis, Judge.

Partition by James H. Stephens and others against Mary Archippa Smith and husband. From an interlocutory judgment for the named defendant, plaintiffs appeal. Affirmed.

R. B. Ruff, for appellants. R. M. Reynolds, for respondents.

JOHNSON, J. The appeal in this case is prosecuted by plaintiffs from an interlocutory judgment in a partition suit in which the trial court in declaring the interests of the parties found for the defendant heir on the issue raised in the pleadings that her interest should be charged with an advancement.

Mary M. Stephens, an aged woman, died intestate in Saline county on or about February 2, 1905, leaving real property, the subject of the present action, of the value of \$1,000, and personal property of the same amount. Defendant, Mary Archippa Smith, was her daughter, and, as such, was entitled to one-eighth of the estate. Mrs. Smith's husband was made codefendant. The remaining heirs of Mrs. Stephens, who are joined as plaintiffs, contend that on November 5, 1904, Mrs. Smith received from her mother the sum of \$300 as an advancement, and that if this were thrown into hotchpot, as it should be, it would equal her interest in the estate. This contention was answered by a general denial, and was found by the learned trial judge to be unsupported by evidence. It appears that Mrs. Stephens made her home with defendants from November 2, 1903, to the time of her death (a period of 15 months), and was supported and cared for by them. After her death defendants presented and were allowed a demand against the estate in the sum of \$54.34 for her board. Plaintiffs introduced as a witness the cashier of a bank at Sweet Springs, who testified that on November 5, 1904, Mrs. Smith presented for payment the following check: "Sweet Springs, Mo., Nov. 5, 1904. Chemical Bank: Pay to Mrs. A. L. Smith, or order, \$300. Three Hundred 0-100 Dollars. No. ——. Mrs. Mary M. Stephens, by Allen L. Smith." Witness paid the check and charged the amount thereof to the ac-

count of Mrs. Stephens, who then was a depositor of the bank. Plaintiffs offered no other evidence, and none was introduced by defendants.

In cases where one of two or more children receives for his own use a transfer of money or other property from his parent, and the evidence does not disclose what occurred between the parties at the time, resort must be had to the surrounding circumstances to determine the question of whether the parent intended to make an absolute gift, loan, or advancement to the favored child. And, in approaching a solution of this question, the presumption should be indulged that an advancement was intended and the burden cast on the party who would overcome it to show by facts or circumstances that a gift or loan was intended. The presumption arises from a recognition of the natural instinct, which ordinarily prompts a parent to treat his children equally, and not to prefer one to another in the distribution of his estate. But the difficulty we encounter in applying it to the present case springs from the failure of plaintiffs to adduce any evidence in proof of the existence of one of the primary facts without which the presumption should not obtain. Plaintiffs do show that Mrs. Stephens gave her daughter a check, which the latter cashed; but, for aught disclosed, the daughter might have acted merely as her mother's messenger in the transaction, or else, on the hypothesis that the check was drawn for the daughter's benefit, it might have been given in payment of board and other services furnished by defendants during the year then just closed. Either of these inferences is just as reasonable as that assumed by plaintiffs that the daughter kept the proceeds of the check and that it was not given in payment of an existing obligation. It is apparent that, in order to adopt the theory of plaintiffs that an advancement was intended, we would be compelled to build presumption on presumption, i. e., first, that the daughter actually received and used the money; second, that it was not given her in payment of a debt; and, third, that it was not intended as a gift or loan, but as an advancement. To reach an ultimate fact by such process, would be violative of a fundamental rule that a legal presumption always must rest immediately on a fact, and not on another presumption. Before the presumption of an advancement could arise, it devolved on plaintiffs to show directly or by circumstances that Mrs. Smith received the proceeds of the check for her own use, and not as a creditor of her mother. This burden has not been met, and it follows that the judgment must be affirmed. All concur.

## THOMPSON v. MARTIN.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)1. PHYSICIANS AND SURGEONS—MALPRACTICE  
—EVIDENCE—VERDICT.

Evidence held to sustain a verdict for plaintiff, in an action against a physician for malpractice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 43.]

## 2. SAME—VERDICT—EVIDENCE.

Where plaintiff sued for malpractice, claiming that he was totally blind in one eye and had almost entirely lost the sight of the other by reason of defendant's improper treatment, and demanded judgment for \$25,000, a verdict, supported by the evidence, awarding plaintiff \$1,500, was not objectionable as indicating by its smallness that the jury had been actuated by sympathy for plaintiff in giving him any damages, and had not found the verdict according to the law and the evidence.

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by John W. Thompson against John C. Martin. From a judgment for plaintiff, defendant appeals. Affirmed.

Webster, Gilmer & Crowley, for appellant.  
Joseph S. Rust, for respondent.

BROADBUSH, P. J. As the appellant's statement is not controverted by respondent, and as it states the case sufficiently full for an understanding of point relied on for reversal, we will adopt it as a matter of convenience. The appellant is a practicing physician of Kansas City, Mo. The respondent, now about 43 years of age, was, in 1903, working as a janitor at one of the public schools of Kansas City. In November of that year he was having trouble with his eyes. This trouble was granulated lids and an ulcerated condition of the eyes. He called in the appellant to treat him. The appellant prescribed a 2 per cent. solution of corrosive sublimate to be used as a wash. The respondent contended that he used the medicine, and that it made him blind, and that his blindness had continued up to the time of the trial—more than two years after the medicine was used. The appellant contended that he gave the respondent oral instructions to put one-third of a dropper full of the medicine in half a tumbler of water, and use it so diluted. This was denied by the respondent. The respondent brought his suit alleging that the carelessness and negligence of appellant in prescribing a poisonous and dangerous medicine had resulted in the respondent being made permanently blind, and asked judgment for \$25,000. The respondent introduced the testimony of three witnesses—that of himself and of two physicians. Respondent testified that he was totally blind in one eye, and that with the other he could not recognize members of his own family, and could not see the members of the jury, nor see where the jury was located. One physician on behalf of respondent testified that the medicine prescribed, if used undiluted,

ed, would destroy the sight of the eyes; and that respondent was practically blind, and would never recover vision enough to follow any trade or occupation, or read a newspaper. The other physician on behalf of respondent testified that the medicine prescribed, if used undiluted, would destroy the sight of the eyes. The appellant introduced the testimony of four physicians, who were experts in treating diseases of the eyes. Each testified that in a case of ulcerated eyes it would be proper to use the medicine prescribed in undiluted form for a few times, and that no injurious effect would follow. The respondent had already testified that he used the medicine in its undiluted form only once in the right eye, and only twice in the left eye. The jury brought in a verdict for \$1,500.

The point relied on by appellant is that "the verdict of the jury shows on its face that it was not based on the law and the evidence." The jury would have been justified in finding either for respondent or for appellant, as the evidence was conflicting. This the appellant has been compelled to admit; but he contends that if respondent was entitled to recover at all, the verdict should have been for \$25,000, the amount claimed. The argument is that the jury did not believe that "appellant was responsible for the unfortunate condition of respondent, but that they allowed their sympathies to lead them to try and aid him by way of a money judgment." We cannot see the force of the argument, for the reason that if the sympathies of the jury were such as to induce them to return a verdict for respondent against their convictions of right, in order to aid him by a money verdict, their sympathies would have led them to return a larger one, and one commensurate with the extent of respondent's injury. We can understand why a jury might allow their judgment to be influenced by sympathy to return a verdict against the evidence. But in this case the verdict for respondent is amply sustained by the evidence, and is such as might have been rendered by an impartial jury. The most rational conclusion deducible from the whole case is that the jury believed that appellant's act in giving respondent the medicine without direction to dilute it before he applied it to his eyes was to be attributed to the fact that he thought he had given such directions. The appellant, on the trial, swore that he had given such directions, and the jury might well have come to the conclusion that the appellant made an honest mistake which might account for the smallness of the verdict. Jurors are liable to make mistakes, but it is an undeniable fact that they are prone to administer equity on suitable occasions. Where nothing is shown that the jury acted from improper motives, it is the duty of the court to impute to them honesty of purpose at least, although it may be that they have been mistaken in their conclusions.

The respondent with propriety might have attacked the verdict on the ground that the sum awarded was inadequate; but as he has seen fit to acquiesce in the result, the appellant ought to be satisfied also as he is bound to admit that under the evidence a verdict in respondent's favor is supported by the evidence.

Affirmed. All concur.

### COMPHER v. MISSOURI & KANSAS TELEPHONE CO.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

#### 1. MASTER AND SERVANT—ACTS OF SERVANT—SCOPE OF EMPLOYMENT.

A master is responsible for the torts of the servant, committed within the scope of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1210-1225.]

#### 2. SAME—MASTER'S LIABILITY FOR INJURIES TO SERVANT.

The act of a chief operator, who was the vice principal of a telephone company for the purpose of maintaining discipline among the operators at the switchboard, in taking hold of the chair of an operator, who had turned away from the switchboard, and violently whirling it around, thereby injuring the operator, was an act of superintendence within the scope of the chief operator's employment, and the telephone company was liable for the injury so sustained.

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Special Judge.

Action by Eva Cook Compber against the Missouri & Kansas Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Harkless, Cryslar & Histed, for appellant. C. W. Prince and Boyle, Guthrie & Smith, for respondent.

JOHNSON, J. Action to recover damages for personal injuries alleged to have been negligently inflicted by defendant. The verdict and judgment were for plaintiff, and defendant appealed.

The only ground relied on for a reversal of the judgment is that the learned trial judge erred in refusing defendant's request for a peremptory instruction to the jury to return a verdict in its favor. In disposing of the questions of law presented under this contention, we will accept as proved the facts adduced in evidence most favorable to the cause of action asserted. At the time of the injury, July 21, 1902, plaintiff, then an unmarried woman about 20 years of age, was employed as a switchboard operator by defendant, a corporation engaged in the business of operating a telephone exchange in Kansas City. Together with some 50 other girls similarly employed, she was on duty at the switchboard in the central office. Each operator was required to attend to the calls from 100 telephones, and each was provided with a revolving chair to occupy while

at work. The chairs were arranged in a straight line in front of the switchboard. The room was in charge of a chief operator, whose duty it was to see that the operators attended to their work in an orderly and businesslike manner. While he had no authority to employ or discharge the operators, he had authority to enforce disciplinary orders, either by reproofing the offender or, if she persisted in being refractory, by sending her home. The chief operator on duty at the time of the occurrence in question observed that many of the girls had turned away from the board and were laughing and talking. This conduct was against the rules, and to restore proper order he wrote a note in which he directed them to stop talking and to face the board, and passed the note down the line. Plaintiff, at the time, was busy answering calls, and the note passed, unread by her. A few moments later, having no work to do, she turned her chair around in order to obtain a brief rest from the cramped position she occupied while facing the board. The chief operator, observing the movement in apparent violation of the order he had just given, angrily went to plaintiff's chair, grabbed it by the back, and with great force and violence whirled plaintiff around, exclaiming, "Eva Cook can't you face your board?" Plaintiff's knees and body collided with parts of the substructure of the switchboard, and she sustained very severe injuries, the nature and extent of which it is not necessary to mention, since no point is made that the verdict was excessive.

It is conceded that the chief operator was the vice principal of defendant for the purpose of maintaining discipline in the room, but it is denied that he had authority, either express or implied, to employ physical force to secure obedience to the rules of the company: and it is argued that since defendant, as plaintiff's master, had no right to resort to physical chastisement for the enforcement of its orders, it could not delegate such right to its vice principal, and, consequently, that the excessive act of the chief operator must be regarded as his own, and not as one for which the master should be held liable under the rule of respondeat superior. We agree with defendant that the ancient rule of the common law which permitted a master to chastise his servants has no place in the jurisprudence of an enlightened civilization and is not recognized by American courts. But it does not follow, as defendant appears to think, that the absence of any right in defendant to assault plaintiff for the purpose of coercing her into obeying its orders relieves it from liability for the tortious act of its vice principal in employing physical force. Old cases are to be found in England and a few in this country where a master has been held not to be liable for the torts of his servant, in the absence of proof of an express direction or sanction by the



master of the wrongful act; but no principle is now more firmly established than that which holds the master responsible for the torts of the servant committed within the scope of his employment and as part of his service. The principle is based on the maxim that "what one does by another, he does himself," and we find the rules by which it should be applied to the facts of a given case to be most aptly expressed in the following quotation from Wood on the Law of Master and Servant, § 307: "It is not necessary, in order to fix the master's liability, that the servant should, at the time of the injury, have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and, if so, the master is liable, even though the servant acted willfully and in direct violation of his orders. A master cannot screen himself from liability for an injury committed by his servant within the line of his employment by setting up private instructions or orders given by him and their violation by the servant. By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistic to his orders. The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders."

The test to be applied in the present case is to ascertain whether the tortious act of the vice principal was one which reasonably and fairly may be said to have been an act of superintendence, and not one which was so disassociated from the duties of the position of chief operator that it should be regarded as prompted alone by the malice or willfulness of the actor. We are of opinion that the act clearly was one of superintendence, and therefore within the scope of the chief operator's employment; and we find this conclusion to be sustained abundantly by the authorities in this state and elsewhere. *Haehl v. Railway Co.*, 119 Mo. 325, 24 S. W. 737; *Meade v. Railway*, 68 Mo. App. 92; *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552; *Railway v. Milligan*, 135 Ala. 205, 33 South. 438, 93 Am. St. Rep. 31; *Hartman v. Muehlebach*, 64 Mo. App. 565; *Farber v. Railway*, 116 Mo. 93, 22 S. W. 631, 20 L. R. A. 350; *Hudson v. Railway*, 16 Kan. 470; *Railway v. Baum*, 28 Ind. 70; *Golden v. Newbrand*, 52 Iowa, 59, 2 N. W.

537, 85 Am. Rep. 257; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Rounds v. Railway*, 64 N. Y. 129, 21 Am. Rep. 597. Defendant chiefly relies on the case of *Jones v. Packet Company*, 43 Mo. App. 398, decided by the St. Louis Court of Appeals; but to the extent that that case may be considered as being out of harmony with the application of the rule of respondeat superior to the facts of the present case it has been twice repudiated by our sister court—first, in effect, in the case of *Voegeli v. Pickel Marble & Granite Co.*, 49 Mo. App. 643, and afterwards in express terms in *Collette v. Rebori*, supra.

It follows that the learned trial judge committed no error in refusing defendant's request for a peremptory instruction, and accordingly the judgment is affirmed. All concur.

### KURTZ v. KNAPP et al.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907. Rehearing Denied  
Jan. 6, 1908.)

#### 1. MUNICIPAL CORPORATIONS — STREETS — DEDICATION—PUBLIC HIGHWAY — CHANGE IN MUNICIPALITY—EFFECT.

Where a county court accepted a written dedication of land for a highway on condition that the owner would accept \$250 for the land, instead of \$500 as stated in the dedication, and the owner received a county warrant for \$250, and the road became recognized as a public highway, the road, on a city thereafter extending its limits so as to include it, became a street of the city; a dedication to a public corporation not being lost by changes in the form of the corporate government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1420.]

#### 2. SAME—STREET IMPROVEMENTS — CONTRACTS — VALIDITY.

A contractor for a street improvement cannot, before the letting of the contract, agree with one of the property owners, liable for a part of the cost thereof, to accept less than the amount of his liability, as the effect is to increase the price to the other persons liable for the cost; but the contractor may, after finishing the work, allow a discount to one person on the payment of his tax bill.

#### 3. SAME—TAX BILLS—VALIDITY.

A tax bill for a street improvement issued to a contractor competent to contract for the work is not void merely because his partner was one of the two sureties on his contract required by the city charter.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Charles B. Kurtz against James H. Knapp and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hayward & McLane, for appellant. Ward, Hadley & Neel, for respondents.

ELLISON, J. This is an action to cancel a tax bill claimed to be a lien on plaintiff's property in Kansas City. The judgment in the trial court was for the defendants.

The first ground for its cancellation is that the sidewalk for which the tax was levied was not built on Prospect avenue, the

street designated by the ordinance, but on plaintiff's private property. The facts are that the street called "Prospect Avenue" was formerly a county road 40 feet in width. It was widened to 80 feet, by taking 20 feet from the adjoining property on either side. The walk in this case was laid on this 20 feet; so, if it were true that the avenue had never in fact been widened, the walk would not be on the street as directed by the ordinance. But the fact is it was widened by the voluntary action of the parties owning the adjoining property, including this plaintiff. In 1897 he signed a written dedication, claiming therein \$500 damages. The county court accepted it, conditioned that he (plaintiff) would accept \$250, instead of \$500. This the plaintiff did by receiving a county warrant and cashing it. The road has ever since been recognized as a public thoroughfare.

At the date of this dedication the street, at the point in controversy, was outside the city limits. The city was afterwards extended so as to include this point. The extension of the city limits over the road did not affect a prior dedication. "A dedication, either statutory or common law, to a public corporation, is not lost by changes in the form of the corporate government, nor by changes in its territorial boundaries. A dedication for the purpose of a public township road will not be lost to the public, if a town or city is built up and the road falls within its limits; nor will it be lost in cases where there is an extension of corporate limits so as to embrace county roads, nor where a village grows into a town, or a town into a city. Towns, townships, and cities are but trustees of the public, and, as in case of ordinary trusts, the public trust is not defeated by a change of trustees. Public corporations of the classes mentioned are governmental subdivisions, and changes in their forms, powers, and obligations do not deprive the public of their rights in public easements, nor in public property, such as schoolhouses, public squares, and the like." *Elliott on Roads & Streets*, § 118.

It is insisted that the bill is void for the reason that one of the property owners was allowed a cut price and relieved to that extent of his just proportion of the whole work; or, stated differently, to that extent his proportion of the cost of the work was thrown upon the other property holders. It is true that if a contractor, by some understanding with one or more property holders had before the contract is let, agrees to a private price for them lower than that for the others, it shows he can do the work for that much less than his bid, and but for the cut price to the favored ones he could and would have made a lower bid for the work. The inevitable effect of his action is to increase the price to general property holders, so that he may be enabled to decrease it to those he had favored. Such scheme is founded either in corruption, or some unfair ad-

vantage, or for some improper purpose. But no such case appears here. The most that can be said was done in this case was that, after the work was finished and the apportionment made, a small discount was allowed one person upon his payment of a bill amounting to more than \$700. There is no evidence that this was in pursuance of any previous understanding, or that it was connected with any improper or unfair purpose, or that it could possibly have affected the public bid or the rights of other property holders. The transaction was not connected with any phase of the case which could directly or indirectly affect the other property holders. It appears to be no more than the contractor for some reason, not at all connected with letting the contract or doing the work, concluded to allow a small discount for payment. He may have been in great need of the money and wanted to induce a prompt payment. But, whatever the reason, it has not been shown, by any proper construction of conduct, to be unlawful or unfair. We do not regard the case of *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046, as in any way supporting the plaintiff in his contention.

It is next contended that the bill is void for the reason that the contractor did not give two sureties on his contract, as required by the charter of the city (section 20, art. 9). It is meant by this that the contract was let to Coumbe, and that Knapp, one of his two sureties, was his partner, and therefore not a surety, as contemplated by the charter. The contract was let to Coumbe as an individual. The bond was signed by him as principal, and by Knapp and one other as sureties. The reason for stating that Knapp was a partner of the contractor, and not his surety, is made up from inferences drawn from the testimony of Coumbe and Knapp on other matters. We cannot understand how we are to declare, as a matter of law, that a tax bill is void, if issued to a contractor who is in every respect competent to contract for the work, merely for the reason that one who is his partner becomes surety on his bond. If the partner is otherwise a proper surety, we cannot see a reason, in the absence of a showing of some improper influence or unfair effect, for saying it should avoid the tax bill. So far as can be seen from the record, the contractor was Coumbe, and one of his sureties was Knapp, and they occupy those positions in the case, both in fact and in law.

Finally, it is contended that the sidewalk is not on the proper established grade. We consider that the evidence justified the trial court in finding that it is. There was some evidence that according to the survey of one party it was not precisely at grade. There was other evidence which tended to show that it was as near to grade as it is possible to have that class of work.

After a full examination of the entire record, and a consideration of all that has been urged against the validity of the bill, we have

concluded that there is no good reason for declaring it to be void. The plaintiff's objections to the work were carefully examined into and found not to be founded on the fact. He has been treated with much consideration, and has now, in our opinion, nothing whatever which would justify us in overturning the judgment of the trial court.

It is accordingly affirmed. All concur.

### WINTER v. CAREY.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

#### 1. PRINCIPAL AND AGENT—ACTING FOR PARTY ADVERSELY INTERESTED.

An agent cannot serve the opposing party without the knowledge and consent of his principal, though he acts in good faith and no harm results to the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 588.]

#### 2. BROKERS—ACTING FOR PARTIES ADVERSELY INTERESTED—EFFECT.

An agent employed by an owner to procure a lessee, who induced the lessee, without the knowledge of the owner, to agree, pending negotiations, though after the rental had been agreed on, to pay him a commission, could not recover commission from the owner, though he procured the agreement with the lessee to save the owner from liability for the entire commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 52-54.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Robert L. Winter against Thomas Carey. From a judgment for plaintiff, defendant appeals. Reversed.

Bowersock & Hall, for appellant. Ball & Ryland, for respondent.

ELLISON, J. Plaintiff is a real estate agent, and seeks to recover from defendant \$1,250 as commission for leasing for a long term certain of defendant's real estate in Kansas City to one Medes. He recovered judgment in the trial court for that sum, with interest. It is alleged in the petition that after plaintiff "had procured the arrangement and agreement to be made between defendant and Medes, and in order to save defendant as much of the costs and charges, by way of commission, as possible, he arranged and agreed with said Medes that the latter should pay of the commission charges the sum of \$1,000." It is then alleged that plaintiff, "upon the consummation of the lease and the execution and delivery of the same, rendered to the defendant a bill and account for defendant's part of said commission of \$1,250." It is further alleged that said charge was much less than usual and customary.

There was evidence in plaintiff's behalf tending to show that \$2,500 would be a reasonable charge for negotiating the lease. At the close of the evidence defendant submitted a demurrer thereto, which the court refused. The court gave for plaintiff two in-

structions, which based plaintiff's right to recover upon the question whether he rendered the services "in good faith." In a third instruction it was declared as follows: "Although the jury may find and believe from the evidence that during the negotiations Medes agreed with plaintiff to pay him, and afterwards did pay him, \$1,000 on account of commissions, yet if the jury further find and believe from the evidence that plaintiff made this arrangement and accepted this payment with the intent and purpose of reducing the charge and commission which he was entitled to charge as defendant's agent, then the fact of such agreement with and payment by Medes would constitute no defense to this suit, although defendant was not informed of such fact until afterwards." There is scarcely a rule of law which has received more uniform approval than that an agent cannot serve the opposing party without the knowledge and consent of his principal. The law, recognizing that, in general, human nature is too weak to assure faithful service in such circumstances, has absolutely forbidden such dual position, and, if it be taken, the agent is denied any redress. *De Stelger v. Hollington*, 17 Mo. App. 382; *McClure v. Ullman*, 102 Mo. App. 697, 77 S. W. 325; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 118 Mass. 133, 18 Am. Rep. 459; *Mechem on Agency*, §§ 455, 972. The foregoing authorities disclose that good faith on the part of the agent and lack of harm to his principal will not interfere with application of the rule, for it is founded in public policy; and so it is expressly decided by the Supreme Court in *Atlee v. Fink*, supra. In *Everhart v. Searle*, 71 Pa. 256, it is said that: "It matters not that there was no fraud meditated and no injury done. The rule was not intended to be remedial of actual wrong, but preventive of the possibility of it." In *McClure v. Ullman*, 102 Mo. App. 703, 77 S. W. 326, Judge Bland said: "The temptation to commit fraud is too great to permit one to act as agent for both buyer and seller. This dual relation, if unknown to the seller, makes the contract absolutely void, because against public policy."

The argument in plaintiff's behalf may be regarded as suggesting two views, either of which, it was said, ought to place his case outside the rule and sustain the judgment. One is that, after a deal between antagonistic parties has been closed, the agent of one may accept a gratuity from the other. We do not intend to dispute the proposition—it is not in this case—that, after the deal between opposing parties has come to an end, an absolute gratuity might be accepted by an agent from his principal's antagonist in the deal without transcending the rule of law we have stated. There may be exceptional circumstances where such an act could be fully explained and justified; for, otherwise, if

not fully explained by the agent, his situation with a discerning court and jury would probably be embarrassing. But that is not this case; for here, while not directly admitted, yet it appears by the testimony of both plaintiff and Medes that before the agreement had been closed the former had demanded of the latter \$1,000 as commission, and the latter agreed to pay it. Plaintiff testified that the amount of the rental per year had been agreed upon before he asked Medes to pay him a commission; but his entire evidence, taken together, shows that the negotiations were not at an end. Medes testified that the rental might have been agreed upon; but he was certain that the commission was asked of him long before the negotiations leading up to a complete agreement had been reached. The mere agreement on the amount of the annual rental in a lease of this kind, which involves the building of a house and a great variety of important considerations and stipulations, is far from being the whole deal. Plaintiff's duty to this defendant did not cease with the agreement between the parties as to one point in the lease.

But we need not discuss the evidence on this head, for it is conceded, in plaintiff's third instruction above set out, that it was during the negotiations for the lease that plaintiff and Medes made their agreement as to the commission. The jury was there instructed that the agreement, though made "during the negotiations," would not prevent a recovery. Plaintiff relies much on the case of *Carr v. Ubsdell*, 97 Mo. App. 326, 71 S. W. 112. In our opinion that case does not aid him. There was no plea or defense of dual agency in that case. The defense was that Carr was the agent of the buyer only, and therefore the seller was under no obligation to pay him a commission. The evidence in Carr's behalf tended to show that he was not the buyer's agent at all, and the court sitting as a jury accepted that view. The instructions in the defendant's behalf did not submit the dual agency theory, but were confined to the theory of agency for the seller only; and the plaintiff did not ask any. It is true that the evidence in the case showed that, after the whole transaction had been completed and come to an end, the buyer offered the agent \$250, which the agent at first refused on the ground that he was to get his commission from the seller; but, with the understanding that he was to get his compensation from the seller, he finally accepted it. The St. Louis Court of Appeals, in referring to this, speaks of the rule of double agency, and states that it was "not necessary to attempt to define the apparent exceptions to the general rule that an agent may not act for two masters in the same transaction." And the court adds that "such of those so-called exceptions as are valid rest upon ground outside the true province of the rule itself, and are sustained because its under-

lying precept of good faith has not been violated, as explained in *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541." That it was not meant by this to say that good faith would justify double agency is apparent, especially when we consider that *Scribner v. Collar* is a clear and instructive case refusing to allow good faith and absence of fraudulent purpose to legalize a claim where there is double agency. The Court of Appeals did not give the construction to *Carr v. Ubsdell* that this plaintiff seeks to have us give it, for the subsequent case (already cited) of *McClure v. Ullman*, 102 Mo. App. 697, 77 S. W. 325, decided by that court, recognizes the rule as founded on public policy, and not as controlled by the good faith of the agent.

The case of *Campbell v. Yager*, 32 Neb. 293, 49 N. W. 181, is likewise called to our attention. There also the buyer "gave" to the agent of the seller \$100 "after the transaction was completed"; and there, also, the defense of dual agency was not made, but it was alleged in the answer that the agent was the agent of the buyer. It was held that, if he was not the agent of the buyer, his acceptance of the money from the buyer, after the transaction was at an end, would not defeat his action against the seller. While, as we have already intimated, one's adversary in a sale or exchange, being a free agent, may, after the transaction is over with, make a gift to the agent of the other party, yet it must be admitted by all persons of common understanding that it has a bad look, unless its exceptional character is explained by the act itself, or by the peculiar circumstances which prompted it. Men do not commonly give their money away except in charity, benevolence, or other good purpose. If a gift cannot be traced to promptings of this nature, we are powerless to shut out from ourselves the spontaneous query, why was it made?

Referring back to our statement of the allegations of the petition as to plaintiff's claim, it must be conceded that, in connection with the second view of his argument, they present a condition of affairs altogether uncommon. It is alleged, and so argued, that, in order to "save" defendant on his debt or obligation to the plaintiff, he required Medes to pay him \$1,000. It is not said in the petition that defendant knew of this effort in his behalf, and the uncontradicted evidence shows that he did not. It seems strange that plaintiff would render defendant such valuable service without any request to do so, and not advise him of it. More than that, it appears by the evidence of plaintiff himself that, after the lease was closed, he informed defendant that he "expected to charge a reasonable commission for making the deal"; yet he did not tell him that he then had Medes' agreement to pay nearly one-half of it, and when he afterwards mailed to defendant his bill for commission (the amount here sued for) he still did not mention his agreement with Medes,

and there was no intimation that it was not the full account. Why so important a matter should have been kept from defendant is not explained. To say that it was done to save \$1,000 to defendant, when he had made no request for such service and knew nothing of it, must be regarded as a mere evasion, and certainly has no legal basis. It was clearly accepting pay from the adversary party without the knowledge of his principal. It could just as well be said that a lawyer, without the knowledge of his employer, could, in the course of a settlement of important litigation, approach the opposite party and receive a fee from him under the guise of not wanting to make a full charge against his client. It must be clear to every one that to permit a proceeding of the nature here claimed by plaintiff would result in nullifying one of the plainest and most salutary rules of law.

The demurrer offered by defendant's counsel should have been sustained.

The judgment will therefore be reversed. All concur.

### SAUNDERS v. OHLHAUSEN.

(Kansas City Court of Appeals. Missouri.  
Nov. 4, 1907. Rehearing Denied Jan.  
6, 1908.)

#### 1. LANDLORD AND TENANT—LIEN—STATUTORY PROVISIONS.

Rev. St. 1899, § 4123 [Ann. St. 1906, p. 2239], providing that, if any person shall buy a crop grown on demised premises on which rent is unpaid with knowledge that the crop was so grown, he shall be liable for the value thereof, only affords a landlord security for rent, and cannot aid in enforcing a lien on the crop acquired by the landlord for a debt of a different nature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 981, 1022-1024.]

#### 2. CHATTEL MORTGAGES — LEASE AS CHATTEL MORTGAGE—VALIDITY BETWEEN PARTIES.

A lease providing that the landlord should have the privilege to enter and assist the tenant in caring for the crop, and should be reasonably paid for his services, and that any money by him thus expended and his labor should be a first lien on the crop, is, so far as it relates to the lien, a chattel mortgage, and, as between the parties, creates a valid lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 83.]

#### 3. SAME—FAILURE TO FILE OR RECORD MORTGAGE—EFFECT.

A lease, in effect a chattel mortgage as to a lien reserved therein on the crop for any money expended by the landlord or labor performed in caring for the crop, is void, as to the lien so reserved, as to a third person, where it was neither recorded nor filed for record, as required by Rev. St. 1899, § 3404 [Ann. St. 1906, p. 1936], nor possession of the mortgaged property delivered to and retained by the mortgagee, whether such third person had actual knowledge thereof or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 429.]

#### 4. SAME—CHANGE OF POSSESSION.

That lessor gave his tenant assistance in saving the crop on which he had a lien for labor under his lease at the tenant's request does not warrant the inference that the tenant thereby divested himself of the possession thereof and

placed the same in lessor, within Rev. St. 1899, § 3404 [Ann. St. 1906, p. 1936], providing that, to dispense with the necessity of recording a chattel mortgage, there must be a change of possession of the mortgaged property from mortgagor to mortgagee.

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Benjamin P. Saunders against William Ohlhausen. Judgment for defendant, and plaintiff appeals. Affirmed.

S. S. Shull and J. W. Boyd, for appellant.  
L. C. Gabbert, C. H. Hillix, and J. H. Hull, for respondent.

JOHNSON, J. This action was begun in a justice court by the filing of the following statement: "Plaintiff states that on the — day of July, 1904, he was entitled to the immediate possession and in possession of certain goods and chattels, to wit, about 225 bushels of wheat, as mortgagee thereof, which said 225 bushels of wheat were then of the value of \$189.50; that afterwards, to wit, on the — day of July, 1904, said wheat came into the possession of the defendant, who then and there unlawfully converted the same to his own use and disposed of the same, to the plaintiff's damage in the sum of \$189.50. Wherefore plaintiff prays judgment against the defendant for said sum of \$189.50 and for his costs in this behalf expended." In the circuit court, where the cause was taken on appeal, the learned trial judge, after hearing the evidence introduced by the parties, instructed the jury to return a verdict for defendant, whereupon plaintiff took a nonsuit, with leave to move to set the same aside, and, on the overruling of his motion for a new trial, brought the case here by appeal.

The facts in evidence most favorable to plaintiff thus may be stated: In July, 1904, a Mr. Scott occupied a certain farm belonging to plaintiff under the terms of a written lease, which had been executed by the parties thereto in 1902, but had not been filed for record. The farm consisted in part of a wheat field, and the lease provided that one-half of the wheat crop grown thereon should be delivered to plaintiff at the thresher in part payment of the rent of the premises. Further, it was provided that the landlord should have "the privilege to enter upon and assist second party [the tenant] in caring for all crops raised and to be reasonably paid for his said services, and any money by him thus expended and his said labor to be a first lien on the crops raised." Plaintiff testified that, when the time came to harvest the wheat crop, his tenant, on account of very unfavorable weather conditions, found himself unable to meet the exigencies of the situation unaided, and the crop was in danger of being lost. The substance of the testimony is given in this quotation therefrom: "Mr. Scott said he was unable to take care of the crops, and asked me to take charge of the threshing thereof, and to do and perform

whatever was necessary in order to save the crops, and that he could not get any hands to assist in the necessary work, and that if I could get hands I should do so under our lease, and that, when the time for threshing came, he asked me to take charge of the threshing, and I did so, and under my direction and control, with his assistance, the wheat was threshed and put in sacks." The total amount thus expended by plaintiff, including the value of his own services, was \$257.54. The crop produced 1,880 bushels, of which 940 bushels were received by plaintiff in payment of rent. Of the remainder, the tenant sold and delivered to defendant 182 bushels and 10 pounds for \$163.95. Plaintiff says that at about the time the threshing was completed, and before the sacks were divided, he was compelled to be absent from the neighborhood, and that the sale to defendant was made during his absence. Members of his family, on being informed that wheat was being hauled from the field by the tenant, investigated, learned of the sale, and telephoned defendant (who is a miller at Weston) that plaintiff claimed a lien on the wheat and warned him against paying over the purchase price to the tenant. This was the first notice of plaintiff's claim to a lien received by defendant, and, heeding the warning given, he refused to pay the purchase price to the tenant until the controversy between the latter and his landlord could be settled, and, as they did not afterwards succeed in coming to an agreement, he still retains the purchase money. Plaintiff, after unsuccessful attempts to induce defendant to pay the money to him, brought this action.

The tenant, in his testimony, admitted that plaintiff furnished him assistance in harvesting and threshing the crop, and that the account rendered by plaintiff is correct, with the exception of two small items. He claims to have paid that indebtedness in full, as well as that for the rent, and states that he remained in possession of the crop during the time it was on the rented premises; that, when it was threshed and sacked, the landlord's half was set apart in a separate pile and afterward delivered to him; and that the wheat sold and delivered to defendant was taken from the half set apart to the tenant. The cause of action pleaded in the statement is the alleged wrongful act of defendant in converting to his own use personal property on which plaintiff held a mortgage lien. It is not founded on an indebtedness for unpaid rent, and the evidence before us conclusively shows that, if Scott was indebted to plaintiff at all at the time of the delivery of the wheat to defendant, it was on account of money expended by plaintiff in providing aid to harvest and thresh the crop. In this state of the pleadings and proof, the provision in section 4123, Rev. St. 1899 [Ann. St. 1906, p. 2239], that "if any person shall buy any crop grown on de-

mised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof to any party entitled thereto," has no application. That provision has no other function than to afford a landlord security for unpaid rent, and cannot be invoked to aid in enforcing a lien on the crop acquired by the landlord as a security for a debt of a different nature. We are of opinion that, as between plaintiff and his tenant, the former has a valid lien on the latter's share of the crop to secure the amount due on the account in controversy between them by virtue of the agreement in the lease we have quoted. So far as it relates to that lien, the lease should be treated as a chattel mortgage. The rule is well settled that "a reservation in the lease of a specific lien on personalty is equivalent to, and is in effect, a chattel mortgage." *Faxon v. Ridge*, 87 Mo. App. 299; *Feller v. McKillip*, 100 Mo. App. 660, 75 S. W. 379; 1 *Cobbe* on Chattel Mortgages, § 113; *Jones on Chattel Mortgages*, § 13; *Attaway v. Hoskinson*, 37 Mo. App. 132.

Treating the lease, for present purposes, as a mortgage of personal property, the lien therein established is inoperative against defendant, for the reason that the instrument, though acknowledged, was not recorded or filed for record, as required by section 3404, Rev. St. 1899 [Ann. St. 1906, p. 1936]; nor was possession of the mortgaged property delivered to and retained by the mortgagee. It has been held repeatedly that a mortgage of personal property is not valid, against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgage, or the property be recorded or filed in the proper county; and where a mortgagor is permitted to retain possession of the property, and the mortgage is not filed, it is immaterial whether a subsequent purchaser from the mortgagor has actual notice of the existence of the lien at the time of the sale. *Feller v. McKillip*, *supra*; *State ex rel. Kaufman v. Sitlington*, 51 Mo. App. 252; *Mead v. Maberry*, 62 Mo. App. 557; *Hughes v. Meneff*, 29 Mo. App. 192; *Faxon v. Ridge*, *supra*; *Bryson v. Penix*, 18 Mo. 13; *Bevans v. Bolton*, 31 Mo. 437. The fact appears to be undisputed that defendant had no actual knowledge of the existence of the lien claimed by plaintiff until after he had purchased the wheat and part of it had been delivered; but, had he known of that fact at the time the sale was made, such knowledge would not have subjected his title to an unrecorded lien, nor infected the sale with fraud against the rights of plaintiff.

But it is urged by plaintiff that he was in the actual possession of the wheat at and prior to the time the sale was made to defendant. We do not find any substantial evidence to support this contention. True, plaintiff in his testimony stated that he was



In possession of the property with the consent of his tenant; but the facts disclosed by him from which he draws this conclusion indubitably establish the contrary fact that the tenant retained the actual possession of his share of the crop. The premises on which it was grown and where it was situated at the time of the sale were in the possession of the tenant as lessee. The mere fact that plaintiff gave his tenant assistance in saving the crop at the request of the latter does not warrant the inference, either as one of fact or law, that the tenant thereby divested himself of the possession thereof. The statute contemplates that a change of possession of mortgaged property from mortgagor to mortgagee, in order to dispense with the necessity of filing the instrument for record, must be actual and visible, regard being had to the situation and character of the property, and such change must take place before the rights of other parties intervene. *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398. As we have said, there is no fact or circumstance in evidence which tends to show an actual change of possession; but, if there were such evidence, there certainly is none from which the fact that the change was visible may be inferred.

It follows, from what has been said, that no error was committed in sustaining the demurrer to the evidence.

Judgment is affirmed. All concur.

#### LATTIMORE v. UNION ELECTRIC LIGHT & POWER CO.

(St. Louis Court of Appeals. Missouri. Nov. 19, 1907. Rehearing Denied Jan. 7, 1908.)

##### 1. MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—SIDEWALKS—OBSTRUCTION—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a pedestrian tripped and fell over a hose attached to a water plug and extending from four to eight inches across a sidewalk into an adjoining excavation, and was injured, the questions of defendant's negligence in maintaining the hose in such condition and of plaintiff's negligence in failing to observe it in time to prevent the injury *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1747-1756.]

##### 2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence that a hose over which plaintiff fell and was injured, alleged to have been negligently maintained across a sidewalk, was covered with dust so as to make its color like that of the pavement, was admissible on the issue of plaintiff's contributory negligence, though the petitioner did not allege such fact, as bearing on the question of defendant's negligence in maintaining the hose in such condition.

##### 3. SAME.

Where plaintiff fell over a hose alleged to have been negligently maintained across a sidewalk as plaintiff was walking along the walk, the fact that plaintiff's attention was diverted from his footsteps to the foundation of defendant's building, and for this reason did not ob-

serve the hose, did not establish that plaintiff was negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1672-1678.]

##### 4. SAME—CARE REQUIRED.

A pedestrian is only required to use ordinary care in proceeding along a sidewalk to discover impediments, pitfalls, or other dangers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1672-1678.]

##### 5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

An instruction requiring plaintiff to establish by a preponderance of the evidence that he was not negligent was erroneous and properly refused; contributory negligence being a matter of defense to be pleaded and proved by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 229-234.]

##### 6. TRIAL—INSTRUCTIONS—REQUEST TO CHARGE.

A requested charge, in an action for injuries sustained by a fall over an obstruction on a sidewalk, that plaintiff is required to exercise ordinary care for his own safety, was covered by an instruction given that, if plaintiff's injury was wholly or in part caused by his negligence "in failing to watch or observe his footsteps," the verdict must be for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

##### 7. SAME.

The jury having been charged that, if plaintiff's injuries were wholly or partially caused by his failure to watch and observe his footsteps he could not recover, the court did not err in refusing to charge that, in order to watch or observe his footsteps, he was bound to use his "God-given senses."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

##### 8. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where a city ordinance was offered in evidence and excluded, the court properly refused a request to charge based thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-602.]

##### 9. MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—OBSTRUCTION OF STREET—INSTRUCTIONS.

Where a pedestrian alleged that he was injured by falling over a hose negligently stretched across a sidewalk at a height "of about eight inches from the surface," he was only required to prove that the hose was maintained far enough above the walk to make it a dangerous obstacle and one likely to trip foot travelers, so that an instruction requiring a verdict for defendant if the hose was not maintained at a height above the sidewalk of about eight inches, and in other respects did not conform exactly to the allegations of the petition, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1720-1723.]

##### 10. SAME—INJURY TO PEDESTRIAN—OBSTRUCTION OF STREET—EVIDENCE.

In an action for injuries to a pedestrian by falling over a hose alleged to have been negligently maintained across a sidewalk from a water tap at a height of about eight inches, a city ordinance permitting defendant to put in the water tap to get water to use on the foundation of an adjoining building was irrelevant; the issue being not as to defendant's right to connect a hose with the tap, but to maintain the hose across the sidewalk in a dangerous and negligent manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1736.]

# 11. SAME—NEGLIGENCE.

City ordinances permitting defendant to take water from a tap to use in the work on the foundation of an adjoining building did not authorize defendant to connect a hose to the tap and maintain the same taut at a dangerous height across the sidewalk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1482.]

# 12. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff fell over a hose negligently maintained by defendants across a sidewalk and was injured. The ligaments of his left knee were injured, and the swelling extending over the lower third of the thigh. The limb was put in a plaster cast, which was changed from time to time for a period of three months. Plaintiff was able to go about on crutches, which he used for three months, and was then able to walk with a cane, which he used for another three months. Physicians testified that the membranes about the knee joint were ruptured, permitting the escape of the lubricating fluid, which rendered it painful for plaintiff to walk. There was more or less stiffness in the limb, and a year after the accident plaintiff still suffered pain and inconvenience therefrom; there also being some evidence that the injury was permanent. Beside the injury to the knee the sheathing inclosing the ligaments of the leg was ruptured. Plaintiff's financial loss was \$150 a month for several months, and his bill for medical attendance was \$200. *Held*, that a verdict for \$2,800 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357-396.]

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Clarence Lattimore against the Union Electric Light & Power Company. From the judgment for plaintiff, defendant appeals. *Affirmed*.

Jno. H. Drabelle, for appellant. Paul V. Janis and Truman P. Young, for respondent.

GOODE, J. Plaintiff, having been injured by a fall, instituted this action to recover damages from defendant, alleging that the accident was due to its negligence. The defendant company was putting in a foundation for a building on the west side of Fourth street, in the city of St. Louis, near Lucas avenue. This work was being carried on under a permit from the city authorities, regulating in some particulars the manner of doing it, and the use by defendant during its progress of the adjacent sidewalk. A water tap or plug had been sunk at the outer edge of the sidewalk near the curb, in order that a hose might be attached and water obtained to use in laying the foundation. We shall state the facts according to the testimony for plaintiff, inasmuch as it is contended the court erred in not directing a verdict for defendant on all the evidence. The water tap projected above the sidewalk, according to the version of the plaintiff, from 4 to 8 inches. A hose of common size had been attached to it by the defendant's workmen, and carried across the sidewalk, which was 15 feet wide, into the excavation for the foundation. By this means water was obtained to use in mixing the concrete that went into the foundation. The hose

had remained stretched across the sidewalk for from one to three weeks prior to the accident. The testimony is not positive as to the length of time, but it was within the period stated. As plaintiff was walking northward on Fourth street about 3 o'clock in the afternoon, he tripped on the hose and fell to the sidewalk, where he lay stunned for an interval, but was helped up and proceeded to his place of business. The evidence regarding the seriousness of his injuries will be adverted to in connection with the exception to the verdict on the ground that the damages awarded were excessive.

Defendant insists that the evidence had no tendency to establish negligence on its part, as nothing was proved, except that it had simply attached a hose of common size to an ordinary water tap, and had carried the hose, lying on the sidewalk, into the excavation for the foundation, to get water. If this were all the evidence tended to prove, we would accede to the proposition that a verdict for defendant should have been ordered. But plaintiff's account of the accident puts the question in a different light; nor was he entirely uncorroborated by other witnesses. The substance of his statement is that, after he regained consciousness and arose to his feet, he examined the position of the hose closely, because he wanted to learn how he happened to fall. He swore the hose, where it was attached to the water plug, arose from 4 to 8 inches above the sidewalk, and was stretched across the sidewalk into the cellar of defendant's building at practically that elevation; in other words, that the hose was drawn taut, or nearly so, and stood from 4 to 8 inches above the walk. The testimony tends to show that, though the hose was originally black, it was covered with lime dust, as was the sidewalk, so that the color of the two was nearly the same. Such an obstruction to the safe use of a walk intended for foot travel on a main thoroughfare of a great city, and maintained for a considerable period, might well be found to constitute negligence on the part of the person maintaining the impediment; in truth, might be found to constitute a nuisance. 2 Dillon, Mun. Corp. § 1032; *Congreve v. Smith*, 18 N. Y. 79; *Beck v. Brewing Co.*, 167 Mo. 195, 199, 68 S. W. 928. The trial court did not err in submitting to the jury the question of defendant's negligence.

It is insisted that on the entire evidence plaintiff was shown conclusively to have been guilty of negligence contributing to the accident, and, therefore, should have been nonsuited. The argument is that the effect of the evidence is that plaintiff was paying no attention to his footsteps, or the security of the sidewalk, but had permitted his attention to be diverted from his course to watch the work on the foundation; and this inattention to his own safety was the proximate cause of the fall, as otherwise he would have



observed the hose across the walk and have avoided stumbling over it. This argument loses sight of plaintiff's testimony. He swore he was walking along in the ordinary way, looking straight ahead of him. An effort was made on cross-examination to get him to state that his vision did not take in the sidewalk as he proceeded, but was raised above it, so that he was not heeding whether his pathway was safe or not. The clear effect of what plaintiff swore is that he was walking as men usually do on the pavements of thoroughfares in large cities, seeing the walk ahead of him as he went along, but not concentrating his attention on it, and that while so proceeding he failed to observe the hose stretched across his way. It is suggested in the brief for defendant that, as the petition does not allege the hose was covered with dust so as to make its color like that of the pavement, this circumstance does not count for negligence on the defendant's part, nor does it. But it was properly received in proof, as being relevant to the issue of plaintiff's contributory negligence in not noticing the hose. It was not shown that plaintiff had been along there previously while the hose was across the walk and had observed it in that position. We do not say the evidence would wholly fail to support a finding that he had seen it or had reason to know it was there, but do say that his own testimony is that he knew nothing about its position until he tripped over it. Even if plaintiff had casually glanced aside, his attention having been attracted to the foundation of defendant's building, or to some other object, it would not follow that he was guilty of negligence as a legal conclusion. A foot passenger on a sidewalk in a city may place more reliance on the security of the walk than would be indicated by such extreme care. People constantly divert their attention from their footsteps when on sidewalks, and to pronounce such an act necessarily one of negligence, would amount to denouncing the entire public as careless. *McCormick v. City of Monroe*, 64 Mo. App. 197; *Barr v. Kansas City*, 105 Mo. 550, 558, 16 S. W. 483; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938; *Holloway v. Kansas City*, 184 Mo. 19, 29, 82 S. W. 89.

We have been cited to many cases by defendant's counsel supposed to support the proposition that plaintiff himself should have been held guilty of contributory negligence by the court. It is useless to review all those decisions, which, however, we have read. They are not in point in the present case. Some of them rested on facts essentially different, and in others it was held that on the facts in proof the case was for the jury. The case most relied on by defendant is *Strutt v. Railroad*, 18 App. Div. 134, 45 N. Y. Supp. 728, wherein the plaintiff was nonsuited for contributory negligence in stumbling over a hose lying across a wharf. This decision was put on the

ground that articles of different kinds are usually lying on docks and wharves, and that there are few places where a traveler is less justified in proceeding without attention to his course. The difference is obvious between such a case and one where a foot passenger stumbles over a hose nearly the color of the pavement, and therefore difficult to distinguish, which is stretched above a walk that is much used. Plaintiff had no reasons to anticipate a dangerous impediment on the walk, or to be specially observant for such a thing. It is not a common, but a very extraordinary, circumstance for a sidewalk to be thus obstructed. It is a common incident to extend a hose over a sidewalk in front of a residence while the hose is in use, but not to stretch it taut above the walk. What the plaintiff was bound to do for his own safety was to use ordinary care in proceeding along the sidewalk to discover impediments, pitfalls, or other dangers. Whether he did so or not was, under the facts, palpably a question to be determined by the jury. *Coffey v. Carthage*, 186 Mo. 573, 585, 85 S. W. 532. A jury might find in this connection that the hose stretched above the sidewalk was so conspicuous that a man exercising ordinary care would not have failed to see and avoid it; but it would be perfectly reasonable to find the contrary. In truth, it strikes us that, if plaintiff was not before aware of the position of the hose, the inference of negligence on his part is rather weakly supported. *Coffey v. Carthage*, supra.

An exception was saved to every ruling of the court on the requests for instructions except the giving of those asked by the defendant. It would prolong this opinion beyond measure to copy the instructions in full and consider in detail the numerous exceptions taken to the rulings on them. Those given fairly covered the case, and we think accurately stated the law. The first of the refused instructions was manifestly erroneous in requiring plaintiff to establish by a preponderance of evidence that he was not guilty of contributory negligence. *Holding v. St. Joseph*, 92 Mo. App. 143. The first clause of said instruction was that the burden of proof was on plaintiff to show by the greater weight of the evidence that his injury was caused wholly by the negligence of the defendant and without negligence on his part. Plaintiff was not bound to establish by affirmative proof that he was free from negligence. His contributory negligence was matter of defense, to be pleaded and proved by the defendant. The second refused instruction, so far as it required plaintiff to exercise ordinary care for his own safety, was covered by those given, and particularly by the first one given at defendant's request, in which the jury were told that, if plaintiff's injury was wholly or in part caused by his negligence "in failing to watch or observe his footsteps," the verdict must be for the

defendant. We think it was not error to refuse to grant another instruction substantially like the one given, except that the degree of care exacted of plaintiff by the law was emphasized by the rhetorical flourish that it was his duty to use his "God-given senses." *Rose v. Kansas City* (Mo. App.) 102 S. W. 578. In a given instruction the jury had been told that, if his injuries were wholly or partly caused by his "failure to watch or observe his footsteps," he could not recover. In order to watch or observe his footsteps, he would be bound to use "his God-given senses"; and hence the instruction given was complete enough on this point. The third refused instruction assumed that if plaintiff allowed his attention to be attracted to the work on the adjacent building, and continued to walk with his eyes fixed on said work, and tripped over the hose while watching it, he was guilty of contributory negligence. This was tantamount to saying that to turn his eyes for a short while away from the sidewalk to the surrounding objects was necessarily an act of negligence. Such is not the law. As already said, plaintiff was bound to use ordinary care; but it would not follow that he was remiss in that regard if he looked in another direction from that in which he was walking. This was directly decided in *Barr v. Kansas City* and *McCormick v. City of Monroe*, supra. The fourth refused instruction commented on a city ordinance which was not in evidence, having been excluded by the court when plaintiff offered it. The fifth of the refused instructions, if given, would have made plaintiff's case fail if the jury found the hose was not maintained at a height above the sidewalk of about 8 inches, and in other respects did not conform exactly to the allegations of the petition. The petition alleged that the hose was negligently stretched across the sidewalk at the height "of about 8 inches from the surface." Only the substance of the allegation needed to be proved, namely, that the hose rose far enough above the walk to make it a dangerous obstacle and one likely to trip foot travelers. The sixth and seventh instructions, relating to plaintiff's contributory negligence, were covered by those given.

Certain city ordinances permitting defendant to put in the water tap to get water to use in the work on the foundation were offered by defendant and excluded. We do not see their relevancy. The issue was not whether defendant had the right to connect a hose with the tap and thereby convey water to where work was being done on the foundation. Defendant had the right to use the hose for that purpose, but not to use it in a careless manner—not to stretch it taut across and several inches above the walk, and keep it so stretched. At any rate, the jury could find such a use of the hose was tortious. The issue as to whether or not the hose was stretched and maintained by defendant across the sidewalk, so as to render

the work unsafe for people traveling along it, was squarely submitted to the jury in the first instruction given for plaintiff.

The jury returned a verdict for \$2,900, and it is contended that this was grossly excessive, and the result of passion and prejudice, and should have been set aside. The facts regarding the injury as established by the testimony of the plaintiff, of the physician who attended him throughout his succeeding ailment, and of another physician who examined him shortly before the trial, were substantially these: Plaintiff was stunned by the fall, but arose and went to his place of business a few blocks away. That night he went by rail to his home at Ferguson, a suburban town some 12 miles from St. Louis. Before he got to his place of business his knee pained him and became stiff, so that when he undertook to go to his train he had to aid himself in walking by leaning against the buildings. He was helped on the train by friends, and met at the Ferguson station by his physician, who drove him home. By that time his leg was swollen and painful. The injury was to the left knee and the ligaments of the leg; the swelling extending over the lower third of the thigh. The limb was put in a plaster cast, and the casts were changed from time to time as they became painful; but the leg was kept in a cast for nearly three months. Plaintiff was able to go about on crutches, which he used for three months, but subsequently was able to walk with a cane, which he used for another three months. It seems that the membranes about the knee joint were ruptured, letting out the fluid which lubricates the joint. The effect of this, according to the physicians, was a gradual roughening of the surface of the joint, so that it was painful for plaintiff to walk. There is more or less stiffness in his limb. He is particularly affected in going up and down stairs and in bad weather. The testimony showed that when the trial occurred, which was a year after the accident, plaintiff still suffered pain and inconvenience from the limb, and the testimony of the doctors would support a finding that the injury is permanent, though they were not positive on this point. But the evidence tends to show that certain delicate membranes about the knee have sustained an injury of a permanent character, which will cause plaintiff inconvenience in the use of his limb and give him pain. Besides the injury to the knee, the sheathing inclosing the ligaments of the leg was ruptured in the fall. It was shown that two or three days after the accident plaintiff was able to come to his office on crutches and give some attention to his business from time to time—that is, was able to spend about two hours or so looking after it; but he was not able to get around to any extent. Plaintiff's testimony goes to show that his financial loss in consequence of the injury was as much as \$150 a month for several months, and that his expense for medical at-

tendance was \$200. On this testimony we do not see that we are justified in setting aside the verdict on the ground that excessive damages were assessed. *New v. Railroad*, 114 Mo. App. 379, 89 S. W. 1043. It may be stated that there was no evidence to controvert the testimony of plaintiff and his physicians as to the extent of his injury.

The judgment is affirmed. All concur.

## HOUGH v. JASPER COUNTY LIGHT & FUEL CO.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

### 1. COURTS—SUPREME COURT—DECISIONS REVIEWABLE—TITLE TO REAL PROPERTY.

Where, in ejectment, it being conceded that title to the real estate is in plaintiffs, the action deals only with the right of possession, the title to real estate is not involved, in the sense that the Supreme Court has jurisdiction of an appeal, and not the Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 657.]

### 2. EJECTMENT—TITLE AND POSSESSION.

Plaintiff, in ejectment, must prove that at the commencement of the action he had the legal title and was entitled to possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16-28.]

### 3. HUSBAND AND WIFE—MUTUAL RIGHTS—CONVEYANCES TO HUSBAND AND WIFE—CHANGE BY SUBSEQUENT LEGISLATION.

The respective rights and interests acquired by a husband and wife under a deed of premises to them are fixed as of the delivery of the deed, and are not enlarged, abridged, or otherwise affected by subsequent legislation.

### 4. EJECTMENT—PARTIES PLAINTIFF—RIGHT OF WIFE.

At common law a wife as a tenant by the entirety had no right to the possession of the estate, could not maintain ejectment in her own name, and could not be joined with her husband as party plaintiff.

### 5. SAME—STATUTORY PROVISIONS.

The common-law rule that a wife as a tenant by the entirety had no right to the possession of the estate, could not maintain ejectment in her own name, and could not be joined with her husband as party plaintiff was not abrogated by any statutory law in force in 1886.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Ejectment by Martha W. Hough and husband against the Jasper County Light & Fuel Company. Judgment for plaintiff wife, and against plaintiff husband, and defendant appeals. Reversed.

Thomas Dolan, for appellant. McReynolds & Halliburton, for respondents.

**JOHNSON, J.** This is an action in ejectment, the real object of which is to terminate the enjoyment by defendant, a corporation engaged in the business of supplying natural gas to its patrons, of an easement over land owned by plaintiffs for the maintenance of a pipe line used as a conduit for gas. It is admitted that plaintiffs, husband and wife, own a fee-simple title to the land as tenants by the entirety under a warranty deed executed

and delivered to them in 1886, and that in April, 1906, defendant laid a pipe line across the land. Defendant does not claim an easement under grant by deed or other instrument in writing, but alleges in its answer "that plaintiffs herein gave their consent and permission and granted a license to lay a pipe line for the conveyance of natural gas underneath the surface of plaintiffs' land, or across the same or such part of the same as is described in plaintiffs' amended petition, for the purpose of supplying with natural gas the various mining plants and engines and boiler in the district in and about Webb City; that the laying of such pipes was attended with great cost and expense, and the removal of said pipes now would be attended with great loss and pecuniary loss to defendant and its patrons from interrupting the flow of gas; and plaintiffs should now be estopped from regaining possession of said land or causing said pipe to be removed." This defense was put in issue by an appropriate reply, a jury was waived, and evidence introduced by the respective parties, from which it appears that before defendant entered the land to lay the pipe it obtained oral permission from the husband plaintiff. His wife was not consulted, nor is it shown that she had knowledge of the fact that he had given the permission until after the line was laid. On these facts the court found against Mr. Hough, but in favor of Mrs. Hough, and adjudged that she "be restored to the possession of said lands and tenements." In other words, the judgment provides for the eviction of defendant from the land at the suit of the wife, but not of the husband. From this judgment, defendant appealed. Mr. Hough did not appeal.

Defendant then filed a motion to transfer the cause to the Supreme Court, on the ground that the title to real estate is involved and will be directly affected by the judgment of the appellate court; but we overruled the motion under the view advocated by plaintiff that, since the parties concede that the title to the land is vested in plaintiffs, the cause of action deals only with the issue of the right to possession, and, therefore, does not affect the title in a sense to divest this court of jurisdiction over the appeal. *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123; *Fischer v. Johnson*, 139 Mo. 433, 41 S. W. 203; *Barber Asphalt Paving Co. v. Hezel*, 138 Mo. 238, 89 S. W. 781; *Bruner Granitoid Co. v. Klein*, 170 Mo. 225, 70 S. W. 637; *Klingelhoefer v. Smith*, 171 Mo. 460, 71 S. W. 1008; *Bals v. Nelson*, 171 Mo., loc. cit. 688, 72 S. W. 527; *Porter v. Railway*, 175 Mo. 96, 74 S. W. 992.

To maintain an action in ejectment, a plaintiff must prove that at the commencement of the suit he had the legal title to the land and was entitled to its possession. *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123; 2 Greenleaf on Evidence (16th Ed.) § 804. With the fact conceded that plaintiffs had the legal title to the land in controversy, the main is-

sue in the circuit court was over the question of the right of possession. That issue, as far as it relates to the husband's claim, was settled adversely to him by the judgment rendered, from which he failed to prosecute an appeal; and our present concern, therefore, is restricted to the question of whether or not Mrs. Hough has a right of possession of which she is being deprived by the acts of defendant performed entirely without her consent. A proper treatment of the question requires consideration of the rules and principles of the common law applicable to the status and rights of a married woman during coverture as a tenant by the entirety, and then of the statutory law relating to that subject in force at the time the estate was created, which as stated, was in 1886. The respective rights and interests then acquired by the husband and wife under the deed conveying the land to them became fixed and vested on the delivery of the deed, and were not enlarged, abridged, or otherwise affected by subsequent legislation. *Graham v. Ketchum*, 192 Mo. 15, 90 S. W. 350; *Vanata v. Johnson*, 170 Mo. 269, 70 S. W. 687; *Arnold v. Willis*, 128 Mo. 149, 30 S. W. 517; *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788; *Bains v. Bullock*, 129 Mo., loc. cit. 119, 31 S. W. 342.

In speaking of the peculiar characteristics of a tenancy by the entirety, the Supreme Court, in *Garner v. Jones*, 52 Mo. 68, said: "At common law a conveyance in fee to husband and wife of real estate created a tenancy by the entirety." Being but one person in law, they took the estate as one person. Each being the owner of the entire estate, neither of whom had any separate or joint interest, but a unity or entirety of the whole. So, if either died, the estate continued in the survivor as it had existed before—an undivided unity or entirety. There was no survivorship, as in joint tenancies, but a continuance of the estate in the survivor as it originally stood. The only change by death was in the person, not in the estate. Before death they both constituted one person holding the entire estate, and after the death of either the survivor remained as the only holder of the estate. This principle was introduced into this state as a part of the common law, and it has not been altered by our statute of conveyances. See *Gibson v. Zimmerman*, 12 Mo. 385, 51 Am. Dec. 168." Following the theory that husband and wife were a unit in person, the husband by virtue of marital right stood as the legal personification of the unit, and as such enjoyed the right to the absolute possession and control of the entire estate during the joint lives of the tenants. He alone could maintain ejectment, and in an action of that nature the wife was not a proper party. *Hall v. Stephens*, 65 Mo. 678, 27 Am. Rep. 302; *Garner v. Jones*, supra; *Russell v. Russell*, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; *Bains v. Bullock*, supra. "This right of the husband," the Supreme Court said, in *Vanata v. Johnson*, 170 Mo. 269, 70 S. W.

687, "arose from the marital relation, and was not in any sense a right of courtesy, initiate or otherwise, and did not depend upon the birth of a child." Under these principles of the common law it is very clear that Mrs. Hough, as a tenant by the entirety, had no right to the possession of the estate, could not maintain ejectment in her own name, and could not be joined with her husband as party plaintiff in an action of that character.

The question of the effect of the statutory law in force in 1886 to emancipate a married woman from the application of these common-law principles has been before the Supreme Court on a number of occasions, and each time decided against the contention that prior to the revision of the statutes in 1889 a married woman might sue in ejectment for the possession of her own land. *Arnold v. Willis*, supra; *Peck v. Lockridge*, 97 Mo. 558, 11 S. W. 246; *Gray v. Dryden*, 79 Mo. 106; *Cooper v. Ord*, 60 Mo. 420; *Vanata v. Johnson*, supra; *Graham v. Ketchum*, supra; *Bains v. Bullock*, supra. In the last case cited it was said: "These rights he had at common law, though the legal estate was vested in the wife. So it has been uniformly held by this court, before the revision of 1889, that the husband is the only proper and necessary party to maintain an action to recover possession of the land of the wife when she holds legal, as distinguished from a separate or equitable, estate therein." If this is the rule that should obtain, were we dealing with the separate estate of the wife acquired prior to the revision of 1889, a fortiori should it be applied in a case where her interest is that of tenant by the entirety, since, in estates of the latter class, the wife at common law had no separate nor separable interest, and her very identity was lost in that of her husband during his lifetime.

These considerations compel the conclusion that Mrs. Hough cannot maintain a cause of action in ejectment, and accordingly the judgment is reversed. All concur.

#### ZALOTUCHIN v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907. Rehearing Denied Jan.  
6, 1908.)

##### 1. STREET RAILROADS — CARE REQUIRED AT CROSSINGS.

It is the duty of a motorman on approaching a crossing where he has reason to anticipate the presence of vehicles and pedestrians to keep a close lookout and give warning of the presence of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 174, 196.]

##### 2. EVIDENCE—WEIGHT—TESTIMONY OPPOSING FACTS AND LAWS.

Testimony entirely inconsistent with physical facts and laws within the knowledge of common experience will be disregarded and treated as though it had not been spoken; hence, where it appeared that a street car could not have been more than 100 feet away when a driver proceed-

ed from a place of safety to the crossing where an accident occurred, his testimony that the rapid progress of the car raised such a cloud of dust as to obscure the headlight so that it could not be seen over a block away must be disregarded.

**8. STREET RAILROADS—COLLISION WITH VEHICLE — PROXIMATE CAUSE — CONCURRING NEGLIGENCE OF ANOTHER.**

If a motorman was negligent in not ringing the bell or making an effort to reduce speed after a collision became imminent, negligence of the driver of the vehicle in which plaintiff was riding would not relieve the railway company from liability, on the ground that the negligent acts of its servant were the remote cause of plaintiff's injury.

**4. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — NEGLIGENCE OF DRIVER.**

Where plaintiff, a girl not over 16 years of age, was sitting in the rear of a vehicle, which her stepfather was driving, his negligence in driving into a dangerous position could not be imputed to plaintiff, her status being that of a mere passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 147-150.]

**5. SAME — QUESTIONS FOR JURY — CONTRIBUTORY NEGLIGENCE OF MINOR.**

Where plaintiff, a girl not over 16 years old, was riding in a vehicle which her stepfather drove into a position of danger, whether she was negligent in not taking precautions to avoid the injury, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 347½.]

**6. TRIAL—INSTRUCTIONS—NONDIRECTION.**

Omission of plaintiff to ask, and of the court to give, instructions submitting the issue of negligence in a personal injury action, *held* mere nondirection, and not reversible error.

**7. SAME—ISSUES NOT PLEADED.**

In an action for negligence, refusal to give an instruction on contributory negligence is not error when that issue is not pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Celia Zalotuchin against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas, Frank G. Johnson, and Ben F. White, for appellant. Fred A. Boxley and E. B. Silverman, for respondent.

JOHNSON, J. Plaintiff alleges she was injured in a collision between a wagon in which she was riding and a street car operated by defendant, and that the injury was the direct result of defendant's negligence. She recovered judgment in the sum of \$200, and the cause is here on the appeal of defendant.

At the time of the injury, which occurred on the 19th day of July, 1903, plaintiff was a minor. Her exact age is not disclosed, but, from facts appearing in the record, it is fair to assume she was not over 16 years old. The place of the injury was at the corner of Guinnotte and Michigan avenues in Kansas City. Defendant operated a double-track street railway along Guinnotte avenue, the course of which lies east and west. East-

bound cars ran over the south track, and west-bound cars over the other track. A brother of plaintiff's stepfather lived on the southwest corner of the intersection of the two avenues, and plaintiff accompanied her mother and stepfather on a visit to his family. They rode in a one-horse wagon, made the visit, and at about 10 o'clock in the evening started to return. When they seated themselves in the wagon, the horse faced north, with his head about five feet from the south rail of the south track. The mother and stepfather occupied the only seat, and the latter acted as driver. Plaintiff sat on a box placed behind the seat, with her face towards the rear of the wagon, and carried a lighted lantern. There were other occupants of the vehicle, but their number and description are not important. There were no street lamps on Guinnotte avenue, and, according to all the evidence, it was very dark. The stepfather testified that it was his purpose to go straight across the tracks, and just before he started the horse he looked up and down the street to see if a car were approaching. His view to the west was unobstructed for perhaps five or six blocks, and he saw no car. Plaintiff also testified that she looked to the west and saw none. The driver started the horse, and had driven him on to the south track, when, looking again to the west, he saw the headlight of a car which then was about a block away and approaching at a very rapid rate of speed. Plaintiff says she looked at the same time, saw the car, and called to the driver to hasten. He urged the horse, and increased its speed, but before the crossing could be accomplished, the car violently collided with the wagon, and the injury resulted. All of the witnesses introduced by plaintiff testified that the car was running at the highest possible rate of speed, and that the bell was not rung, nor was any warning given of its approach. They state further that the motorman made no effort prior to the collision to reduce speed. It is admitted that the car was provided with an electric headlight; but, in explanation of the failure of the occupants of the wagon to see it in time to avoid the collision, they say the car in its rapid progress raised a great cloud of dust which so obscured the light that it could not be seen until the car was not over a block away. On behalf of defendant, the evidence tends to show that the car was running at a rate of speed not to exceed 10 or 12 miles per hour; that the bell was being rung continuously; that owing to the darkness the motorman could not see the horse and wagon until they came into the narrow pathway of the headlight; that the wagon then was not over 30 feet away; that the motorman at once reversed the current in an effort to stop the car, and did materially reduce speed, but could not, in the space allotted, prevent the collision. The negligence charged in the petition is that the

"agents and servants in charge thereof carelessly and negligently ran an electric car eastward along the south track of the defendant's said railway and across Michigan avenue aforesaid, without ringing the bell or sounding the gong of said car, and defendant, its agents and servants aforesaid, carelessly and negligently failed to look ahead and to observe plaintiff crossing and being upon the track and in a position of danger, and carelessly and negligently failed to stop or check the speed of said car until plaintiff could get off the said track or out of the way of said car, although said car at the time plaintiff was crossing said tracks as aforesaid was sufficient distance westward from said point of crossing for defendant to have done so, by the exercise of ordinary care, and carelessly and negligently ran said car against said vehicle and against plaintiff." The answer, in addition to a general denial, contains the following plea: "That if plaintiff received any injuries at the time mentioned in said petition, the same were caused by the fault and negligence of the driver of the wagon in which the plaintiff was riding."

First we will dispose of the contention that the learned trial judge erred in refusing the request of defendant for an instruction in the nature of a demurrer to the evidence. From the standpoint presented by the evidence of plaintiff, the negligence of defendant in the operation of the car is apparent. Grant that plaintiff cannot recover on the ground of negligence in running the car at an excessively high rate of speed for the reason that she has not pleaded such act in her petition, still her evidence abundantly sustains the charge that the bell was not rung as the car approached the crossing, and that the motorman was negligently inattentive to the track ahead of him. Whether the rate of speed at which the car was running was 25 or 30 miles per hour, as the testimony of plaintiff's witnesses would seem to indicate, or was only 10 or 12 miles per hour, as stated by the witnesses for defendant, the fact remains that the motorman was operating a powerful and dangerous vehicle along a public thoroughfare where others had a right to be, and, in the exercise of reasonable care, could not approach a crossing where he had reason to anticipate the presence of vehicles and pedestrians without keeping a close lookout and without giving warning of the presence of the car. *Grout v. Central Electric Railway Company* (Mo. App.) 102 S. W. 1026; *Cole v. Railway*, 121 Mo. App. 605, 97 S. W. 555.

But it is argued by defendant that the negligence of the motorman, if it existed, should be regarded, not as the direct, but as a remote, cause of the injury, the direct cause being the negligence of the driver, which, it is urged, is indisputably established by plaintiff's evidence as well as by that introduced by defendant. We agree with defendant that his negligence is so clearly established by all

the evidence, including his own testimony, that it cannot be regarded as an issue of fact. At the time he started to drive forward he was in a position where, in the exercise of reasonable care, he could not fail to see the car, nor to understand that it was perilous for him to attempt to cross ahead of it. The horse had not traveled over 12 or 15 feet until the vehicles collided, and, should we assume that the car was running at the rate of 25 or 30 miles per hour, it could not have been over 100 feet from the place of collision when the driver proceeded from a place of safety to the crossing. His assertion that when he looked just before starting the car was not visible, for the reason that it was at that time more than a block away, and, on account of its great speed, was raising a cloud of dust in front of it which totally obscured the headlight, is too absurd to merit serious consideration. As we have just said, it could not have been more than 100 feet away, even had it been going at top speed, and the contention that a swiftly moving vehicle under ordinary conditions of wind and weather will throw up a cloud of dust in advance of it is a proposition in physics beyond the comprehension of reasonable minds. Such evidence goes for naught against the plain physical facts of the situation. The rule is well-settled that testimony utterly at war with physical facts and laws within the knowledge of common experience will be disregarded and treated as though it had not been spoken. The driver either did not look at all until after he drove into peril, or else deliberately attempted to cross in front of a car running at a dangerously high rate of speed, relying on the prudence and humanity of the motorman to prevent a collision. In either event, his conduct cannot be defended successfully, and, if this were a contest between him and defendant, we would not hesitate to declare that his own negligence would preclude a recovery.

But it cannot be declared as a matter of law that the negligence of the driver was the sole producing cause of plaintiff's injury. On the hypothesis that the motorman was negligent in not ringing the bell and in failing to make any effort to reduce speed after it became apparent that a collision was imminent, and that the driver negligently failed to look for the approaching car before attempting to cross and did not know of its presence until after plaintiff was imperiled—a hypothesis of fact which reasonably may be indulged after the rejection of that part of the driver's testimony at variance with plain physical facts—the negligent acts of the motorman and driver were concurrent and co-operative. Each contributed to the production of the injury, and defendant cannot escape liability on the ground that the negligent acts of its servant were a remote cause.

Nor do we agree with the argument of defendant that the negligence of the driver

should be imputed to plaintiff, and if regarded as an agency contributing to her injury should prevent a recovery. Waiving the point that imputed negligence is not pleaded by defendant in its answer, the evidence clearly shows that the status of plaintiff in the wagon was that of a mere passenger. She had no right nor power to exercise control over the management of the vehicle, and neither actually nor theoretically was her stepfather her agent in the discharge of his duties as driver. *Stotler v. Railroad*, 200 Mo. 107, 96 S. W. 509; *Petersen v. Transit Co.*, 199 Mo. 331, 97 S. W. 860; *Becke v. Railway*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; *Sluder v. Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186; *Profit v. Railway*, 91 Mo. App. 369; *Marsh v. Railway*, 104 Mo. App. 577, 78 S. W. 284.

Finally, it is contended on this branch of the case that though we should conclude that the negligence of the driver should not be imputed to plaintiff, still she cannot recover for the reason that her own evidence convicts her of negligence which directly contributed to the production of her injury. The rule is invoked that "if a person riding in a vehicle knows that the driver is negligent, and he takes no precaution to guard against injury, he cannot recover, for, in such case, the negligence is his own and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge." *Elliott on Railroads*, vol. 3, § 1174; *Canter v. City of St. Joseph* (decided at this term) 105 S. W. 1; *Marsh v. Railway*, 104 Mo. App. 577, 78 S. W. 284. Overlooking the fact, for the present, that defendant did not plead contributory negligence in its answer, and treating the question now under consideration as one in issue, we find no occasion for pronouncing plaintiff guilty of negligence in law under the rule stated. Whether plaintiff looked while the vehicle was in a place of safety, saw the car approaching, and failed to warn her stepfather, or did not look at all in the direction from which the car approached until she had reached a dangerous position, her conduct would have been a subject for the jury to classify, had the pleadings raised the issue of contributory negligence. On account of her minority, her actions should not be measured in law by the standard to be applied to persons of mature years. As a general rule, the characterization of the conduct of a minor is regarded as an issue for the triers of fact to solve, and we perceive no reason for making of the present case an exception to that rule. The acts of plaintiff were not so glaringly negligent as to compel us to say that reasonable minds could not differ with respect to them. Considering her position in the wagon, and the further fact that, being a mere child, she naturally would rely greatly on the watchfulness and discretion of her moth-

er and stepfather, whose opportunities to judge of the risk involved in attempting the crossing were better than her own, it is a fair inference to say that she acted in a manner to be expected of a person of her age and apparent intelligence. *Mann v. Railway*, 123 Mo. App. 486, 100 S. W. 566; *Stotler v. Railroad*, supra. The demurrer to the evidence was properly overruled.

Objections are made to the rulings of the learned trial judge in the giving and refusal of instructions to the jury. Most of the objections have been answered in the views expressed. The omission of plaintiff to ask, and of the court to give, an instruction submitting the issue of negligence, must be classed as mere nondirection, and therefore not reversible error. *Hooper v. Railway*, 125 Mo. App. 329, 102 S. W. 58; *Wilson v. Railway*, 122 Mo. App. 667, 99 S. W. 465. As the issue of contributory negligence was not pleaded, no error was committed in the refusal of an instruction asked by defendant in which that issue was submitted.

The record is free from substantial error, and it follows that the judgment must be affirmed. All concur.

BROWN v. QUINCY, O. & K. C. R. CO.  
(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907. Rehearing Denied Jan.  
6, 1908.)

1. RAILROADS—FAILURE TO FENCE TRACK—KILLING ANIMALS—LIABILITY.

Where a railroad track passes along a highway, the statute requires the company to fence it; and where animals pass on the track through want of such fence, and are injured, the company is liable, whether the owner owns adjacent lands or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1426.]

2. APPEAL — RULINGS ON EVIDENCE — PREJUDICIAL ERROR.

Where, notwithstanding an objection to a question was sustained, the witness answered it and the answer was not withdrawn, the ruling was not prejudicial.

3. RAILROADS—KILLING ANIMALS—EVIDENCE—ADMISSIBILITY.

In an action against a railroad for injuries to an animal escaping on its right of way through a defective gate in the right of way fence, the testimony of witnesses, who examined the gate soon after the occurrence, that by working the gate back and forth the slat holding it shut would work out and the gate would open, was competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1600.]

4. EVIDENCE—STATEMENT OF FACT—CONCLUSION OF WITNESS.

A statement of witnesses, who experimented with a gate, that by working it back and forth the slat holding it would work out and the gate would open, was a statement of a fact, and not a mere conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2151.]

5. RAILROADS — INJURIES TO ANIMALS ON TRACK—ACTIONS—NEGLIGENCE—INSTRUCTIONS.

An action for injuries to a horse struck by a train at a point where the railroad was re-



quired to fence, after the horse had entered on the right of way through a defective gate in the right of way fence, is not an action for negligence, and a charge on the absence of evidence of negligence is properly refused.

**6. TRIAL—INSTRUCTION—COMMENT ON TESTIMONY.**

An instruction that any statement plaintiff testifying in his own behalf may have made against his own interest is presumptively true, and that the jury should give statements made by him in his own favor only such weight as they may believe they are entitled to, considering his interest in the result amounts to a comment on the testimony, and is properly refused.

Appeal from Circuit Court, Grundy County; Geo. W. Wanamaker, Judge.

Action by Dee Brown against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. G. Trimble and Hall & Hall, for appellant. E. M. Harber and A. G. Knight, for respondent.

**BROADBUSH, P. J.** The plaintiff's suit against defendant is for damages for alleged injuries to his horse, claimed to have been struck by defendant's engine and cars at a point on its railroad where it was required by the statute to fence its track. It appears that the animal got upon defendant's right of way through an open gate at a farm crossing. This farm crossing led from the highway into premises of one Thompson. The plaintiff's land did not adjoin the railroad. The plaintiff's testimony tends to show that said gate had not sufficient fastening hooks, or latches to keep it closed; that the post to which it was fastened was broken off and shaky; that the gate did not come sufficiently close to the post to properly fasten; and that by reason of these defects it would not stay closed, and on the slightest movement of the wind it would open. The gate remained in this condition from April to October; the latter being the month in which the horse was injured. The defendant's evidence tended to show that the gate was continuously and persistently left open by trespassers during the time mentioned, and that plaintiff, with knowledge of these facts, turned his horse loose to graze upon the common, and that he wandered onto the defendant's right of way through said gate. The cause was submitted to the jury upon instructions, which returned a verdict for the plaintiff.

The defendant raises various questions; the principal one being that, the animal not having escaped from plaintiff's premises adjoining the railroad track, the defendant is not liable. But this point must be ruled against the defendant. It is the law of this state that, where a railroad passes along a highway, the statute requires the company to fence its track as a police regulation for the protection of the public generally. In such cases, where animals get upon the railroad track through want of such fences and are injured, the company will be liable to

the owner for such injury, whether he be owner of adjoining lands or not. *Higgs v. Railroad*, 120 Mo. App. 353, loc. cit., 96 S. W. 707; *Morris v. Railway Co.*, 79 Mo. 367; *Miller v. Wabash Ry. Co.*, 47 Mo. App. 630.

On the trial the defendant asked the witness Miller whether in his opinion the wind could shake the gate open and work the latch back so as to open the gate. The plaintiff objected to the question, which objection was sustained. Notwithstanding the objection was sustained by the court, the witness answered, "No," and the question and the answer were not withdrawn from the jury. It seems from this that the defendant had the benefit of the question notwithstanding the action of the court, and the plaintiff was content to allow the answer to remain in the record. The witness further said that "that slat fitted in the gate and between the braces, and stayed in the gate so tightly that it couldn't be shoved back six or eight inches by the wind."

Objection was made by the defendant to the action of the court in permitting the plaintiff to prove, by witnesses who examined the gate soon after the occurrence, that by the working of the gate back and forth the slat holding the gate shut would work out and the gate would come open. We think the evidence was competent, for it tended to show that there had been no change in the condition of the gate. It was shown that the witnesses experimented with the gate by handling it, and demonstrated by working the gate the slat would come out. This was a statement of a fact, and not the mere conclusion of witnesses.

The defendant complains of the action of the court in refusing to instruct the jury, as requested, that there was no evidence that defendant's employes who had charge of the train that struck plaintiff's horse were guilty of negligence. This is not an action for negligence, and therefore the instruction had nothing to do with the issue. The action of the court was proper.

The defendant complains of the refusal of the court to give instruction No. 12, asked on its part. The said instruction reads as follows: "The court instructs the jury that, while the plaintiff is a competent witness in his own behalf, yet in considering his testimony, and determining what weight, if any, you will give to it, you should take into consideration the fact that he is the plaintiff and directly interested in the result of the suit; and any statement he may have made against his own interest the law presumes to be true, because against his interest, but you should give statements made by him in his own favor only such weight and belief as you may believe, from all the facts and circumstances in the case, they are entitled to." On the question raised by this instruction the decisions of the appellate courts in this state are not in harmony. In *Feary v. Met-*

ropolitan Ry. Co., 162 Mo. 75, 62 S. W. 452, the court held that a similar instruction was proper. In *Sheperd v. St. Louis Transit Co.*, 189 Mo. 362, 87 S. W. 1007, the court held that the plaintiff's statement, made against his own interest, was presumed to be true. There are also other cases to the same effect. But in *Montgomery v. Railroad*, 181 Mo. 477, 79 S. W. 930, the court held that such an instruction was erroneous. The latter case has met the approval of the Supreme Court in the decision of the late case of *Zander v. St. Louis Transit Co.*, 103 S. W. 1006, wherein the court holds that it would amount to a comment on the testimony. It follows that the action of the court in refusing said instruction was proper.

No other questions of importance were raised in the case.

For the reason given, the cause is affirmed. All concur.

**CHANDLER v. ST. LOUIS & S. F. R. CO.**  
(Court of Appeals of Kansas City. Missouri.  
Dec. 2, 1907.)

**1. ACTION—CAUSE OF ACTION — WHAT LAW GOVERNS.**

There being no law in the place where the alleged act was committed giving plaintiff right of action, no action for such wrong can be maintained here, for to hold otherwise would be to say that one state could prescribe rules, no matter how arbitrary, to govern persons and things in another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 10-16.]

**2. COURTS—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION — AUTHORITY OF COMMON LAWS OF STATE.**

Where the relation of master and servant is unaffected by statute, the responsibility of the master for injuries caused to or by his servants is one of general law as to which the courts of the United States are not bound to follow the state courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 939-949.]

**3. SAME.**

Act Cong. May 2, 1890, c. 182, §§ 29-31, 26 Stat. pp. 93-96, establish a United States court of general jurisdiction in Indian Territory, and provide that the general laws of Arkansas as contained in Mansfield's Digest of Arkansas Statutes shall be in force in Indian Territory so far as not locally inapplicable or in conflict with any law of Congress, until otherwise provided. Mansf. Dig. § 566, provides that the common law of England, so far as applicable and of a general nature, and all British statutes in aid of common law, passed not later than a certain time, and not inconsistent with the Constitution and laws of the state, shall be the rule of decision in Arkansas until altered or repealed. Plaintiff was injured in Indian Territory through the negligence of a fellow servant. Held that, there being no statute in Arkansas as to the responsibility of a master for injuries to a servant, and the question being one of general law in which the federal courts are not bound by the decisions of state courts, the decisions of the federal courts furnish the rule by which defendant's liability should be tested, and not the decisions of the Arkansas courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 977, 978.]

**4. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.**

The rule that, where a servant is injured by the concurrent negligence of a master and fellow servant, no action will lie against the master, is not recognized by the courts of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515-534.]

**5. SAME—RELATION OF—NATURE OF.**

In the courts of the United States, a section foreman, in the operation of his hand car, stands to the section hands, not as a vice principal, but as a fellow servant.

**6. SAME—MASTER'S LIABILITY FOR INJURIES TO SERVANT—RISK ASSUMED BY SERVANT—OPERATION OF RAILROADS.**

Where a section hand, on account of his hand car being overloaded by fellow servants, was thrown and injured, and it was shown that such overloading was customary when he accepted the employment, and continued to the date of his injury; that he made no complaint, and had no assurance that the defect would be remedied, the principle of assumption of risk, as interpreted by the courts of the United States, denies him a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 559-564.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Adelbert Chandler against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. F. Parker and I. P. Dana, for appellant. Reed, Yates, Mastin & Howell, for respondent.

JOHNSON, J. Plaintiff, employed by defendant as a section hand, was thrown from a hand car and injured. He brought this action in the circuit court of Jackson county to recover damages, and in his petition alleged that his injury was the direct result of defendant's negligence. He recovered judgment in the sum of \$2,000, and defendant appealed.

The injury occurred on the 6th day of November, 1902, on defendant's railroad, near the station of Miami, in the Indian Territory. Plaintiff was a member of a section crew, consisting of 10 laborers and a foreman. In obedience to an order of the foreman, they placed their tools, dinner buckets, and a water keg on the car, and the 11 found places thereon, and proceeded to the scene of their work for that day. The vehicle was an ordinary hand car, the platform of which was about 5 feet long and 4½ feet wide. Plaintiff and three other laborers stood at the front handle, and were so crowded that they were compelled to stand sidewise. The evidence of plaintiff tends to show that the car was overloaded, and that on account of this condition, and of the fact that he could use but one hand in supporting himself, his position was dangerously insecure. Plaintiff did not know where the car would stop, and, taken unawares by a sudden and unnecessarily violent checking of its speed, produced

by one of the men setting the brake, was thrown in front of the car and seriously injured. It does not appear that the foreman who was present ordered the brake to be set at that time, nor in that manner; but the act was performed by the brakeman of his own volition, and for the reason that the car had reached the place where the men were to work. Plaintiff, on cross-examination, testified that he had been working for defendant "on that job" for about three weeks, and that the car on that morning carried its usual load of men and tools.

The averment in the petition of specific negligence is as follows: "That its foreman, James Klegg, was negligent in placing upon said car said large quantity of tools, and said 11 men, thereby increasing the liability of plaintiff and others to be thrown from said car in the event of its sudden stop. That defendant, through its agent and servant, was guilty of negligence in suddenly applying the brake to said car while it was moving at a high rate of speed. That plaintiff was thrown from the car by reason of the concurring negligence of defendant's agents and servants in crowding and overloading said car and thereby rendering plaintiff's footing thereon insecure, and in the sudden putting on of the brake of said car while it was being propelled at a high rate of speed." The answer contains (1) a general denial, (2) a plea of contributory negligence, (3) a plea that the injury, if any, was the result of one of the usual and ordinary risks of the business, (4) the defense that "if plaintiff was injured at the place described therein, then his right to recover damages, and defendant's liability therefor, were and are dependent upon and must be determined by the law in force at the time in the Indian Territory, where he says he was hurt, and under such law defendant was not negligent, and was not and is not liable for his alleged injuries, for plaintiff assumed the risk, in connection with his employment, of such injuries."

Defendant introduced in evidence sections 29, 30, 31, Act Cong. May 2, 1890, c. 182, 26 Stat. 93, 94, 95, and 96. This act established a United States court of general jurisdiction in the Indian Territory, and included the provision "that certain general laws of the state of Arkansas in force at the close of the session of the General Assembly of that state of 1883, as published in 1884, in the volume known as 'Mansfield's Digest of the Statutes of Arkansas,' which are not locally inapplicable, or in conflict with this act, or with any law of Congress relating to the subjects especially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide." Then follows an enumeration of the provisions of said general statutes adopted for use in the Indian Territory, and among them that contained in chapter 20 of the digest relating to the com-

mon and statute law of England. Defendant then introduced section 566 of said chapter 20, which is as follows: "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First (that are applicable to our form of government), of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state." Further, defendant introduced in evidence the following decisions of federal courts: *Railway Company v. Dye et al.*, 70 Fed. 24, 16 O. C. A. 604; *Railway Co. v. Waters*, 70 Fed. 28, 16 O. C. A. 609; *Thom v. Pittard*, 62 Fed. 232, 10 O. C. A. 352; *Tomlinson v. Railroad*, 97 Fed. 252, 38 C. C. A. 148; *Coyne v. Railway*, 133 U. S. 370, 10 Sup. Ct. 382, 33 L. Ed. 651; *Railway Company v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *Railroad v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Railway v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; *Id.*, 139 Fed. 737, 71 O. C. A. 555; *Looney v. Railroad*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *So. Pacific Ry. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551. Also the following decisions of the Supreme Court of Oklahoma: *Ruem-mell-Braun Co. v. Oahill*, 14 Okl. 422, 79 Pac. 260; *Mollhoff v. Railway*, 15 Okl. 540, 82 Pac. 733. Plaintiff introduced in evidence the decision of the Supreme Court of Arkansas in the case of *Neal v. Railway*, 71 Ark. 445, 78 S. W. 220. At the conclusion of all the evidence, as well as at the end of that introduced by plaintiff, defendant requested the court to give an instruction peremptorily directing a verdict for defendant. The refusal of the court thus to instruct the jury is the chief ground of present complaint, and presents questions of law, the proper solution of which will finally dispose of the case.

It is conceded that at the time of plaintiff's injury there were no other courts of general jurisdiction in the Indian Territory than those established by the act of Congress to which we have referred, and that appellate jurisdiction over actions originating in the territorial courts was vested in the Circuit Court of Appeals of the United States for the Eighth Circuit. And, further, it is admitted that the cause of action, if any, which inured to plaintiff in the Indian Territory, was not statutory, but arose from the common law, and that it was transitory

and not local; that is to say, being a species of intangible property of a personal nature, it traveled with the plaintiff, its owner, wherever he might go, and could be enforced in the courts of any jurisdiction where the defendant could be legally brought into court.

The issues of law presented for our determination will appear from a statement of the positions taken by the respective parties. Defendant contends that the courts of the Indian Territory are bound to follow the interpretation of the rules and principles of the common law, made by the appellate courts of the United States having jurisdiction over them, and are not bound by the decisions of the Supreme Court of Arkansas, whether pronounced before or after the adoption of the Arkansas statutes as a part of the jurisprudence of the Indian Territory, where such decisions are in conflict with those of the federal courts. Defendant then points to a number of cases decided by the Circuit Court of Appeals for the Eighth Circuit, and by the Supreme Court of the United States, as authority sustaining its contention that on the facts adduced in evidence by plaintiff he had no cause of action in the Indian Territory for the following reasons: (1) The two negligent acts of which he complains, namely, that of overloading the car and that of stopping it with unnecessary violence, were the acts of fellow servants, for which defendant could not be held liable. Authorities cited show that in the running of a hand car the foreman of the section crew is not a vice principal, but a fellow servant. (2) Though it should be conceded that the foreman in the present case was a vice principal, still plaintiff could not recover on account of the rule obtaining in the federal courts that where a servant is injured by the concurring negligence of the master and a fellow servant, there can be no recovery. (3) That as the car was loaded in the usual manner in vogue at the time plaintiff entered the employment, the rule followed by the federal courts would hold the risk of injury to be one assumed by plaintiff as one of the incidental risks of the employment, notwithstanding the practice was the offspring of defendant's negligence. Having reached the conclusion, as we have shown, that his injury afforded plaintiff no cause of action under the law as administered by the courts of the place where it occurred, defendant finally rests on the proposition that however radical the difference may be between the courts of this state and those of the United States in the interpretation of the common law with respect to the principles pertaining to the relation of master and servant, plaintiff can have no cause of action in this state, nor any standing in its courts, if he had none under the *lex loci delicti*. Plaintiff, in repelling this argument, has two strings to his bow. First, he argues, somewhat tentatively, that whether the cause of action arose in this state or in another juris-

isdiction, the courts of this state when required to go to the common law for rules and principles applicable, will use, to borrow counsel's expression, "our own brand of common law," and if it differs from that used by the courts of the place where the injury occurred, that fact is immaterial. The idea appears to be borrowed from the following expression of his individual view by the judge who wrote the opinion of the Supreme Court in the case of *Root v. Railway*, 195 Mo. 343, 92 S. W. 621, 6 L. R. A. (N. S.) 212: "The common law is a common heritage, i. e., it is our law, and why should we not adopt our own construction of our own law? The writer of this opinion sympathizes with that view; otherwise, in passing on the common law, we might speak with two voices, and make 'confusion worse confounded.'" But the chief reliance of plaintiff is grounded on the rules and principles of the common law as expounded by the Supreme Court of Arkansas, and which appear to be identical with those recognized in our own state, and at variance with those pronounced by the federal courts. To borrow again plaintiff's apt and striking expression, in so far as it relates to the present case, Missouri and Arkansas use the same "brand of the common law," and one which differs so radically from that used by the federal courts that under the former the pleadings and proof of plaintiff disclose a good cause of action, while under the latter, he has no right of action.

In the opinion of the Supreme Court to which we have just referred (*Root v. Railway*) it is held that "in a transitory common law action, where suit is brought in a state other than where the injury happened, the interpretation of the common law obtaining in the state where the cause of action accrued, the *lex loci* will govern." And, further, "the gist of the matter is that if a litigant has no cause of action in the courts of the state in which he was injured, he has none elsewhere." The same was said in *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S. W. 684: "The contract of employment with plaintiff was made in Illinois. The work to be done by him and the work he did was in that state. The accident happened in that state. The liability of the defendant must therefore be determined and measured by the laws of that state." In both of these cases the case of *Alexander v. Railway*, 48 Ohio St. 623, 80 N. E. 69, was cited with approval. There it was said: "An act should be judged by the law of the jurisdiction where it was committed. The party acting or omitting to act must be presumed to have been guided by the law in force at the time and place and to which he owed obedience. If his conduct, according to that law, violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights, nor is it material that the rules of a Pennsylvania law that deny relief

to plaintiff in error result from the adjudications of the courts of that state instead of being legislative enactments. The rules of law established by judicial decisions are as binding as legislative enactments until modified or overturned by other decisions or legislative enactments binding within that jurisdiction. In theory, it may be true that there is no common law of Ohio or of Pennsylvania, that the common law is one and the same in every state acknowledging its obligations, and that the decisions of one state are but evidence of it, not binding upon the courts of any other state. But, as a matter of fact, we know that in the application of the rules of common law to the affairs of men there is, unfortunately, in the several states, a wide divergence, and that it necessarily follows that acts and transactions sufficient in one state to create a cause of action will not produce that result in another, and, in the administration of justice, mere theory must be made to yield to the truth as established by facts and experience." A very clear statement of the principle was made by the Supreme Court of Alabama in *Railroad v. Carroll*, 97 Ala. 126, 11 South. 803: "We do not understand appellee's counsel even to deny either the proposition or its application to this case—that there can be no recovery in one state for injuries to a person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they are received. Certainly this is the well-established rule of law, subject in some jurisdictions to the qualification that the infliction of the injuries would also support an action in the state where the suit is brought had they been received in that state. \* \* \* The true theory is that no suit whatever respecting this injury could be sustained in the courts of this state except pursuant to the law of international comity. By that law foreign contracts and foreign transactions out of which liabilities have arisen may be prosecuted in our tribunals by the implied assent of the government of this state; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be."

It is immaterial that the rules and principles of the law obtaining in the Indian Territory differ from those recognized and followed by the courts of this state. Our concern is not with the question of whether the law there is as we would have it, nor are we called upon to attempt to harmonize that law with ours, nor to make something out of nothing. The vital question is, did plaintiff have a cause of action in the Indian Territory which the courts of that jurisdiction under their view of the law would enforce? If he had no cause of action there, certainly he could not acquire one by entering this state. If naked when he came to our border, the mere act of stepping over an imaginary line would not clothe him. His cause of ac-

tion must be measured, not by our own standard, but by that fixed by the rules and principles recognized by the courts of the place where he was injured. If there is no law giving him a right of action in the place where the alleged wrongful act was committed, no action can be maintained here, though the laws of this state would have given him a right of action had the same acts been committed within our boundaries. To hold otherwise would be to say that one state could prescribe rules, no matter how arbitrary, to govern persons and things in another state, "and thus contravene the fundamental principles maintained by all nations that every independent state has an exclusive right to regulate persons and things within its own territorial limits, and that the laws of the state or country can have no intrinsic force proprio vigore except within the territorial limits and jurisdiction of that country." State, to Use of Allen, v. Railway, 45 Md. 41; 22 A. & E. Encyc. of Law (2d Ed.) 1378; Jaggard on Torts, § 34; Cooley on Torts (2d Ed.) side page 471; Pullman Co. v. Lawrence, 74 Miss. 782, 22 South. 53; Brewster v. Railway, 114 Iowa, 144, 86 N. W. 221; Railroad v. Harris (Miss.) 29 South. 760; Walsh v. Railroad, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; Le Forest v. Tolman, 117 Mass. 109, 19 Am. Rep. 400; Railroad v. Moore, 29 Kan. 632; Willis v. Railway, 61 Tex. 432; Railroad v. Carroll, 97 Ala. 126, 11 South. 803; Bridger v. Railroad, 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Railroad v. Tanner, 68 Ga. 384; Railroad v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. These considerations not only dispose of the suggestion that our own construction of the common law should obtain, but also answer the argument that the decisions of the Supreme Court of Arkansas should control in actions arising in the Indian Territory. The courts of the United States have uniformly held that, where the relation of master and servant is unaffected by statute, the question of the responsibility of the master for injuries caused to or by his servants is one of general law, in regard to which the courts of the United States are not bound to follow the state court. Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Railway v. Mase, 63 Fed. 115, 11 C. C. A. 63. In the latter case Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said: "In the absence of legislative enactments, the liability of a master to one of his employes for the negligence of another is determinable by the general law, and not by the local law, and the decisions of the courts of the state in which the injury is inflicted are not controlling in the national courts. But whenever this subject is regulated by the statutes of the state in which the injury is inflicted, these become the rules of decision in trials at common law in the national courts, under section 721 of the Revised Statutes [U. S.

Comp. St. 1901, p. 581], and measure the duties and liabilities of the litigants." To the same effect is *Railway v. O'Leary*, 93 Fed. 737, 35 C. C. A. 562. As it does not appear that the state of Arkansas had in force any statute affecting the cause of action asserted by plaintiff, it is clear from the authorities last cited that, had the injury been inflicted in Arkansas, the federal courts, in an action brought therein by plaintiff, would not have considered themselves bound to follow the interpretation of the common law to be found in the decisions of that state, but would have determined the right asserted by plaintiff by the rules and principles of the general law recognized by the courts of the United States. Certainly they would apply the same standard to an action brought in the Indian Territory to recover for an injury sustained in that jurisdiction. And, if it be true that the principles of the general law relating to the relation of master and servant as interpreted and applied by the courts of the United States would preclude a recovery by plaintiff, we must hold that he had no right of action in the courts of the place of his injury, and therefore none in the courts of this state.

We find the rule invoked by defendant that where a servant is injured by the concurrent negligence of the master and a fellow servant no action will lie against the master is not recognized by the courts of the United States as a rule of the common law. Recently in the case of *Gila Valley Ry. Co. v. Lyon*, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, the Supreme Court of the United States applied the contrary doctrine: "The rule would seem to be that if the negligence of the company had a share in causing the injury to the deceased, the company was liable notwithstanding the negligence of the fellow servant contributing to the happening of the accident"—citing *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Ellis v. Railway*, 95 N. Y. 546. To the same effect was the decision of the Circuit Court of Appeals for the Fourth Circuit in *J. W. Bishop Co. v. Dodson*, 152 Fed. 128, 81 C. C. A. 346. But it has been held both by the Supreme Court of the United States and the Circuit Court of Appeals for the Eighth Circuit that, in the operation of a hand car, the section foreman, in his relation to the section hands, should not be regarded as the vice principal of the company, but as a fellow servant. *Railway v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Alaska Mining Co. v. Whalen*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad v. Waters*, 70 Fed. 28, 16 C. C. A. 609. This rule would prevent a recovery by plaintiff in the courts of the Indian Territory on the causes of action pleaded in the petition, since the negligence of the defendant, as alleged, consisted of acts of fellow servants

for which defendant could not be held under the doctrine of respondeat superior. But had plaintiff alleged, as one of the elements of his cause of action, the negligence of his master in failing to exercise reasonable care to furnish him with reasonably safe and suitable appliances, and to provide him with a reasonably safe place in which to work, still he could not recover in the Indian Territory, for the reason that under the principle of assumption of risk, as interpreted by the courts of the United States, the risk of such injury was assumed by him as one of the incidents of his employment. In *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, the Circuit Court of Appeals for the Eighth Circuit reaffirmed the rule which has repeatedly received the sanction of other federal courts that, "among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances to use." The negligence of which plaintiff complains, or could complain, existed at the time he entered defendant's service, and continued to the date of his injury. He made no complaint to the master, nor did he have any assurance that the defect would be remedied. Clearly his injury afforded him no right of action in the courts of the Indian Territory. Had it occurred in this state, the facts disclosed by him, if believed by the jury, would have entitled him to recover. *Mack v. Railway*, 123 Mo. App. 531, 101 S. W. 142; *Stanley v. Railroad*, 112 Mo. App. 601, 87 S. W. 112; *Haworth v. Railway*, 94 Mo. App. 215, 68 S. W. 111.

It follows that the judgment must be reversed. All concur.

#### REDDING v. BADGER LUMBER CO.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

#### 1. REFORMATION OF INSTRUMENTS—RIGHT OF ACTION—GROUNDS—MUTUAL MISTAKE.

In order to reform a written instrument for a mistake, the mistake must be mutual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 74-78.]

#### 2. SAME—EVIDENCE.

The evidence of mistake, to warrant a reformation of a written instrument, must be clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 157.]

#### 3. CONTRACTS—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

In an action on a contract, evidence held sufficient to show mutual mistake in the execution of the contract, precluding recovery.

Appeal from Buchanan County Court;  
Henry M. Ramey, Judge.

Action by James I. Redding against the Badger Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Kendall B. Randolph, for appellant. Culver & Phillip, for respondent.

BROADDUS, P. J. The plaintiff bases his cause of action on the following written agreement: "St. Joseph, Mo., Nov. 8th, 1905. This agreement, entered into on this date, witnesseth: That J. I. Redding and Badger Lumber Co. has entered into the following agreement, to wit: In the event of the South St. Joseph Loan Association (M. C. Powell, Agt.) making a loan to Joseph W. Graham of \$1,800.00, and also to Samuel E. Hahn of \$1,800.00 (\$3,600.00 in all), and in case said loans are paid to said Badger Lumber Co. in full, then the said Badger Lumber Co. is to pay to said J. I. Redding the sum of \$1,000.00 (payment in full for lots 5 and 8, block 1, Redding's addition). This agreement also witnesseth: That said Badger Lumber Co. has this day advanced to said Redding the sum of \$500.00 as a payment on paying bill against said lots and others, with the understanding that said \$500.00 shall be considered as a partial payment of the \$1,000.00 heretofore mentioned. Said \$500.00 is accepted by said Redding with the distinct understanding that, in case said loans of \$3,600.00 be not paid to Badger Lumber Co., then said Redding is to make a deed to said Badger Lumber Co. to lot 3, block 1, Redding's addition, not later than February 1st, 1906; said \$500.00 being the payment in full for said lot. J. I. Redding. Badger Lumber Co., by J. L. Pope, Mgr." The petition alleges that the defendant is indebted to the plaintiff in the sum of \$500 as provided by said instrument, which the defendant has failed and refused to pay. The defendant admits the execution of the writing sued on, but sets up as a defense that it did not express the true contract as entered into between the parties.

In order to understand the issue in the case, it will be necessary to state a few of the general facts. On and prior to the 8th of November, 1905, the plaintiff was the owner of several lots in block 1, Redding's addition to the city of St. Joseph. On said date he was negotiating to sell two of those lots, one to a man by the name of Graham and one to a man by the name of Hahn, who were desirous of erecting buildings on said lots, but did not have the money for that purpose. The South St. Joseph Loan Association was willing to loan sufficient money to build the respective houses, but would not do so unless certain liens on the lots for taxes and improvements were first discharged. The defendant agreed to discharge said indebtedness, as will be seen by the contract aforesaid. The evidence shows that the estimated cost of each of said buildings was \$1,300, which made a total cost of \$2,600 for

that purpose. The loan association required a bond from the contractors for the performance of the work and that all liens for labor and material should be paid. The defendant became such security. In addition to the \$2,600, the loan association loaned said Graham and Hahn \$1,000; that is to say, \$1,800 to each, which made a total loan of \$3,600. This money was not to go into the hands of said Graham and Hahn, but into the hands of defendant.

The defendant contends that the actual agreement entered into between the parties was that if the loan association made a loan of \$1,800 to Graham and a loan of the same amount to Hahn, and if the full loan was paid to defendants, it would pay out of said sum the cost of erecting two buildings on lots 5 and 8 in block 1 of said addition, estimated to cost \$1,300 each, and would pay the remaining \$1,000 to plaintiff in payment of said lot, provided that, if the cost of said buildings exceeded \$2,600, then it should pay to plaintiff for said lots only the difference between \$3,600 and the amount paid for the erection of the buildings. But the defendant contends that by mutual mistake the contract was written as it appears on its face as set forth hereinbefore. The plaintiff contends that there was no such mistake, and that the written contract expressed the true intention of the parties. The court, upon a hearing of the case, reformed the contract as prayed for by defendant, and further found that the defendant had paid out, including \$500 advanced to plaintiff to remove the said lien for taxes on the lots and for work and material used in construction of said building, more than said sum of \$3,600, and rendered judgment for defendant. The plaintiff contends that there was no mistake on his part, that as far as he was concerned the writing expressed his intention, and that, such being the case, the court was not authorized to decree a reformation of the contract.

It is the settled law that, to reform a written instrument, the mistake must be mutual, and not unilateral; and such is conceded to be the law by the defendant. 1 Story, Eq. § 151; Gwin v. Waggoner, 98 Mo. 315, 11 S. W. 227; Allen v. Carter, 8 Mo. App. 585. And the rule is also well settled, to prove a mistake in such cases, the evidence must be clear and convincing. Meredith v. Holmes, 105 Mo. App. 343, 80 S. W. 61; Sweet v. Owens, 109 Mo. 1, 18 S. W. 928. There are exceptions to the rule that a court will not correct a unilateral mistake in a written contract, and that is where one party to a contract has by some fraud induced the other party to make the mistake; but as there was no evidence of fraud the question is not presented in this case. The only question, then, was the mistake mutual?

The contract in question was written by Mr. Pope, the defendants' manager. He testified that there was a mistake; that the



agreement was that the plaintiff was to have out of said sum of \$3,600, after the payment of said \$500 which had been advanced by defendant and the cost of work and material, what was left over. In this he is supported by witnesses Sidney L. Stout, Alfred Guy, A. H. Walmsley, and A. E. Thornton. Witness Stout was present and heard the agreement made. Other witnesses testified that the plaintiff told them that he was to have what was left over of the \$3,600 after paying said \$500, cost of doing work, and the material. And it was also further shown that the sum mentioned of \$1,300 for the erection of each of said buildings was not a fixed sum, but an estimated cost for such erection. The plaintiff is almost unsupported in his evidence that there was no mistake made in the writing of the contract. It seems to us that the defendants' theory of the case was supported by a great preponderance of the evidence, and it was rather convincing that a mutual mistake had been made. Besides, the investigation of the record will show that plaintiff's answers to certain questions put to him on cross-examination were not as full and frank as they should have been; but, instead, he somewhat equivocated, and did not directly answer many questions put to him, which he could and should have done without hesitation. The court had all the witnesses before it and had the opportunity of judging, from their manner while testifying, the degree of credibility to which they were entitled, and for that reason in a much better condition to pass upon the merits of the case than we are. In view of the overwhelming preponderance of the evidence in favor of the defendant, which we must assume came from creditable witnesses, we do not feel we would be justified in interfering with the judgment of the court.

Affirmed. All concur.

#### KANSAS CITY ex rel. ELLIOTT v. HOLMES et al.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

#### 1. TAXATION—LEVY AND ASSESSMENT—ESTOPPEL.

Though the valuation placed on real estate and taxes extended on the land tax book were irregular, not being in compliance with Rev. St. 1890, § 9177 [Ann. St. 1906, p. 4226], regulating the assessment of real property which has been omitted, yet, the owner having requested a valuation to be put on the real estate so that he might pay the taxes thereon, he cannot be heard to question the validity of the assessment and tax.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 824-827.]

#### 2. SAME—RECOVERY OF TAXES IRREGULARLY ASSESSED.

Though a taxpayer cannot be compelled to pay taxes irregularly assessed, yet if he does so, and the sum paid represents the amount for which his property is justly liable, he cannot recover it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 999, 1,000.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by the city of Kansas City, on the relation of Robert S. Elliott, against Albert E. Holmes and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. B. Leavel and Ed. E. Aleshire, for appellant. Cook & Gossett, for respondents.

BROADBUSH, P. J. This is a suit against defendant Albert E. Holmes and the securities on his official bond as treasurer of Kansas City, Mo. Plaintiff's amended petition alleges that in the year 1904 he was the owner of certain real estate situated in said city; that during the months of May, June, July, and August of said year he applied at defendant's office, and requested and demanded to be allowed to pay the taxes on said land for said year; that he was told by defendant Holmes that a description of the land did not appear on the land books in his office, and that the same had not been assessed for that year, and that he was unable to tell him what the amount of the taxes was; and, further, that in the month of August aforesaid, he demanded to know of defendant Holmes if he had located the error with regard to the taxes on the land, and was informed by defendant that the land had just been placed upon the books in his office, but no valuation had been placed thereon, but instead there was a notation to the effect that it had been washed into the Missouri river, whereupon plaintiff informed him that such was not the case, and demanded to know the amount of his taxes, and made tender of amount sufficient to pay the same, which was refused by defendant for the reason that there was no valuation of the land; that defendant treasurer thereafter, without the knowledge and consent of plaintiff, put a valuation on said property of \$600, and had it sold for the taxes assessed on such valuation; and that thereafter he was obliged to redeem his land from said wrongful sale by paying \$15.56, which he paid under protest. Plaintiff asks judgment for the amount thus paid and \$100 attorney's fee.

The evidence was to the effect that plaintiff was the owner of the land in the year 1904, and that his deed was on record; that in August and September of that year he applied at the treasurer's office to pay his taxes, where he was told that the land was not listed upon the tax books of the office of defendant. After search being made, a description of the same was found on the books, but not its valuation, but instead there was a notation that it had been washed into the Missouri river; that thereupon plaintiff informed defendant that such was not the case; that thereafter defendant caused a valuation of \$600 to be put upon the land, and without plaintiff's knowledge

in November of that year caused the same to be sold for the taxes; and that plaintiff was compelled to pay \$15.56 to redeem it from the purchaser. It appeared that the plaintiff's different interviews at the treasurer's office were not with defendant Holmes, but with his deputy, D. S. Russell. Russell, who was a witness, corroborates the plaintiff as to the fact that there was a notation on the land tax book that it had been washed into the river; but he further states that plaintiff requested him to have a valuation put upon it, and that this was done at the auditor's office. It was shown by an employé in the auditor's office that the land in question was put on the tax books by authority of that office upon request, which was a common practice where parties wanted to pay their taxes in such cases. The defendant introduced as evidence plaintiff's original petition, wherein he alleged that the defendant treasurer agreed to have the omitted valuation placed upon the land by the auditor. The cause was submitted to the court. The finding and judgment were for defendants, from which plaintiff appealed.

There were no declarations of law asked or given. Consequently we are not in a position to know upon what theory of the law the court based its decision. There was no conflict in the testimony, except in one particular, and that was as to whether the plaintiff requested Russell, the deputy in the treasurer's office, to have a valuation placed upon his land, so that he might be enabled to pay the taxes thereon. We take it for granted that the finding on that issue was in favor of defendants. Such being the case, the question for decision is merely one of law. Defendants admit that the valuation placed upon plaintiff's property and taxes extended on the land tax book was irregular, not being in compliance with the law regulating assessment of real property which has been omitted from as-

essment. Section 9177, Rev. St. 1899 [Ann. St. 1906, p. 4226]. But it is claimed that the assessment in question was valid because it was made at the request of plaintiff. In *State ex rel. v. Stamm*, 165 Mo. 73, 65 S. W. 242, we have a precedent, where the owner, after having placed a value on all his personal property except stock in a building and loan association, requested the assessor to get from the secretary of the association the value of such stock. This the assessor did, and made the assessment accordingly. The taxes became delinquent, and suit was instituted to compel their collection. The defendant set up the defense that the assessment on said stock was invalid, not being in compliance with the statute. It was held that, "the valuation having been arrived at in accordance with the agreement, the defendant ought not to be heard to question the validity of the assessment on the ground that he himself did not place any value on the stock, or for the reason that after delivering the list he did not receive any notice of the valuation fixed by the assessor."

We think the principle of that case should govern this also; and, furthermore, the taxes were just. When plaintiff paid the money to redeem his land, he was paying that for which his land was liable. We assert the proposition that, whereas, a taxpayer cannot be compelled to pay taxes irregularly assessed against his property, yet if he does pay them under such a condition, and the sum paid represents the amount for which his property is justly liable, he cannot recover it. It has even been held that, where a taxpayer pays taxes that are illegal, he cannot recover them back, unless he paid them under duress. *Robins v. Latham*, 134 Mo. 466, 38 S. W. 33; *Wolfe v. Marshal*, 52 Mo. 167; *State ex rel. v. Ry. Co.*, 165 Mo. 597, 65 S. W. 989.

The judgment of the circuit court is affirmed. All concur.

**NEW AMSTERDAM CASUALTY CO. v. MESKER et al.**

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

**1. ACCORD AND SATISFACTION—ACTUAL CONTROVERSY—NECESSITY.**

In employer's liability insurance policies, the premium was based on the compensation to employes, and it was provided that if the compensation exceeded the approximate estimate in the schedule thereafter given, the employer should pay the additional premium earned, and if less, the insurance company should return the unearned premium. The insurance company requested of the employer a statement of the wages paid to employes during the year covered by the policies, which was furnished, showing that the full premiums due according to the policies had not been paid. On demand therefor the employer paid the additional premiums without dispute, and thereafter the insurance company claimed that there was a balance still due, and that the statement of wages was erroneous. *Held*, that no controversy having arisen at the time of the payment of the additional premiums, such payment did not operate as an accord and satisfaction.

**2. INSURANCE—EMPLOYEE'S LIABILITY INSURANCE—PREMIUMS.**

Employer's liability insurance policies insured the employer against liability for personal injuries to any employes in and during the operation of the trade or business described in the schedule, and stipulated that the premium to be paid was based on the compensation to employes. The schedules contained, under the head of "Trade or Kind of Business," "galvanized iron cornice and wrought iron work, including drivers." *Held*, that the insurance company was entitled to premiums computed on the wages, not alone of employes who worked directly on cornices or wrought iron work and drivers, but also on the wages of workers on skylights, tanners, carpenters, shippers, machinists, engineers, and night watchmen.

**3. SAME.**

The schedule in other policies indemnifying the employer against losses for personal injuries to employes on outside work contained, under the head of "Kind of Business," "galvanized iron and sheet iron workers, wrought iron work, erecting." *Held*, that the wages for tanners' work done outside were within the schedule, entitling the insurance company to have them included in the basis for computation of the premiums on the policies.

**4. EVIDENCE—PAROL EVIDENCE—EXPLANATION OF EMPLOYEE'S LIABILITY INSURANCE POLICIES.**

Employer's liability insurance policies being obscure as to what employes are within the risk, the acts of the parties pursuant thereto, showing their understanding of their terms, and the conditions existing when the insurance was written, may be resorted to to ascertain the employes included.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2129.]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by the New Amsterdam Casualty Company against Benjamin T. Mesker and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

R. M. Nichols, for appellants. C. P. Ellerbe, Jr., and L. R. Brokaw, for respondent.

GOODE, J. The purpose of this action is to recover from the defendants, who are

partners, certain sums of money alleged to be due the plaintiff as a portion of premiums earned on six policies of insurance. The insurance was of the employer's liability kind, and was intended to indemnify the defendants against losses for personal injuries occurring to their employes and other persons in the course of defendant's business. There were three policies for the year from June 19, 1902, to June 19, 1903, and three other policies for the ensuing year to June 19, 1904. In addition to those six policies, which constitute the subject-matter of plaintiff's petition, there were three other policies of a like sort issued for the year from June 19, 1904, to June 19, 1905, but canceled by plaintiff pursuant to the terms of the policies on September 24, 1904. The last three policies form the subject-matter of a counterclaim preferred by the defendants, who allege in their answer that plaintiff is indebted to them in the sum of \$185.21, which they paid in advance as premiums in excess of the premiums actually earned while the policies were in force. The answer contains a general denial of all the allegations contained in the petition, and also pleads an accord and satisfaction in defense of the action on the first three policies declared on in the petition, to wit, those covering the period from June 19, 1902, to June 19, 1903. The facts on which this defense rests will appear from the further statement of the case. The petition is in six counts, of which the first three, as indicated, are based on the three policies issued for the first year, and the second three counts on the three policies issued for the second year.

The gravamen of plaintiff's case is this: The premium to be paid for each policy was stipulated to be based on the total compensation paid by defendants on the whole number of their employes during the period covered by the policy; and as it could not be known when a policy was issued what would be the total compensation to employes during the ensuing year, an approximate estimate of the amount was made, and the premium paid in advance in proportion to such estimate. The policy provided that such estimate should be provisional only, and if it turned out that there was more compensation paid to employes than was estimated, there was to be a proportionate increase of premium paid by defendants; whereas, if it turned out there was less compensation paid, a proportionate part of the premium already paid should be returned to defendants. The averments in the first count of the petition are that the rate of premium under the policy was 67½ cents for each \$100 of wages paid during the year from June 19, 1902, to June 19, 1903; that the estimated pay roll for said period was \$15,000, and the total amount of premium paid \$101.25; that it turned out defendants actually paid for employes' wages during said term \$30,000 more than was estimated, and therefore de-

defendants became indebted to plaintiff for an additional premium covering said excess of the pay roll in the sum of \$202.50, for which judgment was prayed. In the second count it is stated that the rate of premium declared on in said count was \$4 for each \$100 of wages paid during the year for manufacturing and erecting galvanized, sheet, and wrought iron work in Louisiana, Kansas, Missouri, Minnesota, and all states east of the Mississippi river, and the entire premium paid was \$120; that the wages for said year for said work were estimated to be \$3,000, but during the period defendants actually paid to employes engaged in the work aforesaid in said territory \$20,000 in excess of the estimated amount, and therefore became indebted to plaintiff for an additional premium in the sum of \$800. The third count states that the policy declared on was issued in consideration of a premium of \$45, based on a pay roll of wages for the year estimated to amount to \$3,000, said premium being at the rate of \$1.50 for each \$100 of wages actually paid for erecting galvanized, sheet, and wrought iron work in the states aforesaid; that during the year covered defendants actually paid to their employes engaged in said work in said territory \$20,000 in excess of the estimate, and therefore became indebted to plaintiff for an additional premium in the sum of \$300. The other three counts contained similar allegations on three policies identical with the first three, except that they were for the year from June 19, 1903, to June 19, 1904. The amount claimed under the fourth count for additional premium is \$337.50, under the fifth count \$1,000, and under the sixth count \$375.

scribed in the schedule and against the expense of defending a suit for such damages." Another clause of the policies provided, among other things, as follows: "This policy does not cover loss \* \* \* for injuries to, or caused by any person, unless his wages are included in the estimated wages hereinafter set forth and he is on duty at the time of the accident in an occupation hereinafter described, at the place or places mentioned in the schedule; but drivers and drivers' helpers while on duty in the employ of the assured at places other than those mentioned in the schedule shall not be excluded from this insurance, provided they are enumerated and their estimated wages are stated in the schedule." The policies contained this provision in regard to the premium: "The premium is based on the compensation to employes to be expended by the assured during the period of this policy. If the compensation actually expended exceeds the sum stated in the schedule hereinafter given, the assured shall pay the additional premium earned; if less than the sum stated the company will return to the assured the unearned premium pro rata; but the company shall first retain not less than twenty-five dollars (\$25.00), it being understood and agreed that this sum shall be the minimum earned premium under this policy."

The schedule referred to in the paragraph from which we first quoted, in so far as it bears on the question at issue, is as follows:

"(4) The factories, shops or yards are located as stated below. The trade or kind of business carried on at each such location, and the number of employes and the pay roll at each such location, are as follows:

"(Enter in 'Trade or Kind of Business' column the precise manual classification. Enter each manual classification separately when pay roll is divided under manual rule. Give number of employes, pay roll, premium rate, and amount of premium opposite each classification. If drivers and drivers' helpers are to be covered, they must be enumerated and their pay roll must be stated.)"

Trade or Kind of Business	Estimated Average Number Employes	Estimated Pay-Roll for Policy Term	Premium Rate per \$100 of Wages	Amount of Premium	Location of Plant
Galvanized iron cornice and wrought iron work, including drivers		14500 500	67½	101 25	421 to 519 So. 6th St. 601 to 615 Poplar St. 508 So. 7th Street and connecting bridge. St. Louis, Mo.

We will now describe the three varieties of policies in suit. The two covered by the first and fourth counts were exactly alike, except, as stated, that one was for the year from June 19, 1902, to June 19, 1903, and the second for the ensuing year. Those policies purported to insure the defendants against loss from common-law or statutory liability for damages on account of bodily injuries accidentally suffered within the period of the respective policies by employes of the defendants, "while on duty within the factory, shop, and yards mentioned in the schedule hereinafter given, or upon the ways immediately adjacent thereto, provided for the use of said employes and the public, in and during the operation of the trade or business de-

"(5) The operations carried on are those usual to the trade or kind of business described herein.

"(12) The estimated pay roll covers the wages of all persons employed by the assured on the premises mentioned in statement No. 4 including executive officers, office employes, piece workers, and drivers and drivers' helpers except as follows: Executive officers and office men.

"(16) The total expenditure for wages for the last calendar year (ended December 31, 1—) was \$—.

"(17) The minimum premium for this policy is \$25.00."

The policies declared on in counts 2 and 5 of the petition are, in their general tenor, the same as the two just noticed, except that instead of insuring the defendants against liability for injuries to defendants' employes in their St. Louis shops, they insured against injury to employes in galvanized, sheet, and wrought iron work, and erecting work in the states aforesaid. The material divergences from the policies already noticed are as follows:

"(4) The place or places where work is to be carried on, the kind of work at each such place, the number of employes, and the estimated pay roll at each such place are as follows:

Kind of Work	Estimated Average Number of Employees	Estimated Pay-Roll for Policy Term	Premium Rate per \$100 of Wages	Amount of Premium	Places Where Work is to be Done
Galvanized iron & sheet iron workers, wrought iron work, erect- ing.	3,000	4.00	120.00	States of Louisiana, Arkansas, Kansas, Missouri, Iowa, Minnesota, and all states east of the Mississippi river.	

"(Enter in 'Kind of Work' column the precise manual classification. Enter each manual classification separately when pay roll is divided under manual rule. Give number of employes, pay roll, premium rate and amount of premium opposite each classification. If drivers and drivers' helpers are to be covered, they must be enumerated and their pay roll must be stated.)

"(10) The estimated pay roll covers the wages of all persons employed by the assured at the places mentioned in statement No. 4, including executive officers, office employes, drivers, and drivers' helpers, excepting as follows: Executive officers and office men."

The policies declared on in counts 3 and 6 of the petition are like the others, except that, instead of insuring defendants against loss for injuries to employes in defendants' shop or engaged in outside work in the states mentioned, it covered liability for injuries to persons not employed by the defendants suffered at or about the work of defendants in erecting galvanized sheet and wrought iron work in the states aforesaid. The provisions and the schedule of said policies, except as to nonemployes instead of employes being within the risk, are like those of the outside policies insuring employes, and from which we have

quoted such parts as are relevant to the questions involved in this litigation. It is to be noted that the premium rate on the outside employes' policies was \$4 on each \$100 of wages; whereas the rate on the nonemployes' policies was \$1.50. There was a slight variation in the provisions of the two kinds of policies in relation to accidents to or caused by drivers, but this discrepancy does not concern us. Every policy contained the same stipulation in regard to the premium being based on the compensation paid to employes during the year, and all the policies were practically the same, so far as the points before us are concerned, except in the particulars stated. It was provided that the insurance company could examine the books of the defendants, so far as they related to the compensation to employes, and that the company should be furnished by defendants with a written statement of the amount of compensation paid during the period. This action is based on the result of an examination of defendants' books by an auditor of the company in July, 1904. On August 7, 1903, the company wrote the defendants, requesting the latter to fill out an inclosed pay roll blank under the three policies covering the period from June 19, 1902, to June 19, 1903; that is to say, the three first issued. This request, though addressed to defendants, was sent by plaintiff to Hirschberg & Bro., an insurance agency in St. Louis, and was mailed to defendants by R. H. McMath, an employe of said Hirschberg & Bro. The insurance in question had originally been procured by the defendants through said McMath as their agent or broker. In compliance with the request, defendants filled the blank and sent it to the company. The blank form as filled purported to state the actual pay rolls under the three policies for the year covered. In estimating the pay roll the defendants excluded the wages of certain employes, which the plaintiff company claims should have been included. As estimated by defendants the pay roll showed an additional premium was due the company on the three policies of \$165.05, and a bill for that sum was made out by plaintiff and collected from the defendants. The whole matter was transacted through the agency of Hirschberg & Bro. On this payment of increased premiums, the defendants found their defense of accord and satisfaction. But the plaintiff contends that even the increased premium paid fell short of what was due, in consequence of the exclusion from the pay roll of the wages of certain employes that should have been included.

Plaintiff further contends there had been no controversy or dispute between the parties at the time the additional premium was paid, and hence the payment did not amount to a settlement and compromise of a bona fide controversy, and, as the payment was less than was due, that it was not a satisfaction of plaintiff's demand. As to defendants' counterclaim for the excessive pre-

miums paid on the three canceled policies running from June, 1904, to June, 1905, and canceled September, 1904, the company contends the policies earned more while they were in force than was paid. The question running through the entire controversy is regarding what wages ought to be included in the statement of compensation paid to employes during the year covered by each policy as a basis from which to compute the premium due on the policy—the wages of what classes of employes. The exact point at issue between the parties may be illustrated from the schedules in the policies declared on in the first and fourth counts. Those schedules contained, under the head of "Trade or Kind of Business," these words: "Galvanized iron cornice and wrought iron work, including drivers." It is the contention of the defendants that in computing the wages of employes on which the premium was to be based, no wages should be included except of employes who actually worked in defendants' St. Louis shops on Sixth, Seventh, and Poplar streets, and whose work was on galvanized iron cornices and wrought iron work and driving teams. But defendants had in their said shops many employes who neither worked directly on cornices nor wrought iron work, nor as drivers. These other employes were (a) workers on skylights for buildings, that is, those who made skylights to be put on buildings by defendants or sold to customers, (b) tinnerns who worked on tin in the shops, (c) carpenters who worked in wood, (d) shippers who packed and unpacked material received or to be shipped, (e) machinists who repaired and kept in order machinery in the shops and cut forms for galvanized and wrought iron work, (f) the engineer who operated the machinery, (g) office help, (h) the watchman who watched the premises and kept a fire under the boilers at night, (i) the butler, whose duties are not defined, but they were performed on the premises. It is the contention of plaintiff that the wages of all said employes, except those who worked in the office at clerical duties, or officials, should have been included in the roll of compensation paid to employes on which the premiums on the policies declared on in the first and fourth counts were estimated; whereas, as said above, it is the contention of defendants that the wages of no employes except such as worked directly on galvanized iron cornices and wrought iron work and of drivers, should be included. For the second year, from June 19, 1903, to June 19, 1904, besides the items already enumerated, certain work was done in the shops on a contract for the Union Electric Light & Power Company of St. Louis. All the work done by defendants under said contract, whether it was done in the shops, or on the building of the power company (i. e., whether it was "inside" or "outside" work, according to the phrases used by the parties), was carried as a separate account on defend-

ants' books. The two policies declared on in the second and fifth counts, that is to say, the policies which insured defendants from liability on account of injuries to their employes in the states enumerated, and those declared on in the third and sixth counts covering injuries to nonemployes, contained in the schedule under the head of "Kind of Work," the following language: "Galvanized iron and sheet iron workers, wrought iron work, erecting." It is the contention of defendants that in making up the total compensation to employes as a basis of premiums due on said policies, the wages of no employes should be included except such as did galvanized, sheet iron, or wrought iron work, or erecting work in the states named. These would come under what is called "outside work." Plaintiff, on the contrary, would include the wages of employes of every kind who did outside work within the territory named; also all those doing outside work on the Union Electric Light & Power Company's contract and certain work done during the two years from June, 1902, to June, 1904, on a job in Durango, Mexico. The cause was referred to a referee, who reported on the law and the facts, recommending a finding for plaintiff on each count of its petition, and also on defendants' counterclaim. The total finding recommended for plaintiff was \$1,815.44, with interest from March, 1905, or in all \$2,011.05. Exceptions were filed to the report of the referee, but it was approved by the court in all respects and judgment entered in accordance with it. From said judgment defendants appealed to this court.

The referee and court below found the total inside or shop wages, except for office help, paid during the first year the insurance was in force, was \$51,863.17, and that this sum included the wages paid for galvanized iron cornice and wrought iron work inside, and the work of carpenters, shippers, machinists, engineer, night watchman, and butler; that the total inside or shop wages paid during the second year for said kinds of work, and also inside work on the Union Electric Light & Power Company contract (which constituted a separate and special account on defendants' books) was \$53,436.15; that the total of shop wages for the period of the third year the insurance was in force (i. e., from June 19, 1904, to September 24th, when the policies were canceled), was \$12,431.30, including wages for inside work on the Electric Light & Power Company's job. The referee found the wages paid for outside work during the first year (except for work at Durango, Mexico, about which there is no contention on the appeal) amounted to \$11,869.75, distributed as follows: For tinnerns' work, outside, \$8,915.02, and for wrought iron work, outside, \$2,954.73. For the second year he found the outside wages to be \$20,660.63, distributed as follows: Tinnerns' work, outside, \$11,406.39, wrought iron work, outside, \$1,591.88, and Union Electric Light & Power

Company work, outside, \$7,662.36. For the portion of the third year while insurance was in force he found the wages for outside work to be \$3,744.62, distributed as follows: 'Tinnners' work, outside, \$2,722.52, wrought iron work, outside, \$634.20 and the Union Electric Light & Power Company work, outside, \$387.90. As throwing light on the interpretation of the policies by the parties, with respect to what employes were covered by them, evidence was introduced relating to certain accidents. Defendants reported an accident on December 22, 1902, to E. F. Barker, an employe in the shop. He was reported as having been injured while employed as a "brake and press hand." Employes of that kind worked in making galvanized iron cornices, but Barker's name appeared on defendants' pay roll as a tinner. An employe by the name of Schell was reported as injured March 26, 1903, while working at a job in East St. Louis, as a wrought iron worker; but he was on the pay roll under the head of "Union Electric Light & Power Company, outside," and was engaged on work done for that company. On March 14, 1904, an employe by the name of Billman was reported as having been injured while working as a laborer. He was on the pay roll as a shipper, and was engaged in that work when hurt. The same was true of another employe by the name of Arnold. The referee found these notices of injuries were sent to the company for the purpose of having it attend to any claims that might arise, and that in each case the parties treated the accident as coming within the risk assumed by plaintiff under its policies. To break the force of these instances as a construction of the contract by the parties, defendants contend the evidence shows the injured employes worked in different capacities, some of which fell within the exact words of the policy which designated the risk insured against. The referee also found that in the statement of compensation made out by defendants, on which plaintiff claimed more premium on the three policies for the first year, the defendants themselves included the wages paid for galvanized iron cornice and wrought iron work, both inside and outside, the night watchman, and part of wages paid tinnners, but excluded wages paid for skylight work, machinists, engineers, the butler, part of the wages to tinnners, carpenters, shippers, work at Durango, executive officers, and office help. The official who compiled the list explained the including of part of the wages paid tinnners by saying the expense of tin work was not then kept separate on defendants' book from the expense of galvanized iron cornice work.

1. We hold that the defense of accord and satisfaction was not established. No controversy had arisen between the parties as to the amount of premiums on policies for the first three years. What happened was simply this: The insurance company demanded of

the defendants a statement of the wages paid to employes during the year covered by the policies. This statement was furnished by defendants, and showed the full premium due according to the terms of the policies had not been paid. Plaintiff made out a bill for the excess of premiums, and defendants paid it without a word. Plaintiff claims there is a balance still owing, and that the statement of wages paid, which the defendants furnished, was deficient in that it excluded wages which ought to have been included. If this was true, the defendants have only paid part of a debt they owed plaintiff, which, of course, is no satisfaction of the entire debt. *Winter v. Cable Co.*, 73 Mo. App. 173; *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738. If there had been a controversy in good faith at the time the second payment on the premium was made, and if the payment had been tendered in full of plaintiff's demand, and plaintiff had accepted it, an accord and satisfaction would have arisen, because a payment under those circumstances would have been a compromise of a disputed claim, and therefore supported by a sufficient consideration. *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038.

2. We have already said that defendants contend the wages of the following employes should not enter into the basis on which the insurance premiums were to be computed: Skylight workers, tinnners, carpenters, shippers, machinists, engineer, night watchman, and the butler. As to all those employes, except the skylight workers, defendants' counsel argues that they plainly are not embraced within the classes of workmen designated in either of the schedules, one of which describes "galvanized iron cornice and wrought iron work, including drivers," and the other two, "galvanized and sheet iron workers, wrought iron work, erecting." It is said to be obvious that neither tinnners, carpenters, machinists, shippers, engineer, or butler, fall within those descriptions. Skylights were manufactured in the shops out of galvanized iron and glass; but the referee found that during the pendency of the policies they were made in the building and sold to customers, but not put into place on buildings, that is, no outside work was done on them. Defendants' counsel argues regarding the skylight workers that they were not within the schedules of the policies insuring against outside accidents, because they worked exclusively in the shops, and were not within the policies insuring against inside accidents, because, though they worked within the shops, those policies only covered galvanized iron cornices, wrought iron work and drivers, thereby excluding workers who made galvanized iron skylights. The general trend of the argument for defendants is that they were not protected against loss from injuries to any of the eight classes of employes we have named, to wit, skylight workers, tinnners, carpenters, machinists, shippers, engineer, watch-



man, and butler, and were not protected from injuries to nonemployees occurring in the course of the work done by any of the employees just enumerated; that the true construction to be put on the policies in seeking a basis for premiums is that no wages except such as were included within the indemnity to defendants should be taken account of in fixing the premiums on the two kinds of policies (inside and outside) issued to protect against loss in consequence of injuries to employees; and that no wages should be taken into account in ascertaining the premiums to be paid on policies insuring against loss in consequence of injuries to nonemployees, except the wages of such employees as were engaged in the very kinds of work described in the schedule of said policies, to wit, "galvanized and sheet iron workers, wrought iron work, erecting." It would not follow, necessarily, that the basis for the premiums on the policies insuring defendants against liability for injuries to employees should consist exclusively of the wages paid only to those employees who were within the indemnity, and, of course, such wages could not be the basis for premiums on policies indemnifying against loss for accident to nonemployees. As regards the basis of premiums on insurance of the first class (against loss in consequence of injuries to employees), peradventure the policies might yield the interpretation that the wages of all hands engaged in the respective kinds of work (inside and outside) should be embraced in the premium bases, even though all were not within the indemnity. Aside from this possibility, it is our opinion that, when fairly interpreted, one set of policies indemnified the defendants against loss in consequence of injuries to any and all employees in the shops, except officials and the clerical force, and that another set indemnified against loss in consequence of injuries to all employees engaged in outside work, with the same exceptions. Possibly the butler's wages ought to be excepted, but his duties are not disclosed. We think the premiums on the shop policies were meant to be based on the wages paid all the workmen in the shops, and the premiums on outside policies on all wages paid men employed outside, except, of course, the executive and clerical men. In interpreting the former (shop) policies, it is appropriate to consider what, in reason, was the purpose of defendants in taking out insurance. The rosters of wages paid the different employees, which the referee accepted, showed that the wages of other than cornice and wrought iron workers, to wit, tanners, skylight workers, shippers, machinists, and carpenters, constituted a large portion of the amount of wages paid for inside work. The wages of neither of those classes equaled the wages paid for galvanized iron cornice work, or wrought iron work, inside; but nevertheless the total of wages to other employees was large enough to show that numerous work-

men were employed in the shops besides those who followed the trades of galvanized iron cornice and wrought iron work. It is not shown that the employees who did those two kinds of work were more exposed to accidents than the other employees; and it seems unreasonable to suppose defendants would insure against loss on account of accidents to cornice and wrought iron workers and drivers, and assume the risk of accidents to other workmen. For several years there had been a steady decline in the quantity of cornice work done in the shops, and in the wages paid for that service. The defendants both swore they had ceased to do cornice work on St. Louis jobs in consequence of disputes with trades unions. Their testimony on this point seems unequivocal; but the referee merely found that they had ceased to erect cornices, though their cashier swore they did erect them whenever they were employed to do so. The evidence is ambiguous along this part of the case; but any version of it shows the cornice work of defendants had greatly diminished before the policies in suit were written, and it is hard to see why defendants should especially need insurance for cornice workers more than for tanners, shippers, etc. For years defendants had advertised their business on billboards and letter heads, in the city directory, and elsewhere, as "Galvanized Iron Cornice Work and Wrought Iron Work"; and while the former work was dwindling in comparison with ironwork, the advertisements remained unchanged. Notwithstanding these facts, which look like defendants needed insurance covering several classes of workmen, if the language of the policies means that no employees, except workers on cornices and in wrought iron, were included in the indemnity, the intention of the parties would be determined from their language, even though the result was unreasonable. But in our opinion the referee and the court below were right in holding that the words "galvanized iron cornice and wrought iron work" under the caption "Trade or Kind of Work" were used to describe, in a general way, the business carried on in the shops, and not to specify the classes of workers within the indemnity of the policy. The tasks of the other employees contributed and, indeed, were essential, to the manufacture of cornices and of wrought iron work. Shippers had to receive, pack, and unpack material, the engineer had to run the engine, machinists had to cut forms and dies and repair the machinery, and part of the work of tanners was in galvanized iron. Moreover the construction put on the contract by the defendants in preferring claims for injuries to other classes of employees, and by the plaintiff company in paying for those injuries, indicate that both parties understood the contract was an indemnity on account of loss in consequence of injuries to all the employees in the shops, and so the referee found. It is true explanatory

evidence was offered by defendants in an attempt to break the force of those circumstances; but the testimony, as a whole, well supported the conclusion of the referee, which we accept.

Having pointed out the conditions under which defendants took the insurance, and what risks they deemed covered by it, we will inquire more closely what the language of the policies imported concerning the risks insured against. The defendants were insured by the shop policies against liability for damages on account of accidental bodily injuries suffered by any employé while on duty in the shops mentioned in the schedule, "in and during the operation of the trade or business described in said schedule." Those words consist well with the view that by galvanized and wrought iron work was meant a description of the business and not of the classes of employés covered by the insurance. In another paragraph of the policy the insurance was said not to cover injuries to or caused by any person whose wages were not included in the estimated wages set forth in the schedule, or one not on duty at the time of the accident in an occupation therein described. There is nothing in that language which is necessarily repugnant to the view that all the employés were included in the insurance. As we said, all the men who worked in the shop were necessary to the prosecution of the work carried on therein in galvanized iron cornice and wrought iron, with the possible exception of the butler. Certain language of the schedule, taken in connection with the grouping of the wages therein, indicates that the words in question, "Galvanized iron cornices and wrought iron workers, including drivers," were not intended as a classification of the employés covered by the insurance, but as a description of the business done in the shops. A printed direction in the policy immediately above those words described the mode of filling out the blanks below, and said that each manual classification should be entered separately when the pay roll was divided under the manual rule; and that the number of employés, *premium rate, and amount of premium* should be given *opposite each classification*. The words "galvanized iron and wrought iron workers, including drivers," could not have been intended by the parties to specify the classes of employés; for the direction contained in the language we have italicized was not followed. The intention was to have the classes of workmen separately specified when the insurance took into account their different trades or tasks in fixing different rates of premium for the different tasks. Nothing of that kind could have been intended in the present instance; for it will be observed that instead of stating separately the number of cornice workers and the number of wrought iron workers, they were grouped together as 14,500 employés. If the intention had been to insure

only cornice workers and wrought iron workers, and to divide the employés into classes, according to their respective trades, the two trades should have been separated in the schedule. It is true the number of drivers is given, but as drivers were sometimes in the shops and exposed to risks there, and sometimes outside, both the body of the policy and the schedule had a special provision for them. It says drivers and their helpers while on duty at other places than the shops would not be included in the insurance given by the shop policies, unless they were enumerated in the schedule. This circumstance strengthens the conclusion that all other employés, except drivers and helpers, were included in the insurance. There is the further fact that the policies specially exempted certain employés from the risks insured against, which argues that all other employés in the shops who were engaged in the work described in the schedule fell within the risk. The exceptions are officials and office help, mechanics engaged in making additions to or repairing the shops, and children under 14 years of age, or employed contrary to law. But employés whose wages went into the pay roll on which the insurance was based were declared to be within the risk while making ordinary repairs. The terms of the policies are, on the whole, indefinite; but, taking into consideration all their provisions, the situation of the parties when the insurance was written, and such of their acts as throw light on their intention, we think the proper construction to give is the one above set forth.

That the acts of parties done pursuant to a contract between them, and showing their understanding of its terms, may be resorted to in order to ascertain the meaning of the contract if its provisions are obscure, is a rule of interpretation that has been applied to contracts like the one in hand to determine what employés were within the risk. *Fuller Bros. v. Fidelity Cas. Co.*, 94 Mo. App. 490, 68 S. W. 222. The breadth of the insurance, and how the conditions existing when the insurance is written aid in determining the extent of the risk covered, is illustrated by the case of *Travelers' Ins. Co. v. Lumber Co.*, 83 Fed. 977, 28 C. C. A. 127. The lumber company's policy insured it against loss on account of accidental injury to any person to whom the company would be liable for injury at common law or by statute; and in the application for the policy it was stated to be understood that said company might, in the conduct of its business, use a railroad owned by itself and "used only for its own lumbering purposes." The company took two commercial travelers as passengers on a train, and collected fares from them. These travelers were going to the company's store to sell goods. They were hurt while in transit, and the lumber company became liable for damages. It sued on the policy for indemnity, and the question

was whether or not the company was using its railroad for lumbering purposes only when it carried the two passengers for hire. The court said: "The company constructed and operated upon its own land, and primarily for use in its business, a railway, by the use of which logs were transported to the mills, and manufactured lumber from the mills to the Grand Trunk Railway, at a point  $3\frac{1}{2}$  miles distant. Over the same railroad needed supplies for operations and stock or merchandise for the shop above mentioned were transported, as there was occasion for so doing. The company's agents and workmen, and persons having business at the mills, or with the shop, including insurance agents and commercial runners and others, also were carried, from time to time, over said railroad, both ways. From some of the persons so carried over its railroad the company demanded and collected pay for the transportation. We are of the opinion that the transportation upon the company's private railroad of two commercial travelers, who had come to the premises of the lumber company to transact business with the company, and to make sales, and to take orders for supplying the shop of the lumber company, was a use of the railroad within the scope of the company's own lumbering purposes.' The fact that the travelers paid a sum of money for a special conveyance is immaterial, since the railroad was used by them and by the lumber company in direct connection with the business of the company." In *Hoven v. Assurance Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, the policy insured against liability for personal injury to any employé in the service of the West Superior Iron & Steel Company "while engaged in the employer's work in any of the occupations or at any of the places mentioned in the schedule." The schedule under the heading "Description of the Occupation of Employés" said "all operations connected with the business of iron and steel works" at "West Superior and elsewhere in Wisconsin in the service of the employer." The plaintiff was a regular employé in the steel works, and was injured while at work in the manufacturing department. The company was building an addition to its shops, and a crew, other than the one plaintiff was connected with, was constructing the addition. While said crew was raising a girder, it fell and hurt the plaintiff. The insurance company refused to indemnify, on the ground that the operation by which plaintiff was injured was not covered by the policy. Plaintiff sued the West Superior Company, and garnished the insurance company. The court said that if the labor of constructing the addition to the shops was not an operation connected with the business of iron and steel work, the insurance company was not liable; but held that the operation was so connected and, after reviewing a Massachusetts case, said: "The general language of the contract,

'All operations connected with the business of iron and steel works,' is not restricted by anything in the conditions indorsed on the policy, or any paper referred to or made a part of it. If the intention was to restrict such language to operations in any particular department, or to any particular branch of the business, or to any particular instrumentalities used in such business, it was easy to have said so in unmistakable language. The court should give the general language the assurer saw fit to use, under the circumstances, a broad and liberal construction in favor of the objects for which the policy was taken out, and by so doing the conclusion is easily reached that it covers the operation of constructing a building for the use of the assured in its business, as one of the operations connected with such business." The foregoing cases are only in point by analogy, and we have found none directly in point; hence we have had to resort to the general rules of interpretation.

3. The policies providing for outside insurance are even more ambiguous than those insuring against inside risks, because, instead of the use of the word "work" in the memorandum under the heading "Trade or Kind of Business," said memorandum reads, "Galvanized and sheet iron workers, wrought iron work, erecting," under the heading "Kind of Work." Those captions are less readily construed as descriptions of business than the former captions. But the bases for premiums on outside policies may be otherwise determined. By referring to the wages found by the referee to have been paid for outside work during the three years covered by the policies, it will be observed that for the first year those wages were composed exclusively of the two items, tinnerns' work, outside, and wrought iron work, outside. The first item, or the one for tinnerns' wages, outside, is \$8,915.02, and the second item for wages for wrought iron work, outside, is \$2,954.73, or a total of \$11,869.75. For the ensuing two years there was an additional item for wages for outside work done on the Union Electric Light & Power Company's job. Of those items there can be no question that the wages paid for wrought iron work should be included in the basis of premiums, for they fall within the express words of the schedule. Neither is there any dispute regarding the outside work on the Union Electric Company's job. What we have to determine then is whether wages for tinnerns' work done outside would fall within the terms of the policy. It was the testimony of both the defendants that part of the work of tinnerns outside was on galvanized iron; and defendants' cashier swore that during part of the period covered by the insurance the wages of tinnerns and galvanized iron workers were not kept separate on defendants' pay roll, but were carried under the one head. It was further testified that tinnerns working outside covered fireproof

doors and shutters with tin, or sheet iron, which consisted of iron sheets covered with tin. It was in testimony, too, that tinnerns put up galvanized iron gutters and down spouts and sheet metal gutters. They also put in heating and ventilating pipes, which were sometimes made of galvanized iron. It thus appears by defendants' own testimony that tinnerns working outside, as well as inside, worked in galvanized and sheet iron, and therefore came within the words of the schedule.

4. By the interpretation we have given, and which the referee gave, to the provisions of the policies relating to the bases on which premiums should be computed, defendants owed plaintiff more for premiums than they paid for the first two years of the insurance, and the policies in force for a part of the third year earned more premiums while in force than were collected; hence the finding on the counterclaim for excess of premiums paid on said last policies was adverse to defendants.

5. Though we think the learned referee and the court below were right in including tinnerns' wages for outside work as the basis on which the premiums for outside policies were to be computed, we have been unable to find any evidence in the record which justified the fixing of tinnerns' wages for work outside from June 19, 1902, to June 19, 1903, at \$8,915.02, or during the ensuing two years at the amounts found for each year. The referee adopted as true the pay rolls furnished by the defendants, and in said rolls the items of wages for tinnerns' work specify said wages as having been paid for both inside and outside tinnerns' work, whereas the referee and the court below classed the items as those of wages paid exclusively for outside work. In truth there is no testimony in the record by which a division can be made of the portions of those items paid for inside tinnerns' work and outside work. It appears that the workmen who did tinnerns' work outside in erecting or hanging doors and shutters also did inside work in covering the doors and shutters with tin. The importance to defendants of a just apportionment of these wages appears from the fact that the rate of premium for inside insurance was 67½ cents for each \$100 of wages paid, while for total outside insurance it was \$5.50 for each \$100 of wages paid. It is therefore evident an exorbitant amount might be awarded against defendants by including inside tinnerns' wages as outside. Counsel for plaintiff, in seeking to support this finding of the referee, point to that portion of the testimony of Mr. Piper, the auditor of plaintiff company, wherein he swore that in making out the pay roll on which plaintiff based its claim for further premiums he co-operated with Mr. Stevens, defendants' cashier, and that Stevens gave him information which enabled him to separate the wages of the inside from

the wages of the outside workers. But the referee did not adopt Mr. Piper's statement of wages, but, as said, adopted that of defendants, which varied widely from Piper's. Moreover the pay roll, as audited by Piper, did not separate the wages of tinnerns doing outside work from the wages of outside wrought iron workers. Repeated perusals of the record have not disclosed any evidence to support a finding that the total sum of wages stated in defendants' pay roll to have been paid to tinnerns for "inside and outside work" was paid for outside work alone. This matter will have to be investigated further, because it is very material to have it right, as otherwise defendants may be seriously wronged. Therefore the judgment will be reversed, and the cause remanded.

It is so ordered. All concur.

### SAEGER v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1907.)

#### APPEAL—REQUISITES—DOCKET FEE—FAILURE TO PAY—DISMISSAL.

Laws 1907, p. 121, § 1, provides that no appeal shall be allowed in any civil cause until the docket fee of \$10 in the appellate court shall have first been deposited with the clerk of the trial court. *Held*, that payment of such fee was jurisdictional, and that respondent was entitled to the dismissal of an appeal for appellant's failure to pay such fee on suggesting the default or raising the objection in any other manner before or after submission of the appeal.

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

Action by Dora Saeger against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Granted.

J. L. Minnis and Higbee & Mills, for appellant. N. A. Franklin, C. C. Fogle, Earl E. Fogle, and Claude C. Fogle, for respondent.

BROADBUSH, P. J. It has been suggested by the respondent that the appeal herein be dismissed because the appellant has failed to comply with the terms of section 1, amendatory of the Code of Civil Procedure, approved March 20, 1907. It is to be found on page 121, Laws Mo. 1907. The said section reads as follows: "Section 1. No appeal shall be allowed in any civil cause by any trial court to the Supreme Court, Kansas City Court of Appeals or St. Louis Court of Appeals until the docket fee of ten dollars in such appellate court shall have first been deposited with the clerk of the trial court."

The appellant contends that the matter is not brought before this court by proper abstract on part of respondent. It is sufficient to say that a question of jurisdiction like this can be raised by suggestion or any other manner before or after a submission of the case to the court. Prior to the adoption of this statute the 10-dollar fee, required to be paid by appellant under the law was re-

quired to be paid to the clerk of the appellate court after an appeal was granted; but the statute now is, as we have seen, that no appeal should be granted until the said fee is first deposited with the clerk of the trial court. The payment of this fee in the manner provided is as much a prerequisite to be complied with before an appeal can be granted as the making of an affidavit for an appeal. It was the intention of the Legislature to prevent delay in such cases. Heretofore a party might take his appeal and fail to perfect it for trial in the appellate court until such time as the respondent, in order to have the matter finally determined, would be compelled to pay the fee himself and to procure a transcript of the proceedings and deposit it with the appellate court. Much delay was occasioned by such practice.

The appellant having failed to comply with the statute, the appeal is dismissed. All concur.

#### WRAY v. WOODARD et al.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907.)

#### APPEAL — DISMISSAL — ABSTRACT — BRIEF — FILING.

Where appellants had from March, 1907, at which time the cause was continued by agreement to allow the parties time to prepare for hearing, in which to have prepared and served their abstract, statement, and brief within 20 days before the appeal was set for hearing on October 8, 1907, as required by Court of Appeals rule 15 (67 S. W. vi), but did not deliver their abstract, statement, and brief to the printer until September 17, 1907, and it was not printed in time for service within the prescribed time, the delay of the printer, and the fact that one of respondent's counsel was absent, and that one of appellant's counsel was sick for a part of the time, was not a sufficient excuse to prevent a dismissal of the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2618.]

Appeal from Circuit Court, Andrew County; A. D. Burnes, Judge.

Action by J. Arthur Wray against William F. Woodard and others. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Granted.

T. H. Cummings and Shinabargar & Blagg, for appellants. W. H. Crawford, for respondent.

**BROADDUS, P. J.** The appeal herein was taken on the 1st day of June, 1906. A transcript of the record was filed on the 15th of September, 1906, and the case was put upon the March docket for the year 1907, at which time by agreement of parties it was continued until the October term of that year in order to allow the parties time to prepare for a hearing. The appellants failed to serve respondent with a copy of their abstract, statement, and brief 20 days before the day on which the case was docketed for hearing, as

provided in rule 15 (67 S. W. vi). It was docketed for hearing on the 8th day of October.

It appears that appellants prepared their abstract, statement, and brief in the cause and delivered it to the printer on the 17th day of September, 1907, to be printed, which was 22 days before the day the case was set for hearing. The printer failed to get them printed in time for service on the respondent, 20 days before October 8th. In an affidavit, filed by appellants, the statement is made that the printing should have been completed by the 19th of October (September was intended), and that would have allowed sufficient time for service of copies on respondent. And as further excuse for delay appellants state that T. H. Cummings, one of respondent's counsel, was absent, but no time is stated when, and that at some time or other, without saying when, one of appellants' counsel was sick.

The appellants had ample time from March, at which time the cause was continued, to have prepared their abstract, statement, and brief, and had them printed and served upon respondent 20 days before it was set for hearing. Instead of doing so, they only allowed themselves 2 days of time to have the printing done and service upon the respondent. This was gross neglect. The excuse offered for failure to comply with the rule is wholly without merit.

The motion to affirm is sustained. All concur.

#### HARTLEY v. CALBREATH.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. On Rehearing, Jan. 6, 1908.)

#### 1. WITNESSES — COMPETENCY — PHYSICIANS — ACTION FOR MALPRACTICE.

A patient, suing his physician for malpractice, waives Rev. St. 1899, § 4659 [Ann. St. 1906, p. 2539], prohibiting a physician from testifying to information acquired from a patient while attending him in a professional capacity, only so far as the action discloses the ailment and the treatment, and defendant and consulting physicians are competent to testify to information acquired while treating the patient, but a physician examining the patient, after the termination of defendant's treatment, with a view of further treatment, cannot testify against the patient's objection, the object of the statute being the relief of the patient, making the way clear for him to permit a complete examination and give full communication of everything connected with his ailment necessary to enable a physician to prescribe for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 769, 782.]

#### 2. TRIAL — INSTRUCTION — ASSUMPTION OF FACTS.

Where, in an action against a physician for malpractice, there was evidence to support the case, instructions assuming that defendant employed recognized and ordinary treatment were properly refused, because they assumed the existence of a controverted fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-431.]

### 3. SAME—MISLEADING INSTRUCTIONS.

An instruction calculated to confuse and mislead is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 569-576.]

#### On Rehearing.

### 4. COURTS—APPELLATE JURISDICTION—CERTIFYING CASE TO SUPREME COURT—CONFLICTING DECISIONS.

The Court of Appeals will not certify a cause to the Supreme Court on the ground that its opinion is in conflict with a Supreme Court decision, where, during the pendency of the motion, a decision adopting principles of law in conformity with the decision of the Court of Appeals is rendered by the Supreme Court.

Appeal from Circuit Court, Mercer County; Geo. W. Wanamaker, Judge.

Action by William Hartley against Claude B. Calbreath. From a judgment for plaintiff, defendant appeals. Affirmed.

Botsford, Deatherage & Young, Marvin Read, and Ira B. Hyde & Son, for appellant. B. F. Kesterson, E. M. Harber, and Orton & Orton, for respondent.

ELLISON, J. The defendant is a physician, and in his professional capacity attended plaintiff, whose shoulder was dislocated. This action is for damages for alleged malpractice. The trial resulted in plaintiff's favor.

It appears that plaintiff was thrown from a horse and dislocated his shoulder. Defendant was called and engaged to attend him. The evidence tended to show that he reduced or "set" the shoulder, and pronounced it "all right"; that he put plaintiff's arm in a bandage or "sling" suspended from around his neck, but he did not secure the arm to the body so as to prevent the upper portion from being free to move. He returned next day, when plaintiff complained of severe pain. He then took off the bandage, or, as otherwise expressed, took it out of the sling and left it free. Plaintiff continued to suffer great pain, and, his shoulder not appearing to be doing well, he was at defendant's office, and there, in presence of another physician, the shoulder was examined, and not being thought to be in proper place, another effort was made. Afterwards yet another effort was made by the use of "pulleys." But after all, according to the evidence in plaintiff's behalf, the shoulder was not properly reduced or "put in place," whereby he has lost much of the use of that arm and has suffered great pain. Plaintiff's theory is that defendant either failed in the first place to reduce the dislocation, or, if he did reduce it, that he left it so improperly bandaged and cared for as that his arm had too much freedom of movement, and the shoulder would not remain in place, and that he was negligent and unskillful in not sooner discovering that the shoulder was not properly reduced, and using immediate means to put it in proper condition.

The defendant offered Dr. Powell as a wit-

ness. On plaintiff's objection he was not permitted to testify, on the ground that whatever he knew about the case was privileged under the statute (section 4659, Rev. St. 1890 [Ann. St. 1906, p. 2539]). It appears that several months after defendant's treatment of plaintiff the latter called on the witness as a physician and was examined by him. There can be no doubt of the correctness of the court's ruling. It is true that in cases of this nature, the physician being a party, the necessity of the matter makes him competent to testify in his own behalf concerning communications between himself and his patient, notwithstanding the statute. *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752. Otherwise the physician might be without means of protecting himself. And so a consulting physician has been held competent to testify concerning those things which transpired at the consultation. This was put upon the ground that the plaintiff himself had removed the privilege of secrecy. *Lane v. Bolcourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442. Some of the language used in the opinion in that case is perhaps broader than would be justified by the views entertained in this state; but, restricted as we have stated, we believe it a proper statement of the law as held by our courts. In this case the defendant and consulting physician were permitted to testify without objection. But the offer of Dr. Powell in defendant's behalf brings up altogether different considerations. He was in no way connected with defendant's attendance upon the plaintiff. He examined plaintiff in his professional capacity, with a view to seeing what could be done for him. Defendant does not answer this position by saying that the secrecy of the whole matter had been removed by the plaintiff bringing the present action and himself testifying, and by his having made it necessary for the defendant to testify, and therefore the privilege did not longer exist; for the secrecy and privilege of the communications to Powell had not been removed. It has been directly held by the Supreme Court that a waiver as to one physician is not a waiver as to others who may have attended upon the person making the waiver. The statute, says the court, "does not exclude the evidence by reason of its inherent character, but only when given by the persons within its purview." *Mellor v. Railway Company*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Barker v. Cunard Ship Co.*, 91 Hun, 493, 36 N. Y. Supp. 256, affirmed in 157 N. Y. 693, 51 N. E. 1089. We held in *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107, that the statute in privileging all necessary information and communications received by the physician from the patient did not apply to a physician who was called upon, not with a view of giving the patient attention and relief, but for the purpose of qualifying himself as a witness. But in this case the trial court and counsel first ascertained from Powell

that nothing was said between him and plaintiff about a suit, or his being a witness, but that he was consulted with a view to "relieve him [plaintiff] of his distress."

Defendant, in support of his view that the bringing of the suit by plaintiff waived all privilege conferred by the statute, cites the following from 4 Wigmore on Evidence, § 2389 (the italics are the author's): "In the first place, the *bringing of an action* in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more of proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclose does not exist. If the privilege means anything at all in its origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: 'One month ago I was by the defendant's negligence severely injured in the spine, and am consequently unable to walk. I tender witnesses A., B., and C., who will openly prove the severe nature of my injury. But, stay, witness D., a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim. I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the court will forbid his testimony.'" It will be observed that the author seems to consider an exposure of the mere ailment by bringing the action is sufficient to entirely remove the bar of secrecy. But we regard his view as being much too restricted. The object of the statute is not fully met in all cases by merely keeping secret the fact that a patient had a certain ailment. If the matter of public knowledge of the existence of the particular ailment is to be considered as measuring the extent of the privilege and the full breadth of the statute, there would be much less necessity for the law than has been supposed; since the mere cause of a physician's attendance on his patient is, perhaps, in the great majority of instances, known to the public, or, at least, to as many of the public as would hear it in a courtroom. The primary object of the statute is the relief of the patient, and to that end it has made the way clear for him to permit a complete examination and to give full and free communication of everything connected with his ailment which may be necessary to enable the physician to prescribe for him. *Arnold v. Maryville*, supra. And those things are as securely included in the purview of the statute as the ailment itself. And an exposure of the ailment does not necessarily release secrecy as to them. That the author's view, as quoted above, is too restricted, may

be illustrated. Suppose a physician, on being called to attend a patient for an ailment about which itself there is no desire for secrecy, finds it necessary to examine his body and so informs him. He has upon his body a scar or other defect, wholly disconnected from the ailment on account of which the physician was called, which would be material evidence against him in the trial of some cause, civil or criminal, to which he was a party. If the physician is at liberty, or may be compelled, to testify to what he observed, or what was told him in relation thereto, the patient might refuse to be examined, and thus deprive the physician of necessary information, and thereby, possibly, lose his life. Again, it is well known that for the same ailment different persons, on account of being or not being, or of having been or not having been, afflicted with other complaints, must be treated in different ways, or with different medicines. In these instances, and numberless others, the statute gives the patient free conduct and free tongue with his physician to the end that the latter may have full information for his relief and restoration. So it seems to be perfectly manifest that it is not alone the mere fact of a particular ailment which the statute intends that the physician shall not give in evidence, but its purpose is to protect all else which may have been communicated to him to enable him to intelligently prescribe.

But we are told by defendant that the Supreme Court in the case of *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752, has decided that the bringing of the action was a waiver of the privilege of the statute, thereby, in effect, overruling *Mellor v. Railway Company*, supra. We do not think so. There is a remark of the court at page 121 of 154 Mo., at page 260 of 55 S. W. (77 Am. St. Rep. 752), which gives some color to defendant's claim. But the point decided in the case was that a physician, when sued for malpractice, from very necessity, should not be held to be included within the terms of the statute. Otherwise, as before stated, he would be at the mercy of his patient. It was further held that in actions for damages brought by the husband for an abortion committed on his wife, public policy justified the admission of the wife's testimony as to matters connected with the attendance and acts of the physician. It being thought that knowledge that the statute did not apply to the wife in such case would operate to discourage such unnatural practice. After thus disposing of the case, the court made the remark upon which defendant relies, as follows, that if an action is brought by a woman against her physician "for physical injury occasioned by his want of knowledge, or negligence, in her treatment, then the privilege of secrecy on the part of the defendant would thereby be waived as to all matters connected with the case and his treatment thereof." But that was said of an action, the very na-

ture of which disclosed all that was desired to be kept secret, viz., an abortion on a woman. That case is not authority for the claim that the mere bringing of an action of itself destroys the privilege of the statute to anything more than those things which the action itself makes necessary to disclose. That no more than this was said or decided in that case is shown by the subsequent case of *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89, the opinion written by the same distinguished judge. In that case this general subject is elaborately discussed, and yet it is nowhere intimated that the mere bringing of an action for injuries received from a fall on a sidewalk would waive the privileges of the statute as to testimony of the physician who treated the injuries. There are some diseases, or other ailments, which are considered to be a disgrace to those afflicted; and others, while not disgraceful, would be considered humiliating; and still others that would annoy a supersensitive person. If bringing the action exposes the secret to the public, the privilege of the statute is waived as to the existence of the ailment and its treatment, and communications necessarily connected with it, and this is all that is decided in *Cramer v. Hurt*, supra. The plaintiff by bringing the action waives the statute no further than the action discloses, viz., the ailment and its treatment by the physician or physicians therein named. It does not waive the privileges as to other physicians. If the privilege is waived as to other physicians called, as was the witness under discussion, disconnectedly from the defendant, it must be by some act of the plaintiff in himself disclosing what took place with such physician by calling it out in evidence. We have already stated that in this case the defendant and the consulting physician with him were permitted to testify. But when it came to defendant's offer of Dr. Powell, who afterwards examined plaintiff, there was no waiver as to him, and hence we approve the trial court's ruling excluding him.

We have examined the instructions given in the case, as well as those refused for defendant. We regard them as applying correct principles of law to the facts which the evidence tended to prove. The demurrer to the evidence was properly rejected, since there was ample evidence, if believed by the jury, to support the case stated. The elaborate argument on that instruction in defendant's behalf, oral and written, is faulty by reason of its ignoring what was shown in plaintiff's behalf and proper inferences to be drawn therefrom. All of the instructions asked for defendant were given, save three. They liberally covered every proper theory of defense. No. 7 was well refused. It is so worded that it practically assumes that defendant employed ordinary treatment for the shoulder. No. 8 was faulty in that, in effect, it excuses the defendant for not using proper bandage, if the shoulder was not reduced, even though

it may have been defendant's negligence which prevented its being reduced. As worded, it was well calculated to confuse and mislead. No. 9 likewise had the fault of assuming matter in defendant's behalf. As written, it assumed that defendant gave plaintiff recognized and ordinary treatment. It related to one theory of defense that the shoulder could not be reduced by the ordinary, recognized treatment, and that defendant then asked to make an incision which the plaintiff refused to permit. A full and proper instruction on this defense (No. 12) was given at defendant's request. We are satisfied that the instructions for plaintiff were so guarded, and those for defendant so full and complete, that no possible phase of the proper defense was kept from the jury. The result is an affirmation of the judgment. All concur.

#### On Rehearing.

We are asked to grant a rehearing in this case or, in case that is refused, that we certify the cause to the Supreme Court on the ground that the foregoing opinion is in conflict with the case of *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752, discussed by us. During the pendency of this motion the case of *Smart v. Kansas City* has been decided by the Supreme Court, in an opinion by Judge Woodson, reported in 105 S. W. 709, published November 6, 1907, in which it is shown that *Cramer v. Hurt* does not bear the construction for which defendant contends and from which it will be seen that the Supreme Court entertain views in regard to the citation from 4 Wigmore's Ev. § 2389, substantially like those to which we have given expression. Thus finding ourselves supported by the Supreme Court in regard to the principal contention of the defendant, we must overrule the motion for rehearing.

#### WEALAKA MERCANTILE & MFG. CO. v. LUMBERMEN'S MUT. INS. CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

##### 1. PROCESS—SUBSTITUTED SERVICE—RETURN.

The return to a summons "executed \* \* \* by delivering a copy \* \* \* to W., the adjuster of defendant, under the provisions of Rev. St. 1899, § 7992 [Ann. St. 1906, p. 3801]," is insufficient; it being necessary that it show that the adjuster was one acting in such capacity within the state, the statute authorizing the service on such an adjuster only of an insurance company not incorporated under the laws of the state, and not authorized by the insurance commissioner to do business in the state.

##### 2. SAME—AMENDMENT.

The return to a summons cannot be amended after submission of the case on appeal, and without leave granted or notice to the opposite party.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Wealaka Mercantile & Manu-



facturing Company against the Lumbermen's Mutual Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Barclay & Fauntleroy, for appellant. R. E. & E. R. Rombauer, for respondent.

BLAND, P. J. On July 16, 1906, plaintiff filed its petition against the defendant in the circuit court of the city of St. Louis on a policy of fire insurance issued by the defendant to plaintiff, in which petition it is alleged that plaintiff, Wealaka Mercantile & Manufacturing Company, is a corporation created by the laws of Missouri, and a resident of the city of St. Louis, where its principal office is located. The petition then avers that "the defendant is a foreign insurance company incorporated under the laws of the state of Ohio, and doing business in this state without having complied with the requirements of the laws of the state of Missouri, and particularly the provisions of sections 7963 and 7991 of the Revised Statutes of 1899 [Ann. St. 1906, pp. 3786, 3799] of this state." The petition alleges a loss to plaintiff by fire March 8, 1900, in Reynolds county, Mo., whereby a sawmill and a lot of shafting, mill implements, and other personal property were "wholly destroyed," wherefore plaintiff asked for judgment for \$1,000 and interest, from the 9th day of June, 1906, at the rate of 6 per cent., and 10 per cent. damages for vexatious delay. The sheriff made the following return to the writ of summons (directed to the sheriff of the city of St. Louis in the usual form): "Executed this writ in the city of St. Louis, Mo., this sixteenth day of July, 1906, by delivering a copy of the writ and petition as furnished by the clerk to C. L. Whittemore, the adjuster of the said defendant, under the provisions of section 7992 of the Revised Statutes of Missouri. [Signed] Patrick H. Clarke, Sheriff, by Jno. H. Morische, Deputy. Fee, \$1.00." In due time, on the return day thereof, October 1, 1906, the defendant insurance company appeared specially, and filed its motion to quash as follows: "The defendant, appearing specially and only for the purposes of this motion and for no other purpose, moves the court to quash and set aside the service of the writ on said defendant, and the return thereof, for the reason that it shows upon its face that it is null and void, and not in compliance with the statutes of the state of Missouri, relative thereto, and for the reason that this court has no jurisdiction over the person of said defendant." The motion to quash the return was overruled, and defendant declined to plead or make any further appearance. The court, after hearing plaintiff's evidence, rendered judgment in its favor for \$1,126.33, from which judgment defendant appealed.

The contention is that the return of the sheriff was insufficient to give the trial court jurisdiction of the person of defendant; and

the motion to quash should have been sustained. It is alleged in the petition that defendant is a foreign insurance company, incorporated under the laws of the state of Ohio and doing business in this state without complying with the provisions of sections 7963, 7991, Rev. St. 1899 [Ann. St. 1906, pp. 3786, 3799]. Section 7991 provides, in substance, that when a foreign insurance company has complied with the laws of this state and is authorized to do business in this state, and has appointed an agent to accept service in this state, that service upon such agent, or upon the superintendent, shall be valid and binding and be deemed personal service. Section 7992, Rev. St. 1899 [Ann. St. 1906, p. 3801], provides for additional service. It reads as follows: "Service of summons in any action against an insurance company, not incorporated under and by virtue of the laws of this state, and not authorized to do business in this state by the superintendent of insurance, shall, in addition to the mode prescribed in section 7991, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either." The return recites that service was made under the provisions of this section. It seems the sheriff undertook, by referring to the statute, to make its provisions a part of his return. As early as the case of *Charless v. Marney*, 1 Mo. 538, it was held that it was the duty of the officer to state how he had served the process, and that a return indorsed on a summons, "The within lawfully executed," was a bad return, that the officer had undertaken to decide the legality of his own return. In *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278, it was ruled: "Where the statute provides for constructive service of process, the terms and conditions prescribed for such service must be strictly complied with. Several defendants cannot be constructively served with a writ by leaving only one copy for all at the usual place of abode." In *King v. Davis* (C. C.) 137 Fed., loc. cit. 206, the court said: "Substituted service of process is a departure from the common law, and the return must affirmatively show a compliance with all the essential requirements of the statutes. \* \* \* Indeed, it has been said that everything is to be inferred against such return which the departure from the statute will warrant. \* \* \* But, at the least, such return is to be strictly construed, and nothing may be added by intendment,"—citing 22 Am. & Eng. Ency. (1st Ed.) 152, and a number of federal and state decisions. That a return cannot be aided by reference

to the statute under which the service is made is manifest; and, unless the return strictly complies with the requirements of the statute, it is insufficient. The section (7902, *supra*) provides that the service shall be legal and binding and have the effect as personal service where made "by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either." Where must the person or persons soliciting insurance, collecting premiums, or adjusting losses be acting in such capacities for the corporation to authorize service upon them? Evidently in this state. The statute can have no other meaning, and the return is defective in that it fails to state that C. L. Whittemore adjusted or settled losses for defendant in this state. See on this point *Painter v. Railroad* (Mo. App.) 104 S. W. 1139.

Since the appeal was perfected, and after the cause was submitted, plaintiff filed with the clerk of this court affidavits and exhibits showing that C. L. Whittemore is the adjuster of the defendant corporation in this state, and was specially authorized to adjust the loss for which this suit was brought, and undertook to adjust the same. No notice of the filing of these papers was served on defendant, nor was leave asked of this court for permission to amend the return. In *Little Rock Trust Co. v. Railway*, 195 Mo., loc. cit. 689, 93 S. W. 950, the court said: "The right to amend a return rests in the sound discretion of the court, and the party to be affected by the amendment has a right to a day in court before the court has a right to permit the amendment." See, also, *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576. Leave to amend the return should have been applied for before the case was submitted, and notice served on the opposite party, so that the court might have fixed a day for hearing the application, and granted or refused the offer to amend before the case was submitted. It is too late now to take this matter up in this court.

The judgment is reversed and the cause remanded, with leave to plaintiff to apply to the circuit court for leave to amend the return, if so advised. All concur.

#### WEALAKA MERCANTILE & MFG. CO. v. LUMBER MUT. FIRE INS. CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Wealaka Mercantile & Manu-

facturing Company against the Lumber Mutual Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Barclay & Fauntleroy, for appellant. R. E. & E. R. Rombauer, for respondent.

BLAND, P. J. This case is on all fours with case No. 11,064, 106 S. W. 573, and was submitted with said case on a stipulation that the cases might be considered together, wherefore the judgment is reversed, and the cause remanded, with leave to plaintiff to apply to the circuit court for leave to the sheriff to amend his return. All concur.

#### FRENCH v. PETTINGILL.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

##### 1. LANDLORD AND TENANT—EVICTION—CONSTRUCTIVE EVICTION.

A constructive eviction from a leasehold cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises, unless the landlord is responsible for what the tenant does, and the landlord should not be held responsible to the extent of permitting a tenant to vacate during his term when no complaint was made by the tenant, and it did not appear that the landlord authorized or consented to the wrongful acts of the other tenant, or that the lease to the latter was for a purpose which was necessarily immoral, illegal, or a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, §§ 705, 706.]

##### 2. SAME.

Defendant rented apartments in a building knowing that the lower portion thereof was occupied by a café in which meals and liquors were served. Subsequently drunkenness and disorderly conduct was sometimes observed in the café among members of a club who would remain until late hours of the night, and were more or less boisterous. Defendant was not personally annoyed thereby, except as they tended to affect the reputation of the building or interfere with her vocation as music teacher. She continued to occupy her apartments long after this disturbance commenced, made no complaint about the disorderly conduct, or any demand of plaintiff, her landlord, that it be restrained, and two months before she vacated her apartments ordered them to be papered, which was done. It did not appear that plaintiff was in any way responsible for the disorderly conduct in the café. *Held*, that there was no constructive eviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, §§ 705, 706.]

Appeal from St. Louis Circuit Court; Matt. G. Reynolds and Wm. Kinsey, Judges.

Action by Jesse French against Alice Pettingill. Judgment for defendant, and plaintiff appeals. Reversed.

Stern & Haberman, for appellant. Hickman P. Rodgers, for respondent.

GOODE, J. This action was instituted to recover rent alleged to be due under a written lease. So far as the record advises us, the terms of the contract were that defendant leased the premises for two years from October 1, 1904, at a monthly rental of \$55,

payable in advance. The lessor was the Majorie Realty Company and the lessee was the defendant. Plaintiff, French, became the owner of the premises, and the landlord, March 15, 1905. The leasehold was a suite of rooms in an apartment house in the city of St. Louis on the northwest corner of Olive street and Newstead avenue. The building is known as the "Alexandria," and is a large structure with a frontage of more than a hundred feet on Olive street and running back northwardly 150 feet along the west line of Newstead. It is three stories high, and was constructed for occupancy by many tenants. The first or ground floor on Olive street was fitted up for storerooms, and there was a bowling alley in the basement near the Olive street front and extending across the building. The bowling alley was without windows or openings, except a door reached by a stairway which descended from the west storeroom on Olive and another door near Newstead avenue, connected with the portion of the basement, which was used as a café. The café rooms in the basement were entered only from Newstead avenue and about 100 feet north of Olive. The café was therefore far toward the rear of the basement, and about 175 feet distant from the entrance to defendant's third-story apartment. The noise of bowling in the basement annoyed defendant and disturbed her slumber to some extent; but she testified that she was disturbed too by the street cars along Olive street, and could not say her loss of sleep was due exclusively to the bowling. Meals and liquors of various kinds were served in the café, and from the first there was a bar in it. A club known as the "Alexandria Club" had its quarters in the building, and began to meet there about January 1, 1905. The relation of this club to the café is not clearly set out by the testimony, but the implications are that the club and café occupied the same rooms, and that in the summer of 1905 the club finally absorbed the café; that is to say, during and after said season no one who was not a member of the club would be served in the café. Defendant testified that she took meals in the café herself on two or three occasions; that the guests appeared to be perfectly respectable, and she saw nothing improper. But the evidence tends to show that in the summer of 1905 and thereafter drunkenness and disorderly conduct were sometimes observed among the members of the club in the café apartments. Intoxicated men, women, and youths were seen to leave the building, and heard to use indecorous language. They would remain until late hours after night, and were more or less boisterous. This happened, too, on Sunday afternoons. Sometimes singing, laughing, hilarious talking, and even fighting were heard inside the clubrooms. There is no proof of lewd conduct about the premises, and it is not asserted that any conduct of that sort took place. On October 15, 1905, defendant ceased

to occupy her apartments in the Alexandria building for lodging purposes, but continued to give music lessons in them. It should be stated that she was a maiden lady who gave instruction in music. On January 15, 1906, she vacated her apartments entirely, having rented others in a building known as the "Musical Arts Building," a block or two away, which was specially arranged for the use of instructors in music. Defendant paid her rent to the date she vacated, but her apartments remained unoccupied thereafter until April 1st, when they were let for \$40 a month, credit given defendant for the rent of the half month ending April 15th, and the present action begun to recover the balance of the rent from January 15th.

The defense is such disturbance of defendant's use and quiet enjoyment of her apartments as amounted to a constructive eviction. To support this supposed eviction, defendant relies on the noise of the bowling in the basement and on the manner in which the café and club were conducted, which, she says, brought the building into bad repute, affected her own reputation, and had a tendency to prevent her pupils, who were young girls, from coming to her studio. The testimony of the defendant proved the bowling noises were not the cause of her abandoning the leasehold, and the court refused to submit the evidence regarding this annoyance to the jury as tending to establish a defense. The jury were instructed to find a verdict for plaintiff for the rent demanded, unless they found that plaintiff had rented part of the Alexandria Building for use as a café or "club," and that said café and club were conducted in such a manner that boisterous and disorderly characters congregated there at night and loud and profane talking occurred about the club, and that these things disturbed the peace and quiet enjoyment of the defendant, or substantially injured the reputation of the building, and that plaintiff, or his agents, had knowledge of such conditions, and because of them defendant surrendered possession of her apartments on January 15, 1906. In a previous case we declined to attempt to frame a rule of general application by which to determine what amounts to the constructive eviction of a tenant. *Delmar Inv. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. 823. The decisions dealing with the subject are cautious about stating broadly when an eviction may occur in consequence of acts of a landlord not amounting to actual expulsion of the tenant from the leasehold premises, but we do not hesitate to say that nothing resembling a constructive eviction was established by the evidence in the present case. Disorderly conduct and language in the café or clubrooms, remote from defendant's apartment, were proved. She was not personally annoyed by these incidents, except in so far as they tended to affect the reputation of the building, compromise her, or interfere with her

vocation of music teacher. But, as already stated, the building was prepared for the occupancy of various tenants and for a café and the sale of liquors therein. These facts the defendant knew when she leased her apartments; or, if she did not know them then, she did soon afterwards and submitted to them. It is true the testimony tends to prove there was no noticeably bad conduct in the café until during the summer of 1905 and subsequently. But plaintiff continued to occupy her apartment long after that time, and until the middle of January, 1906. She made no complaint about the disorderly conduct in the club or café, or any demand of the plaintiff that it be restrained. Two months before she vacated she ordered her apartments to be papered, and this was done at her request. This act indicated no dissatisfaction with what was going on in the building or intention to quit her apartments. Moreover, it was not shown that the plaintiff even rented the basement, or a portion of it, for café purposes. The record suggests that the basement was occupied for those purposes before he became the owner of the building. It is obvious that a café or club may be conducted without drunkenness, bad language, boisterousness, or other disorderly behavior. Hence the giving of a lease for a club or café would not imply that the landlord intended to authorize the use of the premises for disgraceful or immoral purposes. That plaintiff was in any way responsible for disorder on the premises there was no proof. A constructive eviction from a leasehold cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises, unless the landlord is responsible for what the tenant does. And the landlord ought not to be held responsible to the extent of permitting a tenant to vacate during his term, when no complaint was made by the vacating tenant, and it does not appear that the landlord authorized or consented to the wrongful acts of the other tenant, or that the lease to the latter was for a purpose which was necessarily immoral, illegal, or a nuisance. *Gilhooley v. Washington*, 4 N. Y. 217; *Cogle v. Densmore*, 57 Ill. App. 591; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Seaboard Realty Co. v. Fuller*, 38 Misc. Rep. 106, 67 N. Y. Supp. 146; 11 Amer. & Eng. Ency. Law (2d Ed.) 471. In view of the undisputed evidence that defendant remained in the premises without complaint for months, while the alleged disorder in the club was going on, and the signal failure to connect the plaintiff in any responsible way with what happened there, it is manifest that there is no defense to plaintiff's action for rent.

Were it necessary to the decision of the cause, we would be compelled to discuss the principles of well-considered opinions cited below, in which conduct of far more annoying and immoral character than that of which the defendant complains was held to constitute

no constructive eviction, as the acts complained of were committed by other tenants or strangers, and not by the landlord. *Cogle v. Densmore and Gilhooley v. Washington*, supra; *Kistler v. Wilson*, 77 Ill. App. 149; *Bristol Hotel Co. v. Pegram*, 49 Misc. Rep. 535, 98 N. Y. Supp. 512; *Gray v. Gaff*, 8 Mo. App. 320.

The judgment is reversed, and the cause remanded. All concur.

## RANEY v. RANEY.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

### 1. DIVORCE — CRUEL AND INHUMAN TREATMENT—RIGHT TO DIVORCE.

Under Rev. St. 1899, § 2921 [Ann. St. 1906, p. 1678], authorizing a divorce for cruel and inhuman treatment, plaintiff's right to a decree was a matter of legal right, and not of discretion, where her case was proven by unimpeached and uncontradicted testimony.

### 2. SAME—DISTRIBUTION OF PROPERTY.

Where a wife, at her husband's solicitation, loaned certain of her separate funds to his friends, and took securities therefor payable to both husband and wife jointly, the wife on securing a divorce from her husband was entitled to a decree vesting in her the exclusive title to such securities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 706.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Virginia C. Raney against George W. Raney. From a judgment dismissing the bill, plaintiff appeals. Reversed and remanded.

JOSEPH S. MCINTYRE, for appellant.

BLAND, P. J. The action is for divorce. Omitting caption, the petition is as follows: "Now comes the plaintiff, and for her cause of action states that she was lawfully married to the defendant, George W. Raney, at the city of St. Louis, and in the state of Missouri, on the 17th day of October, 1905, and continued to live with defendant as his lawful wife from and after the date of said marriage until the 6th day of February, 1907, when plaintiff and defendant separated. Plaintiff further states that after said separation she filed suit for divorce in this court, but that shortly thereafter, at the earnest solicitation of defendant, and relying on defendant's promise to treat plaintiff kindly and to conduct himself properly as her husband, she dismissed said suit, and returned to defendant and lived with him as his wife until the — day of May, 1907, when, on account of renewed indignities and mistreatment of her by defendant, she again separated from the defendant, and at no time since said separation on said — day of May, 1907, has she lived with defendant as his wife. Plaintiff further states that at all times since her marriage to defendant she has borne herself toward defendant as a true and faithful wife and performed her duties

as such, and treated him at all times with kindness and affection, but that defendant wholly disregarded his duties as the husband of this plaintiff, and has almost continuously since the day of their marriage offered her such indignities in his demeanor, acts, and conduct as to render her condition intolerable, in this, to wit, that defendant is possessed of a violent temper which he neither controls nor attempts to control, and that, beginning with the month of November, 1905, following their said marriage in October, defendant began to abuse plaintiff, to quarrel at her, and to treat her with contempt and incivility, which treatment he has continued from time to time up to the time of their said separation on the ——— day of May, 1907; that repeatedly during their married life defendant applied to plaintiff vile and indecent epithets, and spoke to plaintiff in this language, 'You are a fool and a damned old crank'; that he frequently ordered plaintiff to leave her own home, and told her that he did not want to live with her and did not want to see her; that during the months of January and February, 1907, defendant repeatedly threatened to leave plaintiff, and said that he did not want to live with her; that he would not be worried with her for all the property that she had, and quarreled with her almost daily and abused her in vile language in the presence of friends and neighbors, to her great mortification and humiliation; that at all times since the date of their said marriage plaintiff has furnished defendant with a good home and all the comforts of life, and at all times furnished him with spending money and in every way paid all the expenses of herself and this defendant, and that at no time has defendant made any effort to go into business or earn money in any manner; that defendant persuaded this plaintiff to loan various sums of money to his relatives, and that, when plaintiff finally refused to make one loan of three thousand dollars (\$3,000), this defendant flew into a rage and abused her in most violent language; that on the ——— day of January, 1906, plaintiff, at the urgent solicitation of defendant, loaned the sum of fifteen hundred dollars (\$1,500) to Samuel Threlkeld, a relative of defendant, which money was the individual property of this plaintiff, and that said Threlkeld executed his certain promissory note for said sum of money, and that said note is made payable to plaintiff and defendant jointly, and secured by a certain deed of trust on real estate located in Monroe county, Mo., and which note is now in the possession, for the purpose of collection, of the Commercial Bank of Shelbyna, Shelby county, Mo., and that defendant has no interest whatever in said note and that no part of said money belongs to defendant; that on the ——— day of July, 1906, plaintiff, at the urgent solicitation of defendant, loaned Oscar Threlkeld and Louvenis Threlkeld, his wife, relatives of defendant, the sum of four

hundred dollars (\$400), for which they gave their certain promissory note for four hundred dollars (\$400), secured by a deed of trust on real estate in the city of Shelbyna, Shelby county, Mo., and that said note was made payable jointly to plaintiff and defendant; that said four hundred dollars (\$400) so loaned was the individual property of this plaintiff, and that defendant had no interest whatever therein; that for the last few months previous to said separation defendant has, in their daily intercourse with each other, addressed plaintiff in offensive language without cause or provocation, and has exhibited in his conduct toward her no affection or respect, but, on the contrary, has exhibited a lack of affection and respect for plaintiff. Plaintiff further states that, notwithstanding said promise of defendant to treat plaintiff kindly if she returned to live with him as above set out, defendant has since she returned to live with him on the ——— day of March, 1907, daily abused and insulted her, and especially during the months of April and the first half of May, and so long as she continued to live with him; that at various times during said months of April and May defendant has used the following or similar language in addressing plaintiff or speaking about her to others in the presence of friends and neighbors, to wit: 'You are an old crank. I don't care anything in the world for you. I wish you would go away and stay, and that I would never see you again. I don't care if you had \$1,000,000, I wouldn't live with you. You are an old fool'—and on the 15th day of April, 1907, defendant abused and cursed plaintiff, to her great mortification and humiliation. Plaintiff further states that she is a resident of the city of St. Louis, Mo., and has resided in said state of Missouri more than one whole year next before the filing of this petition, and that the acts and things complained of herein were committed while plaintiff and defendant resided in the state of Missouri. Wherefore, the premises considered, plaintiff prays that she be divorced from the bonds of matrimony contracted as aforesaid with defendant; that the title to the said notes hereinabove set out, one for fifteen hundred dollars (\$1,500) and the other for four hundred dollars (\$400), be decreed and vested exclusively in this plaintiff, and that this honorable court grant her such other and further relief as may seem meet and proper under all the facts and circumstances."

Defendant was duly served with process of summons, but made default. Plaintiff, in her own behalf, testified to the truth of every material allegation in her petition, and in regard to the indignities charged therein was corroborated by the evidence of Mrs. M. K. Chamberlain, Mrs. Mary Shacklett, and Mrs. Sarah J. Threlkeld. Defendant was brought in by the court and sworn as a witness. He did not in terms admit that he had mistreated his wife, yet he did not deny he had done so.

or that he had offered her the indignities charged in the petition. His answers to questions asked for the purpose of eliciting evidence in respect to his treatment of his wife were evasive and unsatisfactory; yet they tend to show he was the guilty party. He testified that he disliked his wife, and stated that they could not live together and be happy, that they had always disagreed, or had always had discord and unhappiness. Plaintiff proved by a number of reputable witnesses, who had known her for 15 or 20 years, that she was a lady of culture and refinement, had always moved in the best class of society, and that her character was, and always had been, the very best. The trial judge, after hearing the evidence, dismissed plaintiff's bill. Plaintiff proved her case by unimpeached and uncontradicted testimony, and, under the statute (section 2921, Rev. St. 1890 [Ann. St. 1906, p. 1678]), is entitled to a decree divorcing her from her husband. Her right to a divorce, under the evidence, is a legal right, not a matter resting in the discretion of the court. *Lynch v. Lynch*, 87 Mo. App. 32. She is also entitled to a judgment vesting in her the exclusive title to the two notes described in the petition.

Wherefore the judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment for plaintiff, as prayed for in her petition. All concur.

#### HEISER v. BERGER CATERING CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

#### INNKEEPERS—LOSS OF GUEST'S PROPERTY—PROPERTY IN INNKEEPER'S CARE.

A hotel keeper who conducts his place as a hotel is a bailee of a suit case left in his care, and owes a duty to use ordinary care to keep it safely and deliver it on demand, and on failure to do so, or to show that any care was exercised, is liable in an action for conversion for the value of the case and its contents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 25-32.]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by William G. Heiser against the Berger Catering Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. A. C. McManus, for appellant. Henry Davis, for respondent.

BLAND, P. J. The action is for the conversion of a suit case and its contents, and was commenced before a justice of the peace, and in due course appealed to the circuit court. Plaintiff's evidence tends to show he is a resident of the state of Kentucky; that he arrived in the city of St. Louis on August 14, 1904, and registered at the Hotel Milton, situated on Eighteenth and Chestnut streets, and was assigned a room. He took his suit case to the room and stayed overnight, and on the following morning deposited it at the

check room of the hotel, and received a check therefor. He attended the World's Fair during the day, and returned to the hotel in the evening, occupying the same room overnight. On the following morning (August 16th) he called a bell boy, to whom he gave his check, with the request that he bring up his suit case. The boy returned with the check, stating the suit case could not be found. Plaintiff then reported the loss to the hotel clerk, who instituted a search, but the suit case was never found. Plaintiff offered evidence tending to prove the contents of the suit case and the value both of the contents and of the case; also evidence showing defendant was the lessee of the hotel, and conducted it in connection with and as an adjunct to its restaurant in the same building. There is no substantial countervailing evidence. The issues were submitted to the court, sitting as a jury, who, after hearing the evidence, found for plaintiff, and assessed his damages at the proved value of the suit case and its contents.

Defendant offered a number of declarations of law which the court refused to give. None of the declarations are copied into the abstracts. They are mostly mere abstract propositions of law, and might have been given, and yet the court could not have found a verdict different from the one it did find, for the reason the evidence is clear, positive, and uncontradicted that defendant was the proprietor of the hotel where plaintiff stopped, that the house was advertised as a hotel, and was, in fact, conducted as such. Defendant was a bailee of the suit case, and was required to use ordinary care to keep it safely and deliver it to plaintiff on demand. *Dixon v. McDonnell*, 92 Mo. App. 479. It failed to deliver the suit case on demand, or show that it exercised any care whatever to keep the same safely, and therefore is liable for its value and the value of the contents in an action for conversion.

The judgment is for the right party, and is affirmed. All concur.

#### CITY OF MONETT v. HALL.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

#### 1. LICENSES—OCCUPATION TAXES—POWER TO IMPOSE—ORDINANCES.

The state may collect an ad valorem tax on property used in a calling, and at the same time impose a license tax on the calling, and this power may be delegated to municipalities, as is done by Rev. St. 1899, § 8542 [Ann. St. 1906, p. 4015], authorizing municipalities to require merchants to pay an ad valorem tax, and by section 5357 [Ann. St. 1906, p. 2961] authorizing municipalities to collect a license tax on the occupation of retail grocers, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 5.]

#### 2. SAME—PENALTIES—PERSONS LIABLE.

A municipal ordinance imposing an occupation tax on retail grocers, and a penalty against any manager of a corporation engaged in such

business without paying the tax, renders a manager liable to the penalty for assisting a corporation to conduct its business without paying the tax.

### 3. SAME—ORDINANCES — PROSECUTIONS — REPEAL PENDING PROSECUTIONS—EFFECT.

The repeal of an ordinance imposing a penalty for its violation pending a prosecution for the penalty does not abate the action, where the repealing ordinance provides that actions pending shall remain unaffected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, § 267.]

Appeal from Circuit Court, Lawrence County; F. C. Johnston, Judge.

F. M. Hall was prosecuted for violating an ordinance of the city of Monett imposing an occupation tax. From a judgment for defendant, the city appeals. Reversed and remanded.

Jno. T. Burgess and T. D. Steele, for appellant. D. H. Kemp, for respondent.

**NORTONI, J.** The city of Monett prosecutes the defendant on a charge of acting as manager of a private corporation engaged in the retail grocery trade without having paid an occupation tax and procured a license as a retail grocer. A trial was had before the court without a jury. The court found the issues for the defendant, and the city appeals.

The material facts are: Plaintiff is a city of the third class, organized and existing under the provisions of the general laws, which constitute its charter. It had duly provided two separate ordinances, one enactment levying an ad valorem or merchant's tax, and the other levying an occupation tax on, among other things, the business of retail grocers. The latter ordinance (No. 166), as amended by Ordinance No. 172, forbids any person, firm, partnership, or corporation, from carrying on or conducting the business of a retail grocer in that city without first paying an occupation tax therein levied against retail grocers, and obtaining a license as such. Section 14 of the ordinance, as amended, provides a penalty for each violation of its terms, and, among other things, provides and levels a penalty specifically against the act of "any manager" of a corporation who shall, as such manager, assist in conducting the business of the corporation without first having procured such license. The Hall Grocery Company is a corporation doing a general retail grocery business in that city, and the defendant is its manager. The said grocery company paid its ad valorem or merchant's tax, but failed to pay the occupation tax, and procure a license evidencing its payment. It conducted its said business under the management of the defendant without such license. Both it and the defendant, its manager, refused to pay the tax. At the request of the parties, the court made a special finding of facts, substantially as above set out, and announced as a conclusion of law thereon that the plaintiff was not entitled to recover.

The court refused to instruct the jury it was competent for the city to enact and enforce both the ordinance levying an ad valorem tax and an occupation tax, and that if the Hall Grocery Company was engaged in the retail grocery business in that city without having paid the occupation tax and the defendant was, at the time, its manager, the defendant was liable to pay the penalty levied against the "manager," under the ordinance. The refusal of this instruction was error beyond question. The statutes (section 8542, Rev. St. 1899 [Ann. St. 1906, p. 4015]) expressly authorized cities of the third class to levy and require merchants to pay an ad valorem or merchant's tax as provided in the ordinance. Section 5857, Rev. St. 1899 [Ann. St. 1906, p. 2961], also expressly authorizes cities of the third class to provide by ordinance for, and levy and collect, a license tax on the occupation of retail grocers, among others. It has been frequently adjudged to be perfectly competent for the state to collect an ad valorem tax on property used in a calling, and at the same time to impose a license tax on the pursuit as a condition to the right to carry it on, and this power may be delegated to municipal corporations, as was done by the statutes above referred to. *City of Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757, 37 L. R. A. 446, 60 Am. St. Rep. 569; *City of Aurora v. McGannon*, 138 Mo. 38, 39 S. W. 469; *City of St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558; *City of Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662; *City of Farmington v. Rutherford*, 94 Mo. App. 328, 68 S. W. 83. The ordinance being valid, it was the duty of the Hall Grocery Company to pay the occupation tax, and to procure a license for the protection of its manager and other employees who came within its express provisions. If the defendant manager persisted in conducting or assisting the corporation to conduct its business without having paid the tax, he is liable to the penalty provided in the ordinance. Especially is this true, in view of the fact that the act of the manager of the company under such circumstances is expressly mentioned and denounced by the ordinance. *City of Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757, 37 L. R. A. 446, 60 Am. St. Rep. 569; *City of Springfield v. Hubbel*, 89 Mo. App. 379; *City of Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662; *City of St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558; *City of Farmington v. Rutherford*, 94 Mo. App. 328, 68 S. W. 83. There may be doubt, and much may be said, with respect to the propriety of inflicting the penalties of an ordinance upon the manager or other agent in those cases where the act of the principal alone is denounced, and the manager or agent is not expressly mentioned and brought within the terms of the ordinance, as was the case of *City of Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662. Be this as it may, there is no longer doubt with respect to this question,

when the penal statute or ordinance, by express words, refers to and includes the manager or other agent within its provisions, and declares him liable to its penalty for violation, as in this case. Under such circumstances, the provisions of penal statutes and ordinances are dally enforced by the courts without question, as will appear in the following cases: *State v. Hemenover*, 188 Mo. 381, 87 S. W. 482; *State v. Eyermann*, 115 Mo. App. 660, 90 S. W. 1168.

2. It appears that after this prosecution was instituted, and while it was pending in the courts, the ordinance involved was repealed, and another enacted in lieu thereof. It is suggested that this repeal abated the present action. Now this cannot be true, in view of the provision of section 20 of the new or repealing ordinance referred to. In section 20 of that ordinance it is provided that all actions, prosecutions, causes, fines, and penalties and forfeitures, "now pending or hereinbefore accrued to the city, shall remain unaffected by this ordinance, and may be prosecuted, recovered, and received as fully in every respect as if this ordinance had not been passed." The penalty sued for in this case is a debt, if recoverable at all, owing to the city, which it could release or not at its pleasure. Therefore, in view of the ordinance last quoted, declaring its purpose not to release the alleged debt, there is no abatement thereof. The action is wholly unaffected by the new or repealing ordinance, and should proceed as though the ordinance under which it was instituted had not been repealed. *City of Kansas v. White*, 69 Mo. 26; *City of Kansas v. Clark*, 68 Mo. 588.

The judgment will be reversed, and the cause remanded, to be proceeded with in accord with the views herein expressed. It is so ordered. All concur.

#### STATE v. ROAN.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

##### WEAPONS—EVIDENCE.

Evidence in a prosecution for carrying concealed weapons held to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, § 29.]

Appeal from St. Louis Court of Criminal Correction; W. A. Taylor, Judge.

Barney Roan was convicted of carrying concealed weapons, and appeals. Affirmed.

W. E. Fish, for appellant. Phillip W. Moss, for the State.

GOODE, J. This appellant was convicted of the offense of carrying a concealed weapon on his person. The weapon was a loaded revolver, and the testimony shows appellant was arrested at a saloon on the corner of Compton and Easton avenues early in the morning of March 12, 1907. The policeman who was walking his beat learned there had been a dif-

ficulty in the saloon, and, as appellant came out, the policeman felt of appellant's hip pocket and found the revolver in his right-hand hip pocket, concealed from view and loaded with powder and balls. Appellant testified that he kept a saloon in East St. Louis, but resided at 2300 Olive street, in the city of St. Louis; that he was accustomed to leave his saloon and come home very early in the morning, between 4 and 5 o'clock, and on one occasion had been robbed by a highwayman on Eads Bridge, and for this reason, and to protect himself in the future, he carried the weapon. It is insisted that under such circumstances appellant was entitled by the Bill of Rights to carry a weapon; and, further, that the statutes permitted him to do so. The section against carrying concealed weapons is 1862 (Rev. St. 1899 [Ann. St. 1906, p. 1283]), and the succeeding section (1863 [Ann. St. 1906, p. 1284]) provides for certain instances in which the prohibition of the prior section does not apply. One of these exceptions is when the accused person can show he had been threatened with great bodily harm and had good reason to carry the weapon in defense of his person or his property. Under those provisos the appellant might have been excused for carrying the weapon if, in good faith and for good cause, he did so to protect himself from robbery. But no declarations of law were requested, and questions asked by the court indicate the court did not believe the appellant was carrying the weapon in good faith for the purpose stated. The court elicited that, though defendant had started for his home on Olive street, he was in a saloon far to the north and west of where his home was. His home was between the saloon where he was arrested and his own saloon in East St. Louis. Appellant's explanation of this circumstance was that he had gone to the saloon in question, without first going home, in order to see a friend. If a proper declaration of law had been requested, setting forth the circumstances under which the appellant might lawfully carry the weapon, and had been refused, the appeal might prevail.

Nothing of this kind was done; and, as the court could believe or not appellant's story, the judgment is affirmed. All concur.

#### STATE ex inf. SAGER v. LEWIN et al.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

##### 1. CORPORATIONS — CHARTER — POWERS — CONSTRUCTION.

The powers granted a corporation should be most strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1519-1524.]

##### 2. CONTRACTS—CONSTRUCTION.

Where a grant from the state or from a private person is susceptible of two constructions, one of which would render the grant void and the other make it legal, the latter should be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]



### 3. CORPORATIONS — CHARTER — POWERS — CONSTRUCTION.

A corporation chartered for the purpose of furnishing treatment for a certain disease and medical and surgical treatment for all other diseases was entitled to contract with persons to supply medical treatment and to contract with physicians to render medical and surgical services, and the fact that the physician employed to furnish treatment was the principal stockholder and the manager of the corporation was immaterial.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Quo warranto by the state, on the information of Arthur N. Sager, against W. A. Lewin and others. Judgment for respondents, and petitioner appeals. **Affirmed.**

Irvin V. Barth, for appellant. Bond, Marshall & Bond, for respondents.

BLAND, P. J. The following taken from appellant's statement is a correct statement of the main facts in the case: "This is a proceeding quo warranto filed ex officio by the circuit attorney of the city of St. Louis, Mo., on the 25th day of April, 1906, to oust the respondents W. A. Lewin, A. Lewin, and M. M. Ritter, and all others acting conjointly with them, from the exercise of the privileges of an incorporation under the name of the Lewin Hernia Cure Company. The information charges that under said name the respondents 'have claimed, and do still claim, the right and privilege to furnish treatment for hernia and medical and surgical treatment for all other diseases, accidents, and deformities, and as such pretended corporation have exercised, and do now exercise, the right and privilege of engaging in the practice of medicine and surgery, treating hernia and all other diseases, accidents and deformities in the city of St. Louis Mo., without any legal warrant, franchise, charter or grant.' In the return to show cause respondents disclaim that the Lewin Hernia Cure Company has claimed or does claim the right or privilege of engaging in the practice of medicine, but that said company claims the right of engaging in the business of contracting for the practice of medicine. It is alleged therein that the respondents were duly incorporated under the laws of the state of Missouri, and particularly article 9 of chapter 12 of the Revised Statutes of Missouri of 1899 [Ann. St. p. 1064], in due form as therein prescribed, and that the charter specifically empowers the said corporation in the following: 'The company is formed for the purpose of furnishing treatment for hernia and medical and surgical treatment for all other diseases, accidents and deformities.' Other allegations appear in the return to the effect that W. A. Lewin, a duly licensed physician, having discovered a formula for the treatment of hernia, organized the Lewin Hernia Cure Company, for the purpose of perpetuating same, and that he entered into

a contract with the company to serve as manager thereof 'and during that time to personally treat all persons who employed said company to furnish treatment for the cure of hernia,' etc. Thereupon appellant filed a reply to said return, admitting the execution of the articles of incorporation, their recordation, all in due form, but denying each and every other allegation in said respondents' return contained. To this the respondents filed a motion for judgment on the pleadings. During the trial of the cause counsel for respondents specifically conceded that it would have been an illegal grant of corporate privileges had the charter authorized respondents to engage in the practice of medicine, but, admitting this proposition, they urged that under the terms of the charter the Lewin Hernia Cure Company in having been granted the right to 'furnish treatment' for diseases was given the privilege not of engaging in the practice of medicine, but in the business of contracting for the practice of medicine in providing medical treatment, through licensed physicians in its employ, to those who might apply to the company." The court sustained the motion for judgment on the pleadings and rendered judgment for respondents, from which the state appealed.

It is conceded by respondents that a corporation cannot be organized to practice medicine in this state. Appellant's contention is that the corporation is indirectly practicing medicine, as shown by the return, in this: that Dr. W. A. Lewin, who owns 98 of the 100 shares of the capital stock of the corporation, is its superintendent and is employed by it to practice medicine. The power granted by the charter is that "of furnishing treatment for hernia and medical and surgical treatment for all other diseases, accidents, and deformities." It is stated in the return that Dr. W. A. Lewin "had discovered a method of curing hernia quickly and permanently without the necessity of using the knife or other surgical instruments therefor, and had also discovered a certain liquid or fluid to be injected into the affected parts for treating and curing the same," and that one of the purposes of the incorporators was to perpetuate these secrets in the corporation. The return shows that Dr. W. A. Lewin is the general manager of the corporation, and is employed by it as physician to treat patients who may contract with said corporation for treatment of hernia or other diseases.

Appellant contends that power granted the corporation to furnish medical treatment means that it may practice medicine through its human agencies. Respondents' contention is that the power granted the corporation is only contractual; that is, it is only authorized to furnish regularly licensed physicians to treat parties who may apply for treatment. These contentions can only be settled by a proper judicial construction of the term "furnish," as used in the charter of the corpora-

tion. Webster defines the term to mean: "To supply with anything necessary, useful or appropriate; to provide, to equip; to fit out, or fit up; \* \* \* to offer for use; to provide (something); to give (something), as, to furnish food to the hungry," etc. March, Thesaurus Dictionary, p. 434, says: "The term 'furnish' is classified with the word 'give' rather than with 'get.'" If the word "furnish," as used in respondents' charter, means to give, then the charter conferred the power on the corporation to practice medicine, and is void; and in this connection it is contended by appellant that the powers granted the corporation should be most strictly construed against it. This is the general rule in construing grants by the state to private corporations. There is, however, another rule of construction that should play a part in this connection; that is, that where a grant from the state or from a private person is susceptible of two constructions, one of which would render the grant void and the other make it legal and enforceable, the latter should be adopted, for neither the state or a private person should, in the making of contracts, be convicted of doing a void and useless thing, and we think the word "furnish," as used in the charter, should be construed to mean "supply." The corporation is not restrained by its charter from entering into contracts with persons to supply medical treatment, nor from entering into contracts with physicians to render medical and surgical services, and has, in this respect, the same right to contract as a private individual. *King v. Phoenix Ins. Co.*, 195 Mo., loc. cit. 304, 92 S. W. 892, 113 Am. St. Rep. 678, and cases cited. In all the larger cities, and connected with most of the medical colleges in the country, hospitals are maintained by private corporations, incorporated for the purpose of furnishing medical and surgical treatment to the sick and wounded. These corporations do not practice medicine, but they receive patients and employ physicians and surgeons to give them treatment. No one has ever charged that these corporations were practicing medicine. The respondents are chartered to do, in the main, what these hospitals are doing every day—that is, contracting with persons for medical treatment and contracting with physicians to furnish treatment—and the fact that Dr. W. A. Lewin is the principal stockholder and the manager of respondent corporation, and is employed by it to furnish medical and surgical treatment to the patients who may contract with it for such treatment, does not alter the legal status of the corporation, or show it has violated the terms of its charter.

The corporation expressly disclaims the right to practice medicine, and we conclude it had a right to do what the return states it is doing, and affirm the judgment. All concur.

**BANNER LUMBER CO. v. McDERMOTT.**  
(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

**TROVER AND CONVERSION — TRIAL — INSTRUCTIONS.**

In an action to recover for building materials claimed to have been converted by defendant while tearing down a building, the evidence was uncontradicted that he was employed by plaintiff to do the work pursuant to an order by the city to tear it down. *Held*, that an instruction that plaintiff was entitled to recover the difference between the value of the building before it was torn down and the value of the material afterwards was properly refused.

Appeal from St. Louis Circuit Court; Walter B. Douglas and Chas. Claffin Allen, Judges.

Action by the Banner Lumber Company against James J. McDermott. From a judgment for defendant, plaintiff appeals. Affirmed.

Robert L. McLaran, for appellant. Alex Young, for respondent.

BLAND, P. J. On April 26, 1905, in a suit before James J. Spaulding, Esq., plaintiff recovered against the defendant herein a judgment foreclosing a mechanic's lien on a building known as "No. 5661 Delmar Boulevard," for the sum of \$278.14. The building was a temporary structure to be used only during the World's Fair period. It appears that the city authorities ordered the building torn down some time in the spring of 1905, and defendant saw plaintiff about tearing it down, and was referred to its attorney, who told him to tear it down, which he did on May 31st. The action, begun before a justice of the peace, and in due course appealed to the circuit court, is to recover the value of the material which the complainant alleges defendant took, carried away, and converted to his own use. Plaintiff's evidence tends to show defendant took some, or all, of the material, and used it in the construction of another building. Defendant's evidence tends to show that he did not take, or remove, or convert, any of the material to his own use. Verdict and judgment were for defendant.

Complaint is made of the refusal of the court to give certain declarations of law asked by plaintiff. The sole and only material issue of fact was whether defendant converted any of the material of the building, after it was torn down, to his own use. This issue was fairly submitted to the jury. The refused instructions proceed upon the theory that plaintiff was entitled to recover the difference between the value of the building before it was torn down and the value of the material after the building was wrecked. The evidence is uncontradicted that defendant, as owner, was ordered by the city authorities to tear the building down; that he notified plaintiff, and was referred to its attorney, who told him to tear it down. Defendant swore to all these facts, and plaintiff did not deny them,

and, it being in its power to do so, they must be taken as true, and it would have been improper to have authorized a recovery on a theory of the case, which, by its silence, plaintiff admitted to be untrue.

The judgment is affirmed. All concur.

#### STATE v. WILLIS.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

#### 1. CRIMINAL LAW—APPEAL—DECISIONS REVIEWABLE—ABSENCE OF DECLARATIONS OF LAW.

Where a trial is by the court, and no declarations of law are asked or given, there is nothing for review except the evidence, and, if the judgment is substantially supported thereby, it must be affirmed.

#### 2. DRUGGISTS—SALE OF COCAINE—PHYSICIAN'S PRESCRIPTION.

While a registered practicing physician, who is also the proprietor of a drug store and a registered pharmacist, may fill from his stock of drugs his prescription calling for cocaine which can be sold only on prescription under the express provisions of the act of March 9, 1905 (Laws 1905, p. 145, § 1 [Ann. St. 1906, § 3044-1]), the prescription must be made out and signed before the sale is made, and he cannot make the sale and afterwards fill out a prescription to cover it.

Appeal from St. Louis Court of Criminal Correction; Wilson A. Taylor, Judge.

Omer Willis was convicted of selling cocaine in violation of the act of March 9, 1905 (Laws 1905, p. 145), and appeals. Affirmed.

John T. Murphy, for appellant. Phillips W. Moss, for the State.

BLAND, P. J. Section 1 of an act passed by the General Assembly and approved March 9, 1905 (Laws 1905, p. 145 [Ann. St. 1906, § 3044-1]), is as follows: "It shall not be lawful for any druggist or other person to retail or sell or to give away any cocaine, hydrochlorate or other salt of or any compound of cocaine, or preparation containing cocaine, or any salt(s) of or any compound thereof, excepting upon the written prescription of a licensed physician or licensed dentist, licensed under the laws of the state, which prescription shall only be filled once." By information filed in the St. Louis Court of Criminal Correction defendant was charged with a violation of this section. He entered a plea of not guilty, and was put upon his trial, which resulted in a verdict of guilty. A timely motion for new trial proving of no avail, he appealed to this court.

The issues were submitted to the court sitting as a jury. No declarations of law were asked or given. Hence there is nothing before us for review, except the evidence, and, if there is substantial evidence to support the verdict of the court, it is our duty to affirm the judgment, and this is so, even though we might be of opinion that the verdict is against the weight of the evidence. The evidence as a whole tends to show about the following state of facts: Defendant was a

regular, licensed, and registered physician, and conducted a drug store at No. 1714 Wash street, in the city of St. Louis. King Rogers, the prosecuting witness, on the night of May 21, 1907, went to the defendant's drug store and called for cocaine. Defendant went behind his prescription case, and returned with a box containing cocaine, and handed it to Rogers, who paid him 10 or 20 cents, and walked out of the store. As he stepped out of the door two police officers, who had been ordered by the chief of police to watch defendant's store for the sale of cocaine, arrested Rogers and took the box of cocaine from him. The box was produced in evidence on the trial. Rogers testified he was a cocaine fiend, and had been in defendant's drug store on a previous occasion, and told him he had acquired the habit, and defendant wrote out a prescription and furnished him with the drug, but that on his visit on May 21st he simply asked for the drug, and defendant gave it to him. Defendant testified that habitual users of cocaine are more or less delirious when deprived of it; that Rogers first came to him in March, 1907, and consulted him as a physician, and told him he was a cocaine fiend; that at the time Rogers was on the verge of delirium, and he prescribed cocaine for the purpose of giving him temporary relief; that he was nervous on May 21st when he came in and called for cocaine, and, being acquainted with his habit and condition, he went behind the prescription case, wrote out a prescription for the drug, filled it, and handed the drug to Rogers who paid him 20 cents for it, and walked out of the store. The prescription was offered in evidence, and is as follows:

Rx. King Rodgers, Cocaine Hyd.  
grs. XII 25¢  
As directed.  
1199-5-22-07.  
Dr. Willis.

Defendant testified that the date of the prescription was a mistake.

A regular, registered, and practicing physician may at the same time be the proprietor of a drug store and a registered pharmacist, and may fill, from his stock of drugs, a prescription calling for intoxicating liquors and such poisonous drugs, including cocaine, as can only be sold on prescription. State v. Carnahan, 63 Mo. App. 244; State v. Pollard, 72 Mo. App. 230. He cannot sell these articles, and afterwards fill out a prescription to cover the sale. State v. Hensley, 94 Mo. App. 156, 67 S. W. 964. The date of the prescription offered in evidence was a day later than the day on which the cocaine was sold, and the court was warranted in finding the prescription was not made out and signed before the drug was furnished, and we conclude there is substantial evidence in support of the verdict of the court.

The judgment is affirmed. All concur.

## STROBEL v. CLARKE et al.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1907. Rehearing Denied Jan. 7, 1908.)

## 1. PROCESS—RETURN OF SHERIFF—CONCLUSIVENESS.

A sheriff's return of service of notice of a motion in the probate court by the public administrator to compel another, as executor, to make final settlement of his accounts that personal service was had, is conclusive, unless the public administrator either procured the sheriff to make a false return, or, knowing that a false return had been made, took advantage thereof to obtain judgment by default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 189-192.]

## 2. JUDGMENT—EQUITABLE RELIEF—CONCLUSIVENESS OF RECORD.

Where a court has jurisdiction of the subject-matter and of the parties, its judgment, in the absence of fraud in procuring it, imports absolute verity, and cannot be attacked by evidence outside the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 907, 940.]

## 3. SAME—CONCLUSIVENESS—EVIDENCE TO CONTRADICT.

The judgment on a motion in the probate court by the public administrator to compel another, as executor, to make final settlement of his accounts, recited that the court found that the executor had in his hands, as belonging to the estate, an amount named, for which judgment was entered against him, and it did not appear that the court included therein a debt of the executor to the decedent, or determined the issue of whether executor had concealed assets which had not been inventoried by him as executor and included them in the judgment. *Held*, that it was not competent, by oral testimony or other evidence outside the record of the proceedings in the probate court, to prove, for the purpose of showing that the court had exceeded its jurisdiction and thereby impeaching the validity of its judgment, that the court did hear evidence as to the indebtedness of executor to decedent and as to uninventoried assets and did adjudicate thereon and include them in the judgment; the proceeding by the public administrator being within the jurisdiction of the probate court, and it being entitled to the same presumptions of the regularity of its proceedings as a court of general jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 907, 940.]

Appeal from Circuit Court, City of St. Louis; Matt G. Reynolds, Judge.

Action by John Strobel against Patrick H. Clarke and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bass & Brock, for appellant. John S. Leahy, for respondents.

GOODE, J. This is an action in the nature of a suit in equity instituted to set aside and hold for naught a judgment of the probate court of the city of St. Louis to restrain the defendant Patrick H. Clarke, sheriff of said city, from paying over money which had been collected on said judgment. The cause in which the judgment of the probate court was entered was a proceeding instituted therein by Henry Troll, public administrator in charge of the estate of William A. Baier, deceased, against the plaintiff, John Strobel, to compel the latter, as

executor of the will of said Baier, to make final settlement and turn over to Troll the assets of the estate of the deceased. Baier died July 17, 1905, leaving what purported to be a last will in which all his property, real and personal, was bequeathed to plaintiff and his wife, Molly Strobel, and plaintiff was appointed executor without bond. After the will was probated, letters testamentary were issued, and plaintiff took possession of the assets of the estate. At a still later date the heirs of William A. Baier began an action in the circuit court against plaintiff and his wife, Molly Strobel, to set aside the alleged last will of Baier. On the institution of this action to contest the will plaintiff was removed from the office of executor. Pending the contest Henry Troll, public administrator, was put in charge of the estate, and plaintiff was ordered to turn over to said Troll the assets. Troll is still in charge. It appears that Strobel did not turn over the assets to him, and on December 28, 1905, Troll, as public administrator in charge of the estate, filed a motion in the probate court setting out that he had been appointed administrator pending the will contest, that Strobel had been previously granted letters testamentary as executor, and that his authority had been revoked pending the action to contest the will, but nevertheless Strobel had made no settlement with Troll, administrator pendente lite, and had not turned over any of the assets. The prayer of the motion was that the court would compel Strobel as executor to make final settlement of his accounts, to the end that the court might ascertain the amount of money and property which came into his hands as executor and remained unaccounted for, and enter judgment in favor of petitioner Troll as administrator in charge of Baier's estate, for said assets and personal property. Process was issued by the probate court, commanding the sheriff to notify Strobel to appear before the judge of the probate court on the first day of the ensuing term, to wit, the first Monday in March, 1906, to answer in the proceeding. Said process was returned executed by delivering a true copy to Strobel January 28, 1906, in the city of St. Louis. The return was signed "Patrick H. Clarke, Sheriff," by "John Ehrhardt, Deputy." It is contended by the plaintiff in the present action that in point of fact he never was served with the notice, and that the return was false. That is one ground on which he asks to have the judgment of the probate court set aside. The proceeding by Troll as public administrator in charge of the estate of William A. Baier, deceased, against Strobel as executor of the will of said Baier, resulted in a judgment by default in the probate court. Said judgment recited that, Strobel having made default, the court proceeded to ascertain the amount of money, the quality and kinds of real and personal property, and all the rights, debts, evidences of debts

and papers of every kind of said William A. Baler, deceased, in the hands of Strobel as executor, or which came into his hands and remained unaccounted for at the time of the suspension of his letters testamentary; further, that the court, having heard and duly considered the petition of Troll as public administrator and the evidence adduced, found that Strobel at the time of the suspension of his letters had in his hands as executor of said last will and belonging to the estate the sum of \$935 in money. It was therefore considered and adjudged by the probate court that Troll have and recover from said Strobel the sum of \$935, together with costs and have execution therefor. No appeal was prosecuted from this judgment; but this fact is sought to be explained away in the petition in the present case on the ground that, as plaintiff was not served with notice, he had no knowledge of the judgment in time to take an appeal; that, in fact, he had no knowledge of it until execution had been issued against him, which was after the time for appealing had passed. It is charged in the bill that the defendant Patrick H. Clarke, as sheriff, caused such execution to be levied on the business property of plaintiff, and the latter, in order to prevent his business, which was conducting a grocery store, from being stopped by sale of the property, paid to the sheriff, under protest, the amount of the judgment, which said amount of money is alleged yet to be in the sheriff's hands. Besides the alleged invalidity of the judgment of the probate court in consequence of the failure to notify plaintiff of the proceeding in which it was entered, it is further stated in plaintiff's present petition that said judgment is void and a nullity, for the reason that the probate court included in it the amount of a personal debt supposed to be owed by plaintiff to Baler for rent which accrued during Baler's lifetime; and further included the amount of certain supposed assets of the estate which plaintiff never had inventoried as assets, but which in said probate proceeding plaintiff was ordered to discover as being part of the estate. It is stated that plaintiff, as executor, had only inventoried assets of the value of \$15, whereas the other supposed assets not inventoried, but included in the judgment against plaintiff, amounted to \$400. The petition does not state the amount of the rent which had accrued against plaintiff as tenant of Baler during the latter's lifetime and which was embraced in the judgment. But the amount of this item may be gleaned from the other allegations of the petition, for it would appear that this amount will be found by taking the sum of the uninventoried assets (\$400) plus the sum of the inventoried assets (\$15), or \$415 in all, from the whole amount of the judgment; that is, from \$935. If we are right in this computation, the probate court, according to the present petition, included in the judgment

against plaintiff, as executor, \$520 for rent which had accrued against plaintiff as Baler's tenant. The petition further complains that, though this rent had accrued against plaintiff, only one month's rent was owing at the time of Baler's death; plaintiff having previously paid the remainder to Baler. It is further alleged that plaintiff as executor had paid many claims against the estate of Baler, and that these claims amounted to \$298.90, for which plaintiff was allowed no credit by the probate court in the judgment in the proceeding against him by Troll. To summarize: The contentions of plaintiff in regard to the invalidity of the judgment of the probate court which he seeks to have annulled and set aside are as follows: First, that said judgment is void or voidable because notice of it never was served on plaintiff as required by law; second, that it is void on account of the court exceeding its jurisdiction in entering judgment against plaintiff for a debt which the court found he owed Baler in a proceeding against plaintiff for the amount of the assets of the estate of Baler which had come into plaintiff's hands as executor, inasmuch as said debt, even if it never had been paid, did not come into plaintiff's hands in that capacity; third, the judgment is void as in excess of the court's jurisdiction, in that in a proceeding against plaintiff as executor to make him settle and turn over the assets in his hands a judgment was entered which included not only such assets as he had inventoried, but other alleged assets which never had been inventoried or come into his hands as executor. We have sufficiently indicated the scope of the petition or bill. The court excluded practically all the evidence to support it, and held, in effect, that the petition stated no cause of action. Judgment having been entered for defendants, this appeal was taken.

1. It was not permissible to show by oral testimony in contradiction of the sheriff's return that plaintiff was not served with notice of Troll's proceeding as administrator pendente lite against plaintiff as executor. The return of the sheriff was conclusive that he was personally served. It is useless to go into a discussion of this question, or to review the authorities bearing on it. Suffice to say that in *Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738, the Supreme Court held that the return of a sheriff on a summons, while conclusive against the parties to the action in which the summons was issued, was not conclusive in a suit in equity to set aside the judgment in said action on the ground that the return was false. But said cause reached the Supreme Court again on a second appeal, when the question determined on the first appeal was reopened, and the prior ruling reversed after a discussion of the proposition in elaborate opinions, in which numerous authorities in this state and other jurisdictions were examined. The rule adopted on the second hearing

was that, even in a suit in equity to set aside a judgment on the ground that there had been no personal service on the judgment debtor, the return of the sheriff showing service was conclusive that there had been service, unless it was shown that the plaintiff in the action fraudulently procured the sheriff to make such a return; or, knowing a false return had been made and that in point of fact the defendant had not been served, took advantage of the falsehood to obtain judgment against the defendant by default. *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481. It is not alleged in the petition in the present case that Troll, the public administrator, either procured the deputy sheriff to make a false return of service on Strobel or had any knowledge that the return was false, if, in fact, it was. There is no attempt, either by allegation or evidence, to connect Troll with any fraud in the matter of the return of the deputy, nor is there an allegation of fraud of any sort in the present petition. It follows that, in so far as plaintiff's cause of action depends on the alleged failure to serve him with notice of the pendency of the proceeding in the probate court, the suit must fail.

2. It is insisted by plaintiff's counsel that in the proceeding to compel Strobel to make settlement and turn over the assets in his hands as executor the probate court had no jurisdiction to hear evidence concerning, and enter judgment for, a debt Strobel owed the deceased, or to hear and determine the issue of whether plaintiff had concealed assets in his hands which had not been inventoried by Strobel as executor. The argument is that different remedies had to be resorted to as to those matters, and that to adjudicate regarding them in said proceeding to the plaintiff's prejudice was an exercise of excessive jurisdiction which rendered the judgment void. We need not determine whether or not the probate court in fact exceeded its jurisdiction, if it adjudicated such demands. As to its right to adjudicate concerning the alleged indebtedness for rent, the decisions appear to be contradictory, as will be seen by reading the following cases: *McManus v. McDowell*, 11 Mo. App. 436; *Ridgway v. Kerfoot*, 22 Mo. App. 661. We have recited the substance of the entry of the judgment of the probate court. It does not appear from said entry that the court included in its judgment the indebtedness of Strobel to Baier or an order that Strobel should pay over to Troll any assets belonging to Baier's estate which had not come into his (Strobel's) hands as executor. The judgment recites that the court found on hearing the evidence that at the time of the suspension of Strobel as executor he had in his hands as executor belonging to the estate the sum of \$935, and it was for this sum that judgment was entered.

What we have to determine, therefore, is whether or not it was competent for plaintiff,

by oral testimony or other evidence outside the record of the proceedings in the probate court, to prove that, in fact, said court did hear evidence as to a personal indebtedness of Strobel to Baier and as to uninventoried assets, and did adjudicate on said demands and include them in the judgment against Strobel in favor of Troll as public administrator. When a court has jurisdiction of the subject-matter of a cause and of the parties, its judgment, in the absence of fraud in procuring it (and there is no charge of fraud before us), imports absolute verity, and cannot be attacked or assailed by evidence allunde the judgment roll and record. *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366; *Knight v. Cherry*, 64 Mo. 513; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521. It may be conceded that if the recital of the judgment, or the pleadings or other contents of the judgment roll, showed affirmatively that the court included those demands in its judgment, and they were in excess of the court's jurisdiction, the judgment would be void. *Fithian v. Monks*, 43 Mo. 502. But, instead of showing this, the record in so far as it speaks on the subject shows the contrary. We have failed to find in a tedious search a precedent in which it was contended that it was competent to show by evidence outside the record or roll of a cause and in contradiction of the record that a court had exceeded its jurisdiction for the purpose of annulling and setting aside its judgment. To our minds such a proposition is opposed to the fundamental rule that the records of a court import absolute verity. *Dixon v. Judge*, 4 Mo. 286; *State v. Taylor*, 171 Mo. 463, 71 S. W. 1005. The proceeding by Troll was one within the clear jurisdiction of the probate court, and the orders and doings of the court therein are entitled to the same presumptions in favor of their regularity and propriety that would exist in the case of a court of general jurisdiction. *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129; *Price v. Real Est. Ass'n*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595. In *Covington v. Chamblin*, 156 Mo. 574, 587, 51 S. W. 728, 732, the Supreme Court said regarding the conclusiveness of an order of a probate court approving a sale of real estate that said order was a final judgment "impervious to collateral attack and subject to impeachment in a direct proceeding for that purpose only for defects apparent upon the face of the record going to the jurisdiction of the court, or for fraud," and the succeeding remarks of the court show it meant that fraud which would justify annulling a judgment was fraud in procuring it to be rendered, instead of in the transactions which gave rise to the litigation. Inasmuch as the return of the sheriff that Strobel was served with process is conclusive, it must be taken for granted that Strobel had his day in court, and at the hearing could have presented his de-

fense to any and all demands sought to be discovered by Troll, and, if the court disallowed his defenses, could have appealed from the judgment. This being true, it is certain that a bill will not lie to attack the validity of the judgment on allegations impugning the verity of the record and to be supported by evidence allunde.

The judgment is affirmed. All concur.

### AIMEE REALTY CO. v. HALLER et al.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

#### 1. MECHANIC'S LIEN—SEVERAL LIENS—JOINT CONTRACT.

Where defendants did the painting and glazing on several houses under a single contract to do the entire work for a specified sum, and it did not appear that the lots on which the houses were located were contiguous, defendants were entitled to file separate mechanics' liens on each house, under Rev. St. 1899, § 4227 [Ann. St. 1906, p. 2317], providing for the filing of separate liens on each piece of property for the work and materials furnished and expended on such property, unless the lots on which separate work is done are contiguous.

#### 2. SAME—ENFORCEMENT—ACTIONS.

The rule against splitting demands does not apply to mechanics' liens claims, the lienor being entitled to bring separate actions to enforce each lien for the value of the material and labor furnished on each of several houses under a single contract.

#### 3. INJUNCTION—ACTIONS—ADEQUATE REMEDY AT LAW—COUNTERCLAIM.

Defendants contracted to do the painting and glazing on 25 dwelling houses, erected by complainant, for the sum of \$4,900. Complainant advanced to defendants during the work \$4,200, and refused to pay the balance, because of defendants' failure to comply with the contract, and because of defective performance of the work, alleging damages in the sum of \$2,000. Held that, since defendants were entitled to institute separate actions before a justice of the peace to recover the amount due on each of said buildings in which complainant's counterclaim might not be available, and it appearing that defendants were insolvent, complainant did not have an adequate remedy at law, and was entitled to an injunction restraining defendants from instituting separate suits in support of such mechanics' liens for the balance due on each of the houses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 17.]

#### 4. SAME—MULTIPLICITY OF SUITS—CONSOLIDATION OF ACTIONS.

The rule that an injunction will be granted restraining prosecution of several actions at law arising out of the same controversy does not apply where the actions may be consolidated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 31.]

#### 5. JUSTICES OF THE PEACE—ACTIONS—CONSOLIDATION.

Under Rev. St. 1899, § 3953 [Ann. St. 1906, p. 2117], providing that, whenever several suits shall be pending before a justice by the same plaintiff against same defendant for causes of action which may be joined, or whenever several suits shall be pending before the same justice against several defendants for the same causes of actions, the justice may order them consolidated. If the questions arising are substantially the same, or the defenses will be substantially the same in both cases, actions which

might be instituted at different times and before different justices could not be consolidated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 230.]

#### 6. INJUNCTION—ACTIONS AT LAW—MULTIPLICITY OF SUITS.

Where defendants agreed under a single contract to paint and glaze 25 dwelling houses on separate lots for a specified price, and complainant claimed a counterclaim of \$2,000, because of unsatisfactory work and materials, complainant was entitled to an injunction to restrain defendants from instituting separate suits in support of a mechanics' lien for the balance unpaid under the contract on each of the houses, in order to prevent a multiplicity of suits, without a trial of at least one of the actions, at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 18.]

#### 7. MECHANICS' LIENS—INJUNCTION.

When defendants had a statutory right to file separate mechanics' liens for the balance due for labor and materials in painting and glazing several houses under a single contract, complainant was not entitled to an injunction to restrain the filing of such liens, though it claimed that defendants were not entitled to any lien because they had been overpaid.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Suit by the Aimee Realty Company against Lewis Haller and others, to restrain defendants from filing several mechanics' liens, and from prosecuting separate suits in support thereof. From a decree for defendants, plaintiff appeals. Reversed and remanded.

A demurrer was sustained to appellant's petition, which is in the nature of a bill in equity, to enjoin the respondents from filing divers mechanics' liens on appellant's property, and instituting suits to enforce them. Appellant stood on the petition, and final judgment having been entered against it, prosecuted this appeal. According to the statements of the petition the respondents are partners under the firm name of Haller Bros., and engaged in the business of painting and glazing in the city of St. Louis. Appellant is the owner of 23 lots in city blocks Nos. 2097 and 2098, on Tower Grove Heights addition to the city of St. Louis. It was at the time of the filing of the petition, and had been for some months previously, engaged in the erection of 25 dwelling houses on said lots, and, in the course of the work, had entered into a written contract with respondents whereby the latter undertook, for a consideration, to paint and glaze said dwelling houses. The petition then states various specifications about how the work of painting and glazing was, according to the terms of the contract, to be finished, and alleges a failure on the part of respondents to comply with their contract in particulars mentioned, and that in consequence of said breaches by respondents appellant was damaged in the sum of \$2,000. The petition further states that the consideration appellant was to pay for painting and glazing said 25 houses was \$4,900, or at the rate of \$196 a house; that during the progress of the work appellant paid respondents on said contract various sums, aggregating

\$4,200; that these payments were made at respondents' request, and for their accommodation, though by the terms of the contract appellant was not compelled to make any payment until all the work on the houses was completed by respondents; and, further, that at the time the several payments were made appellant was unaware of the failure of respondents to comply with the specifications of their contract. This failure consisted in not putting on the agreed number of coats of paint, failing to paint the iron work on the buildings, using inferior materials, and doing the work generally in such a defective, unskillful, and unworkmanlike manner as to cause the paint to scale. It was further averred that the work on the houses, except the painting and glazing which respondents were to do, was finished, and appellant had entered into contracts for the sale of several of the houses, and had guaranteed the purchasers against any liens or claims by respondents or others. It is further alleged that respondents have so completely failed to carry out the terms of their contract that appellant has been greatly damaged, and will be compelled to pay a large amount of money in order to put the dwellings in the condition they would have been in if respondents had complied with their contract; that appellant has sustained much greater damage by respondents' breach than would offset any balance whatever due, or that yet may be due, to respondents from appellant; that the claim of respondents on account of the balance that will be due when they shall have completed all the work under the contract is \$1,000, and the damage sustained by appellant on account of respondents' breaches is about \$2,000; that appellant is not indebted to respondents in any sum whatever; that it has paid them more than they are entitled to, and when the set-off and counterclaim, based on respondents' breaches, is considered, they will be found to be indebted to it more than \$800 on account of money heretofore paid them; that respondents threaten to harass and annoy appellant and the purchasers of the houses and tenants of appellant by filing mechanics' liens on account of painting and glazing and for extra work alleged to have been done, respondents claiming that all but two houses have been completed, and that they (respondents) have completed all the work required of them under the contract; that respondents insist on the payment of their demands before they will finish the contract, and threaten to serve notice on appellant's tenants and the purchasers of said houses of the intention to file mechanics' liens thereon, and to create the impression that the titles to the houses are defective and uncertain, and to frighten away other prospective purchasers, and to involve appellant in a multiplicity of suits and costs to defend such actions. It is further averred that the contract between appellant and respondents to paint the houses is single, complete, and in-

divisible, and by its terms respondents must complete the work before filing any liens or bringing any suits against appellant; that respondents have already filed one lien suit against the property, and threaten to file others; that in doing so they are moved by a desire and purpose to harass and annoy appellant by vexatious litigation, and to cast a cloud on the title of appellant's real estate, and compel it to submit to their unjust demands, and to waive their numerous breaches of the contract, and that, unless restrained, respondents will file numerous suits and liens and cast numerous clouds on the title of appellant's property, and involve appellant in a multiplicity of suits, and cause it to spend large sums to defend the same, and will split up their cause of action under the contract, and compel appellant at great cost to defend said suits; that, if respondents are permitted to take such course, appellant will be prevented from presenting its counterclaim and set-off arising out of respondents' breaches of the contract, and to recover the excess of money it had already paid out on account of said excess on said work, and will be harassed and annoyed by vexatious litigation; that, though it was under no obligation to do so, appellant has offered to file a sufficient bond, guaranteeing the payment by it of any sum of money that might be found to be due respondents for work done by them under the contract, but respondents have refused to accept such guaranty, and insist that they will file separate suits to enforce said liens. It is further averred that respondents are insolvent, and have no property out of which a judgment against them can be satisfied. The prayer of the petition is that respondents, and each of them and their agents, assignees, or attorneys, be enjoined from giving notice of their intention to file liens on any of said houses; and, further, that they be enjoined and restrained from filing any liens as original contractors or as subcontractors, or otherwise, on any of said lots or houses, and be required to account to appellant for the moneys paid to them by it, and that, after allowing respondents the value of the work done and to be done by them, in the sum of \$3,000, appellant have judgment against them in the sum of \$1,000, and for other proper relief.

Jno. A. Blevins, for appellant. P. A. Griswold and C. H. Krum, for respondent.

GOODE, J. (after stating the facts as above). There are two meritorious grounds on which a court of equity will entertain this suit. One is that otherwise the appellant might be cut off from relief on its counterclaim. Though all the work of painting and glazing was to be done under a single contract, the respondents may file separate liens on each house. Indeed it may be that they would have to do so, because it is not stated in the petition that the lots are contiguous,



which is the only instance when it is allowable to file one lien on several lots. Rev. St. 1899, § 4227 [Ann. St. 1906, p. 2317]. The decisions in mechanics' liens cases permit separate actions to be brought to enforce each lien for the value of the material and labor furnished on the respective houses, and do not apply the rule against splitting demands. *Kick v. Doerste*, 45 Mo. App. 134; *Christopher & Simpson, etc., Co. v. Kelly*, 91 Mo. App. 93. Respondents might institute separate actions before a justice of the peace, and, as the amount of appellant's counterclaim exceeds the jurisdiction of a justice, it could not prevent judgments from going against it, or establish its counterclaim. Moreover the counterclaim might take on an equitable nature to recover money paid under a mistake of fact, and of this a justice of the peace would not have jurisdiction. *Hicks v. Martin*, 25 Mo. App. 359. In view of these facts in connection with the averment that respondents are wholly insolvent, it is apparent that appellant might be made to pay what they claim, without having any effective recourse against them for the damage sustained by their alleged breaches of the contract. One of the favorite grounds of equity cognizance to restrain proceedings at law exists when, in the courts of law, the defendant cannot avail himself of a valid equitable defense. *Bispham, Eq. (8th Ed.)* §§ 407, 409, 418. And sometimes a defense by way of set-off or counterclaim cannot be asserted at law, and then equity will take jurisdiction. *Id.*, § 327, and cases cited in notes 2 and 3. This is especially true where the party against whom a set-off is claimed is insolvent. *Wabash R. R. v. Bowring*, 103 Mo. App. 158, 160, 77 S. W. 106; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

The second ground on which equity should take cognizance is to prevent a multiplicity of suits. In our opinion, the present case clearly falls under that head of equity jurisdiction. It is an instance of one party being threatened with successive actions at law by another party, when the actions arise out of a common transaction, and involve the same questions of fact and the same legal propositions. Where these conditions exist, a court of equity may interfere to restrain the prosecution of actions at law, if justice will thereby be subserved; that is to say, if the litigation will be circumscribed and annoyance and expense diminished, and still the rights of the parties preserved. 1 *Pomeroy, Eq. Jur. (2d Ed.)* § 254. The rule is not applied when the several legal actions might be consolidated; but in the present instance the right of appellant to have them consolidated is precarious. They might be instituted at different times, and before different justices of the peace, and then, of course, they could not be consolidated. Rev. St. 1899, § 3953 [Ann. St. 1906, p. 2174]. And if different actions were instituted in the

circuit court, it seems doubtful whether or not they would fall within the class of liquidated demands which alone may be consolidated in the discretion of the court. Rev. St. 1899, § 749 [Ann. St. 1906, p. 735]. It is clear that, whatever legal remedy the appellant may have, it is neither plain nor adequate, and, when this is true, and the cause falls under one of the heads of equity jurisdiction, a court of chancery will grant relief. *McDaniel v. Lee*, 37 Mo. 204; *Biddle v. Ramsey*, 52 Mo. 153. The prevention of a multiplicity of suits is one of the heads of equity jurisdiction, and, when the circumstances are appropriate, chancery will entertain a cause simply to prevent the annoyance and expense of repeated legal actions. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; 1 *Pomeroy*, § 249. It must, of course, appear that the petitioner for equitable relief has a meritorious cause. 1 *Pomeroy*, § 250. This appears in the present case, and also that the cause of appellant is not only meritorious, but one which it might find difficulty in asserting at law. At the same time it is not conceivable how any issues could arise regarding the demands of respondents which could not be settled and determined by a court of equity in one suit. The jurisdiction of equity to enjoin legal actions, or grant other appropriate relief, in order to prevent unnecessary litigation, has been exercised in instances where the circumstances were not so far as the point in hand is concerned, materially different from the case at bar. That is to say, jurisdiction was assumed by the equity tribunal in order to prevent the party complained against from instituting against the complaining party successive legal actions involving the same questions of law and fact which might as well be determined in one as in many cases. The question is soundly elucidated in *Galveston, etc., R. R. v. Dowe*, 70 Tex. 5, 7 S. W. 368, wherein it appears that certain contractors who had worked for the railroad company had issued to their laborers a large number of written obligations known as "contractors' checks," which had been indorsed by the payees in blank, and all of them assigned to defendant Dowe, who was proposing to institute 30 or more actions against the railroad company. The bringing of such actions was restrained. In *Third Ave. R. R. v. Mayor*, 54 N. Y. 159, it appeared that the defendants, the mayor of New York and others, had instituted 77 actions against the railroad company to recover penalties prescribed by a city ordinance for running cars without a license. The company brought an action in equity to restrain the prosecution of more than one of said actions until that one was heard and decided, and this relief was given. A more striking case is *Norfolk Hosiery Co. v. Arnold*, 143 N. Y. 265, 38 N. E. 271. Those parties had entered into a contract by which the plaintiff had agreed to

pay specified royalties for the use of an invention. It paid the royalties for several years, and then refused to pay, alleging that the contract had been induced by fraud. Successive actions for several monthly installments were instituted by the defendant, and other actions were threatened to be brought as the installments fell due. Those facts were held to present a strong case for the interposition of equity to prevent unnecessary and multiplied actions. Quite similar is the case of *Tarbox v. Hartenstein*, 63 Tenn. 78, in which a party employed at \$25 a week was restrained from suing separately for each week's wages. In *Cuthbert v. Chauvet*, 60 Hun, 577, 14 N. Y. Supp. 385, it appeared that one of the defendants had commenced 10 actions of ejectment against the plaintiff to recover an interest in certain lands, and that the other defendants had threatened to institute similar suits. The land consisted of 10 parcels, and an injunction was granted against the prosecution of actions for more than 1 parcel until one action was determined. In *Featherstone v. Carr*, 132 N. C. 800, 44 S. E. 592, the equitable remedy was allowed to prevent a landlord from instituting successive actions for monthly installments of rent, it appearing that the whole matter could be settled in one case. According to the rule in many jurisdictions, an injunction would not be granted to restrain the prosecution of successive legal actions on the ground of avoiding a multiplicity of suits, unless the party complaining in equity had first had the merits of his cause determined in at least one instance by a court of law. But this rule does not prevail in all jurisdictions, and, according to the decision in *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566, is not enforced in this state. That case was a suit in equity by several coal companies to enjoin the city of St. Louis from enforcing the provisions of a certain ordinance providing for the weighing of coal and other merchandise on public scales, and the furnishing by the city comptroller, at a given price, of blanks or certificates for the use of all weighers on private scales. The ground of the suit in equity was that the ordinance involved was invalid and void, and that the defendants in the cause were threatening to enforce it by successive actions to recover penalties for each violation. It was held to be no reason for denying equitable relief that in each prosecution the coal companies might plead successfully the invalidity of the ordinance; that this did not give them an adequate remedy, as they were entitled to be protected from the annoyance of a multiplicity of suits brought on a void ordinance. It was also ruled there was no good reason, under the present system of procedure in code states, where equity and law are administered by the same tribunal, why relief against a multiplicity of suits should not be granted in the first instance by in-

junction, without waiting to have the legal questions involved determined at law.

Appellant asks to have the respondents restrained, not only from instituting separate suits, but from filing separate liens. We know nothing of equity enjoining a multiplicity of liens. The statutes give respondents the right to file different liens for their demands, and with this positive statutory provision a court of equity will not interfere. It is true appellant claims respondents are not entitled to a lien because they have been overpaid, but that might be said in every case wherein a builder or contractor sues. Nor is it necessary to restrain the liens in order to give appellant the full measure of relief it needs. It will be protected from unnecessary and harassing litigation by determining the issues in one suit, wherein it will have an opportunity to establish its counterclaim if it is meritorious. An equity tribunal is perfectly competent to settle all the issues in one suit, no matter how many parties there may be on either side. It can determine the rights of the appellant and its purchasers and tenants, and of the respondents, and every one else interested in the property.

The judgment is reversed, and the cause remanded, with directions to the court to overrule the demurrer to the petition and permit the respondents to answer if they are so advised. All concur.

#### CORNWALL v. STAR BOTTLING CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

##### 1. PROCESS — SERVICE — RETURN — CONCLUSIVENESS.

An officer's return of a summons showing due service is conclusive on the parties to the suit, and, if it is false in fact, the remedy of the party injured is by suit on the officer's bond; hence, where a sheriff's return of service of summons on a corporation stated that the president or other chief officer of the defendant could not be found in the state and that it was served by leaving a copy, etc., with one in charge of defendant's usual business office, affidavits that the president and vice president maintained offices in the city and were almost constantly in the city for six months prior to the date of service, and that the service was not made as stated, etc., were not admissible as evidence in support of a motion to quash the return.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 189-193.]

##### 2. CORPORATIONS—SERVICE OF PROCESS ON CORPORATION—METHOD—ABSENCE OF CERTAIN OFFICER ON DAY OF SERVICE.

Rev. St. 1899, § 995 [Ann. St. 1906, p. 876], provides that service of summons on a corporation shall be made on the president or other chief officer, or in his absence, by leaving a copy at any business office of the company with the person in charge thereof. Section 996 [Ann. St. 1906, p. 878] requires the sheriff's return to show the manner of execution, and, if not on the chief officer, he shall express the absence of such officer, or that he cannot be found. A return of service on a corporation stated that the president or other chief officer of the defendant could not be found in the city at the time of service, and that service was made by delivering

a copy, etc., to a certain person named, he being in defendant's usual business office and in charge thereof. *Held*, that the return was sufficient; since, if the president or other chief officer could not be found in the sheriff's bailiwick on that day, postponement of service would not be required, but he could serve it in another statutory method.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1978-2000.]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by John Cornwall against the Star Bottling Company, a corporation. From a judgment by default for plaintiff, and an order overruling a motion to set aside the judgment, defendant appeals. Affirmed.

F. A. & L. A. Wind, for appellant. Geo. W. Bailey, for respondent.

BLAND, P. J. Defendant is a corporation. The action was to recover a balance of \$150 on account. Defendant moved the court to quash the sheriff's return of the summons, for the reason "that no summons was ever served upon the defendant; that no copy of summons and petition was ever left with Wm. Freudenau, secretary of the defendant company; that Alex D. Grant, president, and J. Wm. Taylor, vice president, of the defendant company, resided and maintained offices in the city of St. Louis, Mo., and were present in the city of St. Louis, Mo., and could readily have been found by the sheriff for service of summons in this cause." Affidavits were filed in support of the motion. The motion to quash was overruled, and, defendant declining to plead further, or to appear to defend the action, judgment was rendered against it by default. A motion to set aside the judgment by default was filed and overruled, whereupon defendant appealed.

The sheriff's return is as follows: "Served this writ in the city of St. Louis, Missouri, on the within named defendant, the Star Bottling Company (a corporation), this seventeenth day of December, 1906, by delivering a copy of the writ and petition as furnished by the clerk to William Freudenau, secretary of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of the service." Defendant's contention is that the judgment was irregular, in that the sheriff's return "does not show that the president or other chief officer could not be found in the city of St. Louis as required by statute. It avers they could not be found 'at time of service.' Non constat they might have been found some other hour of the same day, or at some other day in time for service." Section 995, Rev. St. 1899 [Ann. St. 1906, p. 876], provides that service of summons on a corporation shall be made on the president or other chief officer of the company, or, in his absence, by leaving a copy of the petition and summons at any business office of the company

with the person having charge thereof. Section 996 [Ann. St. 1906, p. 878] requires the sheriff to express in his return on whom, how and when the summons had been executed, "and, if not on the chief officer, he shall express the absence of such officer, or that he cannot be found." The affidavits filed in support of the motion to quash the return are to the effect that both the president and vice president of defendant maintained offices in the city of St. Louis, and were almost continuously in the city for six months prior to the date the affidavits were made, February 21, 1907.

William Freudenau, secretary of the company, filed an affidavit denying in toto the truth of the return, and stating that the first intimation he had that suit had been brought was after judgment had been rendered. It is no longer a debatable question in this state that, when the officer's return to a summons shows service in the manner prescribed by statute, it is conclusive as to the parties to the suit, and, if the return is false in fact, the remedy of the party injured is by suit on the officer's bond. *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481; *Taussig v. Railroad*, 186 Mo. 269, 85 S. W. 378; *State ex rel. v. Cowell* (Mo. App.) 102 S. W. 573; *Realty Co. v. Packing Co.*, 112 Mo. App. 271, 86 S. W. 880; *Rosenthal v. Windensohler*, 115 Mo. App., loc. cit. 243, 244, 91 S. W. 432, and cases cited. Therefore the affidavits filed in support of the motion to quash were inadmissible as evidence, and were properly disregarded by the trial court. But it is contended that the return does not show the president, or other chief officer of the company, was absent from the city of St. Louis, or could not be found in said city. The statement in the return that the president or other chief officer could not be found in the city of St. Louis on the day the service was made is conclusive of that fact, and the fact that the president or other chief officer might have been found on some other day does not vitiate the return. The officer would naturally go to the office of the corporation to make service, and, if on arriving there he ascertained the president or other chief officer could not be found in his bailiwick on that day, he would not be required to postpone service of the writ to some other day, if he could then and there serve it in one of the methods authorized by the statute.

The judgment is affirmed. All concur.

DEAN & RATCLIFFE v. BROCKMAN.  
(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

APPEAL—ABSTRACT OF RECORD—SUFFICIENCY. Where there is no printed abstract in the record on appeal in short form, as required by Rev. St. 1899, § 813 [Ann. St. 1906, p. 783], and appellant only files a "statement, points, and authorities" containing a short recital of some facts only, the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2618, 2620.]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Dean & Ratcliffe against F. P. Brockman. From a judgment for plaintiffs, defendant appeals. Dismissed.

Wm. A. Kinnerk, for appellant. Abbott & Edwards, for respondents.

NORTONI, J. The appeal in this case is in the short form contemplated in section 813, Rev. St. 1899 [Ann. St. 1906, p. 783]. It is provided in that section that, when the appellant avails himself of its provisions and files only a copy of the judgment and order granting the appeal in this court, as was done in this case, he shall also file "printed abstracts of the entire record in the office of the clerk of such appellate court." Upon examination, we find there has been no such printed abstract of the entire record as required by the statute filed in this case. The appellant has filed a pamphlet entitled "Statement, Points, and Authorities for Appellant," in which there is a short recitation of some facts only. There is not a word in this pamphlet showing it to be an abstract of the entire record in the case. In fact, neither the petition, answer, reply, verdict, nor any other matter of record prior to the judgment, is mentioned therein. In this state of affairs it is certainly impossible for the court to know the nature of the cause or the issues in the court below. Inasmuch as respondents move a dismissal of the appeal for the reasons above stated, it will be ordered, as was done in the cases of Goesse & Remmers Bldg. & Const. Co. v. Kinnerk (Mo. App.) 97 S. W. 218, and Lawson v. Mills, 150 Mo. 428, 51 S. W. 678.

The appeal is dismissed.

BLAND, P. J., and GOODE, J., concur.

#### COLLIER v. LANGAN & TAYLOR STORAGE & MOVING CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

#### JUSTICES OF THE PEACE—APPEAL—NOTICE—SUFFICIENCY.

A notice of appeal from a judgment of the justice of the peace is good, if it is full enough to identify the judgment appealed from and informs the nonappealing party that an appeal has been taken; and hence a notice of appeal which correctly states the title of the cause, the amount of the judgment, the justice of the peace who rendered it, the number of the case in the circuit court, and the room in which it is pending, is sufficient, even though it misstates by two weeks the date of the rendition of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 586, 587.]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Needham C. Collier against the Langan & Taylor Storage & Moving Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Browning & Mason, for appellant. Kincahy & Kinealy, for respondent.

GOODE, J. The only point for decision in this appeal is whether or not a notice of an appeal by the defendant company (respondent here) from a judgment in favor of plaintiff, rendered by a justice of the peace, was sufficient. The defendant is engaged in the business of moving and storing furniture in the city of St. Louis, and was employed by plaintiff March 31, 1906, to remove certain personal property, chiefly clothing and household furniture, from plaintiff's residence, 4124 Delmar boulevard, in the city of St. Louis, to 4236 Cleveland avenue. The property was damaged by a fire while in transit, and this action was instituted before a justice of the peace to recover the damages. In defense it was pleaded that plaintiff carelessly and negligently permitted a stove with live coals of fire in it to be loaded into the van along with his other furniture; that defendant's servants were not aware the stove contained fire, and the motion of the van jostled the coals out and ignited the property. The trial before the justice resulted in a verdict and judgment for plaintiff, and defendant appealed to the circuit court. The judgment was rendered by the justice on August 6, 1906. The notice of the appeal was as follows: "Needham C. Collier, Plaintiff, v. Langan & Taylor Storage & Moving Company, a Corporation, Defendant. Before A. O'Hallaron, Justice of the Peace within and for the Fifth District, City of St. Louis, Mo. To the Plaintiff in the Above-Entitled Cause, or His Attorney before the Justice: You will please take notice that on or about the 16th day of August, 1906, the defendant appealed from the judgment rendered by the above-named justice of the peace in the above cause in favor of the plaintiff on the 26th day of July, 1906, for the sum of \$350 and costs, and that said cause on appeal is now pending in the circuit court of the city of St. Louis, in room 2 thereof, and is known as cause No. 43,202a of said court. Langan & Taylor Storage & Moving Company."

It will be observed that the foregoing notice describes the judgment as having been rendered on July 26, 1906, instead of August 6th, the true date, and for this reason it is contended that the notice was fatally defective. No doubt this point would be well taken, if the notice was not otherwise sufficient to apprise the plaintiff beyond possibility of doubt in what cause the appeal had been taken, and to what court. But the title of the cause is correctly stated; also the justice of the peace before whom it had pended, and who had given the judgment, the amount of the judgment, and that the cause was then pending in room 2 in the circuit court of the city of St. Louis, and was known as case No. 43,202a of said court. The only error in the notice was the misstatement of the date of the judgment. But this error could not have misled the plaintiff, in view of the other

elements of description of the cause, which pointed unmistakably to the case in which the appeal was taken, and the judgment it was taken from. While much strictness has been insisted on in notices of appeal, this policy ought not to be extended so as to produce absurdity. It would be little less than absurd to hold that plaintiff was not given sufficient information to apprise him completely of the appeal. This matter has been discussed in several cases recently by this court, and the doctrine stated that the notice is good, if it is full enough to identify the judgment appealed from, and informs the nonappealing party that an appeal has been taken. *Munroe v. Herrington*, 99 Mo. App. 288, 73 S. W. 221; *Igo v. Bradford*, 110 Mo. App. 670, 85 S. W. 618; *Teasdale v. Fruit Product Co.*, 120 Mo. App. 584, 97 S. W. 655. It is true the erroneous date of the judgment might have misled the plaintiff if it stood alone; but as the amount of the judgment is given, the justice who rendered it named, and the number of the case in the circuit court referred to, it would be a sacrifice of reason and justice to say the clerical misprision in the date should so far transcend in importance all the other elements of the notice as to be fatal to the appeal. Palpable clerical errors are not allowed that force in any class of judicial records or documents.

The judgment is affirmed. All concur.

# BRADBURY MARBLE CO. v. LACLEDE GAS LIGHT CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

## 1. NUISANCE—PRIVATE NUISANCE—DAMAGES—INDIRECT CONSEQUENCES—DEPOSITS FROM GAS PLANT.

The fact that discharges from defendant's gas plant, deposited on plaintiff's marble, were harmless, in the absence of moisture, would not render the damages so indirect as to prevent recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 123, 124.]

## 2. DAMAGES—QUESTIONS FOR JURY.

Whether damages to plaintiff's marble resulted from discharges from defendant's gas plant alone *held*, under the evidence, for the jury.

## 3. NUISANCE—PLEADING.

Where a petition charges that defendant in manufacturing gas wrongfully caused large quantities of discoloring ashes, etc., mixed with carbon, iron, etc., to issue, which were deposited upon plaintiff's stock of marble, and that by reason thereof plaintiff was required to make expenditures for sand rubbing, the action is not based on negligence, but is for maintaining a private nuisance.

## 4. SAME—NATURE AND ELEMENTS.

As a general rule an act in itself lawful is a nuisance, if it is done in a particular place, and so necessarily tends to injure and damage another's property; but one may reasonably enjoy his property by putting it to any use he chooses, whatever damage results to another, providing no legal right is violated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 6.]

## 5. SAME—ACTS CONSTITUTING PRIVATE NUISANCE.

As a general proposition, neither a private person nor a corporation has the right to erect and maintain a nuisance, which has the effect of depriving an adjoining property owner of the beneficial use of his land, without making compensation for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 4, 5, 26.]

## 6. SAME—NUISANCE PER SE—GAS PLANTS.

The operation of a plant for manufacturing gas for heating and lighting purposes is lawful, and not a nuisance per se; and if there is no evidence that its machines were operated in a negligent or unskillful manner, or that they were in themselves obnoxious, there can be no recovery for damages therefrom, in the absence of a showing of an interference with the ordinary use of plaintiff's property, or a violation of his legal rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 20, 23, 24, 129.]

## 7. SAME—QUESTIONS FOR JURY—NATURE OF QUESTION.

In an action at law to recover for damages caused by a private nuisance, whether the acts complained of constitute a nuisance should be left to the jury, if the evidence tends to show an invasion of plaintiff's legal rights, to his damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 129.]

## 8. SAME—INVASION OF LEGAL RIGHTS.

In an action for damages caused by discharges from a gas plant, whether plaintiff's legal rights were invaded *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 129.]

## 9. SAME—DEFENSES.

Though plaintiff, a marble company, has a right to stack its marble on its yard, and leave it uncovered, a defendant gas company across the street has a right to operate its machines in a careful and skillful manner, and to discharge such substances as are not injurious to the neighboring property, when used in the usual way, and plaintiff cannot recover, if it is making an unusual use of its yard in view of its location in a district devoted to manufacturing purposes, or if the marble so stacked in its yard is of so delicate a nature as to become stained and injured from the reasonable use of the gas plant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 106.]

## 10. TRIAL—INSTRUCTIONS IGNORING DEFENSES.

An instruction authorizing a verdict for plaintiff upon mere proof that its marble was damaged by discharges from defendant's gas plant, but ignoring defendant's legal right to operate its machines, and whether plaintiff devoted its premises to an unusual use, is erroneous in omitting important issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613, 616.]

## 11. NUISANCE—PRIVATE NUISANCE—ACQUISITION OF RIGHTS BY PRESCRIPTION.

While the right to maintain a public nuisance cannot be acquired by prescription, the right to maintain a private nuisance may be established by adverse and exclusive enjoyment for the length of time prescribed by the statute for the acquisition of title to land by adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 42.]

## 12. SAME—QUESTION FOR JURY.

Evidence *held* sufficient to warrant the submission of the issue of a prescriptive right to maintain and continue a private nuisance.

Appeal from Circuit Court, City of St. Louis; Daniel D. Fisher, Judge.

Action by the Bradbury Marble Company against the Laclede Gas Light Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff and defendant are both Missouri corporations. Plaintiff is engaged in the business of buying, selling, polishing, and cutting marble, granite, and other stone for building and monumental purposes, and occupies a parcel of ground in block 47, city of St. Louis. The lot has a frontage of 125 feet on the west line of Second street, and a depth of 150 feet, and is situated between Convent and Rutger streets. Defendant is engaged in manufacturing gas for lighting and heating purposes, and for many years, to wit, since 1889, has maintained a plant for the manufacture of gas east of and just across Second street from plaintiff's marble works and yard. It is charged in the petition "that defendant, in the process of manufacturing gas, as aforesaid, on said premises, and in and with said works and plant, wrongfully caused to issue and proceed from said works and plant large quantities of offensive, deleterious, harmful, and discoloring ashes, smoke, gases, soot, cinders, oil, dust, together with and mixed with carbon, iron pyrites, oxydized pyrites, which, on various days and times from December 20, 1903, up to the date of commencing this action, spread and diffused themselves, and were, especially whenever the wind was blowing, or there were currents of air moving from the east in a westwardly direction, diffused and spread over and upon the lot or tract of ground in block No. 47, of said city of St. Louis, used, occupied by, and in the possession of plaintiff (Bradbury Marble Company), as hereinbefore alleged, and settled and were deposited upon and against the stock of material aforesaid, consisting chiefly of marble then and there owned by and in possession of plaintiff, and then and there kept and stored by it on said lot or tract of ground, whereby and in consequence of which a large number of pieces and blocks of said marble, to wit, 1,167 pieces and blocks, so, and then and there owned by and in the possession of Bradbury Marble Company (plaintiff) were stained, discolored, and partially disintegrated and made and rendered unfit for use, unsalable, and valueless in their said damaged and injured condition, and said stains, discoloration, and disintegration penetrated said pieces and blocks of marble to such extent that it became and was necessary to do a large amount of extra sand rubbing thereto and thereon in order to restore said marble and make it again fit for use and salable; that by reason of the premises and of defendant's wrongful acts aforesaid plaintiff has been compelled to expend and has already expended a large sum of money, to wit, the sum of \$850, and will hereafter be compelled to expend further

large sums, to wit, the sum of \$215 in doing extra sand rubbing to and upon said pieces and blocks of marble, damaged and injured as aforesaid by defendant's wrongful acts aforesaid, between the 20th day of December, 1903, and the date of commencing this action, that is, an additional sand rubbing thereon and thereto which would not have been necessary if it had not been for the damage and injury aforesaid, caused to said marble by defendant; that the aggregate of said two sums, to wit, the sum of \$1,065, was, at all the times herein mentioned, and is, the reasonable cost and expense of doing said extra sand rubbing." A bill of particulars, stating the damage to the marble, was filed with the petition. It is also stated in the petition that plaintiff in 1903 notified defendant of the harm which was being done its property, and presented a bill for the damages accrued up to that time (\$470), but defendant refused to pay the same. The answer was, first, a general denial, and the following: "Defendant, further answering, says that in its business of manufacturing gas it is and was operating the plant complained of in plaintiff's amended petition. Defendant further states that it acquired the property in question from the St. Louis Gas Light Company, in or about the year 1889, and that said St. Louis Gas Light Company erected the works and plant thereon, and that said plant and works were operated by said St. Louis Gas Light Company and this defendant in the same manner in which they were operated during the times mentioned in plaintiff's amended petition, for a period of over 20 years prior to any complaint from plaintiff of the acts alleged in said amended petition to have been committed by defendant; that the alleged damage and injury to plaintiff's stock of marble, if any, was caused by the acts of plaintiff in placing and leaving said marble uncovered and unprotected and exposed to the elements, when plaintiff well knew that by such exposure its marble would be injured and damaged thereby; that the alleged injury and damage to plaintiff's said stock of marble, if any, was greatly increased because plaintiff needlessly and carelessly exposed a greater part of said marble than was necessary, that is to say, that instead of placing the small surfaces in an upright position, it placed the large surfaces upright. Wherefore, having fully answered, defendant prays to be discharged with its costs in this behalf expended." The reply was a general denial of the new matter in the answer. Verdict and judgment were for plaintiff for \$1,000.01, which was reduced by voluntary remittitur to \$975.

William A. Baehr was introduced as a witness by plaintiff, and testified he was defendant's chief engineer, and had charge of all its manufacturing stations in the city of St. Louis; that Station A, located east of plaintiff's marble yards, is what is known as a water gas station, composed of machines

consisting of three parts, a generator, carburetor, and a superheater, and minutely described the construction of the several parts of the gas machines, the office each performed in the manufacture of gas, and described the process by which gas is made. Witness testified that in manufacturing water gas coke produced from Pittsburg coal is used, and "In making coal gas the bituminous coal is put in large retorts, which are heated to a high temperature, in the neighborhood of 2,000 degrees Fahrenheit, and this high temperature distills the coal; in other words, it drives the gas out of it, and the stuff that remains in the retorts after the gas is driven out of the coal is coke." Witness also testified as follows: "During the period that the gas is being made the stack valve prevents the gas from escaping into the air, it being closed. The gas has to pass during that time through a separate opening into purifying vessels. During the time when we wish to blast the machine up to heat it, the stack valve is opened, so the products of combustion during the blasting or heating period will pass off into the air. The blast is introduced at the bottom of the generator, and at the top of the carburetor, and is produced by two fans, each eight feet in diameter. The steam jet is introduced at the bottom of the generator during the gas-making process, and goes upward through the coke, and out from the top of the generator into the carburetor. To each machine, composed of the three parts already mentioned, there is a valve stock at the top of the superheater. These stacks are constructed of steel and are about 25 feet apart, 35 or 40 feet in height from the ground, and are located upon defendant's premises about 20 or 25 feet east of the east building line of Second street. During the blasting period the products of combustion in the machine are forced through these stacks. This material consists mostly of carbonic acid. It also contains hydrogen and oxygen, and possibly a trifle of sulphur. On an average three machines are operated constantly, night and day, during which time they consume probably 30,000 pounds of coke each." Witness further testified that to make illuminating gas it was necessary to use a certain quantity of oil, which was sprayed into the gas machines; that the oil used is fuel oil, known as "gas oil," and is a product of crude petroleum after the kerosenes and gasolines have been distilled off; that "at the end of the gas-making period there is always a certain amount of crude gas left in the machine when the stack valve is opened and the blast turned on. This portion of the gas is driven up through the stack, and on meeting with the air it sometimes ignites. The plaintiff made a complaint to defendant about some stains on its marble, and I went to its works three or four times for the purpose of determining the cause of these stains. Mr. Bradbury, the president of plaintiff corporation,

and I looked at some of the substance on the marble, but I did not take any of it away, nor did I make any analysis. \* \* \* The plant of the N. K. Fairbanks Soap Manufacturing Company adjoins plaintiff's premises directly on the north. These works have a number of smokestacks which emit smoke, and odors incidental to such an establishment are very noticeable in that vicinity. The plant of the Heine Safety Boiler Works adjoins plaintiff's premises directly on the south. This concern conducts some of its operations in the public thoroughfare of Second street, such as putting in red-hot rivets on boilers from which small particles or scales of steel fall on the street, when the rivets are hammered. These particles mix with the dust and other substances on the street, which is blown about by the wind, as the street is not very frequently sprinkled, and generally remains in a dusty condition. Plaintiff leaves some of its marble on the sidewalk of Second street. \* \* \* There is absolutely no oxide of iron discharged from defendant's machines. The complaints of plaintiff as to stains on its marble originated after there was a rainfall. The stacks of the Heine Safety Boiler Works are within 30 feet of plaintiff's premises, whereas the stacks of defendant are 100 feet away. There is an iron smelter or foundry in the next block south of plaintiff's marble yard, from the stacks of which dense yellow and black smoke, together with flames, are emitted. The district where both plaintiff's and defendant's plants are located is in a manufacturing part of the city."

Plaintiff's evidence tends to show that, when the wind was from the east, ashes and fine particles, resembling coal, were blown from defendant's gas works on plaintiff's lot, and quantities of it settled on the marble stacked in its yard, and when wet this black powder would dissolve, spread and penetrate the marble for about three-eighths of an inch, leaving a yellow stain which had to be ground off to make the marble salable; that the discoloring never occurred except after a rain. Plaintiff gathered a quantity of this black powder and submitted it to Dr. Keiser, chemist at Washington University, for analysis. Dr. Keiser testified he made an analysis of the powder submitted to him, and found it contained carbon, soot, iron, and sulphur; that, when the powder was moistened, "it gave an acid reaction. The iron and sulphur slowly oxidizes when it is wet, and it forms what is called 'ferrous sulphate,' and this acid has a sour taste, and will eat into limestone or marble, and stain it yellow." Plaintiff's witnesses testified they watched this black powder, and saw that it came from defendant's gas plant and settled on the marble stacked in plaintiff's yard; that they dropped water on it, and when the powder became wet it dissolved, spread and penetrated the marble, and discolored it; that from February, 1903,

to the date of the commencement of this suit, 3,098 square feet of plaintiff's marble stacked in its yard was discolored by this substance, and it cost about 70 cents per square foot to sand-rub the stains out of the marble. They testify the ashes and black powder could be swept off the marble, and that it did no harm until it became wet.

Defendant's evidence shows the N. K. Fairbanks Soap Factory is directly north of plaintiff's marble yard, and that its smokestacks discharge substances which would naturally fall on plaintiff's premises; and also that the Heine Boiler Company's shops are immediately south of plaintiff's yard, and that this company has forges for forging steel, and uses compressed air to force draught through its forges; that the company does something to its boilers out on the street running between its plant and plaintiff's yard, and scales from these boilers fall upon the street, which is very seldom clean, and winds could carry dust charged with fine particles of iron to plaintiff's yard. S. W. Forder, defendant's superintendent at the gas plant in question, testified he was a practical chemist and familiar with the substances discharged from defendant's plant or smokestack, and they consisted mainly of gases, which contained carbon dioxide, carbon monoxide, nitrogen, and some oily vapors, which at times floated off with the gases into the air; that none of these substances would stain marble, or have any effect whatever upon it; that the stains complained of were the result of the action of water on iron oxide; and that the discharges from the stacks of the Heine Boiler Company contained carbon and iron. The evidence of

Hawkins, read from an affidavit for a continuance, corroborates that of Forder.

The evidence shows defendant's machines, or machines of practically the same construction as the ones in use, were installed in 1892. The ones now in use were installed in 1902 or '03. Plaintiff has occupied its premises continuously since 1891. Some of plaintiff's witnesses testified they had watched discharges from the smokestacks of the Fairbanks Soap Company and the Heine Boiler Company, and they did not fall on plaintiff's yard, and that the dirt from the street in which the Heine Boiler Company sometimes riveted its boilers is prevented from getting into plaintiff's yard by a close board fence six feet high. Plaintiff deals in Italian, Vermont, and Georgia marble. The Vermont and Italian marble is kept under a roof for the reason it is more delicate than the Georgia marble, and easier marred or stained by foreign substances. The Georgia marble is sawed into squares and blocks at the quarry before shipment. These blocks and squares require a sand rubbing of about one-sixteenth of an inch to polish them. The evidence shows plaintiff kept both polished and unpolished Georgia marble stacked in its yard.

Boyle & Priest and Robt. E. Moloney, for appellant. Leonard Wilcox, for respondent.

BLAND, P. J. (after stating the facts as above). At the close of plaintiff's case, and at the close of all the evidence, defendant offered a demurrer to the evidence. The refusal of the court to grant its request is assigned as error. For the reason the powder deposited on the marble did no injury in itself, and was harmless unless moistened, defendant contends the damages were not direct, and for this reason plaintiff cannot recover. Some of the cases hold to this doctrine; but the majority of the cases in the United States repudiate it, and hold that consequential as well as direct damages may be recovered in this form of action. See 21 Am. & Eng. Ency. of Law, p. 716, and cases cited in footnote 11. There is some evidence tending to show the discharges from the smokestacks of the Heine Boiler Company and the Fairbanks Soap Company may have contributed to the damage complained of, but there is no direct evidence that they did so. On the other hand, plaintiff's evidence tends to prove the discharges from defendant's works fell upon its yard, and these discharges, when wet by rain, dissolved, penetrated, and stained the marble; hence we think the evidence was sufficient to authorize the jury to find the damages complained of were caused by discharges from defendant's plant alone, when combined with rain falling after the deposits were made. The action is not based on negligence, but is for maintaining a private nuisance. The general rule is: "Although an act may be in itself lawful, yet, if it is done in a particular place, and so necessarily tends to the injury and damage of another's property, it constitutes a nuisance." Joyce on Nuisances, § 26. Wood says: "It may be stated, as a general proposition, that every enjoyment by one of his own property, which violates the rights of another, in an essential degree, is a nuisance, and actionable as such at the suit of the party injured thereby." 1 Wood on Nuisances, § 1. This general rule is subordinate to the right of every one to the reasonable enjoyment of his own property by putting it to any use he chooses, provided the use to which he devotes it violates no legal right of another, however much damage the other may sustain therefrom; as where the damages are caused from the natural development of the land itself, or when one lives in a city and is bound to submit to the consequences of the obligations of trade carried on there. 1 Wood on Nuisances, p. 6, and cases cited in the text. As a general proposition, neither a private person or a corporation has the right to erect and maintain a nuisance which has the effect of depriving the adjoining proprietor of the beneficial use of his land, without making compensation for the injury. Paddock v. Sones, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; Powell v. Brick & Tile Co., 104 Mo. App. 713, 78 S. W. 640;



Chicago G. W. Ry. Co. v. Church, 102 Fed. 85, 42 C. C. A. 173, 50 L. R. A. 488; Bohan v. Gas Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Hauck v. Tidewater Pipe Line Co., 153 Pa. 366, 28 Atl. 644, 20 L. R. A. 642, 34 Am. St. Rep. 710. The operation of defendant's gas machines was lawful, and hence not a nuisance per se. There is no evidence that the machines were operated in a negligent or unskillful manner, or that they were in themselves obnoxious. The question, therefore, is whether or not their operation interfered with the ordinary use of plaintiff's yard, or violated any of his legal rights.

The case of Robinson v. Kilvert, 58 L. J. Rep. (Ch. Div.) 392, was a suit by a tenant against his landlord for loss caused by an alleged nuisance maintained by the landlord. The facts were: The tenant had leased of the landlord a warehouse, in which he stored large quantities of brown and tissue paper. Under the wareroom was a basement, in which the landlord maintained a heating boiler. Heat from this boiler heated the ware-room to about 80 degrees Fahrenheit. The heat injured the brown paper by drying it out and reducing its weight, thereby preventing it from acquiring weight by absorbing moisture which it otherwise would have acquired in a moist atmosphere. On these facts, Cotton, J., at pages 394-396, said: "It has been put before us on the ground that what has been done by the defendants is a nuisance, because it interferes with the user by the plaintiff of his premises. It is to be noticed that the heat raised in the room of the plaintiff is not very considerable—it has never exceeded 80 degrees Fahrenheit on the floor, and is generally considerably below. A question of nuisance must be a question of degree. If a person does a thing which is in itself noxious, or which interferes with the ordinary user of a house or building, that is a nuisance. But no case has been quoted, and I know of none, which lays down that, where a person does something, not in itself noxious (e. g., the emission of poisonous fumes), he is guilty of a nuisance, unless it is an injury to the ordinary enjoyment of life. But it would be wrong to say that a person can be guilty of a nuisance for doing something, not in itself noxious, and which does not interfere with the ordinary enjoyment of life, because it interferes with some particular delicate trade which is carried on by a neighbor. That would be throwing too great a burden on a man's neighbors."

If the marble stacked in plaintiff's yard was of a delicate nature, and easily stained by foreign substances, the case perhaps falls within that of Robinson v. Kilvert, supra. This case is authority for the text (21 Am. & Eng. Ency. of Law [2d Ed.] p. 658), where it is said: "The question of nuisance is not affected by the mere fact that the property injured consists of luxuries; but one who carries on an exceptionally delicate trade cannot complain of a lawful use of neighboring prop-

erty, which would not injure anything but such a trade." The question is mainly one of degree and location; for what would be a private nuisance in one portion of a populous city, devoted to private residences, would not be one in a portion of the same city where a great number of factories had been in operation for a number of years. Demarest v. Hardham, 34 N. J. Eq. 469; Ross v. Butler, 19 N. J. Eq., loc. cit. 306, 97 Am. Dec. 654; Owen v. Phillips, 73 Ind. 234. However, in an action at law to recover for damages caused by a private nuisance, the question whether or no the acts complained of constitute a nuisance should be left to the jury, where the plaintiff's evidence tends to show his legal rights have been invaded by the defendant, resulting in damages. Plaintiff, we think, made out a prima facie case, and therefore the demurrers to the evidence were properly overruled.

The court gave the following instruction for plaintiff: "If, from the evidence, you find that during the time between December 20, 1903, and January 16, 1906, the Bradbury Marble Company, plaintiff herein, was occupying and using in its business a certain lot of ground fronting on the west side of Second street in St. Louis, city block bounded north by Convent street and south by Rutger street and east by Second street, and was the owner of and in possession of a stock of marble which was located on said lot of ground, and that during the same period of time the Laclede Gas Light Company, the defendant herein, owned and was operating a certain gas plant and gas works which were situated on land fronting on the east side of Second street and situated in St. Louis, city block bounded north by Convent street and south by Rutger street and west by Second street, and that said plant and works were near Second street and were opposite to the said premises occupied by plaintiff and to where said marble was located, and that during the period of time aforesaid said defendant caused or permitted carbon, iron, oil, and sulphur to issue from its said plant and works, which were then, on certain day or days during said period, spread and diffused westwardly across Second street over said premises occupied by plaintiff and were deposited or settled on said marble, thereby causing said marble or any of it to be so stained that it was materially damaged and made unfit for commercial uses in its stained condition, and that, in consequence of such stains, plaintiff, in order to restore said marble to a condition fit for commercial uses, was compelled to incur and has incurred expense in doing an additional amount of sand rubbing over and above what it would have had to do if said marble had not been so stained, then your verdict must be for plaintiff, and you will assess the plaintiff's damages at a nominal sum, say 1 cent, and also at such further sum, if any, as you may find from the evi-

dence was the reasonable expense or cost of doing any such additional sand rubbing, which you find was made necessary by stains which were made on and to said marble during the period of time between December 20, 1903, and January 16, 1906, and were caused by defendant's acts aforesaid." Plaintiff had the legal right to stack its marble on its yard, and to leave it uncovered. Defendant had the legal right to operate its gas machines in a careful and skillful manner, and to discharge such substances therefrom as were not injurious to the neighboring property when used in the usual way. Therefore, if plaintiff is making an unusual use of its yard, in view of the fact that it is located in a district largely devoted to manufacturing purposes, or if the marble it stacks in its yard is of such a delicate nature as to become stained and injured from substances discharged from the smokestacks of factories by which it is surrounded, it ought not recover. The instruction authorized a verdict for plaintiff on the mere fact that plaintiff's marble was damaged by discharges from defendant's plant and rain, totally ignoring defendant's legal right to operate its machines, and leaving out of view the question of whether or not the user to which plaintiff devotes its yard is a usual one, in the circumstances, and we think was erroneous in thus leaving out important, and perhaps controlling, issues in the case.

The answer pleads a right by prescription in defendant to operate its gas plant. The evidence tends to prove that machines of practically the same pattern and operated in the same manner were installed more than 10 years before the commencement of this suit. On this evidence, defendant asked the following instructions, which the court refused: "(4) Adverse possession is possession by one person which is inconsistent with possession or right of possession by another. In theory it is a possession founded in trespass originally, but available after the lapse of years by reason of an open, notorious, and hostile occupation. To constitute adverse possession, it is necessary that the possession be actual, continuous, notorious, and hostile, but all of these may appear from the nature and circumstances of the possession. 'Actual,' in this sense, means real, visible. 'Continuous' means without interruption. 'Notorious' means open, undisguised, generally known, and 'hostile' means opposed and antagonistic to the claims of all others. Undisputed means not called in question. (5) The court instructs the jury that, although they may believe from the evidence that ashes, smoke, gases, soot, cinders, oil, and dust did proceed from defendant's works, and did damage plaintiff's stock of marble, from December 20, 1903, to the date this suit was instituted, yet, if the jury further find from the evidence that defendant had, for at least 10 continuous years prior to any complaint from plaintiff, maintained its said works at

the same location, and that said works had, during all that time, discharged ashes, smoke, gases, soot, cinders, oil, and dust in the same manner that they were discharged from December 20, 1903, to the date this suit was instituted, and if the jury further find that the discharge by said plant of said ashes, smoke, soot, gases, cinders, oil, and dust in said manner was adverse, notorious and undisputed, as defined in instruction No. —, then their verdict must be for the defendant." While the right to maintain a public nuisance cannot be acquired by prescription, the right to maintain or continue a private nuisance may be, that is, by adverse and exclusive enjoyment, for the length of time prescribed by the statute of limitations for the acquisition of title to land by adverse possession. 21 Am. & Eng. Ency. of Law (2d Ed.) 734, 735. There is evidence from which a jury might have drawn the inference that plaintiff could have maintained an action against defendant for maintaining the nuisance charged in the petition at any time within 10 years next before it commenced this suit, and the above refused instructions should have been given. According to our views as herein expressed, we think the court also erred in refusing the following instruction asked by defendant: "(6) The court instructs the jury that, in determining whether the acts complained of constitute a nuisance, they must take into consideration the locality of the business of plaintiff and that of defendant, the nature of the business that is being conducted by defendant, the character of the machinery he is using, the manner of using the property producing the alleged injuries, and you may also consider the kinds of business, if any, which are being conducted and carried on in the vicinity of these premises." The instructions given by the court for defendant, we think, fairly submitted to the jury all other phases of the defense.

For errors noted, the judgment is reversed, and the cause remanded. All concur.

#### HAAS v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

##### 1. DAMAGES—EARNING CAPACITY—EVIDENCE.

Where plaintiff, in an action against a carrier for injuries, was employed at a fixed salary, to be increased to the extent of 5 per cent. on all sales made during the year in excess of \$25,000, evidence of what he made in previous years was inadmissible to show loss of earnings by reason of the accident, plaintiff being confined to proof of the amount of his salary lost on account of the injury, if any.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 490.]

##### 2. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

Where a passenger claimed he was injured by falling from the icy steps of a car as he was about to alight, and there was no dispute that there was ice and sleet on the steps and platform at the time, defendant was not prejudiced by an instruction that, if the steps and platform were covered "with hard, uneven, lumpy, and

slippery sleet, snow, or ice," they were in a dangerous condition, because assuming that the steps and platform were dangerous in fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4221.]

### 3. TRIAL—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.

Where, in an action for injuries to a passenger by falling from a car because of the icy condition of the steps, defendant claimed contributory negligence in that plaintiff attempted to alight from the car with a handbag in one hand and an umbrella in the other, an instruction that it was the carrier's duty to use the utmost care to have the platform and steps of the car free of danger from ice, etc., and was liable if the carrier's agents or servants were negligent was erroneous, as ignoring the defense of contributory negligence, and was not cured by another instruction that, if the ice formed en route, it was not the duty of the carrier's employees to remove it after the train arrived at plaintiff's station before permitting passengers to alight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

### 4. CARRIERS—INJURIES TO PASSENGERS—NEGLIGENCE—INSTRUCTIONS.

A request to charge that, if a carrier's car platform and steps became icy en route, which caused plaintiff to fall therefrom as he was about to alight, the jury would not be authorized to find that defendant's employees were negligent in not removing or attempting to remove the ice after the train arrived at plaintiff's station before permitting passengers to alight, was properly refused, as conditions might arise under which it would be the carrier's duty en route to remove ice from the steps of its cars for the safety of passengers.

### 5. SAME.

A request to charge that carriers of passengers are not insurers, and are not required to keep up a continuous inspection of their appliances en route, and are not responsible for accidents resulting from agencies over which they have no control, such as storms en route, etc., and that, if the ice and snow accumulated on the car platform, which caused plaintiff to fall, en route, and was due to the weather prevailing, then the carrier was not negligent in failing to remove the ice and snow en route, or at destination before permitting passengers to alight, was properly refused, since, whether the carrier was bound to remove the snow and ice so accumulated, was dependent on the existing circumstances, and whether it was apparent to a reasonably prudent person that passengers could not get on or off the cars in the exercise of reasonable care without danger of falling, unless the platform and steps were cleared.

### 6. SAME—KIND OF EQUIPMENT—VESTIBULED CARS.

Where a passenger was injured by falling from the icy platform and steps of a railroad car, the carrier was not chargeable with negligence merely because vestibuled cars were not provided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1177.]

Appeal from Circuit Court, City of St. Louis; Jesse A. McDonald, Judge.

Action by William J. Haas against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

On February 4, 1905, at Arkansas City, in the state of Kansas, respondent took passage on one of appellant's passenger trains to be carried to Winfield, Kan., a distance

of about 40 miles. The cars in the train were not of the vestibuled pattern, and the steps and platforms were covered with ice, and were in this condition when the train reached Winfield, where respondent, in the act of getting off the train, slipped on the platform, fell, and was injured. The action is to recover for the injury. The answer is a general denial and a plea of contributory negligence. Respondent's evidence tends to show that the weather at Arkansas City and Winfield on February 4th was clear and cold, the thermometer being below zero; that when he boarded the train the steps and platform of the car in which he traveled were covered with about three-fourths of an inch of snow and ice, frozen hard, which was rough and hard, and showed imprints of human footsteps; that he had an umbrella and handbag, which he held in his left hand when he started to leave the car, and "grabbed" the railing of the car with his right hand as he stepped on the platform, and, in stepping from the platform to the first step, his feet slipped from under him, broke his hold on the railing, and he fell out on the station platform. After falling he was taken to the Benton Hotel at Winfield and given attention. His shoe was cut off, and his ankle found to be swollen. He was unable to walk, and remained in Winfield about four days, during which time he received medical treatment, and was visited by a physician four times. After arriving in St. Louis he received medical attention, and was confined to the house about 10 days, commencing February, 1905, used crutches about 60 days, and thereafter used a cane about 30 days. Respondent's evidence also shows he was a salesman—a millinery drummer—and at the time of his injury was traveling in the employ of the Hanlon Millinery Company of St. Louis, Mo.; that his business when traveling was to solicit milliners to come to St. Louis and buy of his house, and to sell goods; that the spring season for the sale of millinery begins in St. Louis about February 20th, and continues for six or eight weeks; that he did not travel any more during the spring season of 1905, but met milliners and merchants coming to the city, took them to the store and showed them around, and continued in this kind of employment until the end of April, 1905; that while with the Hanlon Company he drew a salary of \$125 per month. Dr. J. C. Lebrecht testified that he treated respondent the first time on the 19th of February, 1905, and saw him about twice a week for a month or six weeks; that pain continued throughout treatment, but after the first two weeks respondent visited witness at his office; that respondent suffered from a sprain or dislocation, and his bill was \$50. Appellant's evidence tends to show that the train on which respondent was a passenger came from Vernon, Tex., and changed crews at Enid, Okl., and there

was no ice or snow on the steps or platform when the train left Ruid; that farther north there was "some mist, falling weather, spitting snow," which froze as it fell, and covered the steps and platform with a thin sheet of ice; that, when the train arrived at Winfield, the sidewalks and trees were covered with ice and sleet. It was very cold, and the steps and platform of the car were also covered with ice and sleet, frozen hard, and there were no ashes or cinders available to cover them. The brakeman testified he got off at Winfield, and assisted passengers to alight from the car adjoining the one respondent was in, and was helping some ladies off when respondent fell; that respondent fell on the first step, and did not roll on the station platform. The station agent at Winfield testified that on the 4th of February it had been spitting snow in the afternoon, and about 7 o'clock it was sleeting, and there was a very thin, hard coating of ice on the station platform, which could not be removed, unless chopped off with a hatchet, and was "just as slippery as glass." Witness called upon respondent at the hotel, and respondent said he was coming down the coach steps when he slipped on the step. That he had a grip in one hand and an umbrella in the other; that respondent said he told the brakeman if he had been there to take his grip from him, he probably would not have fallen; that respondent was not in bed at either time he saw him, was sitting in the hotel office in a chair. Other witnesses testified as to the state of the weather at Winfield on the day respondent was hurt, and stated that a "mist and spitting snow" fell, and was converted into ice, the weather being very cold. C. W. Adams, vice president of the Hanlon Millinery Company, testified respondent commenced working for the company January 1, 1905, and was to be paid a salary of \$1,200 per annum, plus 5 per cent. commission on all sales over and above the amount necessary to make the stated salary; that he had to sell \$25,000 worth of goods to make \$1,200, his salary, which was payable monthly, \$100 per month, though he drew from time to time what he needed; that but few customers came in and called for respondent, and he was asked for his resignation about the 10th of March, 1905, but his injury had nothing to do with his discharge. In rebuttal respondent offered reports of the United States Weather Bureau, which tended to show that a snow prevailed throughout Kansas on February 3d, but that it was clear and cold on the 4th.

Jones & Hocker, for appellant. Pearce & Davis, for respondent.

BLAND, P. J. (after stating the facts as above). 1. Respondent, over the objection of appellant, was permitted to show what his earnings had been during the spring seasons

for four years previous to the year of his injury. He had been in the same business these previous years, but was working for another firm engaged in the millinery business. The admission of this evidence is assigned as error. In *Lewis v. Insurance Co.*, 61 Mo. 534, it was held that, in a suit by an agent against an insurance company for his wrongful discharge, an estimate of his probable earnings after his discharge, derived from proof of the amount of his collections and commissions before his discharge, without other proof relating thereto, is too speculative to be admissible. In *Paul v. Railway*, 82 Mo. App., loc. cit. 505, it was ruled that, in a personal injury case, the average earnings of the defendant, where he has no fixed salary, are proper to go to the jury on the extent of his loss. Substantially the same ruling was made in *Pryor v. Railway*, 85 Mo. App. 367. See, also, *Griveaud v. Railway*, 33 Mo. App., loc. cit. 466, where the same ruling was made. These cases (cited by respondent) are not in point. Respondent was employed at a fixed salary, to be increased to the extent of 5 per cent. on all goods sold by him during the year in excess of \$25,000. Evidence of his loss of earnings, therefore, should have been confined to what, if anything, he lost of his salary on account of the injury. Evidence of what he had made in previous years was inadmissible for this purpose. Respondent's third instruction predicated on this erroneously admitted evidence should not have been given.

2. Error is assigned in the giving of the following instruction for plaintiff, in that it assumes that the presence of snow and ice upon the steps and platform made them unsafe: "(1) If you shall believe and find from the evidence that on or about the 4th day of February, 1905, the plaintiff boarded one of defendant's trains at Arkansas City, in the state of Kansas, to take passage thereon to Winfield, in said state, and paid his fare for said passage, and if you shall further believe and find from the evidence that, when said train arrived at plaintiff's destination, the defendant or its agents and servants had negligently allowed the platform or steps of the car on which the plaintiff was a passenger to become covered with hard, uneven, lumpy, and slippery sleet, snow, or ice, and that the condition of said platform or steps was known to the defendant, its agents, or servants, or had they exercised reasonable care under all the circumstances shown in evidence as defined in instruction No. 2, it would have been known to them, in a time sufficient, had they exercised such reasonable care under the circumstances, with the appliances at hand for the purpose to have removed said sleet, snow, or ice, or otherwise to have rendered said platform or steps safe for plaintiff's use, and if you shall further believe and find from the evidence that plaintiff, while in the exercise of reasonable care for his own safety, and while attempting to

alight from said train and car, and while using said platform and steps, slipped and fell upon said platform and steps, and to the ground and was injured, then your verdict shall be for the plaintiff." The dangerous condition of the steps was a fact in dispute. In effect, the jury were told that if they found from the evidence the steps and platform were covered "with hard, uneven, lumpy, and slippery sleet, snow, or ice," they were in a dangerous condition. The instruction would have been more accurate had it been left to the jury to find whether the steps were dangerous. But there is no dispute about the fact of the ice and sleet being on the steps and platform. That their icy, slippery condition made them dangerous to passengers getting on and off the train hardly admits of doubt, and appellant was not prejudiced by the instruction given in the form it was. *Reno v. City of St. Joseph*, 169 Mo., loc. cit. 658, 70 S. W. 123; *Moore v. Railway*, 100 Mo. App. 665, 75 S. W. 176. The instruction is open to criticism, in that it failed to direct the jury that the ice, etc., upon the steps and platform caused respondent to fall.

3. Error is assigned in the giving of the following instruction for respondent: "You are instructed that, as to providing the plaintiff with a safe place of egress from its car, it was the duty of the defendant to use the utmost degree of practical care, diligence, and foresight, under all the circumstances, to have the platform and steps of its car free of danger from hard, uneven, lumpy, and slippery sleet, snow, or ice, and that the defendant is liable in this case, if you find from the evidence that its agents or servants were guilty of negligence in that respect, which directly contributed to cause plaintiff's injury." The criticism made is that the effect of the instruction was to direct the jury that if both appellant and respondent were negligent, respondent was entitled to recover. Contributory negligence was pleaded, and appellant's evidence tends to show that respondent attempted to alight from the car with a handbag in one hand and an umbrella in the other, and that the brakeman was at hand and would have assisted him had he asked it. This evidence tends to prove respondent was negligent. We think the instruction is erroneous in ignoring the defense of contributory negligence, and the error is not cured, as contended by respondent, by the giving of the following instruction for appellant: "(5) You are instructed that, if you find and believe that the day was cold, and that it was raining or sleeting while the train was en route, and that the ice complained of accumulated en route, then it was not the duty of the employees of the railroad company to remove said ice after the train arrived at Winfield before permitting passengers to alight."

4. Error is also assigned in the refusal of the court to give the following instructions asked by appellant: "(5) The court instructs the jury that carriers of passengers are not

insurers of the safety of passengers, and railroad companies engaged in carrying passengers are not liable for inevitable accidents, nor for every possible casualty resulting in injury to a passenger. They are only liable where such injury results from the negligence of the railroad company, or its servants, and, in cases of this kind, negligence is not presumed from the proof of an accident and an injury, but the passenger is required to establish by a preponderance of the evidence that the injury resulted from the failure of the carrier to exercise due care in the premises. And in this case, if you find and believe from the evidence that the day was cold and sleety, and that ice accumulated on the car steps en route, then you will not be authorized to find that the employees were negligent in not removing or attempting to remove said ice en route, nor were they required to do so after the train arrived at Winfield and before permitting passengers to alight." "(4) You are instructed that railroad companies as common carriers of passengers are not insurers and are not required to keep up a continuous inspection of its appliances en route, and are not responsible for accidents resulting from agencies over which they have no control, such as storms en route. Therefore, if you find and believe from the evidence that the ice or snow complained of fell en route, and was due to the condition of the weather prevailing, then the railroad company cannot be charged with negligence in failing to remove said ice or snow en route, or at Winfield before permitting passengers to alight." "(9) You are instructed that the defendant was not negligent in running cars not provided with vestibuled platforms, and you will not consider that fact as an element of negligence in this case." Refused instruction No. 5, we think, goes too far in respect to releasing appellant from the duty to keep its platform and steps in a reasonably safe condition for passengers to get on and off its cars. Conditions may arise (the evidence tends to prove they were present on the day respondent was injured) when it would be the company's duty, en route, to remove ice, etc., from its steps for the safety of passengers in getting on and off its cars. *Weston v. New York Elevated Railway Company*, 73 N. Y. 595. Refused instruction No. 4 is open to the same criticism. It seems to us that in such circumstances the duty of the company should be measured by the danger of the situation; and if it is apparent to a reasonably prudent person that passengers cannot get on or off the cars, exercising reasonable care, without danger of falling, the steps and platform should be put in such condition as to enable them to do so, even though the train must be delayed for that purpose, for it is of more importance to the passenger that he arrive safely than that he arrive at his destination on schedule time. The ninth instruction should have been given as a mat-

ter of caution to the jury not to infer negligence from the mere fact that the cars were not provided with vestibules.

The judgment is reversed, and the cause remanded. All concur.

# STATE v. HILLMAN et al.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

## 1. ADULTERY — OFFENSES — STATUTES — CONSTRUCTION.

Rev. St. 1899, § 2175 [Ann. St. 1906, p. 1395], providing that every person living in a state of open adultery, and every man and woman, one or both of whom are married, and not to each other, who shall cohabit with each other, etc., shall be punished, denounces several offenses, one of which is the living in a state of open adultery by two persons, one or both of whom are married to others, and the state on a trial for the latter offense must allege and prove such facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adultery, §§ 12-17.]

## 2. SAME—INSTRUCTIONS.

On a trial for living in adultery by two persons, one or both of whom are married to others, an instruction authorizing a conviction on finding that one of the accused was a married man and had a wife living was erroneous, since it authorized a conviction, though the parties were married to each other.

Goode, J., dissenting.

Appeal from Criminal Court, Greene County; A. W. Lincoln, Judge.

John Hillman and another were convicted of crime, and they appeal. Reversed and remanded.

J. A. Moon and G. D. Clark, for appellants. Roscoe Patterson, for respondent.

NORTONI, J. The prosecuting attorney informed against the defendants in the criminal court of Greene county, and charged them with the offense of living in a state of open and notorious adultery, denounced in the first subdivision of section 2175, Rev. St. Mo. 1899 [Ann. St. 1906, p. 1395]. They were tried and convicted in and sentenced by the criminal court. The case is here on their appeal.

The state having introduced substantial evidence tending to prove the defendants guilty of the offense mentioned, the court instructed the jury as follows: "You are instructed that if you find and believe from the evidence in this cause that the defendants, John Hillman and S. E. Cain, on the 1st day of July, A. D. 1904, and from that date continuously to the 15th day of June, A. D. 1906, at the county of Greene, in the state of Missouri, did then and there abide and cohabit together with each other as if the conjugal or marital relation existed between them, and did then and there dwell together for that purpose, and that John Hillman one of the defendants was a married man, and had a wife living, you should find them guilty and assess the punishment of each at imprisonment in the county jail for a term of not more than one year or at a

fine of not more than \$1,000, or at both such fine and imprisonment." The statute above referred to is as follows: "Every person who shall live in a state of open and notorious adultery, and every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor." It has been pointed out by the Supreme Court in several recent cases that there are five separate offenses denounced in the section quoted, the first of which is "living in a state of open and notorious adultery, by two persons of opposite sexes, one or both of whom are married, but not to each other," etc. State v. Sekrit, 130 Mo. 401, 405, 32 S. W. 977; State v. Chandler, 132 Mo. 155, 160, 161, 33 S. W. 797, 53 Am. St. Rep. 483. It therefore appears the fact that one or both of the accused parties are married, but not to each other, is a material fact constituting an element of the offense. Hopper v. State, 19 Ark. 143; Tucker v. State, 35 Tex. 113; State v. Clinch, 8 Iowa, 401; 1 Enc. Plead. & Prac. 307. It devolves upon the state in both pleading and proof to specially bring the defendants within all the material words of the statute, and nothing can or will be taken by Intendment against them. State v. Sekrit, 130 Mo. 401, 32 S. W. 977. The instruction above set out authorizes a conviction upon the jury finding with respect to this matter. The mere fact "that John Hillman, one of the defendants, was a married man and had a wife living," even though his codefendant was this "wife living," there is not a word in the instruction requiring the jury to find that John Hillman and his codefendant were not married to each other. It might be true as directed therein that even though "John Hillman, one of the defendants, was a married man and had a wife living," that his codefendant was the "wife living." The instruction should have required the jury to find a verdict in affirmation of this negative proposition, which would operate to acquit both defendants; that is, that they were not married to each other.

For the error mentioned, the judgment will be reversed and the cause remanded. It is so ordered.

BLAND, P. J., concurs. GOODE, J., dissents.

# REISSAUS v. WHITES et al.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

## 1. PRINCIPAL AND SURETY—SURETY DEFINED.

A surety is one who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to indemnity from an-

other, who ought himself to have made payment or performed the obligation before the surety was required to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 1.]

## 2. SAME—SURETIES — SPECIAL DESIGNATION—NECESSITY.

Though one in fact a surety may by express terms obligate himself as a principal, and thus waive the rights accruing to him as a surety, that several persons become both jointly and severally bound to pay a debt, which as between themselves is the debt of one of their number, does not make them principals so as to deprive them of their rights as sureties, though the obligors, other than the principal debtor, are not identified in the writing as sureties, and where a joint and several bond, not designating any one as principal or as surety, bound the obligors to respond for the default of one of them the other obligors were sureties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 105, 108.]

## 3. SAME—CONTRACTOR'S BOND—DISCHARGE OF SURETIES—ALTERATION OF CONTRACT.

A building contractor's surety was discharged where the contract was changed without the sureties' consent by the substitution of a stone wall for a wooden girder, by the laying of concrete along the foundation walls, by a change as to the character of a skylight, by the addition of a door and wainscoting, and the substitution of a door for a window, the changes increasing the contractor's burden to the extent of \$18.75.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 162-164.]

## 4. SAME.

Though, where a building contract authorizes changes from the specifications, such changes may be made without discharging a contractor's sureties, a provision of such a contract that the price should be paid only on the architect's certificates as the work progressed, and on a basis of 70 per cent. of its value, "subject to additions and deductions as may be hereinafter provided," did not authorize the parties to change the terms of a contract without the sureties' consent; there being no other provision in the contract authorizing changes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 162-164.]

Appeal from Circuit Court, Phelps County; Robert Lamar, Special Judge.

Action by Charles Reissaus against W. Vas Whites and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Watson & Holmes, for appellants. J. B. Harrison, for respondent.

**NORTONI, J.** The suit is on a builder's bond. Plaintiff recovered in the circuit court against both the builder and his sureties. Defendants appeal. The plaintiff, Reissaus, entered into a contract with the defendant W. Vas Whites, a contractor and builder, whereby Whites undertook to do certain excavating, furnish all the material, labor, etc., and erect for plaintiff a certain brick building, etc., in St. James, Mo. For the same consideration and at the same time, defendant Whites, the builder, executed and delivered to plaintiff a bond conditioned for the faithful performance of the building contract, and defendants J. S. Williams, N. Whites, and C. W. Pace became jointly and severally obligated with the

contractor, W. Vas Whites, in this bond. The builder failed to comply with several stipulations of the contract with respect to the payment for materials used by him in constructing the building. These accounts being lienable in their nature, plaintiff proceeded, under competent provisions of the contract to that effect, to pay the same and relieve his building from the liens. Plaintiff, having expended several hundreds of dollars in excess of the amount due the contractor in discharging these accounts, prosecutes this suit against all of the obligors in the bond, assigning the breach above mentioned. The case was referred in the circuit court. The referee, having heard the evidence, made a finding of fact, and recommended judgment for the plaintiff against all of the defendants. The court overruled defendants' exceptions to the report of the referee, and entered judgment in accordance with the finding of fact and recommendation therein given. The record discloses an appeal on the part of all the defendants. However this may be, there is no argument advanced here seeking to reverse the judgment of the circuit court in so far as defendant W. Vas Whites is concerned. All of the arguments advanced in this court are in favor of those defendants other than the contractor himself, upon the theory that they are sureties in his bond, and, as such, are released from its obligation because of certain changes made in the original contract by the principal parties thereto without their consent.

In support of the judgment it is argued on behalf of the plaintiff, first, that the several defendants last mentioned are principals, and not sureties, in the bond, and are therefore not entitled to the ordinary rights and equities accruing to sureties; and, second, that, even though they are sureties in the bond, the several admitted changes in the contract were made with the consent of such sureties given by them at the time of the execution of the contract, as is manifested by the express terms of the instrument, which, it is asserted, contemplated by competent provisions, that changes from its original terms might be made by the principal parties. If this latter proposition of fact be true, the sureties remain liable as a matter of course, notwithstanding such changes, for the reason it is so nominated in the bond. The circuit court gave its judgment upon the theory that the defendants, other than the contractor, were principals with him, and not sureties in the bond. The first inquiry is: Are the defendants other than the contractor sureties? In order to reach an accurate solution of this question, it is important to ascertain first with precision, just what a contract of suretyship is and how such a contract may be identified and determined from that of the principal. Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some

other person, who ought himself to have made payment or performed the obligation before the surety was required to do so; or, in other words, it is the established law that whenever, as between two or more debtors liable to the creditor to pay the same debt or perform the same obligation, it is the debt or obligation of one of them, the others may be said to be and are sureties for him who, as between themselves, should have first paid the debt or performed the obligation. *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529; *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700; *Cassan v. Maxwell*, 39 Minn. 391, 40 N. W. 357; *Brandt on Suretyship* [3d Ed.] § 1; 27 Amer. & Eng. Ency. Law (2d Ed.) 431, 432; *Stern's Law of Suretyship*, §§ 1-6.

It is argued on behalf of the plaintiff, however, that because the obligors are not expressly denominated or pointed out in the bond, the one as principal and the others as surety, they all became principals by executing the bond which, in express terms, declares itself to be a joint and several obligation. Now, while it is very true that one who is in fact a surety may, by the express terms of a contract, obligate himself as a principal so as to exclude the idea of suretyship, and thus waive the rights and equities which accrue to him as incident to the contract of suretyship (*Picot v. Signiago*, 22 Mo. 587; *McMillan v. Parkell*, 64 Mo. 286; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Wood v. Motley*, 83 Mo. App. 97; *Brandt on Suretyship* [3d Ed.] § 51), it is not true, in the absence of some express words signifying as much, that several persons by merely becoming both jointly and severally bound to pay a debt or discharge an obligation which, as between themselves, is the debt or obligation of one of their number, thereby become as principals in such a sense as to forego the rights and equities incident to suretyship. The fact that those of the obligors other than the principal debtor are not mentioned or identified in or upon the writing as sureties is entirely without influence. This is true for the reason if it appears that there is a principal contract which, in the first instance, is the obligation of one of their number (*Brandt on Suretyship* [3d Ed.] § 19), and that this principal obligation is assumed in the full measure of its scope by the joint and several obligors under such circumstances as will permit them, in event they are required to pay the debt or any part thereof, to recover so much as they have discharged from the obligor whose duty it was to first discharge the entire obligation, then the contract is one of suretyship, notwithstanding the precise form of the words employed. The form of words is wholly immaterial, unless the obligors expressly signify a purpose to waive their rights as sureties and become bound as principals, and, if this intention is not signified, the ordinary rights and equities incident to suretyship arise, not from the

particular words, but from the position the parties have assumed toward each other with respect to the debt or obligation assumed. *Brandt on Suretyship* (3d Ed.) § 1; *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529; *Clark v. Turk* (Tex. Civ. App.) 50 S. W. 1070; 27 Amer. & Eng. Ency. Law (2d Ed.) 432. The bond in suit is, by express provision, a joint and several obligation whereby all of the defendants, without denominating any one as principal or any one as surety, firmly bound themselves, their executors, etc., to pay the plaintiff, Charles Reissaus, etc., conditioned as follows: "The condition of this obligation is such that if the above bounden, W. Vas Whites, his executors, \* \* \* shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, and agreements in the above-mentioned contract, entered into by and between the said Charles Reissaus and the said W. Vas Whites," etc., and shall fully perform the contract, etc., then the obligation to be void, otherwise to remain in full force. There appears in this a joint and several undertaking on the part of the obligors other than the contractor himself to respond for the default of the contractor and indemnify the obligee, Reissaus, to the extent of loss entailed upon him by reason of the default of Whites, the contractor. It thus appears that Whites, the contractor, is the principal obligor, and therefore it was his duty to first discharge whatsoever obligation had accrued to Reissaus on the bond because of his, the contractor's, default, and thus save harmless his co-obligors, the other defendants. Not having done so, it was the privilege of Reissaus to proceed against all of the defendants, and, if he shall recover, it is certainly beyond cavil or controversy that the several defendants, other than the contractor, have a right to demand and enforce indemnity and not contribution from the contractor, Whites. This being true, there are present every element of suretyship in the undertaking before us and the defendants, J. S. Williams, N. Whites, and C. W. Pace, are adjudged to be sureties, and, as such, entitled to the rights ordinarily incident to such relation.

2. It is insisted the sureties are released from the obligation of the bond, because the parties made numerous changes in the principal contract without their consent. The argument predicates upon the familiar proposition that a surety, being a favorite in the law, has a right to stand upon the strict terms of his contract and that any change therefrom by the principal parties, without his consent, will operate his release for the reason such changes destroy the identity of his contract, and substitute another and distinct undertaking for that assumed by him in the first instance. In accord with this doctrine, it has frequently been determined there is no implied obligation on the part of the surety that he has undertaken more or other than that expressed in his contract, for



It is only to the extent and in the manner and under the circumstances pointed out in the obligation he is bound, and no further. *Miller v. Stewart*, 9 Wheat. (U. S.) 681, 6 L. Ed. 189; s. c., 4 Wash. C. C. 26, Fed. Cas. No. 9,591; *Nofsinger v. Hartnett*, 84 Mo. 549; *Oberbeck v. Mayer*, 59 Mo. App. 289; *Bauer v. Cabanne*, 105 Mo. 110, 16 S. W. 521; *Brandt on Suretyship* (3d Ed.) § 106; 27 *Amer. & Eng. Ency. Law* (2d Ed.) 489-496; *Martin v. Whites* (decided at this term, but not yet officially reported) 106 S. W. 608.

Invoking the principle referred to, the sureties point out numerous changes by the principal parties from the stipulations of their contract as manifested by the plans and specifications which were made parcel thereof, and that these changes were made without their consent. In respect of this matter of defense, the referee found the facts as follows:

(a) That under the west storeroom a stone wall was substituted by the contractor at the request of the owner and architect, instead of a wood girder mentioned in the specifications, and this change was without the consent of the sureties. It appears the contract required the builder to remove the dirt excavated, and not permit it to remain under the building. The contractor failed to carry out this provision. The owner and architect determined that to permit the dirt to remain under the building would cause decomposition of a wood girder called for in the specifications, and insisted upon the contractor removing the same. They proposed as an alternative, however, that he might permit the dirt to remain if he chose, and erect a stone wall as a support for the floor joists in lieu of the wood girder, the wall to be paid for at the price provided in the contract for other rubble masonry. Nothing appears tending to show the value of the wall or the amount paid therefor. Suffice to say it was paid for at the same rate provided in the contract for certain other rubble masonry which was authorized and called for in the specifications, and from this fact it may be gathered that no loss was entailed upon the contractor thereby. However that may be, enough appears to show a new and additional stipulation was ingrafted upon the principal contract by the principal parties without the consent of the sureties. This new stipulation operated to change the terms of the contract between the parties from those assumed in the bond.

(b) The referee found that certain concrete work was laid along the foundation walls, and that this work was not contemplated or specified in the contract. The contractor failed to remove certain refuse dirt as required, and, as it was feared the dirt would injure the brick walls because of its communicating dampness thereto, the owner and architect insisted upon its removal. As an alternative, however, they agreed upon and permitted the contractor to build a line of concrete around

the walls, which they accepted in lieu of removing the dirt. The sureties were not consulted, and did not consent thereto. The concrete work mentioned was paid for by the owner presumably at a fair price. However this may be, the fact remains that the principal parties, in proposing and accepting the alternative mentioned, ingrafted an additional stipulation upon the principal contract without the consent of the sureties, which operated to change its terms from those assumed in the bond.

(c) The referee also found that by the agreement of the architect, who was plaintiff's agent, and the contractor, and without the consent of the sureties, a skylight differing from the one described in the specifications was selected and installed. No extra expense was entailed on this account. The cost of the skylight installed was about the same as would have been that specified. This change was at the instance of the contractor. It was a concession made to him without the consent of the sureties. It nevertheless ingrafted a stipulation upon the contract between the original parties which operated to change its terms from those assumed by the sureties at the time of executing the bond.

(d) The referee further found that the contractor, at the request of the owner, put in a door not specified under a stairway, and the extra cost entailed upon him thereby was \$5; that on the order of the owner a door was substituted in one place where a window was called for in the specifications, and this change entailed an extra cost of \$5.75 from the contract; that at the instance of the owner the contractor put in wainscoting in the kitchen which was not specified in the contract, and this change entailed an extra cost of \$8 upon the contractor. None of these changes were consented to by the sureties. There is nothing in the record tending to show the contractor received extra pay for any of these items. The record discloses that he received only the amount due him under the provisions of the contract as it was written. However this may be, each of the changes above referred to ingrafted a new stipulation upon the principal contract without the consent of the sureties, which operated to change its terms from those assumed by the several sureties when they executed the bond.

It is suggested that, if some of these changes made by the owner and contractor entailed no additional expense and the extra expense of others was fully paid to the contractor by the owner, then the liability of the sureties was in no sense enlarged thereby, and such changes should be treated as immaterial deviations, etc. Now, it is proper to say here that the doctrine with respect to immaterial deviations from the contract in respect of acts of omission and commission in matters of performance is not pertinent to the case in judgment as it was to that of *Martin v. Whites* (decided at this term of

court but not yet officially reported) 106 S. W. 608, for the reason here the matters complained of are not alone mere deviations in performance from provisions, such as those designed to regulate the mode and manner of payment, etc., nor are they alone deviations in the matter of performance from the plans and specifications after which the building should be fashioned, but, on the contrary, the complaint is that new and additional terms and stipulations have been added by agreement of the principal parties to the principal contract without the consent of the sureties, which new stipulations so completely change the principal contract by deducting from and adding to its terms as to entirely destroy its identity. There is a noticeable distinction in the cases dealing with the two propositions suggested, although it is not often pointed out, and the law is somewhat confused by reason of the distinction being overlooked at times. The one class of cases, those dealing with mere permissive deviations in acts and omissions of performance without any agreement, express or implied, between the owner and the contractor thereabout, turn upon the question of the materiality of such deviations, and the inquiry directs itself to ascertain whether or not the deviation was substantial or insubstantial, when considered with reference to the intention of the parties, as manifested in the contract when viewed from the standpoint of the surety's risk. For example, see *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669, and other authorities cited in *Martin v. Whites*. The other class, of which the case at bar is one, where the original contract has been departed from, not merely a permissive departure, however, but a departure made in conformity to one or more subsequent express or implied agreements, turn upon the question of whether or not the identity of the surety's contract has been destroyed by the principal parties adding to or deducting one or more new terms or stipulations therefrom without his consent, and, if so, the surety is discharged. In such cases it is wholly immaterial whether the surety's risk is increased or diminished. The mere destruction of the identity of the contract without the surety's consent is sufficient to operate his release. The reasoning of the law is the surety is not bound by the old contract, for that has been abrogated by the new. Neither is he bound by the new contract, because he is no party to it, nor can it be split into parts so as to be his contract to a certain extent and not for the residue; and therefore the surety is either bound in toto or not at all. *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Warden v. Ryan*, 37 Mo. App. 466; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201; *Bethune v. Dozier*, 10 Ga. 235; *Prairie State Nat. Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Burnes' Est. v. Fidelity, etc., Co.*, 96 Mo. App. 467, 70 S. W. 518;

*Leavel v. Porter*, 52 Mo. App. 632; *Brandt on Suretyship* (3d Ed.) § 427. Whatever may appear with respect to the cost of several of the changes above mentioned, the referee's report shows clearly the following items entailed extra cost upon the contractor by reason of the changes mentioned: On account of the door under the stairway, \$5; on account of a door being substituted for a window, \$5.75; and on account of wainscoting in the kitchen, \$8. All of these were changes from the specifications which were parcel of the original contract. It appearing the contractor received from the owner only the amounts due under the contract, therefore no additional compensation was allowed him on account of these changes. In such circumstances they were certainly not immaterial deviations for they actually increased the burden of the contractor to the amount of \$18.75, as found by the referee, and thereby enlarged the obligation on which it is now sought to charge the surety. These changes of themselves are sufficient to operate the sureties' discharge. *Beers v. Wolf*, supra.

3. It is argued on the part of plaintiffs that the contract contemplated changes should be made from its original terms as the building progressed, and for that reason the sureties are not entitled to be discharged. It is very true that, when the building contract authorizes variations and changes from the specifications to be made, such changes may be made in conformity thereto without discharging the sureties. This proposition rests upon the fact that the sureties have consented in the first instance to the changes in the prescribed manner. *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Burnes' Estate v. Fidelity, etc., Co.*, 96 Mo. App. 467, 70 S. W. 518; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620. In this connection, after providing the money shall be paid out only on certificates of the architect as the work progressed and on a basis of 70 per cent. of its value, the only provision of the contract referring to future changes is as follows: "Subjected to additions and reductions as may be hereinafter provided." Now, it is argued from this the parties contemplated additions and reductions should be made to the terms of the contract. The language quoted certainly goes no further than to authorize the per cent. mentioned, to be ascertained with reference to the estimated value of the labor and materials in place under the original contract and such "additions and reductions" as might be "hereinafter provided." There is no provision thereafter in the contract, nor thereinbefore for that matter, providing for changes from the original stipulations, and the words above quoted, which are invoked in aid of this argument, cannot be reasonably construed to confer the consent of the sureties and authorize the principal parties to change the original contract.

For the reasons given, the judgment will

be reversed and the cause remanded, with directions to the trial court to enter judgment for the plaintiff against the principal defendant, in accordance with the finding of the referee, and discharge the defendant sureties. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

MARTIN et al. v. WHITES et al.  
(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

**1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ALTERATION OF CONTRACT.**

Though liability of a surety may not be extended beyond the strict terms of his contract, and any alteration in the terms by the principal parties thereto, without his consent, will discharge him, where, at the contractor's surety's request, the owner extended the time for the completion of the work, the surety was not discharged because the written contract was altered to show such extension, though he did not consent to the interlineation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 169-180.]

**2. ALTERATION OF INSTRUMENTS—CONTRACTS—NECESSITY FOR CONSENT.**

When parties agree upon a change in the terms of a contract, the contract is not invalidated because one of them, without the knowledge of the other, notes the alteration on the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 169-180.]

**3. PRINCIPAL AND SURETY—SURETY'S OBLIGATION—RULE FOR CONSTRUING.**

Contract of suretyship must be construed reasonably, in the light of the parties' intent, and by the surrounding facts and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 103.]

**4. APPEAL—REVIEW—REFEREE'S FINDINGS—CONCLUSIVENESS.**

A referee's finding, if supported by substantial testimony, is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4006, 4007.]

**5. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—IMMATERIAL DEVIATIONS.**

Though an obligee's act, which increases a surety's risk, discharges the surety, and though security held by the obligee to assure the discharge of the obligation, or any rights given the owner by a contractor in a building contract to secure its faithful performance inure to the contractor's surety, and he is discharged from liability to the extent of which the owner surrenders such securities otherwise than according to the contract or without the surety's consent, where a building contract provided that the contractor should be paid as the work progressed 80 per cent. of the price of the work done, upon the architect's certificates, the contractor's surety was not discharged because payments were made without such certificate where no payment was made in excess of such percentage; the surety not being prejudiced by the deviation from the contract.

Appeal from Circuit Court, Phelps County; Robt. Lamar, Special Judge.

Action by Herman Martin and others, trustees of the German Lutheran Congregation, etc., against W. Vas Whites and another. From a judgment for plaintiffs, the defendant surety appeals. Affirmed.

Watson & Holmes, for appellants. J. B. Harrison, for respondents.

NORTON, J. The suit is on a builder's bond. Plaintiffs recovered, and the defendant surety appeals. On the 1st day of June, 1904, the plaintiffs, trustees of the German Lutheran Congregation of St. James, Mo., entered into a contract in writing with one W. Vas Whites, a builder, whereby said Whites bound himself to furnish all of the materials, labor, etc., and erect for plaintiffs a certain house of worship situate at St. James, Mo. In conjunction with this contract, and of even date therewith, Whites executed to plaintiffs a bond conditioned that he would faithfully perform the contract, etc. The defendant Cox is surety on the bond. The contractor, Whites, breached the obligation of the building contract by failing to pay certain material bills, for which liens were filed against the building, and plaintiffs instituted this suit on the bond against Whites, the contractor, and Cox, his surety. The matter was referred to Hon. Chas. H. Shubert, a member of the bar, who, after hearing the testimony, found the issues for the plaintiffs, and recommended judgment against both defendants. The circuit court overruled defendants' exceptions, and entered judgment in accordance with the recommendations of the referee, and, from this judgment, the defendant surety only appeals.

The facts and arguments thereon as to whether or not this defendant is a principal or surety in the bond are precisely the same as those in another case now under submission. In this respect, the two cases being identical, it is unnecessary to restate the facts and reasoning thereon which have impelled us to adjudge the defendant Cox to be a surety, and not a principal, in the bond. The reasoning of the law, which essentially enforced this conclusion, is set forth in the opinion given in the case of Reissaus v. Whites (decided at this term of court, but not yet officially reported) 106 S. W. 603.

There are two propositions advanced on behalf of the defendant surety, either of which, it is argued, operated his discharge from the obligation assumed in the bond. It is first insisted that the defendant is discharged for the reason plaintiffs' agent, without his consent, made certain interlineations in the building contract, whereby its provisions were changed to conform to a new agreement made with the builder regarding the time in which the building should be completed, and thereby destroyed the identity of the contract. The rule is well established to the effect that a surety is a favorite of the law, and his liability is not to be extended or varied beyond the strict terms of his contract. "To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further." Therefore any alteration in the terms of the contract by the principal parties thereto, without the

consent of the surety, will operate to discharge him therefrom, and, of course, the rule applies to the contract of suretyship evinced by a building bond the same as to any other surety. *Miller v. Stewart*, 9 Wheat. (U. S.) 681, 6 L. Ed. 189, s. c. 4 Wash. C. C. 26, Fed. Cas. No. 9,591; *Ryan v. Morton*, 65 Tex. 258; *State ex rel. v. Tittmann*, 134 Mo. 162, 35 S. W. 579; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Nofsinger v. Hartnett*, 84 Mo. 549; *Taylor v. Jeter*, 23 Mo. 244; *Warden v. Ryan*, 37 Mo. App. 466; *Killoren v. Meehan*, 55 Mo. App. 427; *Heim Brew. Co. v. Hazen*, 55 Mo. App. 277; *Mallory v. Brent*, 75 Mo. App. 473; *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974; *Swasey v. Doyle*, 88 Mo. App. 536; *Burnes' Estate v. Fidelity, etc., Co.*, 96 Mo. App. 467, 70 S. W. 518; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Bowman v. Globe Heating Co.*, 80 Mo. App. 628; *Lloyd on Building*, § 69; 27 Amer. & Eng. Ency. Law (2d Ed.) 494-495; *Brandt on Suretyship* (3d Ed.) § 460. The contract, which is parcel of the bond, of course, required the building to be completed by August 15, 1904. It appearing that this stipulation could not be complied with, Whites, the contractor, called upon plaintiffs' agent and requested one week more time. Plaintiffs' agent suggested an extension of two weeks instead. The suggestion of two weeks was discussed, and, although not then agreed upon, was found to be satisfactory to both parties. On the following day Mr. Cox, the surety, requested the plaintiffs' agent to grant Whites such additional time as he required, which request was assented to, and in conformity therewith plaintiffs' agent, without either the contractor or surety being present, and without their knowledge, interlined in the written contract next after the provision requiring the building to be completed August 15th, as follows: "(Altered to August 29th, 1904.)" The argument advanced is that even though the surety requested the plaintiffs' agent to grant Whites such additional time as he might desire, and even though the additional time desired by Whites would expire on August 29th, these facts did not authorize plaintiffs' agent to write into the contract the words: "(Altered to August 29th, 1904.)" It is said, admitting the proper construction to be that the surety requested an extension of time to the contractor, expiring August 29, 1904, he is nevertheless discharged by the act of plaintiffs' agent in altering the contract when he neither requested nor consented to the act of interlineation, for the reason such interlineation destroyed the identity of his contract. The whole argument proceeds upon the idea that defendant should have consented to the alteration in the writing rather than to the extension of time which was the change

in the contract. In view of the fact that defendant requested the extension of time, and thus voluntarily consented to the modification of his original undertaking to that extent, we are not impressed with the argument that his consent—or, in other words, the contract as modified with his consent—is to be defeated for the reason that plaintiffs, without express authority from defendant, noted the substance of the modification upon the writing. It is true the alteration changed the terms as expressed by the original writing, but it only changed them in conformity to the modified contract as made by the principal parties and consented to by the surety; and, while it destroyed the identity of the surety's original contract, it indicated the truth with respect to the identity of the modified contract to which the surety had given his consent. It is the law that when the parties have agreed upon a change in the terms of a contract, as in this case, the contract will not be invalidated by one of the parties, without the knowledge of the other, noting the alteration on the instrument. See *Phillips v. Crips*, 108 Iowa, 605, 79 N. W. 373; *Wardlow v. List*, 41 Ohio St. 414; *Kane v. Herman*, 109 Wis. 33, 85 N. W. 140; 2 Cyc. 156.

2. The second proposition advanced by defendant for a reversal of the judgment predicates upon the fact that the owner paid to the builder certain of the funds due him without certificates of the architect, when the contract provided for payment only upon such certificates. It is argued because of this the defendant is discharged, for the reason that such payments were made in violation of the terms of the contract. In other words, the payment of these moneys to the contractor by the owner without the certificates of the architect is such a violation or deviation from the express provisions of the contract as to operate a release of the surety who is bound to respond only in accord with the strict terms of his obligation. Now, it is certain that the liability of the surety is strictissimi juris, and that an alteration or change in the terms of the contract by the principal parties without his consent will operate to release him. This for the reason the identity of the surety's contract is thereby destroyed and a new and distinct undertaking has been substituted for it by the principal parties. This doctrine is pertinent in those cases where there has been one or more new express or implied agreements between the principal parties by which the terms and stipulations of the principal contract have been added to or deducted from. For an application of the doctrine and cases in point, see *Reissaus v. Whites*, and authorities therein cited. There is a marked distinction, however, between a case where the identity of the surety's contract has been destroyed without his consent and a case where there has been merely an immaterial deviation in performance from its terms, without any implied or express agreement between the parties adding to or deducting from

the original terms. The principal above referred to is entirely without influence under the circumstances mentioned, when there has been a mere permissive deviation in acts and omissions with respect to the performance of the contract. Now in such cases the matter of the surety's liability or nonliability turns upon the question as to whether or not the deviations by the owner or obligee are material to the surety's risk. The sum and substance of the entire adjudicated law upon this subject is, we believe, that whenever a creditor does an act whereby injury or loss or liability to loss or increase of risk accrues to the surety without his assent the surety is entitled by reason thereof to be discharged. In accord with this doctrine, it has frequently been adjudged in building cases that in the matter of acts and omissions with respect to the performance of the contract assured mere immaterial variations and insubstantial deviations which do not, in any manner, prejudice the right or encroach upon the liability of the surety, will be insufficient to operate a discharge. *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669; *Geo. A. Fuller Co. v. Doyle* (C. C.) 87 Fed. 687; 27 Amer. & Eng. Ency. Law (2d Ed.) 494-496; *Brandt on Suretyship* (3d Ed.) § 445. See, also, for a clear enunciation of the same principle, although not building cases, *Merrick et al. v. Greely*, 10 Mo. 106; *State ex rel. v. Benedict*, 51 Mo. App. 642; *Jones v. Whitehead*, 4 Ga. 397. The principle is peculiarly pertinent to these building contracts where minor and immaterial variations are so frequent, even though the parties exercise a high degree of care and good faith. It is the law, too, that whatever securities of the principal debtor the creditor may hold as a further assurance of the payment of his debt, or whatever special rights and privileges are vouchsafed to the owner by the builder in a building contract for the purpose of securing to the owner its faithful performance, inure to the benefit of the surety on the builder's bond, and the surety is always discharged from liability to the extent to which the creditor or owner has surrendered these securities otherwise than in accordance with the contract or without the consent of the surety. *Taylor v. Jeter*, 23 Mo. 244; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Ryan v. Morton*, 65 Tex. 258; *Warre v. Calvert*, 7 Ad. & El. 143; *Watkins v. Pierce*, 10 Mo. App. 595; *Brandt on Suretyship* (3d Ed.) §§ 480, 481.

In accord with these principles, it is obvious that if the payments of the funds mentioned were made to Whites without certificates of the architect when such certificates were required by the contract, and the provision requiring the architect's certificates in and of itself vouchsafed an element of security to the owner for the faithful performance of the contract, then the defendant surety was entitled by subrogation to the full benefit of that element of security, be it ever so slight, and is released from the obligation

of the bond. He is released for the reason such deviation from the terms of the contract in making such payments is material, in that it operates to substantially impair his rights. It is likewise obvious that, if there was no element of security for the performance of the contract vouchsafed in the covenant with respect to the architect's certificates when considered alone, the mere fact that the money was paid to the contractor without the certificates first being obtained certainly would not operate to the prejudice of the surety. Under such circumstances, when no substantial right of the surety is impinged nor any security inuring to his benefit surrendered, the surety will not be released, even though the principal parties to the contract have slightly deviated from its terms by acts and omissions in matters of performance. It therefore appears the correct solution of the question of defendant's liability depends upon the true construction of those provisions of the contract pertaining to the architect's certificates when considered with reference to the facts of the case as established by the finding of the referee. Before adverting to an examination of the terms of the contract for the purpose of determining the extent and scope to which it should influence the question involved, it is important, first, to ascertain with certainty the rule concerning the construction of the obligation of suretyship. Now, while it is true the surety is a favorite in the law, this cannot be allowed to influence the construction of his obligation voluntarily assumed. The fact of his favoritism imports no more than that he is not liable on any implied engagement as a principal party contracting for his own interests would be, and that he has a right to insist upon a strict performance of any entire condition for which he has stipulated. The contract of the surety is to be construed fairly and in a reasonable manner. The court should endeavor to ascertain the true intention of the parties as disclosed by the instrument identically as when dealing with all manner of other undertakings. In its endeavor to ascertain this intention the writing should be considered with reference to the situation of the parties at the time it was executed, and in the light of the surrounding facts and circumstances which point the purpose for which the particular stipulation was inserted. *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669; *Brandt on Suretyship* (3d Ed.) § 107; 27 Amer. & Eng. Ency. Law (2d Ed.) 470.

With these principles in mind, let us examine the contract. There is but one provision contained therein which is pertinent to the question under consideration, and that is article 9, as follows: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractor for said work and materials shall be six hundred and eighty-seven and 50/100 dollars (\$687.50) subject to additions and

deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractor, in current funds, and only upon the certificate of the architect, as follows: Eighty per cent of amount of all work done or material in place, being the basis, when application is made. The final payment shall be made within thirty (30) days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued." Now, when we view this provision in connection with other portions of the contract and in the light of circumstances attending its execution, the intention of the parties is manifest. It is obvious the only element of security sought to be vouchsafed to the owner by providing for payments only on the certificates of the architect is that the builder be permitted at no time to draw funds from the owner in excess of the value of "eighty per cent. of the amount of all work done or material in place." That is to say, it was contemplated and intended that at all times there should remain in the hands of the owner a fund equal to 20 per cent. of the "amount of all work done or material in place." And, of course, this fund was a security in the hands of the builder which inured to the benefit of the defendant surety, and, had it been impaired by the failure to require architect's certificates, there is no doubt the surety would be released thereby. The referee found the fact to be, however, that "at no time did the plaintiffs pay to the contractor any amount in excess of eighty per cent. of labor done and material in place," etc. This finding of fact by the referee, supported as it is by substantial evidence, stands in the appellate court as a special verdict (*Howard County v. Baker*, 119 Mo. 397, 24 S. W. 200; *Wiggins Ferry Co. v. Railway*, 73 Mo. 389, 39 Am. Rep. 519), and by it a further examination here on the question of fact is foreclosed. In view of this finding, it appears the only element of security contemplated in this provision of the contract was not impaired because of payments having been made without certificates of the architect. The case of *Queal v. Stradley*, 117 Iowa, 748, 90 N. W. 588, is not in point here. In that case it was provided that the fund should be paid only on the certificate of the architect on the basis of 85 per cent. of the amount earned, etc. Other provisions required the builder to present receipted bills for labor and material as the work progressed, and, it appearing that certificates were issued by the architect and payments made by the owner to the builder without first requiring him to produce such receipted bills, the court very properly adjudged the surety to be discharged, saying that, although the payments were not in excess of 85 per cent., the provision requiring the production of receipted bills was very material for the protection of the sureties. No one will question the soundness

of the judgment given in that case. If a like provision were in the contract before us, a like judgment would be given here. In this case, however, there is no word in the contract requiring the builder to produce receipted bills; nor is there any word therein requiring him to make any specific application of the fund to be received. Indeed, as a matter of course, in virtue of his general obligation, it was his duty to pay for all labor and material, but not a word in the contract requires him to so employ the fund received by him thereunder. As the contract stands, it was the duty of the architect to issue certificates upon application for an amount not exceeding 80 per cent. of labor done or materials in place, and upon these certificates the builder was entitled to be paid the amount thereon by the owner. The builder could do as he saw fit with these funds. Of course, it was a moral duty to apply them on accounts for labor and material used in the construction of the building. There is no stipulation in the contract to that effect, however. It is therefore manifest that the provision requiring the certificate from the architect, disconnected from that directing payment to be made only on a basis of 80 per cent., contained no element of security which inured to the benefit of this defendant. It appearing, as found by the referee, that the builder did not, at any time, receive payment equal to 80 per cent. of the amount of labor performed or material in place, the security vouchsafed in this provision of the contract remained intact. It is manifest that under the circumstances stated a breach of the covenant requiring the architect's certificates was an immaterial variation in so far as the surety was concerned, as it entailed no possible injury upon him. The case of *Smith v. Molleson*, supra, is very similar to the case now in judgment, and there a like opinion was given by the court.

For the reasons above given, the judgment will be affirmed. It is so ordered.

BLAND P. J., and GOODE, J., concur.

#### CARTER v. WABASH R. CO.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

##### 1. DAMAGES—DESTRUCTION OF PROPERTY.

The general rule is that the measure of damages for property destroyed by fire negligently set is the value of the property consumed at the time and place of its destruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 277.]

##### 2. SAME—DESTRUCTION OF GROWING CROPS.

In ordinary cases, the measure of damages for the destruction of a growing crop by fire is its value at the time of the fire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 277.]

##### 3. SAME—BREACH OF CONTRACT—TORTS.

Damages resulting from breach of contract or tort are recoverable, where they naturally

and proximately result from the breach or tort, though they are not manifest at the time of the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 55-57.]

#### 4. SAME—FIRES—INSTRUCTIONS.

In an action by a landlord in a lease, stipulating that the land shall be used only for grazing and cutting hay, for fire burning over a meadow, an instruction that the measure of damages is the market value of the crop of hay the land would have produced, less the expense of harvesting, is erroneous, though the evidence shows that the grass in the meadow was destroyed in the spring of the year, and that it grew up in weeds and wild grass; but the measure of damages is the value of the crop at the time of the fire.

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by Richard Carter against the Wabash Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Geo. S. Grover and Geo. Robertson, for appellant. E. S. Gantt, for respondent.

BLAND, P. J. Plaintiff was the lessee of 175 acres of meadow and pasture lands adjacent to defendant's railroad track, in Audrain county, Mo. He held by a written lease, and his term began March 1, 1905, and terminated March 1, 1906. The lease provided that "none of said lands is to be plowed, but used only for grazing purposes and for cutting hay." Eighty acres of the land lying adjacent to the railroad was in meadow. On March 11, and again on March 12, 1905, defendant's locomotive engines set fire to the meadow and burned over from 20 to 25 acres of it. The action was to recover the resulting damages, and was commenced before a justice of the peace in Audrain county, Mo., and in due course was appealed to the circuit court, where, on a trial de novo, plaintiff recovered judgment, from which defendant appealed to this court.

Defendant admitted that its engines set the fires, and the sole controversy is in respect to alleged errors committed at the trial in the admission and rejection of evidence, and the giving and refusing of instructions in respect to the measure of damages. The trial court, both in the admission of evidence and in its instructions, ruled that the measure of plaintiff's damages was "the difference in the value at harvest time between the stand of grass actually produced on the land burned over and the stand of grass which from the evidence the jury find said land would have produced at harvest time, had it not been burned over. Such values will be estimated at the fair and reasonable market value of the stand of grass at harvest time prior to the actual beginning of the cutting of said grass"—and refused to admit evidence and instruct in defendant's behalf, on the theory that plaintiff's measure of damages was the difference per acre between what plaintiff rented the land at and what it was damaged per acre by reason of

the fire. The general rule is that the measure of plaintiff's damages for property destroyed by fire, negligently set, is the value of the property consumed at the time and place of its destruction. *Matthews v. Railway*, 142 Mo. 645, 44 S. W. 802; 13 Am. & Eng. Ency. of Law (2d Ed.) 533. In *Atkinson v. Railroad*, 63 Mo. 367, it was held that the measure of the plaintiff's damages for the destruction of forest trees by fire was the difference between the value of the trees before and after the fire. *Matthews v. Railway*, supra, was an action for the destruction of a barn by fire. It was ruled that the measure of damages was the value of the barn. The same rule was announced in *Burke v. Railroad*, 7 Helsk. (Tenn.) 451, 19 Am. Rep. 618. In *Railway Co. v. Jones*, 59 Ark. 105, 26 S. W. 595, in an action by the owner against the railroad company for damages to his meadow destroyed by fire, negligently set by the defendant, the court said: "The measure of damages is the cost of reseeded the meadow, and its rental value until it is restored." In *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285, and *Vermilya v. Railway Co.*, 66 Iowa, 606, 24 N. W. 234, 55 Am. Rep. 279, the cost of restoring the meadow to as good condition as it was before the fire was held to be the proper measure of damages. *Belch v. Railway Co.*, 18 Mo. App., loc. cit. 85, was a suit by the owner for the destruction of a meadow by a fire set by defendant. The court said: "If the meadow was utterly destroyed by the fire, the measure of damages would be its value at the time of the fire."

It seems to me that the more logical and better rule for estimating damages in the circumstances related in the foregoing cases, that is, where the realty itself has been damaged, is the difference in the value of the premises before and after the injury. *Wiggins v. Railroad*, 119 Mo. App. 492, 95 S. W. 311. In *Scanland v. Musgrove*, 91 Ill. App. 184, the landlord entered upon the demised premises, and destroyed the defendant's growing crop of wheat by plowing it under. The court ruled that defendant "was entitled to recover as damages therefor the value of his two-thirds at the time it was destroyed—not its then value for immediate use, in the condition it then was, but with a view to his right to use the land until it was matured, and then harvest it—and this value may be properly ascertained by showing the probable amount of wheat the crop, as it appeared when destroyed, would likely yield, the value of the same at the market season, and deducting therefrom the necessary cost for harvesting and threshing the same. *C., B. & Q. R. R. Co. v. Schaffer*, 26 Ill. App. 280, and *Economy Light & Power Co. v. Cutting*, 49 Ill. App. 422." *People's Ice Company v. Steamer "Excelsior"*, 44 Mich. 220, 6 N. W. 636, 38 Am. Rep. 246, was an action to recover the value of a crop of ice, formed on a leased pond along inside the channel bank of

the Detroit river, and negligently destroyed by the defendant steamer. In respect to the measure of the damages, the court, after discussing the rule for the measure of damages caused by the destruction of a growing crop, at page 237 of 44 Mich., at page 640 of 6 N. W. (38 Am. Rep. 246), said: "The owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once, and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not, however, absolve the wrongdoer, and the dangers, if any, from such a rule, he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one, the yield per acre in that vicinity, the market price of the crop, the expense—all could be ascertained with tolerable certainty, and why should the law exclude such proofs? The law affords abundant instances of cases analogous to the present, where the extent of the injury cannot be ascertained immediately thereafter, and where evidence is permitted to be given to show the probable extent thereof, or, if sufficient time has intervened before the trial, to show the actual result. In all such cases the extent of the injury can be ascertained with reasonable certainty."

The difference in the rental value of the land just before and immediately after the fire would not afford plaintiff adequate compensation for the loss, for the reason he was restricted by the terms of his lease from cultivating the land, nor could he sublet it; and, as he had no interest in the soil, he was not entitled to damages for injury to the inheritance, if any. The fire did not interfere with his rights in the property as lessee, therefore his damages cannot be measured by the difference in the rental value of the land burned over and what he agreed to pay per acre as rent. In ordinary cases the measure of damages for the destruction of a growing crop by fire, as the destruction of a crop of grass, is its value at the time of the fire. 3 Joyce on Damages, § 2126; 4 Sullivan on Damages, § 1023. In Donovan v. Railway Co., 93 Wis. 373, 67 N. W. 721, the action was for the destruction of timber, hay, grass, buildings, and pasture by fire, negligently set by defendant. In proving damages the plaintiff offered evidence showing what the land had previously produced. The court, at page 376 of 93 Wis., at page 722 of 67 N. W., said: "In proving damages we perceive no objection to proving what the lands had previously produced." Damages caused by the breach of a contract, or the commission of a tort, are not, in every instance, manifest at

the time of the happening of the wrong. Injurious consequences often follow which are not apparent, and which cannot be foreseen at the time, but, nevertheless, form an element of the damages, if it can be shown that such injury was naturally and proximately caused by the breach or tort. Thus in Schille v. Brokhahus, 80 N. Y. 614, it was held: "Where a business has been partially interrupted, because of the trespass, it is competent to prove upon the question of damages the amount of business previously done, and how much less the business was during the months when the injury occurred than during the corresponding months of the previous year, and the profits upon the business, and, where the evidence is sufficient to show that the falling off of business was in consequence of the wrongful acts of the defendant, the loss of profits thus established is a proper item of damages." In Gildersleeve v. Overstolz, 90 Mo. App., loc. cit. 527, the following paragraph is approvingly quoted from Schille v. Brokhahus, supra: "Loss of profits consequent upon a tort as well as a breach of contract are allowed, provided they are such as might naturally be expected to follow from the wrongful act, and are certain both in their nature and in respect to the cause from which they proceed."

Plaintiff's evidence tends to show that, with the exception of about three acres, the portion of the meadow burned over was practically destroyed and grew up in weeds and wild grass, and was not worth anything as a meadow at harvest time. It also tends to show that in previous years the yield of hay per acre from the burned portion had equaled or exceeded that of the unburned portion of the meadow. At the times the fires occurred plaintiff could not pasture the meadow without damaging it, and hence the short green grass, in the condition it was then in, had no appreciable value to him; and it seems to us that nothing less than what the value of the grass would have been, standing on the meadow at harvest time, had it been permitted to mature, will fully compensate plaintiff for his loss, and the most rational and satisfactory way of proving that value was by showing the average product per acre of the portion of the meadow not burned, and if, as was held in People's Ice Co. v. Steamer, Scanland v. Musgrove, and Donovan v. Railway, supra, the loss or damages may be shown by proof of what the land produced in former years, it seems to us that proof of what it would have produced the year in which it was burned ought to be admissible, where, as in this case, the proof is such as to make it reasonably certain what the land would have produced.

The court gave the following instruction on the measure of damages: "(4) If the jury find in favor of the plaintiff on either or on both counts of plaintiff's petition under the other instructions given in the cause and under the evidence, the jury will assess the



amount of plaintiff's recovery at such sum as will fairly and reasonably compensate plaintiff for his loss and damage occasioned by the fire; that is to say, the difference in value at harvest time between the stand of grass actually produced on the land burned over and the stand of grass which from the evidence the jury find said land would have produced at harvest time, had said land not been burned over. Such values will be estimated by the jury at the fair and reasonable market value of the stand of grass at harvest time prior to the actual beginning of the cutting of said grass." If, to prove the damages, it was competent to hear evidence of what the land would have produced but for the fire, it was proper to instruct the jury that the measure of damages was the market value of the crop of hay the land would have produced, less the expense of harvesting and marketing the same. In substance, this is what the court directed the jury to do in estimating the damages, and I can see no substantial objection to the instruction. The majority of the court consider the instruction given in the present case on the measure of damages erroneous. The question as to what is the measure of damages for loss of crops destroyed while growing was discussed in *Hunt v. Railroad* (Mo. App.) 103 S. W. 133, the rule prescribed, and the range indicated, which the evidence in proof of the damages may take. The instruction in this case is incorrect within the reasoning and the rule of the *Hunt Case*, and, as we are satisfied with the soundness of the views therein expressed, we will adhere to them.

The judgment is reversed, and the cause remanded for new trial. All concur.

**SUMMET et al. v. CITY REALTY & BROKERAGE CO. et al.**

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907.)

**1. JUDGMENT—RES JUDICATA—PARTIES CONCLUDED—PRIVIES.**

A judgment is binding, not only on the parties to the suit, but on their privies, whether in contract, estate, blood, or law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1195-1200.]

**2. SAME—MATTERS DETERMINED.**

Where in ejectment to recover property sold under a deed of trust, the defendants by cross-bill sought to have the sale set aside because of the fraud and misconduct of the trustee, they thereby impliedly admitted the valid execution of the deed of trust, so that a judgment against the defendants in that suit was *res judicata* of the due execution and validity of the trust deed, both because of such admission, and under the rule that *res judicata* applies, not only to the matters actually litigated, but to every question which properly belongs to the subject of litigation, and which the parties by reasonable diligence might have brought forward at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1234-1241.]

**3. SAME—SPLITTING CAUSES OF ACTION—DEFENSES.**

A party must try the entire cause of action or make his entire defense in the same action,

and will not be permitted to split either his cause of action or defense and litigate them separately, when all the matters properly and naturally relate to the subject-matter of litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1107-1114.]

**4. SAME—SET-OFF AND COUNTERCLAIM.**

The rule that a party may not split his entire cause of action or defense does not apply to a set-off or counterclaim which may be pleaded or not, at the defendant's election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1136.]

**5. MORTGAGES—TRUST DEED—CAPACITY OF LENDER—ESTOPPEL TO ATTACK.**

A borrower of money from a life insurance company, who executes a deed of trust on real property as security therefor, and the borrower's privies, are estopped to deny the power of the corporation to loan the money and to take the deed of trust as security.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 192; vol. 12, Corporations, §§ 1565, 1566.]

**6. CORPORATIONS—RIGHT TO HOLD REAL ESTATE—PERSONS ENTITLED TO OBJECT.**

Where a foreign insurance company, having loaned money on real estate in Missouri, purchased the same at its own foreclosure sale, only the state could object that the company held the land for more than six years, in violation of Const. 1875, art. 12, § 7 [Ann. St. 1906, p. 304].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1549, 2580.]

**7. ESTATES TAIL—STATUTES—CONVERSION—CONTINGENT REMAINDER.**

An antenuptial contract, conveying certain property to the grantor's affianced wife, and to the heirs of her body by him begotten, created an estate tail in the grantee, which was converted by Gen. St. 1865, c. 108, § 4, into a life estate in the wife with a contingent remainder in fee in favor of the persons answering the description "the heirs of her body," etc., on the wife's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estates Tail, § 2.]

**8. REMAINDERS—CONTINGENT REMAINDER—CONVEYANCE BY REMAINDERMEN.**

Where land was conveyed to C. for life, with a contingent remainder in fee to the heirs of her body on C.'s death, and C. and all her children who owned any interest in the land, after reaching majority, joined in conveyances to an insurance company as security for a loan, and C. thereafter died without leaving any other heirs, such conveyances covered all outstanding interests, under the rule permitting alienation of contingent remainders.

**9. SAME—CONSIDERATION.**

Where contingent remaindermen joined with the life tenant in executing a deed of trust on the land as security for a loan, it was immaterial to the validity of the conveyance of their interest that they received no part of the loan.

**10. QUIETING TITLE—CROSS-BILL—REQUISITES.**

Rev. St. 1899, § 650 [Ann. St. 1906, p. 667], provides that any person claiming any title, estate, or interest in any property may sue any person or persons having or claiming to have any title, estate, or interest in such property, whether in possession or not, to ascertain and determine the estate, title, and interest of the parties respectively, and to define and adjudge the same. *Held*, that a cross-bill to quiet title under such section need only allege how defendants acquired their title, and then state generally that defendants claim an interest in and to the premises, adverse to plaintiffs, and pray that the respective interests may be ascertained,

and a decree entered adjudging the rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 80.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Ejectment by Mary E. Summet and others against the City Realty & Brokerage Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is a suit in ejectment for the possession of the south 49 feet of lot 146, in block 11, McGee's addition to Kansas City, Mo. The petition is in the usual form. The answer of Anna Voypool is a disclaimer of any interest in the premises, and an allegation that she was in possession of the property as tenant of defendant, the City Realty & Brokerage Company, and that she was ready and willing to attorn to the party to whom the title and possession of the property may be adjudged. The defendant company's answer is, First. A general denial. Second. A plea of *res judicata*. Third. A cross-bill, claiming to be the owner in fee of the premises, and admits its possession. Then it proceeds to allege that plaintiffs claim some right, title, or interest in and to the property, but the character and nature of which is to the defendant unknown, except that it is adverse and prejudicial to defendant's title. The reply is a general denial of the new matters contained in the answer and cross-bill. The plaintiffs demanded a trial by jury, claiming that the suit was one at law, while the defendant contended that the answer and cross-bill converted it into an equitable proceeding, and was for that reason triable before the court. The court took the latter view of the cause, and proceeded, over the objections and exceptions of plaintiffs, to try the case as one of equity. The findings and decree were for the defendant, and in proper form and in due time plaintiffs appealed the cause to this court.

The facts are few and simple, and are stated by counsel for respondent, substantially, as follows: "April 25, 1862, D. A. N. Grover was the owner of the south 49 feet of lot 146, block 11, McGee's Addition, in Kansas City, Mo.; and on that day he entered into an antenuptial contract with Latitia J. Cockrell, whereby this and other property was granted to his said intended wife 'for her separate use, benefit, and behoof and the heirs of her body begotten by the said D. A. N. Grover, forever.' May 1, 1862, the said parties were married to each other. February 18, 1863, a son, Charles Grover, was born of said marriage. May 13, 1864, a second son, D. A. N. Grover, Jr., was born of said marriage. April 27, 1866, a daughter, Gertrude A. Grover, was born of said marriage. February 9, 1868, a third son, Shelley Grover, was born of said marriage. October 17, 1873, a fourth son, Pliny Warner Grover, was born of said marriage. No other

children were born of said marriage. February 15, 1876, the said Pliny Warner Grover died. February 11, 1880, D. A. N. Grover, the said husband of Latitia J. Cockrell Grover died. July 10, 1890, the said Latitia J. Cockrell Grover, D. A. N. Grover, Jr., Gertrude A. Grover, and Shelley Grover, all then single persons, and Charles Grover and Mary J. Grover, his wife, united in the execution and delivery of a deed of trust, whereby they 'granted, bargained, and sold, conveyed and confirmed' the said land unto Theodore S. Case, as trustee for the Prudential Insurance Company of America, in trust to secure one note for \$1,000 and another note for \$8,000, executed by all of the said grantors on said July 10, 1890, to said insurance company, which notes represent a loan that day made to said grantors by the said insurance company. The deed of trust was properly acknowledged. July 11, 1890, the deed of trust was recorded in the proper office. August 20, 1893, Latitia J. Grover deeded said property to Charles Grover, consideration \$621.88. July 10, 1894, Charles Grover and wife, D. A. N. Grover, Jr., and wife, Shelley Grover and wife, deeded said property to Gertrude A. Grover, consideration \$100. This deed was made subject to 'a deed of trust for \$8,000 and interest thereon from January 10, 1894.' October 13, 1894, Charles Grover and wife and Gertrude A. Grover deeded said property to Mary E. Summet, subject to 'a deed of trust of \$8,000, and interest thereon from January 10, 1894, which is now on record in the recorder's office of Jackson county, Missouri.' The consideration named in this deed is \$1,500, but Mr. Summet testified that the actual consideration was \$275. February 21, 1895, the deed of trust was foreclosed and the land sold after proper notice and because of default in the payment of the notes and interest secured by the deed. The Prudential Insurance Company of America was the purchaser, and on said day the said trustee made, executed, and delivered his trustee's deed to said land to said insurance company. February 27, 1895, said trustee's deed was recorded in the proper office. In March, 1895, said insurance company brought its action of ejectment against William L. A. Summet, Mary E. Summet et al., in the Jackson county circuit court, claiming possession of the property in controversy. In April, 1895, defendants in said ejectment case filed answer, setting up defects in the trustee's sale, in that the trustee was guilty of fraud and misconduct in stating to prospective bidders that the sale would be made at one hour of the day, and that in violation of those statements made it at another and different hour, and thereby caused the property to sell for a much less sum than it was really worth, and for which it would have sold had it not been for the statements; and prayed for affirmative relief, and filed an application for change of venue; this change of venue was granted, and the case sent to the

circuit court of Clay county. November 11, 1895, the said insurance company obtained judgment against defendants in said ejectment case. November 30, 1895, the sheriff ousted the Summets from the said property and put the insurance company in possession. January 9, 1896, said insurance company filed in the Jackson county circuit court its bill in the nature of a bill of peace against said William L. A. Summet et al., based upon the judgment in the former ejectment case. Defendants answered setting up equities and asking for affirmative relief. July 8, 1896, decree was rendered in favor of plaintiff in said bill of peace against the said William L. A. Summet and W. F. Johnson (the cause having been dismissed as to Mary E. Summet), whereby they were permanently restrained and enjoined from going upon the property in controversy in this case, from 'injuring or defacing said property, from exercising any acts of ownership on said property, or taking possession thereof or any part thereof, and from in any way interfering with the possession of the plaintiff, or of the possession of those holding said property or parts thereof under this plaintiff, or from committing any acts of trespass thereon,' and for costs. August 19, 1901, the said insurance company, by general warranty deed, in consideration of the sum of \$5,500 conveyed said property to Robert A. Carey, of Kansas City. September 23, 1901, said deed was recorded in the proper office. September 23, 1901, Robert A. Carey and wife made a general warranty deed of said property to respondent City Realty & Brokerage Company of Jackson County, Mo. January 3, 1902, the said insurance company executed and delivered to the said Robert A. Carey its quitclaim deed of correction 'for the purpose of correcting certain errors in the execution and acknowledgment of a certain deed made by first party herein to second party herein, dated August 19, 1901, and recorded September 23, 1901, in book B 778, page 309, of the records in the recorder's office of Jackson county, Mo.' March 15, 1902, the said Latitia J. Grover died and left surviving her the said Charles Grover, D. A. N. Grover, Jr., Gertrude A. Grover, and Shelley Grover. December 23, 1902, the aforesaid deed of Robert A. Carey and wife to City Realty & Brokerage Company, dated September 23, 1901, was recorded in the proper office. July 28, 1903, the said quitclaim deed of correction of said insurance company to said Carey was recorded in the proper office."

English & English, for appellants. Haff & Michaels and W. M. Walker, for respondents.

WOODSON, J. (after stating the facts as above). 1. The first contention of the plaintiffs and appellants is that the judgment in the case of the Prudential Insurance Company against William L. A. Summet, Mary E.

Summet et al., rendered by the circuit court of Clay county on change of venue is not *res judicata* between the parties to this suit, and assign two reasons therefor: First, because the suit is not between the same parties; and, second for the reason that the same issues were not the same in that case as are those here involved. We will dispose of those two propositions in the order presented.

First. While it is true the parties to that suit and this are not the same, yet the plaintiffs in this case were defendants in that, and the defendant in this is in privity in estate with the plaintiff, the insurance company, in that case, having purchased the same property involved in that suit. The law is too well established to require a reinvestigation of the question that judgments are binding upon the parties to a suit and their privies, whether in contract, estate, blood, or in law. *Litchfield v. Goodnow*, 123 U. S. 551, 8 Sup. Ct. 210, 31 L. Ed. 199; *Crispin v. Hannavan*, 50 Mo. 415.

Second. The cross-bill in the former case assailed the validity of the sale made by the trustee named in the deed of trust executed by plaintiffs, grantors, whereby they conveyed the property to the insurance company as security for the payment of the notes described therein, upon the grounds that he had been guilty of fraud and misconduct in the sale of the property, and asked for equitable relief. In that case the defendants therein, who are the plaintiffs herein, by not assailing the due execution and validity of the deed of trust, did by implication and necessity admit its due execution and validity by asking to have the sale set aside because of the fraud and misconduct of the trustee. If he was not the trustee, or if the deed was not properly executed or was invalid, why litigate the conduct of the trustee in making the sale thereunder? The only reasonable interpretation to be placed upon the cross-bill is that it admitted the due execution and validity of the deed of trust, but that the sale by the trustee thereunder was invalid because of his fraud and misconduct in making the sale thereunder. That being true, we must hold that all of those questions were adjudicated in the former trial, and cannot be relitigated in this. But suppose that was not the true intent and meaning of the cross-bill, yet under the well-known rule of *res judicata* every question which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time, are included in the judgment, and it is as binding upon those matters as if they had been specifically put in issue. This rule is based upon the principle that a party must try his entire cause of action or make his entire defense in the same action, and will not be permitted to split up the cause of action or defense into several parts and litigate each separately, when all the matters properly and naturally relate to the subject-matter in liti-

gation, and could properly and logically have been tried in the same cause; but this rule does not extend to matters which are wholly independent of, and have no relation or connection with, the subject of the litigation, such as set-off or counterclaim, without they are actually set up and adjudicated. *Mason v. Summers*, 24 Mo. App. 174; *Edgell v. Sigerson*, 26 Mo. 583. According to the law as enunciated in the foregoing authorities, both of appellants' contentions must be ruled against them.

2. Appellants next present the legal proposition that in this state a life insurance company has no power or authority to lend money or take a deed of trust on property to secure the same. What has been said in paragraph 1 of this opinion applies with equal force and effect to the proposition here presented, as well as the next one to be considered; but as each of them are presented in different form we will give them separate consideration. The question now under consideration is no new one in this state. It has been held a number of times by this court that a borrower of money and he who executes a deed of trust on real property as security therefor and his privies are estopped from questioning the power of the corporation to loan the money and to take a deed of trust as security therefor. *Broadwell v. Meritt*, 87 Mo. 101; *West Mo. Land Co. v. Ry. Co.*, 161 Mo. 595, 61 S. W. 847; *Smith v. Sheeley*, 12 Wall. (U. S.) 361, 20 L. Ed. 430.

3. This court is next asked to reverse the judgment in this cause because the record discloses that the insurance company held the land in question for a period of more than six years, which is in violation of section 7 of article 12 of the Constitution of 1875 [Ann. St. 1906, p. 304]. This question can be raised by the state alone. It is a matter that does not concern the individual, as held by the following cases: *Hall v. Farmers' Bank*, 145 Mo. 418, 46 S. W. 100; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *The Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

4. The contention that the deed of trust to the insurance company is void as to the children of D. A. N. Grover and Latitia, his wife, and for that reason no title passed to the company, is equally untenable. The marriage contract entered into between them gave the lot to Latitia Cockrell and to the heirs of her body by him begotten. At common law those words created an estate tail in the first taker, but under section 4 of chapter 108, Gen. St. 1865, that estate was converted into a life estate in Latitia, with a contingent remainder in fee in favor of the persons answering the description of the words "the heirs of her body," upon the death of the life tenant. Latitia and all the children of that marriage, after the death of D. A. N. Grover, and after all of them became of age, either by direct or mesne conveyances, conveyed the land to the insurance company as

security for the loan before mentioned, and afterwards the mother died. While it is true the marriage contract created only a contingent remainder in their children, for the reason that no one could tell who the heirs of her body by him begotten would be until after her death, as the living have no heirs; but in this case that is entirely immaterial, because all of their children, after reaching their majority, together with their mother, joined in the conveyances to the insurance company. By this it is seen that the owner of the life estate joined in the conveyances with the contingent remaindermen, all of whom owned the entire estate in fee, and conveyed it to the insurance company, and then, in 1902, the life tenant died, without leaving any other such heirs. The law of this state no longer rests in doubt regarding the right and power of contingent remaindermen to sell and convey their interest in real estate. This court has uniformly held that contingent remainders are alienable the same as are other estates. *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224; *Finley v. Babb*, 173 Mo., loc. cit. 263, 73 S. W. 180. Nor can the fact that the remainderman received no part of the money lent to the life tenant in any manner affect the validity of the deed of trust made to the insurance company. The money loaned by the company to Latitia Grover on her note, secured by the deed of trust signed by her and all of the remaindermen, was a good and valid consideration as to the latter; and even between the parties to the deed remaindermen are estopped from asserting a want of consideration to them. *Mullanphy v. Reilly*, 8 Mo. 675; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Halsa v. Halsa*, 8 Mo. 303; *Coal Co. v. Blake*, 85 N. Y. 226; *Edwards v. Schoeneman*, 104 Ill. 278; *Johnson v. Bldg. Ass'n*, 104 Pa. 394.

5. Appellant's contention that the cross-bill of respondents does not state facts sufficient to entitle it to the equitable relief prayed is not in harmony with the ruling of this court. It must be observed that respondents in their cross-bill rely upon section 650, Rev. St. 1899 [Ann. St. 1906, p. 667], to have the title to their property quieted. Whatever may have been the individual views of the writers upon that subject, this court, in the case of *Burk v. Pence* (not yet officially reported), 104 S. W. 23, held that all that was necessary to be alleged in the petition to entitle the plaintiffs to relief under that section was to state how they acquired their title, and then state, generally, as was done in the cross-bill in this case, that the defendant claimed some interest in and to the premises adverse to the plaintiffs, and prayed that their respective interests might be ascertained and determined by the court, and a decree entered adjudging the rights of the respective parties. The same rule of plead-

ing is applicable to a cross-bill where affirmative relief is prayed for.

6. It must follow from the views hereinbefore expressed that the appellants did not introduce evidence sufficient to make out a prima facie case, justifying its submission to a jury, and for that reason they have no valid legal reason for complaining of the action of the court in refusing them a trial by jury, even conceding, without deciding, that ordinarily they would be entitled to a jury in the trial of such cases.

Under the evidence introduced, the findings and judgment of the trial court were unquestionably just, proper, and for the right parties, and the judgment should be affirmed; and it is so ordered. All concur.

STATE ex rel. EATON et al. v. GMELICH,  
State Treasurer.

(Supreme Court of Missouri. Dec. 24, 1907.)

# 1. STATUTES—CONSTRUCTION—RULE FOR.

The primary rule governing the interpretation of statutes is the one requiring the legislative intent and purpose to be ascertained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-265.]

# 2. HOSPITALS—STATE FUND—CREATION—STATUTES CONSTRUED.

Act April 15, 1905 (Sess. Acts 1905, p. 292 [Ann. St. 1906, p. 3717]), created a state sanatorium, and section 24 made laws governing other eleemosynary institutions applicable to it. Rev. St. 1899, § 7808 [Ann. St. 1906, p. 3710], requires moneys received by such institutions to be paid to the State Treasurer, and by him placed in respective funds created by such sections. Section 7809 provides that moneys in the state treasury to the credit of any such fund shall be appropriated for the support of the institution to which the fund belongs. Act April 15, 1907 (Laws 1907, p. 37) § 27a, appropriated out of the state treasury chargeable to the "Missouri state sanatorium fund" a specified sum, "the same being derived from the payment into the state treasury by the treasurer or other financial officer of said institution." Act March 19, 1907 (Laws 1907, p. 309) § 15, requires the superintendent of the sanatorium to furnish the State Treasurer sufficient data to enable him to collect from the various counties, etc., sums owing the institution for care, etc., of patients. Section 16 (page 310) gives indigent patients the preference over private patients. *Held*, that the Legislature intended that an institution's receipts be used to defray its running expenses, and not that they go to the state's general revenue fund, and that the "Missouri state sanatorium fund" was created by section 27a, though not in express terms.

# 3. SAME.

Moneys received by the State Treasurer under such section 15 (Laws 1907, p. 309) from the different counties are moneys "derived from the payment into the state treasury by the treasurer or other financial officer of said institution" within such section 27a (Laws 1907, p. 37), since by section 15 the State Treasurer has been made a financial officer of the institution, and as such falls within the term "other financial officer."

In Banc. Petition by the state, on the relation of J. L. Eaton and others, for mandamus to J. F. Gmelich, State Treasurer. Writ awarded.

James F. Ball, for relators. The Attorney General and N. T. Gentry, for respondent.

GRAVES, J. This is an original proceeding in this court, wherein the relators, who constitute the board of managers of the Missouri state sanatorium, seek, by writ of mandamus, to compel respondent, who is State Treasurer, to open an account in the books of his office with the said Missouri state sanatorium in the name of the "Missouri State Sanatorium Fund," and to place to the credit of said fund the sum of \$17.89, which said respondent has collected from the city of St. Louis as pay for keeping and maintaining indigent patients from said city in the sanatorium, and to further place to the credit of such fund any and all other moneys collected from the like or any other source for such sanatorium, and to pay out such funds for the maintenance of said sanatorium upon orders issued by the proper officers of said sanatorium. Relators aver that by virtue of section 27a of the act of the General Assembly approved April 15, 1907 (Laws 1907, p. 37), and section 15 of an act of the General Assembly, approved March 19, 1907 (Laws 1907, p. 309), and section 7808, Rev. St. 1899 [Ann. St. 1906, p. 3710], it became and was the duty of respondent to open up an account as aforesaid, and to collect and credit the moneys as aforesaid, and to pay the same out in the manner and for the purpose as aforesaid. These several statutes are as follows:

"Sec. 27a. There is hereby appropriated out of the state treasury, chargeable to the Missouri state sanatorium fund, the sum of seventy-five thousand dollars (\$75,000.00), the same being derived from the payment into the state treasury, by the treasurer or other financial officer of said institution, in pursuance of the laws of this state, or so much thereof as may be necessary."

"Sec. 15. Support of Free Patients.—At least once in each month the superintendent of the sanatorium shall furnish the State Treasurer a list of all free patients in the sanatorium, together with sufficient facts to enable the State Treasurer to collect from the various counties or cities such sums as may be owing to the institution for the examination, care, clothing, and treatment of the patients who have been received by the institution and who are shown by the statement of the proper county or city officials, as hereinbefore provided, to be unable to pay for their care and treatment. State Treasurer shall thereupon collect from the various counties or city the sum due for the care and treatment of each such patient at a rate not exceeding five dollars a week for each patient."

"Sec. 7808. Certain Funds Created.—That there is hereby established and created in the state treasury of this state the following named funds: 'State Hospital for Insane No. 1,' 'State Hospital for Insane No. 2,'

'State Hospital for Insane No. 3,' 'School for Blind,' 'School for Deaf,' 'Reform School for Boys,' 'Industrial Home for Girls,' 'Earnings of Missouri Penitentiary,' 'University,' 'State Normal School, First District,' 'State Normal School, Second District,' 'State Normal School, Third District,' and 'Lincoln Institute.' Whenever any moneys are paid into the state treasury under the provisions of this article, they shall be receipted by the State Treasurer into and placed to the credit of the fund to which they respectively belong, so that money derived from each institution may be placed to the credit of the fund herein provided for that institution."

Respondent, by his return, says: "Now, on this day, comes the respondent, and, for return to the alternative writ herein, says that he admits that the relators are now and were at the time stated in the alternative writ duly appointed, qualified, and acting board of managers of the Missouri state sanatorium, which institution was established and located at Mount Vernon, Lawrence county, Mo., according to law. He admits that he is now and was at the times mentioned in said writ the duly qualified and acting Treasurer of the state of Missouri. He admits that the General Assembly of Missouri, by an act passed and approved April 15, 1907, made provision for said institution, as stated in section 27a of said act. He admits that section 15 of said act provides for the support of free patients, and that said section of said act is correctly copied in said alternative writ. He further admits that he has collected from certain counties and cities now maintaining indigent patients in said institution, to wit, in the city of St. Louis, the sum of \$17.89, and that he will in the course of his official duty, from time to time, probably collect other amounts due said institution, and he admits that the board of managers of said institution have requested him to open an account in the books of his office in the name of the 'Missouri State Sanatorium Fund,' and to place said amount now collected, to wit, \$17.89, and all other amounts coming to his said office from the same source, to the credit of the 'Missouri state sanatorium fund.' He finally admits that he has refused to place said sum, and any other sums collected from a like source, to the credit of the 'Missouri state sanatorium fund,' and that he has refused to open on the books of said office an account to said fund until directed to do so by this honorable court. And, further, the respondent states that there is no authority in law for the placing of said sum or any other sum to said account, and that the General Assembly of Missouri has failed to provide, by law, for the establishment of such a fund, and that the respondent has no right or authority to open an account to such a fund, without direct authority given him by law. Wherefore, respondent respectfully requests that no peremptory writ of mandamus issue, and that he go hence with

his costs." Upon the filing of this return, relators filed their motion for judgment upon the pleadings.

From the foregoing it will be seen that the sole question is a construction of section 27a of the act of April 15, 1907, which is an appropriation act, and the act of March 19, 1907, which is an act providing for the government of the Missouri state sanatorium for the treatment of incipient pulmonary tuberculosis, and section 7808, Rev. St. 1899 [Ann. St. 1906, p. 3710], and the amendatory act of 1901, which creates certain funds for the several eleemosynary and penal institutions of the state. Respondent's contention is that by no act of the Legislature has a "Missouri state sanatorium fund" been created, and until such is created he has no legal right to open up an account with such a fund in the books of his office, or to credit the same with moneys received, or debit the same with moneys paid out. The issue therefore is purely one of statutory construction.

1. First, we are called upon to say whether or not there has been by law created the "Missouri state sanatorium fund." Of the many canons of construction in the interpretation of legislative acts, the chief one is that which requires us to find the legislative intent and purpose. The intent and spirit of the legislative act should be made to speak, if such can be done without doing violence to express language. The Missouri state sanatorium had its birth by the act of 1905, approved April 15, 1905. Sess. Acts 1905, p. 202 et seq. [Ann. St. 1906, p. 3717]. Section 24 of that act (page 3723) provides: "The managers of said institution shall have the powers, rights and privileges given to and perform all the duties required of the board of managers of other state eleemosynary institutions in this state, and said sanatorium hereby established shall, in all respects not inconsistent with this act, be governed by and be conducted according to the laws governing other eleemosynary institutions in this state, with like powers, privileges and immunities, as far as the same are applicable and not inconsistent with this act." In the succeeding act of 1907, supra, we have section 12 (page 308) which reads: "The Missouri state sanatorium, located at Mount Vernon, is hereby declared to be an eleemosynary institution of this state, and all laws contained in article 1 of chapter 118 of the Revised Statutes of 1899, and acts amendatory thereof [Ann. St. 1906, p. 3876], are declared to be applicable thereto." We start, then, with this sanatorium as one of the eleemosynary institutions of the state. By the acts of 1907, approved respectively April 15th and March 19th, no provision is made to meet the running expenses of the institution, except such as is made by section 27a, supra. It is clear from all the acts that it was the intention of the lawmakers that the pay received for the treatment of patients was to be used to defray the running ex-

penses. By section 16 (page 310) of the act, approved March 19, 1907, private patients may be received and treated, "when there is room in said sanatorium for admission of said applicants, without interfering with preference in the selection of patients, which shall always be given to the indigent." So that under the law these indigent patients or county charges have the preference, and if the funds paid for their treatment by the several counties and the city of St. Louis are to be diverted to the general revenue fund of the state, the institution, if filled with these preferred patients, would not have a dollar with which to pay running expenses. By section 24 of the act of 1905, supra, the laws governing other eleemosynary institutions are made applicable to this institution. Of those laws we have article 9, c. 118, in which section 7808, supra, is found. By the provisions of this article, the moneys received by the institutions are required to be paid to the State Treasurer, and by him placed in the respective funds created by law as stated in section 7808, Rev. St. 1899, supra. Then section 7809 of that article reads: "That any moneys in the state treasury to the credit of any of the funds in this article created, paid therein under the provisions of this article, or so much thereof as may be necessary, shall be appropriated by the General Assembly for the support or improvement of the institution to which the fund belongs." When section 7808, supra, was enacted, the Missouri state sanatorium was not in existence. It should be remarked here—a fact which seems to have escaped attention of counsel—that this section was amended by act approved April 13, 1901, by adding therein the words "State Hospital for Insane No. 4," since which time there has been no amendment that we are able to find. Now, considering all these statutes together, and considering the further fact that if all the earnings of this institution are to go to the general revenue fund, unless this special fund has been created, was there a legislative intent sufficiently expressed in section 27a, supra (Acts 1907, p. 37), to create the "Missouri state sanatorium fund"? We are inclined to think there is, and so hold. Had there been added after the word "fund" in the second line of said section the words "which is hereby created," there would be no doubt or question; yet it seems to us, when we consider all the statutes together, the legislative intent is just as apparent as if these words had been written therein. We therefore hold that within the meaning of the law there has been created the fund aforesaid.

2. Respondent, however, makes a further contention, which we omitted from our statement, and that is that the money which he has and which he will in the future receive from the different counties are not moneys "derived from the payment into the state treasury, by the treasurer or other financial

officer of said institution, in pursuance of the laws of the state," as specified by section 27a, supra. Under the provisions of the Laws of 1907, § 15, supra, it is made the duty of the superintendent of the sanatorium at least once each month to furnish the Treasurer a list of the free patients, together with such data as "to enable the State Treasurer to collect from the various counties or cities such sums as may be owing to the institution for the examination, care, clothing, and treatment of the patients," etc. It will be noticed that the funds to be collected by the Treasurer are funds "owing to the institution," and not to the state. In our judgment, the State Treasurer has thus been made a financial officer of this institution for the purpose of collecting these moneys, and as such falls under the term "other financial officer of said institution," as mentioned in said section 27a.

From these views, it follows that the peremptory writ of mandamus should be awarded, and it is so ordered. All concur.

ORDELHEIDE et al. v. BERGER LAND CO.  
et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

1. NEW TRIAL—ORDER—SPECIFICATION OF  
GROUNDS.

An order granting a new trial for "error in finding as to facts and law" was too general to constitute a compliance with the statute requiring the trial court to specify in such order the ground or grounds on which the new trial was granted, intended for the information of the losing party and of the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 330.]

2. APPEAL—REVIEW—FIRST NEW TRIAL—  
EJECTMENT.

Under Rev. St. 1899, § 806 [Ann. St. 1906, p. 769], providing that a party aggrieved may appeal from any order granting a new trial, an order granting a first new trial in ejectment is subject to review on appeal, and will be reversed if the evidence is such that in no view of it can a verdict for the party in whose favor the new trial is granted be sustained.

3. EJECTMENT—DESCRIPTION—EXISTENCE OF  
LAND—SUFFICIENCY OF EVIDENCE.

Where, in ejectment, the land was described as Island 63 in the Missouri river, in section 6, township 45, range 3 west, "except 80 acres off the upper end," sold to W., all in Warren county, Mo., there being no description by which the eighty acres could be located with reasonable certainty, and it being doubtful whether the island, as it existed at the time suit brought, contained 80 acres in all, and plaintiff claimed under a tax deed conveying the title of a person not shown to have ever been in possession, but to have abandoned the land, plaintiff could not recover.

Appeal from Circuit Court, Warren County; H. W. Johnson, Judge.

Ejectment by F. A. Ordelheide and another against the Berger Land Company and others. From an order sustaining plaintiffs' motion for a new trial, defendants appeal. Reversed and remanded.

Jesse H. Schaper and J. W. Delventhal, for appellants. C. E. Peers, for respondents.

VALLIANT, P. J. This is an appeal from an order sustaining a motion for a new trial. It is an action in ejectment for the possession of land described in the petition as: "Island 63 in the Missouri river in section 6, township 45, range 3 west, except 80 acres off the upper end sold to Wehmeyer, all in Warren county, Missouri." Defendants in their answer say that they are in possession, and are the owners in fee of all that part of the island lying southeast of a line specifically described in the answer.

On the trial the plaintiffs introduced the following documentary evidence, to wit: (1) A quitclaim deed from one Ferdinand Withaus December 10, 1892, to John Withaus to all the grantor's "interest in the northeast part of island No. 63, section 6, township 45, range 3 west, in the Missouri river." The deed was duly recorded. (2) A judgment in a suit wherein the state of Missouri, at the relation of the collector of revenue of Warren county, was plaintiff, and John Withaus or his unknown heirs were defendants, for delinquent taxes amounting to \$6.24 for the years 1893, 1894, and 1895 against land described as follows: "Island No. 63 in the Missouri river in section 6, township 45, range 3 west, except eighty acres off the upper end sold to Wehmeyer." (3) The original petition in that case in which the land is described as shown above in the judgment, and two summonses for John Withaus, one to St. Louis county the other to Warren county, both returned not found. (4) Order of publication against John Withaus, if living, or his unknown heirs, if dead. (5) Sheriff's deed under that judgment October 26, 1898, conveying the land as last above described to the plaintiffs in this suit. The oral testimony for the plaintiff showed that there never was any particular part of the island assessed to John Withaus or, for that matter, to any one, it was assessed as 35 acres, in Island 63, to Withaus, and 35 acres to Berger Land Company. Whether Ferdinand Withaus was ever in actual possession the evidence does not show, but it does show that John Withaus was never in possession of any part of it, and never paid any taxes on it; after he got his deed he granted some parties the right to graze cattle on it, but when they attempted to do so they were warned to keep off by a man named Thee, who claimed to be the owner and they left. At the time of the suit for taxes John Withaus was living in St. Louis. He said he could not get a deed of good title and concluded to "let it go." The plaintiff's testimony also showed that at the time this suit in ejectment was brought it was very doubtful if any of the land they claimed was in existence, the river had washed away first one end of the island then the other, and first one

side and then the other, and afterwards made accretions where it had before made erosions, so that little of the island as it was when John Withaus got his deed was in existence when this litigation commenced. Defendant's testimony tended to show a good title, by adverse possession at least, to that part of the land specifically described in their answer, but it is not necessary to set it out in this statement. The cause was tried by the court without a jury, there were no instructions given and none asked, except one in the nature of a demurrer to the evidence, which the defendants asked at the close of the plaintiff's evidence, which was refused and exception taken. The finding was for the defendants, but the court afterwards sustained the plaintiffs' motion for a new trial, and being requested by defendants to specify the grounds stated in the order: "Error in finding as to facts and law." From that order the defendants have appealed.

1. The object of the statute in requiring the trial court to specify in the order the ground or grounds on which the new trial is granted is for the enlightenment of the losing party and of the appellate court. It is a substantial right which the statute gives the losing party, and the trial court has no right to deprive him of it. The party has the right to know what the real cause is, and he is not accorded that right by a general vague statement that specifies nothing. "Error in finding as to facts and law" is not a compliance with the statute.

2. It is insisted by respondents that the granting of one new trial is in the discretion of the court, and will not be reviewed on appeal. That position cannot be sustained because it is in the face of the statute (section 806, Rev. St. 1899 [Ann. St. 1906, p. 769]), which says that the party aggrieved may take his appeal "from any order granting a new trial," which means as well an order granting a first new trial as a second. The right of appeal from an order granting a first new trial would amount to nothing if the action of the trial court was not subject to review in the appellate court. What we have said on the subject is that, if the first new trial is granted on the ground that the finding of the triers of the facts is contrary to the weight of the evidence, the ruling of the trial court will not be reversed if the testimony was conflicting, and there was substantial evidence to sustain the trial court in its ruling, although we might differ from the trial court in its estimate of the weight of the evidence. But even if the new trial is granted on alleged error in the finding of the facts, if the evidence is such as that in no view of it could a verdict for the party in whose favor the new trial was granted be sustained, then the ruling of the trial court will be reversed, although it is the first new trial granted. *Homuth v. Ry. Co.*, 129



Mo., loc. cit. 642, 643, 81 S. W. 903; *Fitzjohn v. Transit Co.*, 183 Mo. 74, 81 S. W. 907.

3. In no view of the evidence in this case could a verdict for the plaintiff be sustained. In the first place, the description of the land as it is given in the petition is vague and uncertain; all of Island 63 "except eighty acres off the upper end sold to Wehmeyer." There is no description given by which that 80 acres can with reasonable certainty be located. What is the shape of the island or how many acres it contains the petition does not say. Looking at the evidence it is doubtful if the island now contains 80 acres all together. The plaintiff testified that the assessment roll showed 35 acres undescribed assessed to John Withaus and 35 to the Berger Land Company, if there was any more he did not mention it. The county surveyor as a witness for defendants testified that he surveyed the island in 1903, ran the line that was called for in defendant's deed entirely across the island, and found that on the east side of the line there were 30 acres and on the west 40. But the plaintiffs' claim under a sheriff's deed under a tax judgment against John Withaus, and the only indication of title in him is the quitclaim deed from Ferdinand Withaus conveying "all his interest in the northwest part of Island 63." Whether that northwest part was the same or any part of the "80 acres off the upper end sold to Wehmeyer" we cannot find from the record. When the collector of revenue (who is one of the plaintiffs in this suit) came to file his suit against this land as the property of John Withaus he did not follow the description given in John's deed but described it as it is now described in the petition. The evidence shows that this land was surveyed by the government and duly platted, but the plaintiffs do not undertake to trace title from the government to John Withaus under whom they claim, but show only a quitclaim deed from Ferdinand to him without attempting to show any title in Ferdinand. If it should be conceded that that deed was color of title on which a claim of adverse possession might be founded, it would avail the plaintiffs nothing because John Withaus never took possession, not only did he not take actual possession, but, according to one of plaintiffs' witnesses Simon Withaus, he abandoned all claim to it "let it go," because he could get no title. Even if the deed from Ferdinand to John conveyed title to any land at all in the island there is nothing in this record to identify it with the land described in the tax judgment or the sheriff's deed.

There is nothing in the record to give the plaintiffs any standing at all.

The order sustaining the motion for a new trial is reversed, and the cause remanded to the circuit court, with directions to overrule the motion and enter judgment for defendants. All concur.

## HENRY COUNTY v. CITIZENS' BANK OF WINDSOR.

(Supreme Court of Missouri. Dec. 24, 1907.)

### 1. DEPOSITARIES—DEPOSITS OF PUBLIC MONIES—ACTIONS FOR RECOVERY—UNDISCLOSED PRINCIPALS.

A county suing a bank for county funds alleged to have been fraudulently received by the bank from the county depository pursuant to an illegal agreement to stifle bidding for county funds, by which the successful bidder was to apportion funds deposited with it among the members of the illegal combination, cannot recover on the theory that the bank was an undisclosed principal, based on the ground that those entering into the combination were, as to the apportionment to them of the county funds, undisclosed principals.

### 2. PLEADING—ISSUES AND PROOFS.

One cannot sue on one cause of action, and recover on another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1300.]

### 3. APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—THEORY OF CASE.

One cannot try his case on one theory in the trial court, and on another theory on appeal after his defeat in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 1053.]

### 4. DEPOSITARIES—DEPOSITS OF PUBLIC MONIES—SELECTION OF DEPOSITORY.

Rev. St. 1899, §§ 6817-6820 [Ann. St. 1906, pp. 3344-3345], providing for the selection of a depository of county funds after competitive bidding, requiring that the bids shall be publicly opened and entered on the records of the county court, and that the bidder offering the highest rate of interest shall be selected, and stipulating for the execution of a bond by the depository and the transfer of the county funds to it, require that the banks with whom the county court is authorized to deal in selecting a depository shall be disclosed, and the county court has no authority to apportion the county funds among two or more banks, and therefore two or more banks cannot jointly submit a bid, nor can one bank be the undisclosed principal of another presenting a bid.

### 5. SAME—RECOVERING DEPOSITS—ACTIONS.

A county suing a bank for county funds fraudulently received by it from the county depository pursuant to an illegal agreement to stifle bidding for county funds, by which the successful bidder was to apportion funds deposited with it among the members of the illegal combination, cannot recover on the theory that the bank and the depository are joint tortfeasors.

### 6. SAME.

Several banks illegally combined to suppress bidding for county funds under an agreement providing that the successful bidder obtaining the funds should apportion the same among the banks. A bidder was designated depository, and it gave a bond and received county funds. *Held*, that the bank selected as depository and its sureties were alone responsible for a failure to account for the funds, there being no authority by which such bank and another bank in the illegal combination could vary the terms of the contract with the county, or render any one other than those disclosed in the contract liable for any breach of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositaries, § 23.]

### 7. CONTRACTS—AGREEMENT TO SUPPRESS BIDDING—VALIDITY.

Several banks combined to suppress bidding for county funds under an agreement providing

that the bidder selected as depositary should apportion the county funds obtained among the banks in the combination. *Held*, that the combination was illegal.

**8. DEPOSITARIES—DEPOSITS OF PUBLIC FUNDS—LIABILITY.**

Several banks illegally combined to suppress bidding for county funds under an agreement providing that the bank selected as depositary should apportion among the banks in the combination the county funds received. A bank was selected as depositary, and it gave a bond, which was approved, and received county funds. It did not part with any of the funds by deposit with a bank in the combination. *Held*, that the latter bank was not liable to the county for any part of the funds which should have been apportioned to it under the agreement, there being no contractual relation between it and the county.

In Banc. Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Henry county against the Citizens' Bank of Windsor. From a judgment for defendant, plaintiff appeals. Affirmed.

This cause is now pending in this court upon appeal by plaintiff, the county of Henry, from a judgment of the Pettis county circuit court in favor of the defendant. We know of no better way of indicating the nature and character of this controversy than by the reproduction of the petition and answer which present the issues that were determined by the trial court. Omitting formal parts, the petition thus states the cause of action by the plaintiff: "Now at this time comes the plaintiff, the county of Henry, in the state of Missouri, and for its amended petition and cause of action against the defendant states that the plaintiff is a municipal corporation and political subdivision of the state of Missouri, and as such is entitled to sue in the courts of this state; that the defendant, the Citizens' Bank of Windsor, is a banking corporation, duly organized and existing under the laws of this state, and was, at all the times mentioned in this petition, and now is, such corporation, and engaged in the banking business at the city of Windsor, in the county of Henry; that at the regular May term, 1903, of the county court of said Henry county it was the duty of said court to select and designate a county depositary for the deposit of the money belonging to said county, including school funds, and the duty of said county court prior to said term to advertise for bids from banking corporations, individual bankers, and others, for the privilege of being selected as such depositary, and said county court, as provided by law, did advertise for bids from such banking corporations, individuals, and others for said purpose; that at, and prior to, the time of the term of said county court, the Farmers' Bank of Windsor and the Citizens' Bank of Clinton were banking corporations, doing a banking business at the cities of Windsor and Clinton, respectively, in said Henry county, and Salmon & Salmon, a firm composed of George Y. Salmon and Harvey W. Salmon, were engaged in the

banking business at the city of Clinton aforesaid, as individual private bankers; that prior to the said May term, 1903, and in anticipation of the selection of a county depositary by said county court, the defendant, the Citizens' Bank of Windsor, and the Farmers' Bank of Windsor, the Citizens' Bank of Clinton, and the said Salmon & Salmon entered into an agreement, by the terms of which it was understood and agreed that the bids of said banks and of said Salmon & Salmon should be so placed with said county court that the bid of said Salmon & Salmon should be the highest bid, and that said Salmon & Salmon should be selected and designated the county depositary of said Henry county at said May term, 1903, of said county court, and that the funds of said Henry county, after being received by said Salmon & Salmon as such depositary, should be divided and apportioned among the said banks, to wit, the defendant, Citizens' Bank of Windsor, said Citizens' Bank of Clinton, and said Farmers' Bank of Windsor, and said Salmon & Salmon, for the use and benefit of said several banks; that in pursuance of said arrangement and agreement bids were so made that the bid of said Salmon & Salmon was the highest bid for the county money of said Henry county, made to the county court at said May term, 1903, and said Salmon & Salmon were, at said term, selected by said county court as such county depositary for Henry county, for the term of 2 years and 60 days next ensuing said May term, 1903; that said Salmon & Salmon qualified under such selection and gave bond, and were duly designated by said county court the depositary of the funds of Henry county, for the term above mentioned, and all the funds of said Henry county, including the school funds, amounting in all to the sum of \$65,000, became and were deposited with said Salmon & Salmon as such depositary, and thereafter, and until the 20th day of June, 1905, all the moneys belonging to the county of Henry, including school funds, were paid to and deposited with the said Salmon & Salmon, amounting in the aggregate to the sum of \$320,000; that after the selection and designation of Salmon & Salmon as county depositary, as aforesaid, to wit, on the — day of July, 1903, said Salmon & Salmon, in pursuance of the agreement aforesaid, for the division of the county funds among said above-named banks, turned over and delivered to the defendant, Citizens' Bank of Windsor, out of the county money belonging to Henry county, the sum agreed upon to be apportioned to the defendant, to wit, the sum of \$10,000, and defendant, Citizens' Bank of Windsor, took and received the said sum of \$10,000, as and for its share of the moneys obtained from the county of Henry, by the means and under the arrangement and agreement aforesaid, and did use and lend and receive the benefits thereof; that on the 20th day of June,

1905, said Salmon & Salmon were, and for many years prior thereto had been, insolvent, and on said day their bank was closed, and has ever since remained closed, and on said day they failed and ever since have failed to pay checks drawn upon them for the county funds of Henry county, by the proper officer; that there was due to Henry county on said 20th day of June, 1905, and still remains due and unpaid, on account of moneys belonging to plaintiff, Henry county, deposited with said Salmon & Salmon as such depository, the sum of \$63,976.76; and that the defendant, Citizens' Bank of Windsor, has wholly failed and refused to pay the aforesaid sum of \$10,000 of the money of Henry county, received by it as aforesaid, but now retains and holds the same, though plaintiff has demanded the payment thereof. Wherefore, the plaintiff asks for judgment against the defendant, Citizens' Bank of Windsor, for the sum of \$10,000, and for costs, and for all other proper relief in the premises."

The answer of the defendant interposed to this petition admits that the defendant is a banking corporation duly organized and existing under the laws of this state, and that plaintiff is a municipal corporation and political subdivision of the state of Missouri. Then followed a denial of each and every other allegation contained in the petition, with a prayer that the defendant go hence without day and for the recovery of costs. The trial of the issues thus presented by the pleadings was proceeded with at the February term, 1907, of the Pettis county circuit court. At the trial, concerning certain facts involved in this proceeding, there was a stipulation filed. By this stipulation it was conceded that Salmon & Salmon were duly selected as county depository in May, both in 1901 and again in 1903, and that they gave bond as required by law under such selection, and that the sureties on the bond given in May, 1903, are solvent, and have sufficient property to enable the county to collect the full amount due from said depository; that the funds belonging to the county in May, 1903, amounted to \$65,000, and were then turned over to said depository, and that all moneys belonging to the county after May, 1903, were turned over to and paid into such depository according to law; that Salmon & Salmon failed on June 20, 1905, and since that date have failed to pay any checks drawn on the county depository for the county money, and have been adjudicated bankrupts, are wholly insolvent, and were wholly insolvent at the dates of their said selection as county depository; that Salmon & Salmon as county depository at the time of their failure were indebted to Henry county in the sum of \$63,976.76, and that such sum includes the money sued for in this case; that Henry county sued for the money on the depository bond of Salmon & Salmon of May 19, 1903, and on June 14, 1906, recovered a

judgment for \$63,000, and that an appeal was taken by the sureties to the Supreme Court (since affirmed by court in banc); that the county sued the Citizens' Bank of Clinton for the sum of \$16,000, the amount it held at the time of the failure of Salmon & Salmon, and recovered a judgment for that amount; and that the same has been paid to the county, thus reducing the said judgment of \$63,000 against the sureties to \$47,000 and interest.

There is practically no substantial dispute as to the facts developed at the trial in addition to those embraced in the stipulation heretofore referred to. Therefore we shall not undertake to recite in the statement of this cause in detail the testimony introduced, but will briefly indicate the nature and character of the proof upon which this cause was submitted to the court. The testimony shows that the county court of Henry county at the May term, 1903, of said court was to let the money of the county under the provisions of the statute upon that subject to such banking institution offering the highest rate of interest. Prior to the time designated that the county court was to select a depository for the county money, there was an agreement and understanding entered into between Salmon & Salmon, private bankers at Clinton, Mo., and the respondent in this cause, the Citizens' Bank of Windsor, by which it was agreed that Salmon & Salmon should put in the highest bid and be selected as the depository for Henry county, the plaintiff in this cause, and in consideration of such agreement, if Salmon & Salmon were selected as the depository they would deposit out of the funds received from the county by virtue of being the depository thereof in the respondent's bank the sum of \$10,000, for which said bank should pay to Salmon & Salmon the same rate of interest that they were required to pay to the county under the terms agreed upon in the selection of Salmon & Salmon as the county depository. The testimony further shows that this agreement by Salmon & Salmon bank to deposit with respondent's bank was never in fact put into execution, and that the \$10,000 that respondent's bank was to receive under the agreement as heretofore indicated was never in fact deposited in said bank; but Salmon & Salmon fully recognized that there was an agreement to deposit the sum of \$10,000 in accordance with the agreement and understanding entered into between the parties, and on July 14, 1900, the following instrument evidencing such recognition of the first arrangement and agreement was signed by Salmon & Salmon: "Whereas, the Citizens' Bank of Windsor, Mo., is entitled to \$10,000 of the county funds of Henry county, Mo., for the year ending July 1, 1905; and whereas said bank has agreed that we may retain their said share of said funds during the time mentioned above: Now, therefore, in consideration of said agreement on the part

of said bank, we hereby agree to pay it the sum of \$400 July 1, 1905, and we also agree to pay the interest due the county on said funds. Salmon & Salmon." The respondent, Citizens' Bank of Windsor, held a similar obligation to the one above quoted from Salmon & Salmon for the year ending July 1, 1904, and received for that year the sum of \$400 as designated in the obligation herein indicated. Witness Joseph S. Calfee, who gave his testimony in the form of a deposition, testified concerning the agreement of Salmon & Salmon to deposit out of the county funds \$10,000 in respondent's bank. His testimony in substance was that Salmon & Salmon promised to make a deposit of \$10,000, and in lieu of making that deposit they were to pay us \$400 a year. Mr. Casey, who was the manager of the Salmon & Salmon bank, also testified upon this subject. The substance of his testimony was to the effect that none of the money of Henry county was sent to respondent's bank under the agreement heretofore referred to, but that instead of depositing money with respondent the Salmon & Salmon bank retained the money and paid them a bonus. There is an entire absence from the record before us of any testimony showing any entry upon the books of Salmon & Salmon tending to show that there was an account kept between the Salmon & Salmon bank and the respondent in this cause, the Citizens' Bank of Windsor, concerning the deposit of this \$10,000, or the borrowing of this fund from the respondent. There is also an absence from the record of any showing upon the books of the respondent that any such deposit was made, or that any loan of such an amount was made by respondent to Salmon & Salmon. The record fails to disclose any obligation or security taken from Salmon & Salmon by the respondent, except the agreement to pay to respondent the \$400 as designated in the agreement. This by no means covers the entire volume of testimony introduced in this cause. However, in our opinion, it sufficiently indicates the nature and character of the transaction upon which this action is predicated, as well as the character of testimony upon which it is sought to successfully maintain the proceeding. At the close of the testimony the court, in conformity to its views upon the facts developed at the trial, declared the law to be that under the evidence in this case plaintiff cannot recover, and the finding must be for the defendant. In accordance with this declaration of law, judgment was rendered in favor of the defendant, and the plaintiff properly preserved its exception to the adverse rulings of the court, and on the same day that the judgment was rendered filed its motion for a new trial, which was by the court overruled, to which action of the court plaintiff excepted. From the judgment rendered in this cause, in due time and proper form this appeal was prosecuted to this

court, and the record is now before us for consideration.

James D. Lindsay, C. C. Dickinson & Son, and Parks & Son, for appellant. W. M. Williams, for respondent.

FOX, J. (after stating the facts as above). Upon the record before us, as is briefly indicated in the foregoing statement of this cause, learned counsel for appellant predicates the following assignment of error: (1) The court erred in giving the instruction in the nature of a demurrer to the evidence. (2) The court erred in rendering judgment for the defendant. (3) The court should have rendered judgment on the facts in favor of the plaintiff. At the very threshold of this controversy we deem it important to first definitely determine the nature and character of this proceeding. That there is no privity of contract between the appellant and the respondent is apparent. Nor is there any contractual relation whatever disclosed by the record between the parties to this suit. The allegations in the petition emphasizes the correctness of this conclusion. They clearly indicate that plaintiff does not seek a recovery in this action upon a contract either expressed or implied. It will be observed by an analysis of the allegations in the petition of plaintiff that the details of the arrangement and agreement between the respondent and Salmon & Salmon, by which bidding was to be depressed and competition avoided at the time designated for the selection of the county depository by the county court, are fully set forth. This is followed by allegations wherein it is averred that in pursuance of such arrangement and agreement the bank of Salmon & Salmon was selected as the county depository, and in accordance with the agreement as heretofore indicated they apportioned \$10,000 of money received from the plaintiff to the respondent in this cause, and deposited said sum in respondent's bank. In other words, it is manifest from the averments in the petition of plaintiff that its cause of action is predicated upon the theory that the respondent, through a wrongful and unlawful combination with Salmon & Salmon to depress bidding at the time of the selection of the depository for the county funds by the county court, procured \$10,000 of the funds belonging to the plaintiff, and that such funds had been deposited in respondent's bank in accordance with the unlawful and fraudulent agreement heretofore referred to. This is substantially the cause of action stated in the petition, and by it plaintiff seeks to compel the payment of the \$10,000 as a fund belonging to plaintiff, and which was deposited in the bank of respondent. We have the briefs of learned counsel both for appellant and respondent now before us, and find numerous legal propositions discussed. In fact, every phase of this case is very earnestly and ably presented by counsel, and everything is said that could in

any way be urged as applicable to the propositions disclosed by the record.

1. It is insisted by learned counsel for appellant that Salmon & Salmon in their application to the county court to have their bank made the depository for the funds of Henry county, as applicable to the \$10,000 which is sought to be recovered by the plaintiff in this proceeding, were acting as the agent of this respondent, and it is earnestly urged that the respondent in this case, by reason of having obtained this money through the agency of Salmon & Salmon, occupies the position of an undisclosed principal. In other words, the contention of the appellant in its final analysis may thus be briefly summarized; that is, that Salmon & Salmon was the disclosed principal, and that the other banks, including the respondent in this case who had entered into the combination to depress bidding, were, as applicable to the funds to be apportioned to them under the arrangement and agreement between the parties, undisclosed principals, and that under the law they should all be treated as principals and a recovery can be maintained upon that ground. We have given this proposition which is so earnestly and ably presented by counsel our most careful consideration, and, with all due respect to the ability and learning of counsel representing appellant, we are unable to give our assent to this insistence. A recovery cannot be maintained upon that ground, if for no other reason that the cause of action as stated in the petition does not proceed upon that theory. It is manifest from the averments in the petition that a recovery in this proceeding is not sought upon the ground that the defendant was an undisclosed principal with Salmon & Salmon, nor upon the ground that there was any contractual relation, either expressed or implied, disclosed or undisclosed existing between the plaintiff and the respondent. We repeat that the cause of action as stated in the petition is for the recovery of money alleged to be in the hands of the defendant, and which was wrongfully and improperly procured from the plaintiff. In other words, that the defendant fraudulently procured \$10,000 of the funds belonging to the plaintiff, and that, in contemplation of law, at the time of the failure of Salmon & Salmon the defendant had said sum of money in his possession, which was the property of Henry county.

It is fundamental that the recovery sought in this proceeding by the plaintiff must stand or fall on the cause of action embraced in the pleading. It cannot sue upon one cause of action, and recover upon another. Another cardinal rule applicable to pleadings and practice, which has repeatedly received sanction by this court, is "that a party will not be permitted to try his cause upon one theory in the trial court, and if unsuccessful on the legal battlefield of his own choosing, spring a fresh theory upon his adversary and undertake finally to enter the contest in this court

forming entirely different lines of legal battle." *Bray's Adm'r v. Sellgman's Adm'r*, 75 Mo. 31; *Wilson v. Railway Co.*, 87 Mo. 431; *Sumner v. Rodgers*, 90 Mo. 324, 2 S. W. 476, and cases cited; *Traver v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Carson v. Cummings*, 69 Mo. 325; *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562. But aside from all this, it may be conceded for argument sake that the plaintiff in its petition seeks a recovery on the theory that the respondent was an undisclosed principal with Salmon & Salmon, yet, in our opinion, a recovery cannot be maintained upon that theory upon the facts disclosed by the record in this proceeding. The fundamental error assumed by the plaintiff upon this insistence is that there can be any such party as an undisclosed principal as applicable to this case. The selection of a depository for the funds of the respective counties of this state is purely statutory, and the county court in making such selection is limited in the exercise of the powers conferred by the statute to the doing of those things which are embraced within the provisions of the statute applicable to the subject. Section 6817, Rev. St. 1899 [Ann. St. 1906, p. 3344], imposes a duty upon the county court of each county in this state to receive proposals from any banking incorporation, association, or individual banker in such county as may be desired to be selected as the depository of the funds of such county. It also provides that notice that such bids will be received shall be given. Section 6818, Rev. St. 1899, provides the manner in which the banking incorporation, association, or individual banker may make his bid with a view of having it considered by the county court. Section 6819 makes it the duty of the county court at noon on the first day of the May term of said court to publicly open the bids and cause each bid to be entered upon the records of the court, and to select as the depository of all funds of the county, including the school funds, except the capital school fund, the banking incorporation, association, or individual banker offering to pay to such county the highest rate of interest per annum for such funds, with the proviso that the county court shall have the right to reject any and all bids. Sections 6820 and 6821, Rev. St. 1899 [Ann. St. 1906, p. 3345], provide in detail for the execution of the bond and the transfer of the funds of the county to the depository.

It will be observed that the statute as heretofore indicated, relating to the subject of county depositaries, provides in detail how the depository shall be selected, and it is there expressly required that the bids of the respective banking institutions shall be publicly opened, and each bid shall be entered upon the records of the court. In other words, the law regulating this subject requires that the banking institutions with whom the county court is authorized to deal upon this subject, as well as the amount of the bids of

such institutions, shall be disclosed upon the records of the county court. The county court had no authority under the provisions of the law conferring upon it the power to select the depository to apportion the county funds among two or more banking institutions. Only one of such banking institutions can be selected as the depository for the county funds; and by the very terms of the statute the theory that one banking institution may act as the agent of others doing a banking business, and include them within their bid submitted to the county court, either disclosing or without disclosing the names of the banking institution, is absolutely negatived. It being true by virtue of the provisions of the statute that the county court can only select one of the banking incorporations, association, or individual banker as such county depository, it must logically follow that two or more of such banking institutions could not jointly submit a bid to the county court with the view of being selected as the county depository. The county court is absolutely without any authority to entertain such bid, or to enter into a contract selecting such joint bidders as the depository for the county funds. It logically follows from this that if the statute does not authorize a joint bid by two or more banking institutions, then there can be no such thing as an undisclosed principal. The theory of an undisclosed principal, as applicable to the selection of a county depository, can only be predicated upon the idea that there is more than one banking institution included in the bid for the selection of the depository for the county funds. In other words, it is based upon the theory that the banking incorporation, association, or individual banker selected as the depository for the county funds by the county court represented some other banking institution as agent in submitting a bid to the county court and in the procuring of the funds of the county, but the name of such banking institution in submitting such bid and in the procuring of such fund was not disclosed to the county court. The terms employed in the statute as herein indicated, controlling the subject now under discussion, in no way authorizes the county court in dealing with the county funds to treat with any banking institution as an undisclosed principal. The very language employed in the statute indicates the policy of the lawmaking power in dealing with this subject to be that the banking institutions with whom the county court is authorized to contract with, together with their bid, should be disclosed by an entry upon the records of the county court. The statute limits the powers conferred upon the county court in dealing with the county funds to contract only with some banking institution that has disclosed its name and its bid; and if a recovery is sought by reason of any contractual relations entered into with the county court, it must be in pursuance of the terms of the contract authorized by the statute and against

the parties who enter into it. We do not mean to be understood as holding that if funds of a county, either legitimately or by some unlawful agreement, find their way into some other banking institution, the county court would not be authorized to pursue such fund and recover it; but we do mean to say that such recovery cannot be sought on the ground that such banking institution having such deposit is an undisclosed principal, or that an action can be maintained at all upon the contract provided for by the statute unless the principal is therein disclosed.

2. It is also insisted that Salmon & Salmon being the agent of the undisclosed principal, that is, the defendant in this cause, and as such agent conspired with such undisclosed principal, under that state of facts an action can be maintained against all of them or any part of them as joint tort-feasors. We are unable to give our assent to that contention, and it is sufficient to say of it that the allegations in the petition, which are the basis of the cause of action, does not proceed upon that theory. It is manifest that a recovery in this cause is not sought by way of damages resulting from any injury or loss by reason of the alleged fraud and combination to depress bidding, but is simply an action seeking to recover a particular fund belonging to the county which is alleged to be in the possession of the defendant. Emphasizing the correctness of this conclusion, we find that appellant in its brief entertains a similar view. It is there stated by counsel for appellant that "the prayer of Henry county for judgment against said banks [\$10,000 against the Citizens' Bank, and \$5,000 against the Farmers' Bank] is based on the contention of appellant that at the time of the failure of Salmon & Salmon, within the meaning and contemplation of law, and the acts of said several banks and the construction they placed upon the transaction, said Windsor banks had said respective sums of money, the property of Henry county." It is clear that the recovery sought in this proceeding is not upon the ground that the defendant and Salmon & Salmon were joint tort-feasors. If that was the theory, each tort-feasor would be liable for the entire loss of the plaintiff by reason of the wrong committed in which such tort-feasor participated. That is not this case. The plaintiff here is simply pursuing a fund which is in the possession of the defendant, and there can be no recovery upon the theory that the plaintiff has been damaged by reason of a wrong committed by Salmon & Salmon, in which the defendant in this cause may have participated.

3. This brings us to the discussion of what we esteem the main proposition involved in this controversy, that is, was the sum of \$10,000 of the funds belonging to the plaintiff, which is sought to be recovered in this cause, deposited with the defendant, the Citizens' Bank of Windsor? Appellant in this cause very earnestly contends that it was, and the

respondent with equal earnestness asserts that it was not. The views of learned counsel for appellant in support of this contention are thus expressed in their brief. They say that "Salmon & Salmon became county depository by the joint act and agreement of themselves and of the defendant bank and others, for a certain purpose. As county depository, so selected, they say, 'We have your share of county funds for you, ready for your use, subject to your order.' They received it only as county depository. They became depository only by virtue of the act of the defendant, and as an agency of defendant for obtaining a certain portion of the county money. Having thus obtained the money through their depository agent, Salmon & Salmon, the defendant for a consideration lends this money to Salmon & Salmon, private bankers, who, in that capacity, by their written agreement with defendant, bind themselves to pay not only interest to defendant, but to pay to Henry county the interest due upon the money thus lent. The final arrangement between Salmon & Salmon and the other banks was treated by them as the payment to them respectively of their allotted shares, and was the same in legal effect as if Salmon & Salmon had turned over to them their several portions of the public funds, and had then borrowed it back again. The object of the joint enterprise was to borrow the public funds for the specific term at a nominal interest rate, hire the money out until the term expired, and then return it to the county as the owner of the funds." It will be observed in the argument of counsel, as herein indicated, that they base the correctness of their contention upon the theory which has heretofore been fully discussed, that is, that there was a joint contract on the part of Salmon & Salmon and the respondent in this case with the county court, which resulted in the selection of Salmon & Salmon as the disclosed depository for the county funds. In other words, it is argued that Salmon & Salmon acted, not only for themselves, but as agent for the respondent in this cause in the procuring of the county funds, and that the respondent, though undisclosed, was in fact embraced in the contract made by Salmon & Salmon with the county as the depository for the county funds. In our opinion, the reasons assigned in support of the contention now under discussion are without force or vitality, and it is sufficient to say upon that proposition that what we have heretofore said in relation to the authority of the county court to contract with two or more banking institutions respecting the selection of a depository for the county funds is equally applicable to the reasons now assigned as a basis for the contention that the \$10,000, which is sought to be recovered in this action, was procured from the county court of Henry county by reason of any sort of contractual relations either by construction expressed or implied. Upon the execution, ac-

ceptance, and approval of the bond of Salmon & Salmon as the depository of the funds of Henry county, they were entitled to the possession of such funds, and they and their sureties became responsible to the county court for any failure to properly account for such funds, and there is absolutely no authority by which Salmon & Salmon and the respondent by any arrangement or agreement could in any way vary the terms of the contract with the county court, or render any other person other than those embraced and disclosed in the contract liable for any breach of it.

It is essential to keep in view the cause of action as stated in the petition, that is, that plaintiff seeks to recover a fund belonging to it which was deposited in the respondent bank. As applicable to the issues presented by the pleadings, we have carefully considered the disclosures of the record and read in detail all of the testimony relating to such issue, and we are unable to reach the conclusion so earnestly contended for by appellant that there was any of the county funds of Henry county that were ever deposited in the bank of respondent. It is argued by counsel for appellant that upon the facts disclosed by the record in this case the \$10,000, which is sought to be recovered in this proceeding, was at least constructively deposited in the bank of the respondent, and then loaned to Salmon & Salmon. We are unwilling to accept the argument of appellant as being sound upon that proposition. A careful examination of the record fails to disclose any of the essential elements of a contract of loan between Salmon & Salmon and the respondent in this case. Salmon & Salmon never parted with any of the funds of Henry county by depositing them in respondent's bank. There is an entire absence of any bond or note executed to the respondent by Salmon & Salmon for a loan, as well as an entire absence of any entry upon the books of either Salmon & Salmon or the respondent that there was any such transaction that occurred. That the arrangement and agreement between Salmon & Salmon and the respondent was entered into, and that such agreement was unlawful, wrongful, and fraudulent, there is no dispute. We in no way commend such agreement as a legitimate business transaction; yet such methods fall far short of resulting in the creation of any contractual relations between the parties to this suit, and the usual presumption that what was agreed to be done was done is not applicable to this agreement, for the reason it was unlawful and not susceptible of being enforced. The respondent in this case was not entitled to receive the \$10,000 sued for by reason of any contract with Henry county. Salmon & Salmon were the only parties under the contract with the county who are entitled to the possession of the county funds, and upon the disclosures of the record in this cause it will not be seriously



contended that there was any actual deposit of any part of the county funds in the possession of Salmon & Salmon made by them in the bank of respondent. This transaction may thus be briefly summarized: Salmon & Salmon sought to have their bank made the depository for the county funds of Henry county. For the purpose of procuring such funds at a low rate of interest, the unlawful agreement was entered into between the respondent and other banks with Salmon & Salmon to defeat competition in the bids to be submitted to the county court respecting the selection of a county depository. The first agreement was that \$10,000 of the funds procured through Salmon & Salmon was to be apportioned to the respondent, and \$5,000 to some other bank. This agreement, it is true, was unlawful and fraudulent; yet it was recognized by Salmon & Salmon, and was subsequently modified, and Salmon & Salmon were to retain the moneys which, under the fraudulent agreement, were to be deposited with the respondent. Salmon & Salmon were the only parties entitled to the possession of the money under the contract with the county; but, recognizing such unlawful and fraudulent agreement as between themselves and the respondent, for the purpose of retaining the money which they alone were entitled to retain under the contract with the county, they agreed to pay to the respondent the sum of \$400 in pursuance of the modified agreement as heretofore indicated. In our opinion, it makes no difference whether you denominate the payment of this \$400 as a payment of bonus, or a payment of interest. It was simply a private arrangement or agreement, wrongful in its character; but it falls far short of being susceptible of the construction that Salmon & Salmon actually deposited the \$10,000 in the bank of the respondent, and that respondent again loaned the money to Salmon & Salmon so as to enable the plaintiff in this cause to recover such sum. Our attention in support of the contention urged by the appellant is directed to the cases of *In re Salmon* (D. C.) 145 Fed., loc. cit. 653, and *In re Blake*, 150 Fed., loc. cit. 282, 80 C. C. A. 167. In those cases a recovery was sought from the Citizens' Bank of Clinton of money belonging to Henry county deposited in said bank to the amount of \$16,000. Those cases are entirely unlike the case at bar. There was no dispute about the fact that the Citizens' Bank of Clinton had in its possession \$16,000 of funds, which was a trust fund, alleged to be the property to Henry county. Hence it is manifest that those cases are by no means to be considered as decisive of the propositions confronting us in the case at bar. As to the discussion in those cases of the principles of law concerning the liability of joint tort-feasors and undisclosed principals, which is sought to be made applicable to this case, we express no opinion other than what we have heretofore indicated.

Having reached the conclusions upon the propositions to which we have herein given expression, we deem it unnecessary to discuss the other proposition which is presented by counsel in their briefs that the county, with full knowledge of all the facts and the arrangement between the banks at the time of the selection of the depository, prosecuted to final judgment a suit upon the contract, that is, the depository's bond, and obtained an affirmance of that judgment in this court, thereby affirming the contract entered into with Salmon & Salmon as the depository, and by reason of such course pursued by the county it is in no position to maintain this action. That proposition is not involved in this proceeding. If this action was to recover damages against this defendant as a joint tort-feasor with Salmon & Salmon by reason of the perpetration of a fraud upon the plaintiff in procuring the county funds, and such damages were to be measured by the amount of county funds deposited with Salmon & Salmon, the defendant might be in a position to invoke that universally recognized doctrine that "a remedy of a party claiming that a fraud has been practiced; by reason of which he was induced to enter into a contract, is that upon the discovery of the fraud he has his election to affirm the contract and bring an action for the recovery of damages sustained by him, or to disaffirm the contract and restore to the other party all he has received under it, and demand and recover from him all he has parted with in pursuance of the contract." However, as heretofore indicated, that is not the nature of this action, but is simply one where, in effect, the averments are that \$10,000 of the public funds of Henry county was turned over and delivered to the defendant, Citizens' Bank of Windsor; that said bank took and received said sum of \$10,000, and did use and lend and receive the benefits thereof, and has wholly failed and refused to pay the aforesaid sum of \$10,000 of the money of Henry county, but now retains and holds the same, though plaintiff has demanded the payment thereof. Nor is this an action to recover for damages by reason of the perpetration of a fraud which may have resulted in a loss to the county in not receiving an increased amount of interest by reason of the arrangement defeating any competition in the bidding. Therefore it is clear upon any theory of this case as presented by the pleadings that the last proposition as above suggested has no application to the real question involved in this proceeding. What is said in this opinion that if this action was one to recover damages against this defendant as a joint tort-feasor with Salmon & Salmon, the defendant might be in a position to invoke the universally recognized doctrine as herein indicated, must not be construed as holding that an action for damages upon the facts disclosed by this record could be maintained. We simply say that that question is



not involved in this proceeding, and therefore express no opinion as to whether or not an action for damages could be maintained. We have given expression to our views upon the legal propositions presented by this record, and we see no escape from the conclusion that the plaintiff is not entitled to recover in this action. The money sought to be recovered was never deposited with the defendant, hence was never loaned to Salmon & Salmon, and upon the facts disclosed by the record, conceding for the sake of argument that the agreement to deposit and the modification of it was valid, as applicable to this cause, the relation of debtor and creditor never existed between Salmon & Salmon and the defendant in this cause, other than for the sum of \$400, which Salmon & Salmon, by the modified agreement, was to pay for a release of their obligation in the first agreement to apportion and deposit with the defendant bank. We repeat that Salmon & Salmon, under the contract with the county, were entitled to the possession of the funds received from the county, and, in pursuance of the subsequent arrangement by which they were to retain the money, they were simply keeping what, under the terms of the contract, belonged to them, and by no sort of construction did Salmon & Salmon become the creditor of the defendant under the modified agreement offered in evidence for the sum of \$10,000, or any other sum other than as before suggested, the amount they were to pay the defendant for the release of the obligation to make the deposit.

Entertaining the views as herein indicated, the judgment of the trial court should be affirmed, and it is so ordered.

GANTT, C. J., and BURGESS, VALLIANT, LAMM, and WOODSON, JJ., concur. GRAVES, J., not sitting.

#### HENRY COUNTY v. FARMERS' BANK OF WINDSOR.

(Supreme Court of Missouri. Dec. 24, 1907.)

In Banc. Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Henry county against the Farmers' Bank of Windsor. From a judgment for defendant, plaintiff appeals. Affirmed.

James D. Lindsay, C. C. Dickinson & Son, and Parks & Son, for appellant. W. M. Williams, for respondent.

FOX, J. This is a companion case of Henry County v. Citizens' Bank of Windsor, 106 S. W. 622. The record discloses the same legal propositions as were involved in that case. Adopting the conclusions upon the legal propositions as reached in Henry County v. Citizens' Bank of Windsor results in the affirmance of the judgment of the trial court.

It is so ordered.

GANTT, C. J., and BURGESS, VALLIANT, LAMM, and WOODSON, JJ., concur. GRAVES, J., not sitting.

#### STATE ex rel. ENTERPRISE MILLING CO. v. BROWN et al.

(Supreme Court of Missouri, Division No. 2. Dec. 24, 1907.)

#### LIMITATION OF ACTIONS — LIMITATION APPLICABLE—ACTION ON ATTACHMENT BOND.

The conditions of an attachment bond being "to refund all sums of money that may be adjudged to be refunded \* \* \* and pay all damages and costs that may accrue \* \* \* under the attachment," an action on the bond is within Rev. St. 1899, § 4272 [Ann. St. 1906, p. 2347], providing that an action upon any writing, whether sealed or unsealed, for the payment of money or property, may be brought within 10 years after the cause of action shall accrue.

Appeal from Circuit Court, Pettis County; Jas. E. Hazell, Special Judge.

Action by the state, on the relation of the Enterprise Milling Company, against Edward F. Brown, as receiver of the First National Bank of Sedalia, Mo., and another. From a judgment for defendants, plaintiff appealed. Reversed and remanded.

H. T. Williams and Wm. D. Steele, for appellant. Robert F. Walker, for respondents.

BURGESS, J. This is a suit upon an attachment bond for \$52,000, which bond had been executed and filed by defendants in the circuit court of Pettis county on the 8th day of May, 1894, and this suit was instituted in said circuit court by plaintiff against the defendants on the 3d day of October, 1903. The defendants interposed a demurrer to the petition filed by plaintiff; the grounds whereof being: First, that said petition did not state facts sufficient to constitute a cause of action; and, second, that it showed upon its face that the cause of action therein attempted to be alleged was barred by the statute of limitations. On a hearing on said demurrer at the December term, 1904, of said court, the same was sustained. Plaintiff excepted to the action of the court in sustaining the demurrer, elected to stand upon its petition, and refused to plead further. Thereupon the court rendered judgment in favor of defendants and against plaintiff for costs, and plaintiff appealed.

It is the contention of defendants that the cause of action was barred by the 5 years' statute of limitations, and that the 10 years' statute of limitations does not apply. Section 4272, Rev. St. 1899 [Ann. St. 1906, p. 2347], provides that an action upon any writing, whether sealed or unsealed, for the payment of money or property, may be brought within 10 years after the cause of action shall accrue. Section 4273, Rev. St. 1899 [Ann. St. 1906, p. 2349], provides that actions may be brought within five years from the time the cause of action accrues upon contracts, obligations, or liabilities, express or

implied, except those mentioned in section 4272, and except upon judgments or decrees of a court of record, and except where a different time is by statute limited. It has been uniformly rule by the Supreme Court that an action upon an administrator's bond may be brought within 10 years from the date of the accruing of the cause of action. *State, to Use, v. Pratte*, 8 Mo. 286, 40 Am. Dec. 140; *Martin v. Knapp*, 45 Mo. 48; *Nelson v. Barnett*, 123 Mo. 564, 27 S. W. 520. In *Henoch v. Chaney*, 61 Mo. 129, where the action was upon an instrument in the nature of a replevin bond taken by a special constable in a suit before a justice of the peace, the same rule was applied. It is, however, due the distinguished judge who wrote that opinion to say that, in the concluding paragraph thereof, he observed: "In the case at bar, over five years had intervened between the accruing of the right of action and the institution of suit, and, were the question an open one, we might not be able to yield assent to the idea that 10 years, instead of 5, is the statutory bar applicable to the case before us. But regarding the point as settled in the case of *Martin v. Knapp*, 45 Mo. 48, the conclusion there reached will be adhered to." In *Howe v. Mittelberg*, 96 Mo. App. 490, 70 S. W. 396, it is held that the clause of the limitation law (section 4272, supra), which provides that no action shall be barred under 10 years if it is founded on a writing for the payment of money or property, embraces any writing which expresses or implies a promise or agreement to pay money or property, whether the payment is to be certain or contingent. The bond required by statute (section 18, Rev. St. 1899 [Ann. St. 1906, p. 344]) of an administrator is conditioned that he shall faithfully administer said estate, account for, pay, and deliver all money and property of said estate, and perform all other things touching said administration required by law or the order or decree of any court having jurisdiction; and, while it is well settled that suit may be instituted upon such bond within 10 years after the cause of action thereon accrues, defendants contend that an attachment bond contains no conditions for the payment of money or property, and does not therefore come within the provisions of said section 4272, but rather the provisions of section 4273, supra.

The parties signing the attachment bond sued upon in this case acknowledge themselves to be indebted to the state of Missouri in the sum of \$52,000, for the payment whereof they bind themselves, their executors and administrators; the obligation to be void (otherwise to remain in full force) if the "plaintiff shall prosecute its action without delay, and with effect, refund all sums of money that may be adjudged to be refunded, to the defendant, or found to have been received by the plaintiff, and not justly due to it, and pay all damages and costs that

may accrue to any defendant or garnishee, by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment, or process thereon." It is true that in *Meneffe v. Arnold*, 51 Mo. 536, it was held that a receipt given by the defendant to a third party for money therein stated to have been received on account of money paid out by defendant as surety for the plaintiff, which receipt was afterwards assigned by the defendant to the plaintiff, was not such a promise to pay as would take the case out of the statute of limitations; but the paper sued on contained no promise of any kind, either express or implied. In *Carr v. Thompson*, 67 Mo. 472, the court said: "The circuit court properly ruled that the plaintiff's suit was not barred by the statute of limitations. The promise to pay was in writing, and though the sum to be paid was not expressed in the writing, but was by the terms thereof to be thereafter ascertained, that fact would not take it from under the operation of the 10 years' statute. Were the writing of such a character that evidence allunde would be required in order to show a promise to pay, the limitation of five years would apply."

Defendants claim that an instrument for the payment of money or property, such as is meant by the 10 years' statute of limitations, should acknowledge an obligation to pay which is neither conditional nor contingent; one which admits an existing debt, and which to enforce does not require evidence allunde. If this position be correct, then all instruments other than notes, bonds, bills of exchange, and other written promises or obligations to pay, unconditionally, specified sums of money would be embraced by the 5 years' statute of limitations. To this we are unable to assent. As supporting their position, defendants cite the case of *Trepagnier v. Rose*, 18 App. Div. (N. Y.) 393, 46 N. Y. Supp. 397, in which it was held that a policy of fire insurance under which a loss has occurred is not "an instrument for the payment of money," and that to constitute "an instrument for the payment of money," within the meaning of the statutes of the state of New York, such instrument must acknowledge an absolute obligation to pay, not conditional or contingent. But such is not the law of this state, as we understand it. *Ancient Order of Hibernians v. Sparrow et al.*, 29 Mont. 132, 74 Pac. 197, 64 L. R. A. 128, 101 Am. St. Rep. 563, is another case relied upon by defendants. But in that case the condition of the bond sued on was that, "if the said Edward B. White shall in all things comply with the contract in letter and spirit, and turn over to the said A. O. H. Div. No. 1, of Anaconda, the said building, fully finished and completed in all its parts, in strict compliance with the said plans and specifications, \* \* \* then the above obligation to be void, otherwise to remain in full force and virtue." The court properly held that an action

against the sureties on such bond, which was for the performance of a contract, could not be maintained because not an action on a contract for the payment of money. It is plain that the bond in that case contained no promise whatever to pay money or to do anything else. *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792, was a suit by attachment upon an appeal bond conditioned for the prosecution of an appeal from a judgment for \$4,437; the condition being that if the appellant shall prosecute said appeal, and, moreover, pay the amount of said judgment, costs, interest, and damages, rendered and to be rendered against one of the appellees, in case the said judgment should be affirmed, then the obligation to be null and void; otherwise to remain in full force and virtue. The section of the Code under which the action was brought reads as follows: "In all actions brought upon overdue promissory notes, bills of exchange, or other written instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issued upon complying with the provisions of this section." The court said: "The meaning of the words 'other written instruments for the direct payment of money' should be construed in connection with the context. Other written instruments are specifically mentioned. It is clear that the statute was intended to apply to instruments of the nature of those specially mentioned. Such instruments are overdue promissory notes and bills of exchange. These are, manifestly, instruments for the direct payment of money. The payment provided for is absolute and unconditional. In other words, it is direct. In this case the obligation assumed by the sureties was not direct, but collateral. They could be charged only upon failure of the principal to pay. If he failed to pay the judgment appealed from, if affirmed by this court, then there would be a breach of the condition of the bond upon which a cause of action might be predicated." In this state we have no such statute, nor have we any fault to find with the ruling in that case. *People v. Boylan* (C. C.) 25 Fed. 594, is also relied upon by defendants as supporting their contention. That was an action by attachment under the same statute as in the next preceding case, and the same conclusion was reached. Our attention is also called to a dissenting opinion in the case of *Hathaway v. Davis*, 33 Cal. 161, which dissenting opinion was by one of the members of a court composed of five members. It was also an action by attachment upon an appeal bond, and the question was whether it would lie under that provision of the California statute which provided that an attachment would lie "in an action upon contract, express or implied, for the direct payment of money," etc., upon an appeal bond conditioned "that the appellant will pay all the damages and costs which may be awarded against the defendant on the appeal, not ex-

ceeding \$300, and that if the judgment appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal." It was held in that case that the undertaking on an appeal bond is an express contract for the direct payment of money in the sense of the statute in relation to attachments. As we have said, one member of the court dissented. It is quite clear that this decision is not an authority in favor of the defendants, but against them.

There is no question that an administrator's bond in this state may be sued upon at any time within 10 years after breach of its conditions. Now, in what respect do the conditions in an attachment bond differ from those of an administrator's bond? The conditions of an administrator's bond are that he (the administrator) "shall faithfully administer said estate, account for, pay and deliver all money and property of said estate, and perform all other things touching said administration required by law, or the order or decree of any court having jurisdiction." To say nothing about the obligation, the conditions of an attachment bond are "that the plaintiff shall prosecute his action without delay, and with effect, refund all sums of money that may be adjudged to be refunded, to the defendant, or found to have been received by the plaintiff, and not justly due to him, and pay all damages and costs that may accrue to any defendant, garnishee or interpleader, by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment, or process thereon, and pay all damages and costs that may accrue to any sheriff or other officer by reason of acting under the attachment." There is no material difference in the conditions and obligations expressed in these bonds, and the promise to pay, upon certain conditions, is as strongly expressed in the attachment bond as in the administrator's bond. If an administrator's bond may be sued upon within 10 years after the cause of action accrues, it logically and conclusively follows that the plaintiff in this case had 10 years within which to bring suit upon the attachment bond.

Our conclusion is that the judgment should be reversed, and the cause remanded.

It is so ordered. All concur.

#### DERBY v. DONAHOE.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. DEEDS — REDELIVERY TO GRANTOR — DESTRUCTION BY PARTIES—EFFECT.

When a conveyance of land is executed and delivered, the title cannot be transferred or re-invested in the original owner by the redelivery

of the deed to the grantor and the destruction thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 551, 553.]

## 2. CANCELLATION OF INSTRUMENTS—FRAUD—EVIDENCE.

While inadequacy of consideration is insufficient to warrant a court of equity in annulling a sale of land, yet, in connection with other facts, it may be considered in determining the question as to whether an actual fraud has been committed on the rights of an individual, or whether the conduct or acts of the parties have been of such a nature as are calculated to operate a fraud on those induced to act by reason of such conduct.

## 3. DEEDS—VALIDITY—FRAUD.

In an action to set aside a deed on the ground that the execution thereof was fraudulently procured by defendant, evidence examined, and held to require a decree for plaintiff.

Appeal from St. Louis Circuit Court; James R. Kinealy, Judge.

Bill by Honora Derby against Mary A. Donahoe to set aside a deed. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

This cause is now pending in this court by appeal on the part of the plaintiff from a judgment of the circuit court of the city of St. Louis dismissing her bill in equity and denying her the relief sought by such bill. It is not essential to an understanding of the nature and character of this case to burden the opinion with a reproduction of the pleadings which present the issues upon which it was tried. It will suffice to say that this is a proceeding in equity to set aside and cancel a certain quitclaim deed executed by plaintiff to defendant conveying her interest to certain property in the city of St. Louis designated as the "Montgomery Street Property," on the ground that said deed was fraudulently procured, by false and fraudulent representations, and in its procurement a fraud was perpetrated upon the plaintiff. The answer interposed to this petition in effect sharply presents the issue as to the truth of the facts alleged in the petition, and avers that the execution of the deed sought to be set aside was brought about by an amicable arrangement of the mother of the plaintiff and defendant's deceased husband, and that such deed was voluntarily, without any representations made or inducements held out by the defendant, executed and delivered to the defendant. The replication was a general denial of the new matter set up in the answer. The evidence introduced at the trial will further indicate the nature and character of the issues involved in this proceeding. In October, 1904, this cause came on for trial of the issues presented in the pleadings. The trial, as indicated from the issues presented, involved the investigation of a conveyance charged to have been fraudulently obtained and procured, and upon questions of that character great latitude is allowed in making the proof. Therefore the testimony as detailed by the witnesses, as disclosed by the record, is quite voluminous.

While we have read in detail all of the testimony developed at the trial, we do not think it is essential, and shall not undertake in a statement of this cause, to give anything like a detailed statement of the witnesses testifying in the cause. We shall be content with a brief statement of the facts developed at the trial which the testimony tended to prove. Upon some of the material facts involved in this controversy there is no conflict, as to others the testimony is somewhat conflicting.

The plaintiff in this case, Mrs. Honora Derby, is a daughter of Mrs. Kate Donahoe. Cornelius P. Donahoe was a son of Mrs. Kate Donahoe and a brother of the plaintiff in this action. Cornelius died August 31, 1900, leaving Mary A. Donahoe, his widow, who is the defendant in this cause. Cornelius P. Donahoe died seised of the property designated in the petition as the "Montgomery Street Lot." Cornelius P. Donahoe left no children surviving him. It was, however, developed at the trial that Cornelius P. Donahoe and his wife, Mary A. Donahoe, now his widow and the defendant in this cause, in 1896 had in custody an orphan child named Bessie Willford. They procured this child from the Catholic Orphan Board. This child was, at the time they received it, three or four years old, and there was testimony tending to show that Cornelius P. Donahoe and his wife, the defendant in this cause, at the time they received the custody of the child, had to sign what Mrs. Mary A. Donahoe says they supposed was a deed of adoption, and she further states that she and her husband always supposed that they had legally adopted this child. There was testimony tending to show that the child continued in their custody and care as though it was their own and had been legally adopted, and Mrs. Mary A. Donahoe states that since the death of her husband she has retained the child in her custody, and that it assumed the name of Donahoe, and has been treated as her child, and was recognized by the people generally as the child of Cornelius P. Donahoe and his wife. It is further shown by the evidence that in April, 1900, Mrs. Kate Donahoe, as heretofore stated, the mother of this plaintiff, Mrs. Derby, and Cornelius P. Donahoe, the late husband of the defendant in this cause, owned a certain lot of ground in the city of St. Louis which is designated as the "St. Louis Avenue Lot." On the 28th day of April, in the year 1900, Mrs. Kate Donahoe executed a deed to the lot known as the "St. Louis Avenue Lot" to her son, Cornelius P. Donahoe, and the plaintiff in this cause, Honora Derby. This deed was properly executed and duly acknowledged, and was delivered to Cornelius P. Donahoe, who kept it among his papers; but it was never placed of record. In consummating the transaction relating to the real estate involved in this controversy, it was arranged that the defendant, Mrs. Mary A. Donahoe, should send for Mr. E. C. Dodge,

an attorney at law, who was to attend to the defendant's affairs in connection with the transactions between the defendant and her mother and the defendant and the plaintiff, Mrs. Derby. On September 5, 1900, Mr. Dodge, attorney for the defendant, went to the house occupied by Mrs. Kate Donahoe. While at the house the defendant, Mary A. Donahoe, produced the deed of April 28, 1900, by which the mother, Mrs. Kate Donahoe, had conveyed to her deceased husband during his lifetime and to his sister, the plaintiff, Mrs. Derby, the St. Louis Avenue lot. This deed had not been recorded, and Mr. Dodge suggested that they ought to treat this deed as though it had never been made and tear it up, and that the mother, Mrs. Kate Donahoe, and Mrs. Derby, the plaintiff, should give a quitclaim deed to the defendant, Mary A. Donahoe, for the Montgomery Street lot, and the defendant should give Mrs. Derby a quitclaim deed for the St. Louis Avenue lot, and the mother should by will give and devise whatever she had to her daughter, Mrs. Derby. It appears that at this meeting the question was discussed whether it was best for Mrs. Kate Donahoe to make a deed or will, and it was concluded that a will was preferable. At this meeting on September 5, 1900, Mrs. Kate Donahoe executed a conveyance to the defendant, Mary A. Donahoe, conveying her interest in the property described as the "Montgomery Street Lot." Mr. Dodge, the attorney, then left, taking along with him the deed of April 28, 1900, and was to come back in a few days with the other papers. The facts developed at the trial as to the meeting on September 5, 1900, at which time Mrs. Kate Donahoe, the mother, executed and delivered her deed to the defendant, Mary A. Donahoe, that the parties were all proceeding in the transactions between them upon the theory that Bessie Williford was the legally adopted child of Cornelius P. Donahoe, and the property designated as the "Montgomery Street Lot," of which he died seised, would go to her subject to the right of the widow and the payment of debts. Mr. E. C. Dodge in his testimony states that it was understood that Bessie Williford was the legally adopted child of Cornelius P. Donahoe, and that the deed executed by Mrs. Kate Donahoe on the 5th of September was a mere matter of form, and in fact she had no title upon which to predicate a conveyance. On the following morning, after the meeting on the 5th of September, 1900, at the home of Mrs. Kate Donahoe, which was the morning of the 6th of September, the defendant, Mary A. Donahoe, accompanied by her attorney, went to the probate court to administer upon the estate of Cornelius P. Donahoe, and made the usual affidavit that the heirs of the deceased Cornelius P. Donahoe were Mary A. Donahoe, the widow, and Bessie Donahoe, an adopted daughter, shown to be Bessie Williford, both of the city of St. Louis. On the afternoon of the same day

that letters of administration were sought in the probate court in the forenoon, the defendant, with her attorney, Mr. Dodge, went to the orphan board, and, after a thorough investigation, discovered that the paper signed by Cornelius P. Donahoe and Mary A. Donahoe, which they had assumed as an adoption, was nothing but a contract, and that Bessie Williford was in fact under the law not an adopted child. Notwithstanding this discovery, however, it does appear that on September 12th, nearly a week after the discovery that Bessie Williford had not been legally adopted, the defendant, Mary A. Donahoe, the widow of Cornelius P. Donahoe, presented the following petition to the probate court:

"Your petitioner states: That she is the widow of C. P. Donahoe, who died in this city August 31, 1900. That at the time of his decease there was on hand no grain, meat or provisions to sustain herself and their adopted child, Bessie Donahoe, aged eight years. That petitioner therefore asks an allowance for one year from the estate in lieu of provisions not on hand. That in the opinion of petitioner the sum of three hundred dollars will be sufficient for this purpose.

"State of Missouri, City of St. Louis—ss.: Mary A. Donahoe, being duly sworn, on her oath says that the matters and facts set forth in the foregoing petition are true to the best of her knowledge, information and belief. Mary A. Donahoe.

"Sworn to and subscribed before me this 12th day of September, 1900. O. Wm. Koenig, Clerk. Barney Seaman, Deputy Clerk."

On September 14, 1900, all the parties again met at the home of Mrs. Kate Donahoe. The subject of the real estate involved in this controversy was discussed in a general way. Mrs. Derby, the plaintiff, at this meeting executed a quitclaim deed, quitclaiming all interest in the Montgomery Street lot to the defendant, and the defendant executed a deed from her to the plaintiff quitclaiming all interest in the St. Louis Avenue lot, and the deed of April 28, 1900, executed by the mother, Mrs. Kate Donahoe, to Cornelius P. Donahoe and his sister, the plaintiff, Mrs. Derby, conveying the St. Louis Avenue lot, was torn up in the presence of all of them. Mrs. Kate Donahoe executed a will which provided for the payment of her debts and for proper funeral expenses. The residue of her estate was to be given to the plaintiff, Mrs. Derby, free from the control or restraint of her husband, James Derby. That the plaintiff, Mrs. Derby, was thoroughly impressed with the truth of the general understanding that Bessie Williford had been legally adopted by her brother, Cornelius P. Donahoe, and would inherit the same as one of his own children, is not denied or in any way contradicted by any of the evidence in this cause. In fact, it is practically conceded by the defendant and Mr. Dodge, her attorney, that it was believ-

ed by all of the family that there had been a legal adoption, and it may be further stated that the defendant, as well as her attorney, Mr. Dodge, knew that the plaintiff was impressed with the idea and firmly believed that Bessie Williford had been legally adopted and entitled to inherit her brother's property.

There is an absence from the record of any disclosures which indicated that the plaintiff, Mrs. Derby, on September 14, 1900, at the time she executed her deed, had received any notice or information which would in any way tend to change her belief respecting the adoption of the child Bessie. The record further discloses the development of the fact at the trial that, notwithstanding the defendant, Mary A. Donahoe, and her attorney, Mr. E. C. Dodge, had discovered on the afternoon of the 6th of September, the next day after the first meeting on the 5th of September, that the child Bessie had not been adopted by Cornelius P. Donahoe during his lifetime, and that in fact Cornelius P. Donahoe died without issue, either springing from his body or by adoption, neither of them at the meeting of September 14th, at the time plaintiff executed the deed to the lot designated as the "Montgomery Street Property," which is the conveyance sought to be set aside by this proceeding, said anything to Mrs. Derby, the plaintiff, or in any way intimated or explained to her the discovery that they had made that Bessie was not an adopted child and could not inherit any of the property left by Cornelius P. Donahoe. The record, however, does not disclose that this was a willful and intentional concealment of a material fact, yet it is conceded that neither Mr. Dodge, the attorney, nor the defendant, made known to her anything about the discovery that Bessie was not an adopted child and would not inherit any of the property left by Cornelius P. Donahoe. The testimony on the part of the plaintiff, Mrs. Derby, tends to show that the plaintiff, at these various meetings and in the execution of her conveyance and the acceptance of the conveyance executed by the defendant, was without any legal adviser, and she states and it is not denied that the defendant at one of these meetings suggested to not let her husband know anything about it. There was no necessity for him being present, and that she executed the conveyance to the Montgomery Street lot and accepted the conveyance executed by the defendant upon the representation of the defendant that Bessie was a legally adopted child, and would inherit Cornelius' property, and that she executed the deed in the firm belief that Bessie had been legally adopted, and that she was induced to such belief not only by the representations of the defendant, but as well by her conduct and the conduct and actions of defendant's attorney, Mr. Dodge. In the conduct and management of the estate of

Cornelius P. Donahoe, the record discloses that the defendant, who was the administratrix, and her attorney, Mr. Dodge, recognized Bessie as a legally adopted child; at least, there is an entire absence from the record of any suggestion to the probate court of the discovery that she was not adopted, and that they had made a mistake in the affidavit. The testimony further tended to show that the reasonable value of the Montgomery Street lot, being the lot embraced in the deed which is sought to be set aside, was reasonably worth somewhere in the neighborhood of \$5,000, and that the St. Louis Avenue lot, in which there was a conveyance by the defendant to the plaintiff of whatever interest defendant had in such property, was worth about \$1,500.

The testimony on the part of the defendant tends to show that the meetings on the 5th of September and the 14th of September were to arrange for an amicable settlement between the parties in accordance with the wishes of the mother, Mrs. Kate Donahoe, and that the execution of the various instruments heretofore referred to was in accord with the mother's wishes, and were voluntarily executed, without any misrepresentations or fraud, and was acquiesced in and consented to by all the parties concerned, and that Mr. Dodge, the attorney representing the defendant, on account of the suggestion of the mother, Mrs. Kate Donahoe, that she wanted the defendant, the wife of Cornelius, to have all of his property, and her daughter, Mrs. Derby, to have the property of the mother, that induced him to suggest that the deed of April 28, 1900, conveying the St. Louis Avenue lot to Mrs. Derby, the plaintiff, and Cornelius P. Donahoe, not having been recorded, could be destroyed, and then the arrangement as to the execution of the other conveyances could be proceeded with without difficulty.

While we have not undertaken to set out in detail the testimony of the various witnesses introduced in respect to the transaction now in judgment before us, we have in a very brief way indicated the nature and character of the facts developed at the trial, as well as the tendency of the testimony on each side, sufficiently to enable us to determine the legal propositions involved in the disclosures of the record. At the close of the testimony, the cause was submitted, and the court, upon the testimony adduced, denied the plaintiff the relief sought and dismissed her bill. A timely motion for new trial was filed and by the court overruled, and from the judgment rendered in this cause denying the prayer of her petition and dismissing her bill the plaintiff in due time and proper form prosecuted her appeal to this court, and the record is now before us for consideration.

T. D. Cannon, for appellant. Ernest C. Dodge and Rasselour, Schnurmacher & Rasselour, for respondent.

FOX, P. J. (after stating the facts as above). We have sufficiently indicated in the statement of this cause the controlling facts developed at the trial upon which the case was submitted to the court. We shall not undertake to discuss any of the facts concerning which there is any conflict, but our conclusions will be predicated upon a state of facts which, as disclosed by the record, are practically uncontradicted. It appears from the record that at the meeting of the parties concerned in this transaction, at which the respective conveyances heretofore referred to in the statement were discussed, and at one of which the conveyance which is sought to be set aside in this proceeding was executed and delivered, the plaintiff, Mrs. Derby, a married woman, was without any counsel, not even her husband to consult or advise respecting the conveyance she was about to execute. On the other hand, it was arranged, as is conceded in the statement of this cause by counsel for the respondent, that Mr. E. C. Dodge, an attorney at law, was sent for respecting these meetings, and was present at the meetings on September 5th and the 14th, attending, as is recited in the statement by the respondent, to the affairs of the defendant. That the plaintiff had been told that Bessie Williford was the legally adopted child of Cornelius P. Donahoe and the defendant, Mary A. Donahoe, and that the defendant and her attorney, Mr. Dodge, proceeded with the administration of Cornelius P. Donahoe's estate upon the theory that Bessie was a legally adopted child and heir, and would as such heir inherit his property, is not questioned. It is also clearly disclosed by the record that, at the time of the execution of the deed by Mrs. Derby, the plaintiff, to the defendant, which is sought to be set aside in this proceeding, she had received no information to the contrary, but was still of the opinion that Bessie was a legally adopted child, and would therefore inherit whatever property belonged to the estate of her brother. Mr. Dodge, the attorney, at the first meeting on September 5, 1900, at which time the quitclaim deed was procured from the mother, Mrs. Kate Donahoe, to the defendant, conveying her interest in the Montgomery Street lot, states that it was generally understood by the family that Bessie was a legally adopted child and would inherit the estate of Cornelius P. Donahoe, deceased. In fact, Mr. Dodge very frankly stated that he did not think the conveyance from the mother at that time would amount to anything as a conveyance of property. It was also developed at the trial, as shown by the record, and there is no dispute as to that fact, that the defendant and Mr. Dodge, her attorney, on the next afternoon after the meeting on September 5th, ascertained definitely that Bessie was not an adopted child of Cornelius P. Donahoe, and under the law would have no interest whatever in his estate. This

fact was known to the defendant and her attorney when they met with the plaintiff on September 14, 1900, to have the deed executed by her to the defendant, and at which time the defendant also executed a deed to the plaintiff for her interest in the St. Louis Avenue lot property. It is also in no way denied that, notwithstanding they had complete knowledge of the fact that Bessie would not inherit the estate of Cornelius P. Donahoe, and while they fully discussed the execution of the conveyances, and destroyed a deed which had been executed by the mother to the plaintiff and her brother, Cornelius P. Donahoe, long prior to that date, which deed had been delivered to Cornelius P. Donahoe, yet there was not a word said or an intimation or insinuation made to the plaintiff, Mrs. Derby, that they had discovered that Bessie was not in fact an adopted heir of Cornelius P. Donahoe. It is also disclosed by the record that on the 28th of April, 1900, Mrs. Kate Donahoe, the mother of Cornelius and the plaintiff, Mrs. Derby, executed to them a conveyance which was delivered to her son, Cornelius, conveying the St. Louis Avenue lot, which she owned at the date of the execution of that deed. This deed, as heretofore indicated, at the meeting on September 14, 1900, was torn up and destroyed by Mr. Dodge, as he states, with the consent of all the parties present. It also appears from the disclosures of the record that the defendant, Mary A. Donahoe, in consideration of the conveyance from plaintiff to her, executed a conveyance to the plaintiff conveying all of her interest in the St. Louis Avenue lot, and Mrs. Kate Donahoe executed a will leaving her estate, after providing for the payment of certain sums, to the plaintiff, Mrs. Derby. The testimony as disclosed by the record substantially shows that the Montgomery Street lot was reasonably worth something near the sum of \$5000, and that the St. Louis Avenue lot was worth about \$1,500. The foregoing facts, as recited, are disclosed by the record, and are practically uncontradicted, and whatever conclusions may be reached as to what should have been the proper decree in this proceeding will be predicated upon these undisputed facts.

It is not essential, in order to entitle the plaintiff to the relief prayed for in her petition, that it should appear that the defendant willfully and intentionally perpetrated a fraud in the procuring of her conveyance which is sought to be set aside. Courts of equity, in dealing with the subject of fraud in transactions between parties, have long since fully recognized that there are certain acts, when done willfully and intentionally respecting a transaction between the parties, would constitute actual fraud, and that the omission to do certain things, or the concealment of facts which are material to the party with whom you are dealing, by which an undue advantage is taken of your ad-

versary in the deal, would also constitute a fraud, not upon the basis that the omissions or concealments were willful and intentional, but predicated upon the ground that it operated as a fraud upon the party with whom you are dealing. We have been unable to find anywhere a more concise definition of "fraud" than the one given by Mr. Kerr, in his work on Fraud, etc., pages 42 and 43, where it is said that: "Fraud in the contemplation of a court of equity may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another; or by which an undue unconscientious advantage is taken of another." Courts of equity do not hesitate to condemn the consummation of a transaction which has been brought about by the commission of willful and intentional fraudulent acts, or by the doing of such things in consummating a deal as would operate a fraud upon the opposing party. It often occurs, though the conduct and acts of the party may not be willful or intentional, yet such conduct and acts may be well suited to accomplish an unconscionable deal as though they were willful and intentional and specially designed to accomplish some fraudulent purpose. This court, in one of the early cases, emphatically condemned all such acts or conduct of a party which would operate as a fraud upon the person with whom he was dealing, and it was expressly ruled in *Clarkson et al. v. Creely et al.*, 40 Mo. 114, that it was not absolutely essential in a business transaction to establish that it was designed to entrap one of the parties to the transaction, but that, if it clearly appeared that the acts of the party seeking to consummate a deal operated as a fraud, in that case it was clearly the duty of a court of equity to not permit such party to reap any benefit from such acts. In *Bishop v. Seal*, 87 Mo. App. 256, it was there held that it was not essential, in order to warrant a condemnation of a transaction by a court of equity, that a willful design to defraud plaintiff should be shown against the defendant; but, if it is made to clearly appear that, if plaintiff's grievance is left unredressed, it would operate as a fraud, notwithstanding a lack of intention upon defendant's part, equitable relief should be granted, and the court said in that case: "In such cases, \* \* \* it is not a question of willful and designing fraud, but rather a question whether a fraud will result to plaintiff if she be put off without redress."

Measured by the rules of equitable jurisprudence, as indicated in the announcement by the appellate courts of this state, as well as the text-writers upon the subject now under consideration, the plain proposition confronts us as to whether, upon the undisputed facts as heretofore recited, the transactions between plaintiff and defendant, which resulted in the conveyance involved in this suit,

should be condemned, and the conveyance set aside. At the very inception of the investigation of this proposition, we are of the opinion that it will not be seriously contended that the plaintiff and defendant, at the time of the consummation of this conveyance, were not upon an equal footing. The plaintiff was a married woman, without knowledge or experience in the transaction of business relating to the conveyance of rights and interests in real estate. At the time this conveyance was executed, on September 14, 1900, she was present without counsel, not even her husband, to suggest or advise her respecting the protection of her rights, and there is testimony tending to show that the defendant suggested that there was no necessity for the presence of her husband. On the other hand, the defendant was present with counsel, who was concededly there to attend to her affairs. That plaintiff was of the opinion at the time of the execution of this deed that Bessie Williford was the legally adopted child of her brother, Cornelius P. Donahoe, and by reason thereof she inherited no interest in the Montgomery Street lot, and that she had reason to entertain such opinion from the acts and conduct of the defendant, as well as her attorney, and from the affidavit made by the defendant in the probate court, there can be no dispute. The defendant and her counsel had full knowledge, at the time of the execution of this conveyance, that Bessie Williford was not an heir, and would not inherit this property, and it is manifest that they knew that the plaintiff, Mrs. Derby, was of the opinion that she would inherit. Therefore it is clear that it was a material fact concerning the interest of the plaintiff in the real estate embraced in the conveyance which is sought to be annulled by this proceeding. It is conceded that the defendant and her counsel, Mr. Dodge, notwithstanding their full knowledge of the material fact as to who was to inherit the Montgomery Street lot of which Cornelius P. Donahoe died seised, and notwithstanding their knowledge of the fact that Mrs. Derby, the plaintiff, was under the impression that she would not inherit any part of that lot, but that Bessie Williford, by reason of her supposed adoption would do so, concealed (whether intentional or not is immaterial) such material fact concerning the interest of the plaintiff, Mrs. Derby, in the real estate she was then about to convey; at least they failed to inform the plaintiff, Mrs. Derby, of the material fact of which they had full knowledge, and of which she was ignorant, which in equity and good conscience they should have done. The condition surrounding the plaintiff and defendant at the time of the execution of the conveyance which is sought to be set aside in this proceeding may thus be summarized: The defendant was present with her counsel for the purpose of procuring a conveyance from plaintiff, Mrs. Derby, to her interest in



the Montgomery Street lot. The defendant and her counsel knew that the plaintiff had a substantial interest in the property embraced in the deed involved in this proceeding. On the other hand, the plaintiff was ignorant respecting her rights and interests in said property. She was there without counsel, and her ignorance upon the subject was largely due to the acts and conduct of defendant and her counsel. Their attitude in the administration of the estate in which the affidavit of defendant was filed, designating the heirship to the estate of Cornelius P. Donahoe, deceased, could have but one tendency, and that was to emphasize the correctness of the general understanding that Bessie had been legally adopted by Cornelius P. Donahoe and would inherit the property of which he died seised. To this, together with other facts, and the failure of the defendant and her counsel to make known to the plaintiff, from whom they were seeking a conveyance, the material fact of which they had full knowledge, and of which she was ignorant, that she had a substantial interest in the real estate must be attributed the cause of the ignorance of the plaintiff of her rights and interest in the property in dispute at the time she executed the conveyance. It must not be overlooked that the defendant, with her counsel, was dealing with a married woman in the absence of any one to advise her, and, upon the undisputed facts disclosed by this record, that they knew that she thought she had no interest in the property to which she was executing in the quitclaim deed, and that the defendant, as well as her counsel, knew full well that she did have a substantial interest. Therefore, in our opinion, equity and good conscience would have dictated to the defendant and her counsel the propriety of advising her of this material fact before procuring a conveyance to the property. It has been expressly ruled by this court, and the principle has been sanctioned by eminent text-writers, that the concealment or suppression of a material fact respecting the interest of the opposing party in a deal, as in the case at bar, is equivalent to a positive assertion that the material fact did not exist. *Morley v. Harrah*, 167 Mo., loc. cit. 74, 66 S. W. 942.

The circumstances concerning this transaction confronting the plaintiff, Mrs. Derby, at the date of the execution of the quitclaim deed to defendant, was simply one where she was to execute a quitclaim deed to real estate in which she was then of the opinion that she had no interest to convey. It was certainly a very material fact for her consideration (of which the defendant and her counsel had full knowledge, and of which she was in entire ignorance) to know that she would, in fact, inherit one-half of the property designated as the "Montgomery Street Lot." It doubtless would have made quite a difference with her if she had known, or had been informed, that she had a sub-

stantial interest in the property which she was about to convey.

Emphasizing the advantage of defendant over the plaintiff in this deal, and the benefits reaped thereby, our attention is directed to the manifest difference in the value of the property rights exchanged in this deal, or, in other words, the gross inadequacy of consideration for the property conveyed by the plaintiff. There having been no election by defendant, the widow of Cornelius P. Donahoe, respecting the Montgomery Street lot, and he having died without issue, upon his death this property descended to his mother, Mrs. Kate Donahoe, and the plaintiff, his sister, subject to the homestead and dower rights of the widow. The plaintiff therefore inherited a one-half interest in the Montgomery Street property, which was conveyed to the defendant by the deed involved in this suit. The half interest of plaintiff in this property which she conveyed to the defendant was reasonably worth, according to the tendency of the proof, about \$2,000 or \$2,500. The defendant executed her deed to the plaintiff conveying her interest in the St. Louis Avenue lot. The facts developed at the trial show that this lot was owned by Mrs. Kate Donahoe, the mother, and some time prior to the date of the conveyances by plaintiff and defendant; that is, on April 28, 1900, she executed and delivered to Cornelius P. Donahoe her deed conveying this lot to her son Cornelius and her daughter, the plaintiff herein, Mrs. Derby. It was this deed that was torn up on September 14, 1900, at the time plaintiff executed the deed in suit. The conveyance which was destroyed is not involved in this proceeding, except as evidence tending to show the interest of plaintiff, as well as the interest of defendant, which was embraced in her deed to plaintiff. It is hardly necessary to say anything upon the effect of the tearing up of that deed. The law is well settled that, when a conveyance is executed and delivered, the title to the property cannot be transferred or reinvested in the original owner in that sort of a way. It was expressly ruled by this court, in *Parsons v. Parsons*, 45 Mo. 265, that: "If the deed was delivered by the grantor with the intent and purpose of vesting the title in the grantee, it amounted to a complete transfer of real estate, and no subsequent act could defeat it. A valid deed, once delivered, has the effect of vesting the title in the grantee, and, although it may be afterwards destroyed, or come into the possession of the grantor, it will not operate as a reinvestiture of title. When once delivered, it can only be defeated by virtue of some condition contained in the deed itself." The rule announced in the *Parson Case* was unqualifiedly approved in the comparatively recent case of *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811. It therefore follows that, at the date of the death of Cornelius P. Donahoe, the title to the St. Louis Avenue lot was vested in him and his sister,

the plaintiff herein, by virtue of the conveyance of Mrs. Kate Donahoe on April 28, 1900. It also follows from what has heretofore been said that on September 14, 1900, when plaintiff and defendant exchanged deeds, plaintiff at that date owned, by virtue of the deed of her mother of April 28, 1900, one half of the St. Louis Avenue lot, and her brother, Cornelius, who owned the other half, having died without issue, and the defendant, who was his widow, not having made an election, the plaintiff took by descent one-half of her brother's interest, which amounted to one-fourth of the entire property, which, together with her one-half interest under the deed of her mother, made the plaintiff the owner of three-fourths of the St. Louis Avenue lot, subject to the dower interest of defendant, who was the widow of Cornelius P. Donahoe. The mother, Mrs. Kate Donahoe, took of the St. Louis Avenue lot by descent from her son one-half of her son's interest, which amounted to one-fourth of the property. It also follows that the defendant, at the time she executed the conveyance to plaintiff conveying her interest in the St. Louis Avenue lot, not having made any election, was only entitled to a dower interest in the one-half interest of such property, of which her husband died seised, and that is all she conveyed by deed to the plaintiff. The St. Louis Avenue lot, according to the tendency of the proof upon the trial, was worth about \$1,500. From this there can be but one conclusion; that is, that the dower interest, which was a life estate in one-third of the one-half of the St. Louis Avenue lot, was, as compared to the interest of the plaintiff in the Montgomery Street lot, of little value.

Now, while inadequacy of consideration is insufficient to warrant a court of equity in annulling a sale of real estate, yet, in connection with other facts, it may be considered in determining the question as to whether an actual fraud has been committed upon the rights of an individual, or whether the conduct or acts of the parties have been of such a nature and character as are calculated to operate a fraud upon those who are induced to act by reason of such conduct and acts of the parties. The question of the effect of grossly inadequate consideration in a sale between parties was most exhaustively treated by Judge Thompson in *Nelson v. Betts*, 21 Mo. App., loc. cit. 231. The law applicable to the subject was thus clearly, and we think correctly, stated: "The general rule is that mere inadequacy of price or consideration is no ground for claiming the rescission of a contract in equity. *Phillips v. Stewart*, 59 Mo. 491. Equity does not undertake to act as the guardian of mankind. It does not aid people who make foolish bargains. But there are exceptions to the rule, which apply with peculiar force, where the parties do not stand in equal positions, do not possess equal knowledge, and where there are circumstances of fraud and oppression, on the one

part, and of distress and submission, on the other. *Durfee v. Moran*, 57 Mo. 374; *Railroad v. Brown*, 43 Mo. 294. In many such cases a shocking inadequacy of price or of consideration, without more, is held to be evidence of fraud, and courts of equity grant relief, not on the ground of inadequacy of consideration, but on the ground of fraud shown by the shocking inadequacy of consideration. As stated by the writer already quoted from: 'Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for canceling a transaction. In such cases the relief is granted, not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby.' *Kerr on Fraud and Mistake*, 161. [Citing many authorities.] The monstrous inadequacy between the benefit the plaintiff received in the loan of the small sum of \$25 and the monthly interest which she was compelled to pay, amounting to \$3.70, is, to say the least, strong evidence of fraud and imposition on the part of the defendant C. F. Betts."

We see no necessity for pursuing any further the consideration of the propositions disclosed by the record. We will not say that the defendant or her counsel willfully or intentionally perpetrated a fraud upon the plaintiff, but from the undisputed facts, as heretofore recited, we see no escape from the conclusion that their acts and conduct concerning the procuring of this conveyance would, at least, operate a fraud upon the plaintiff, respecting her rights and interests in the real estate conveyed.

We have given expression to our views upon the questions presented, and in our opinion the action of the trial court in denying plaintiff relief upon the facts developed, and dismissing her petition, was erroneous. The judgment of the trial court should be reversed, with directions to set aside the conveyance executed by plaintiff to defendant on the 14th of September, 1900, upon condition that the plaintiff reconvey by quitclaim deed to the defendant whatever interest she may have acquired in the St. Louis Avenue lot from the defendant by her deed executed to the plaintiff on September 14, 1900, and it is so ordered. All concur.

#### GOTTFRIED v. BRAY.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

#### 1. EVIDENCE—PAROL EVIDENCE TO VARY OR EXPLAIN WRITTEN CONTRACT — SPECIFIC PERFORMANCE.

On a bill for specific performance of a written contract, defendant may, by parol evidence, show that through the mistake of both or either of the parties the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 20, Evidence, §§ 1990, 2000.]

## 2. SPECIFIC PERFORMANCE — DISCRETION OF COURT.

Specific performance is not decreed as a matter of course, but rests in the sound discretion of the court, and the fact that plaintiff is able to establish a contract valid at law is not alone sufficient to entitle him to a decree, for courts will often refuse to order specific performance of a contract which they would refuse to set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

## 3. VENDOR AND PURCHASER — CONTRACT OF SALE—MISTAKE—SUFFICIENCY OF EVIDENCE.

In an action to compel specific performance of a contract for the sale of land, evidence examined, and held insufficient to show that the contract expressed the agreement of the parties so as to entitle plaintiff to a decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 69-76.]

## 4. APPEAL—FINDINGS OF TRIAL COURT—EFFECT—EQUITY CASES.

In equity cases, a finding of fact of the trial court is not conclusive on the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3970-3978.]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by William H. Gottfried against Martha Bray for specific performance of contract to convey real estate. Judgment for plaintiff, and defendant appeals. Reversed.

Barbour & McDavid and McCollum & Johnson, for appellant. Tatlow & Mitchell and E. D. Merritt, for respondent.

GANTT, J. The plaintiff, William H. Gottfried, brought his suit in the Greene county circuit court against the defendant, Martha Bray, alleging that on the 29th day of June, 1903, defendant agreed in writing to sell to him certain real estate situated in the city of Springfield, which alleged agreement is as follows: "50.00. Received from William H. Gottfried the sum of fifty (\$50.00) dollars, the same being part of purchase price of the east fifty (50) feet of the lot or tract of land now and for many years past owned and occupied by me as a residence and situated on East Walnut street, on the north side of the street, between Jefferson and Kinbrough streets, in the city of Springfield, Greene county, Missouri. Said lot so purchased by said Gottfried has a frontage of fifty (50) feet on Walnut street with a depth of two hundred and twenty-six (226) feet. The purchase price of said lot is to be fifty (\$50.00) dollars per front foot on Walnut street, and is to be due and payable when I tender to said Gottfried an abstract of title showing perfect title in me, together with a good and sufficient deed of conveyance, with covenants of general warranty, conveying said lot to said Gottfried. Abstract and deed to be furnished within ten days from date thereof. Martha Bray. Dated this June 29, 1903." Plaintiff prayed specific performance of said alleged contract. Defendant's answer pleads as a defense to the action that she never agreed to the writing sued on, nor the terms thereof, although her name was appended

thereto; that she and the plaintiff had been negotiating with reference to the sale of this piece of ground prior to the execution of the alleged contract, but that in all of their negotiations they had talked of and agreed upon \$60 per front foot as the price of the property to be sold, with a depth of 220 feet; that the plaintiff had never complained of the price, but, on the contrary agreed to the same, and also to the depth which said lot should have. The plaintiff came to her house in company with his wife, and presented to the defendant what he termed a "receipt" for money, and represented it as such and nothing more; that she explained to plaintiff that she could not read the writing owing to defective eyesight, and stated that she would go and get her other glasses which would enable her to read it; that plaintiff reassured her and volunteered to read it himself; that she trusted him to read the writing as it really existed, which he pretended to do; that he did not read it as it is set forth in the contract sued on, but purposely omitted from such reading, and with intent to defraud this defendant and procure her signature to an instrument, to the terms of which she did not and does not agree, all that part of said alleged contract relating to the price per front foot, and to the depth of the lot. Defendant further states as a defense to said action that she relied upon plaintiff's representation that he would read it correctly, and that it contained only a receipt for the \$50 which he at that time was paying her, and signed the same, but that said writing did not contain the terms upon which the ground had been sold, but other and different terms, and that her signature was procured through fraud and misrepresentation. The circuit court decreed specific performance, and defendant appeals.

1. That there was an agreement by defendant to sell plaintiff a portion of her residence lot fronting on Walnut street, in the city of Springfield, there can be no doubt. Plaintiff insists that she agreed to sell and convey him the east 50 feet of said lot fronting on Walnut street, and extending in depth 228 feet, for \$50 per front foot or \$2,500 in the aggregate; whereas, defendant testifies and insists she only agreed to sell him 50 feet front with a depth of 220 feet for \$60 per front foot, or \$3,000 in the aggregate. On the part of plaintiff evidence consists of plaintiff's testimony and the written memorandum prepared at his instance and signed by defendant. The defendant on her part testified positively that she agreed to sell plaintiff the 50 feet, but that it was only to extend 220 feet in depth, and that the price was \$60 per front foot, or \$3,000; that during the negotiations she and her niece, Mrs. Collins, went with plaintiff over the lot, and showed him that the 220 feet extended to the barn lot fence, and that she would not sell more than that amount as more would ruin her driveway; that previous to plaintiff's coming to her resi-

dence she and her niece had measured the lot, and found that 220 feet deep would take the lot to her barn fence, and she cut a notch in the fence to show him where it would come to, and, when plaintiff came, she and Mrs. Collins went with him, and showed him where it would come, and plaintiff said that it was as deep as he wanted it, and she told him then and there that was all she would sell under any circumstances or consideration, because, if she sold more, she would have to drive between her barn lot and his lot, and that would ruin her driveway. On this point Mrs. Collins fully corroborated defendant. She testified the lot was to be 50 feet in width and 220 feet in depth. She had assisted her aunt, the defendant, in measuring the lot the day before plaintiff came to look at it. Defendant wanted to know how near the 50 feet would come to her house. On this branch of the testimony, plaintiff, on cross-examination, testified that, when he went to the lot, defendant said the additional 6 feet would take her chicken coop, and she did not want to lose that, and he replied, "Well, the contract was for a lot 226 feet deep"; that she said she had stepped it off, and was afraid it would take her chicken coop, and he, plaintiff, kind of laughed it off and said, "Well, that is not of much consequence," and said no more about it. Plaintiff then left and went to his attorney, and had him prepare the memorandum of the trade set out in plaintiff's petition.

The real contention on this appeal hinges upon the execution of the memorandum of sale by defendant; for, while in a court of law the written document is presumed to contain the final agreement of the parties and that all prior verbal negotiations are merged therein, it is nevertheless a well-established rule that when a plaintiff comes into court of equity for a specific performance of the agreement, even when written, the defendant may by parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms. "In short," says Pomeroy in 2 Pomeroy, Eq. Jur. (2d Ed.) § 860, "a court of equity will not grant its affirmative remedy to compel defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood." We are required by the arguments of respective counsel to scrutinize the transaction which resulted in defendant's signing the written agreement. It appears that after the plaintiff and defendant had had one or two short conversations in regard to the trade, on the street, or in plaintiff's store in the city, plaintiff went to the residence of the defendant, and together they looked over the lot. In view of the positive testimony of defendant and Mrs. Collins that

the proposed tract to be sold was to be only 220 feet deep, and the admission of plaintiff on cross-examination that Mrs. Bray did raise an objection to conveying more than 220 feet in depth, the preponderance of the testimony tends to show that defendant did not agree to sell plaintiff a lot 226 feet deep as set forth in the memorandum, and defendant gave a good reason for declining to sell more. As to the price per front foot there is an irreconcilable conflict between the parties; plaintiff testifying the price was \$50 per front foot and defendant and Mrs. Collins, unqualifiedly, that it was \$60 per front foot, or \$3,000 for the lot. Recurring to the circumstances in which the memorandum was signed, it appears that nothing had been said about making a written contract to bind the trade. Indeed, plaintiff says that, when he approached this subject on which apparently was a mere social call upon defendant at her residence at night, just as he was leaving, he opened the negotiation by saying: "Mrs. Bray, all the dealings we have had in reference to this lot have been verbal. I have had my attorney draw up the contract, and I will read it to you, and if, after you read it, it meets with your approval, I will give you my check for the consideration, and close the deal." It thus appears that the attorney who drew the memorandum of sale had no information other than that imparted by plaintiff. The record also discloses that the defendant had a son, a lawyer living at that time in Springfield, but he had not been consulted as to the drawing of the contract. The plaintiff read the writing to her he says; but here again the testimony is hopelessly conflicting. Plaintiff says he read it as written, except that on two occasions he read "Will Gottfried," instead of "said Gottfried," and his wife called his attention to the mistake. He says then he handed it to Mrs. Bray, and she put on her glasses and began to read it aloud, and made the same mistake he had made, and she then read the balance to herself and said, "I guess it is all right, Mr. Gottfried," and said, "I haven't any pen and ink in the room," when he said his pencil would do as well, and she signed it, and he then entered up a check for \$50, and gave it to her, and she said "This is not signed," and he begged her pardon, and signed it. Opposed to this testimony, both Mrs. Bray and Mrs. Collins testified plaintiff did not read the instrument as it afterwards proved to be, but told Mrs. Bray it was just a receipt for \$50 for part of the purchase price for the 50 feet of ground; that as he read it there was nothing in it about depth of the lot nor the price he was to pay. Mrs. Bray says, when he offered it to her to read, she told him she could not see with the glasses she was wearing at the time, and her eyesight was not good at night any way, and she signed the paper upon his representation that it was merely a receipt for \$50 to bind the bargain. She had never thought of making a contract, and had never

talked of making one. It was a cash sale. She afterwards furnished the abstract and had her son, Mr. Vint Bray, prepare the deed to the lot as she understood the trade, and for \$3,000, and tendered it to plaintiff, whereupon he declined it, and brought this suit. It appears that, when the dispute arose as to the contract, Mrs. Bray attempted to see the paper she had signed, but plaintiff denied having it, and referred her to his attorney, who said he did not have it, but had a copy of it; that plaintiff said to defendant's son that "I have got an iron-clad contract here for \$50 a foot."

Specific performance is not decreed as a matter of course. The fact that the plaintiff is able to establish a contract valid at law is not alone sufficient to entitle him to a decree. It has often been said by this court that a decree for specific performance rests in the sound, not arbitrary, discretion of the court, and it is well established that a court of chancery often refuses specific performance of a contract which it would not set aside. *Mortlock v. Buller*, 10 Ves. 308; *Seymour v. Delancey*, 6 John. Ch. (N. Y.) 222; *Jackson v. Ashton*, 11 Pet. (U. S.) 248, 9 L. Ed. 698. The underlying considerations are stated by Kerr in his work on *Fraud and Mistake* (Amer. Ed.) 357, 358, as follows: "Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. \* \* \* Where a party calls for specific performance, he must, as to every part of the transaction, be free from every imputation of fraud or deceit," and "must show that his conduct has been clear, honorable, and fair." *Kelly v. Railroad Co.*, 74 Cal., loc. cit. 563, 16 Pac. 390; *Railway Co. v. Reno*, 113 Ill., loc. cit. 43, 44; *Pinner v. Sharp*, 23 N. J. Eq. 274. In the last cited case the Supreme Court of New Jersey comments upon the great want of prudence on the part of the vendor in signing a document drawn by a stranger with interest adverse to his own without reading it himself and without submitting it to an adviser, and without keeping a copy, but says: "That he did so is certain. The latter fact may serve, perhaps, to make it more credible that he signed upon a general assurance and belief of its purport, and without attending to a possibly hasty, imperfect, and unintelligible reading." Proceeding to say that written instruments executed voluntarily by competent parties are not to be lightly impeached, and that the fraud or deception must be clearly established, he adds: "This, however, is not a suit by defendants to have the contract annulled, but an application to the extraordinary jurisdiction of equity to enforce it. A contract, though valid in law and sufficient for the recovery of damages, may not be such as equity will decree to be performed." Measuring the plaintiff's conduct by the foregoing stand-

ards, did he bring himself within the principles therein announced? It must be borne in mind that plaintiff was the moving party. Mrs. Bray had indicated no desire to sell a part of her residence lot. He accosted her on the street, and it is clear that nothing definite had been agreed upon but he was to go to the lot, and did go, and, when he went, Mrs. Bray pointed out to him where the 220 feet would reach, and said she would not sell more in depth. The testimony of plaintiff as to this conversation is lacking in that open candid and fair tone that equity demands. Over and against the unqualified positive testimony of Mrs. Bray and Mrs. Collins, he opposes his statement about the extra six feet taking her chicken coop, but was driven to admit that he said that "it was a small matter," thus impressing Mrs. Bray with the belief that at least on this point he acceded to her terms. We think the great preponderance on the amount of land she agreed to sell him was on the part of the defendant. On the vital point of the execution of the document upon which he bases his demand for specific performance we think the evidence for plaintiff falls short of that fair, clear, and honorable conduct which the books require. He was a business man dealing with an old woman. After viewing the lot, and obtaining her terms, if he was unwilling to trust her verbal contract, he should have made known to her his desire to have the contract reduced to writing and requested her to have a conveyancer or attorney prepare the same, or at least, if he wanted to draw it himself, had her attention drawn to the preparation of the paper. No intimation had been given by him to her that he intended to have his own lawyer draw the agreement upon his ex parte statement of what the agreement was. Mrs. Bray says nothing was said about a contract, and, if there had been, she would have consulted her own lawyer, and, as her own son was an attorney in the city, nothing would have been more natural. But, instead of advising her of his desire for a written contract, he had his own counsel prepare this document. When he went to defendant's residence, he did not approach this important business in a business way. On the contrary, he and his wife spend an hour or two in a social manner, and just as he was leaving broached the subject, and asked her to sign a receipt for \$50 to bind the bargain, and, when told she could not read it, volunteered the reading himself, leading her to believe it was mere receipt for a part of the purchase money. Even if read as written, the circumstances were such as to throw Mrs. Bray off of her guard, and in the language of the New Jersey Supreme Court to lead her to act upon his assurance of its purport, and to fail to give a close attention to "a possibly hasty, imperfect, and unintelligible reading of the instrument." That Mrs. Bray understood she was only to deed a lot 220 feet deep and

was to receive \$3,000 for it her conduct, before any controversy had arisen, strongly supports. And the conduct of plaintiff in refusing to let her see the document smacks strongly of unfair dealing. In our opinion the testimony does not entitle plaintiff to a specific performance of the contract evidenced by the memorandum. We think he has not overcome the proofs by defendant that she never knowingly executed it in the form it is now, either as to the description of the lot or the purchase price. As to the fact that our learned Brother on the circuit has reached a different conclusion, we need only add that this court does defer in a large measure to the judgment of the trial court on findings of fact, but we have often in equity cases ruled that such a finding is not conclusive upon us, otherwise appeals in chancery causes would be idle formalities. *Benne v. Schnecko*, 100 Mo., loc. cit. 257, 258, 13 S. W. 82; *Blount v. Spratt*, 113 Mo., loc. cit. 54, 20 S. W. 967; *McMurray v. McMurray*, 180 Mo., loc. cit. 533, 79 S. W. 701; *Ryan v. Dunlap*, 111 Mo., loc. cit. 618, 20 S. W. 29; *Glasgow Milling Co. v. Burnes*, 144 Mo., loc. cit. 196, 45 S. W. 1074.

Upon a careful review of the whole record, we think the plaintiff was not entitled to have the contract set forth in the memorandum specifically enforced. Defendant offered to convey in accordance with the contract she made, but is not bound by the document to which she never knowingly and understandingly gave her assent.

The judgment is reversed, with directions to the circuit court to dismiss plaintiff's bill, at his costs, and require defendant to return the plaintiff's check for \$50.

FOX, P. J., and BURGESS, J., concur.

#### CABLE et al. v. DUKE et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

#### 1. APPEAL—JURISDICTION—DETERMINATION OF QUESTION.

The question of jurisdiction may be raised either in the lower or appellate court by the parties or on the court's own motion.

#### 2. COURTS—APPELLATE JURISDICTION—AMOUNT IN DISPUTE.

In the absence of a constitutional or federal question, the only ground of jurisdiction of the Supreme Court of an appeal is the amount in dispute.

#### 3. SAME—REPLEVIN.

Under Rev. St. 1899, § 4473 [Ann. St. 1906, p. 2452], providing that if the plaintiff in replevin fail to prosecute his action with effect and without delay, and shall have the property in his possession, and the defendant in his answer claims the same and demands its return, the court or jury may assess its value and damages for the taking and detention, where the answer is simply a general denial and the plaintiff has judgment for the property, already in his possession, there is no amount in dispute to give the Supreme Court jurisdiction of an appeal, since no judgment could be rendered for defendant except a general finding, carrying costs,

and leaving the value of the property to be determined, if at all, in other litigation.

#### 4. SAME.

In replevin for cattle, where the plaintiff had possession, and the answer was simply a general denial, and the evidence tended to show that defendants had an agister's lien on the cattle for \$1,100 to \$1,200, even if this be considered the amount in dispute, it does not give the Supreme Court jurisdiction of an appeal.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

Action by M. W. Cable and others against W. H. H. Duke and others. From a judgment for plaintiffs, defendants appeal. Transferred to the Kansas City Court of Appeals.

Thos. J. Smith, for appellants. O. A. Lucas and T. W. Silvers, for respondents.

LAMM, J. Plaintiffs brought replevin for 208 head of cattle, alleged to be of the value of \$6,500, praying damages for their unlawful and wrongful detention in the sum of \$1,000, and, recovering below (without damages), defendants appeal to this court.

No question of jurisdiction is put into the case by either party litigant; but it is axiomatic that a question of jurisdiction may be raised here or below, and it may be brought in by a litigant, or may obtrude itself on the notice of the court and be considered *sua sponte*. *May v. Jarvis-Conklin Mortgage Trust Co. et al.*, 138 Mo. 447, 40 S. W. 122; *City of Tarkio v. Clark*, 186 Mo., loc. cit. 294, 85 S. W. 329. In the absence of a constitutional or federal question, there is only one allowable theory upon which to base our jurisdiction of this appeal, to wit, "the amount in dispute." *Vanderberg v. Gas Co.*, 199 Mo., loc. cit. 458, 97 S. W. 908. The question, then, is, what is the amount in dispute in the case at bar? Attending to that, there were three defendants—two of them answering jointly thus: "Now come the defendants, W. H. H. Duke and F. M. Woods, and for their separate answer to the plaintiffs' petition herein admit that at the time of the institution of this suit they were in the possession of the cattle sued for. But they deny each and every other allegation in said petition contained, and especially deny that they, or either of them, were at the bringing of this suit, or prior thereto, partners of their codefendant, W. C. Woods. And, having fully answered, they ask that plaintiffs' petition be dismissed, and that they have judgment for their costs." The foregoing answer was verified by affidavit. The other defendant filed the following answer, also verified by affidavit: "Now comes the defendant, W. C. Woods, and for his separate answer to the petition of the plaintiffs denies that at the time of the institution of this suit, or at any other time, he was a partner of his codefendants as alleged in the plaintiffs' petition, or otherwise. And further denies that at the time of the institution of this suit he was in possession of the cattle sued

for, or any part of them. Wherefore he asks judgment against the plaintiff for his costs in this behalf." The cause was tried on the foregoing paper issues. It is disclosed in the evidence that plaintiffs claim possession on a defaulted chattel mortgage, executed on the cattle in controversy by defendant W. C. Woods to them to secure money advanced. The petition averred that W. C. Woods and his codefendants were partners. The answers, as seen, put in issue the allegation of partnership and otherwise were general denials, barring an admission of the allegation of possession in Duke and F. M. Woods. The bone of contention uncovered at the trial is an alleged agister's lien asserted by defendants. Defendants' case proceeds on the theory the mortgagor, a few months after executing the mortgage, and while the cattle were pasturing on lands demised by lease to all three defendants jointly, transferred his interest in the leasehold estate and the cattle-pasturing business to his codefendant, F. M. Woods, his father (possibly as collateral security), and that at the time the replevin suit was brought he had no interest in the pasturage bill or in the claimed agister's lien, but that said bill and lien belonged to his codefendants. In a nutshell, plaintiffs' theory was that the agister's lien had no existence in law or fact. There are other questions in the case, not related to the question of jurisdiction needing no present attention.

The court gave for plaintiffs the following instruction: "The court instructs the jury that under the pleadings and evidence in this case the defendants have no legal lien on the cattle in controversy for pasturage. Therefore, if you shall believe from the evidence that the said cattle are described in and covered by the chattel mortgage introduced in evidence, you should return a verdict in favor of plaintiff." And refused mandatory instructions to find for defendants, first, on plaintiffs' own evidence; second, on all the evidence of the case; and then refused 11 other instructions drafted on various theories of defendants' learned counsel not germane to the present discussion. The jury returned the following general verdict for plaintiffs: "We, the jury, find the issues in favor of the plaintiffs." Upon that verdict the material part of the judgment follows: "And plaintiffs, having heretofore voluntarily dismissed their suit as to all cattle sued for, except the 193 head taken by the sheriff under the writ of replevin and by him delivered to them, and it appearing that plaintiffs are still in possession of said 193 head of cattle, it is therefore, by the court, considered and adjudged that plaintiffs retain the possession of said 193 head of cattle, and that they have and recover of and from the defendants their costs in this behalf laid out and expended, and that execution issue therefor."

It appears, then, that the property was tak-

en under the writ of replevin from defendants and put into plaintiffs' possession, and remained in their possession for the purposes of the case. That being so, section 4473, Rev. St. 1899 [Ann. St. 1900, p. 2452], is material in ascertaining "the amount in dispute." It reads: "If the plaintiff fail to prosecute his action with effect and without delay, and shall have the property in his possession, and the defendant in his answer claims the same and demands a return thereof, the court or a jury may assess the value of the property taken, and the damages for taking and detaining the same for the time such property was taken or detained from defendant until the day of the trial of the cause." Referring again to defendants' answers, it will be seen at once that neither of those pleadings comply with, or were drafted under, the foregoing statute—neither claims the property or demands return thereof. If defendants, jointly or severally, desired to make an issue of the value of the cattle, or the damages for taking and detaining the same (which issues alone would produce an amount in dispute sufficient to give us jurisdiction), they should have claimed the cattle and demanded a return thereof, and pleaded their damages. Failing to do that, defendants were not entitled to an assessment of their value in the pending suit, nor of the damages for detention, unless the statute is meaningless. Is it meaningless? Certainly not. The most favorable judgment defendants (if successful) could have in the state of these pleadings would be a general finding in their behalf, which would carry costs and leave the question of value of the cattle to be determined in other litigation, if at all. See authorities *infra*.

In *Young v. Glascock*, 79 Mo. 574, it was held (quoting from the syllabi): "In an action of replevin, after the plaintiff has obtained possession of the goods, the defendant must, in his answer, claim them and demand a return thereof; otherwise the court cannot, upon a finding in his favor, give judgment against plaintiff for their value." The precise question has not been here since, but that case has been followed by a line of live decisions in the courts of appeal, illuminating the matter in all its phases. *St. Louis Drug Co. v. Dart*, 7 Mo. App. 590; *Puller v. Thomas*, 36 Mo. App. 105; *Fowler v. Carr*, 55 Mo. App. 145; *Merrill Chemical Co. v. Nickells*, 66 Mo. App. 678; *Pallen v. Bogy*, 78 Mo. App., loc. cit. 98 et seq.; *Cartmell Mach. Co. v. Sikes*, 83 Mo. App. 565; *Anthony v. Carp*, 90 Mo. App., loc. cit. 394; *Walker v. Robertson*, 107 Mo. App., loc. cit. 575, 81 S. W. 1183. There was evidence tending to prove that the pasturage bill for the replevined cattle, for which the agister's lien was claimed, amounted to between \$1,100 and \$1,200; so that, if we should even go so far as to hold that the amount of said bill was in dispute as the value of the lien, under a general denial (see *Anthony v. Carp*, *supra*), yet

such holding would not give us jurisdiction; nor does any other amount in dispute disclosed by this record give it.

Hence it must be held this court has no jurisdiction. So holding, the cause is transferred to the Kansas City Court of Appeals for its determination. All concur.

**GARDNER et ux. v. ROBERTSON et al.**  
(Supreme Court of Missouri. Division No. 1.  
Dec. 24, 1907.)

**1. QUIETING TITLE—PROCEEDINGS—PARTIES.**

A husband and wife, claiming to own different tracts of land separately, cannot join as plaintiffs in an action to quiet title of all the tracts.

**2. SAME.**

Defendants who do not, in every instance, claim interests adverse to plaintiffs in the same tracts of land, cannot be joined in an action to quiet title of all the tracts.

**3. PLEADING—DEFECTS—WAIVER BY FAILURE TO DEMUR.**

A defect in the petition not attacked by demurrer or otherwise is waived by answering over.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1348, 1349.]

**4. APPEAL—RECORDS—COUNTER ABSTRACTS.**

Where a respondent's abstract of title put in evidence at the trial could not be found at the time of appeal, having been used in another case with which respondent's attorney had no concern, and appellant reconstructed the abstract from notes and other memoranda of the trial, it was proper for respondent to embody the true abstract of title, when subsequently found, in his counter abstract.

**5. SAME.**

A litigant being charged with constructive notice of pleadings filed in the progress of live litigation, an overruled motion to affirm a judgment will not be reopened and sustained merely because respondent was not served with a copy of the suggestions and affidavits of appellant on which the denial of the motion was based.

**6. SAME—REVIEW—ERROR WAIVED IN APPELLATE COURT.**

An assignment of error as to admitting testimony will be overruled where the testimony claimed to be improperly admitted is not pointed out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

**7. SAME—RECORD—BILL OF EXCEPTIONS.**

Where the bill of exceptions contains no objection to the admission of a deed in evidence, an assignment of error therein must be overruled.

**8. SAME.**

An assignment of error that the court erred in not passing on objections to testimony when they were made, not being predicated of anything in the bill of exceptions, is bad.

**9. SAME—REVIEW—BURDEN OF SHOWING ERROR.**

An assignment of error that the judgment was for the wrong party throws the burden on appellant to show reversible error; the presumption being that the judgment was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

Appeal from Circuit Court, Butler County;  
J. L. Fort, Judge.

Action by Samuel Gardner and another against James M. Robertson and others.

From a judgment in favor of plaintiffs, Albert W. Cody, and Frank Barker appeal. Affirmed.

Phillips & Phillips, for appellants. L. R. Thomason, for respondents.

LAMM, J. Plaintiffs, husband and wife, sued Robertson and 23 others to quiet title in divers tracts of land in Butler county, under Rev. St. 1899, § 650 [Ann. St. 1906, p. 687]. Among the 23 are three Barkers, to wit, Albert W., Cody, and Frank. Plaintiffs had judgment, and from that judgment the Barkers appeal.

The petition is an omnibus pleading (not the draft of plaintiffs' present counsel), and on its face discloses a bundle of vices, viz., a misjoinder of plaintiffs, a misjoinder of defendants, and a misjoinder of causes of action. Plaintiffs are not jointly interested in the several parcels of land described in the petition. Each holds title distinct from the other in separate parcels. Therefore the husband should have brought a separate action covering his land, and the wife might have brought a separate action covering hers, though she had the statutory option of joining her husband. Rev. St. 1899, § 4335 [Ann. St. 1906, p. 2378]. Defendants, as likewise disclosed by the petition, do not in every instance claim interests adverse to plaintiffs in the same tracts of land. Therefore a separate action should have been brought against the different groups of defendants jointly interested, or severally claiming an adverse interest, in any one body of the land. Such being the case, the petition was bad, for that it improperly united several distinct and independent causes of action in one. The to be expected evil result followed, to wit, a conglomeration of evidence thrown at the court and making a maze of uncertainty wherein the judicial mind may grope as in a fog, unable to clearly apply the evidence to the issues, tracts, individual claims, etc. These defects in the petition were not struck at by demurrer or otherwise below; hence were waived by answering over (Hudson v. Wright [Mo. Sup., not yet officially reported] 103 S. W. 8), and are now only noticed because they and their attending chaos make a clear and full statement of the facts and issues out of the question.

1. Appellants file a motion to strike out respondents' "Abstract of Pleas, Proceedings and the Record." In aid of that motion, we are asked to pass a rule commanding the clerk of the circuit court of Butler county to produce here for inspection all the original files, including the bill of exceptions in this case, and a rule commanding respondents to produce for similar inspection a certain abstract of title, called for in the bill of exceptions and introduced below as evidence by them, under a rule of the trial court. Without awaiting a rule, there have been submitted here the original bill of exceptions and



files, together with the document designated as "Plaintiffs' Abstract of Title." The integrity of these documents is not questioned. The only thing left for determination in this behalf, then, is whether appellants' motion to strike out respondents' counter abstract should be sustained. To get at the merits of that matter, we must go back a little in the history of the case in this court. There fell a time at a former term when respondents filed a motion to affirm, grounded on the fact that the cause was returnable to the October term, 1904, of this court, and appellants had failed to timely lodge here either a complete transcript, or a certified copy of the judgment with the order granting an appeal. On its face the motion was well made, but appellants made a counter showing by suggestions and affidavits. This phase of the case will receive further attention in the next paragraph of the opinion. For the present, it is sufficient to say the motion to affirm was overruled. Thereupon appellants in due time served and filed their abstract of record. The bill of exceptions contains the following offer of evidence, and makes the following call on the clerk, to wit (by plaintiffs' attorney): "I now offer the entire abstract of the plaintiff [which, being interpreted, means plaintiffs' abstract of their title to the lands in controversy], which is as follows: (The clerk will here copy abstract)."

It seems when appellants' counsel came to make an abstract of the record they could not find, with respondents' counsel, or in the files of the case, the abstract of title called for, as said, by the bill of exceptions. It seems the attorney trying the case for the Barkers had died, and their present counsel, perplexed in this dilemma, cast about for a way out. In searching among the papers of the deceased attorney, they discovered what was conceived to be his original notes and memoranda of the trial. Deeming these memoranda and notes (in the absence of better data) a proper reservoir of facts and information, they drew therefrom the wherewithal to reconstruct the abstract of title called for, and they put such reconstructed abstract of title in their abstract of record. Not only so, but they found in such memoranda certain objections apparently made to the introduction of certain deeds, and certain exceptions apparently made to the rulings of the court. These, also, they wove into their abstract of the record. When appellants served such abstract upon respondents' counsel, he was not satisfied with it. In the meantime, the lost abstract of title was discovered in the files of another case tried in the same court; it having been used in that case, under the same novel circuit court rule, as evidence. Accordingly, respondents' counsel prepared a counter abstract of the record, including the contents of the newly found abstract of title. But he circumspectly left out (as he had the right to do) the objections and exceptions supplied from the memoranda of

the deceased attorney, and which were not in the bill of exceptions, and hence without legal being. It is this counter abstract appellants move to strike from our files. The controversy, being unfortunate in its details, need not be spread and embalmed in our reports. For our purposes it will do to say that the abstract of title was not suppressed by respondents' attorney; it was temporarily lost track of by use in another case (with which he had no concern) and (by misadventure) was hid away in its files. Therefore when found it was properly embodied in respondents' counter abstract. While appellants' present counsel show diligence of search in uncovering, and zeal in desiring to use, the notes and memoranda of their predecessor in reconstructing the objections, rulings, and other incidents of the trial, on behalf of their new clients, yet both diligence and zeal in this instance must go with mere mention and no substantial reward, because the bill of exceptions itself is the only receptacle of objections and exceptions. It alone can speak in that behalf, for obviously wise reasons; and this inexorably stiff rule must apply to all attorneys in all parts of the state, to all courts, and to all bills of exceptions alike. Respondents' abstract of the record was properly made, served, and filed. Hence the motion to strike out is overruled.

2. Respondents' counsel in his brief renews his insistence that the judgment be affirmed because of appellants' failure to bring the case here within the time required by the statute and our rules. His theory is that, with the record before us, we can now see that appellants' affidavits and suggestions against sustaining the motion to affirm were not sufficient in substance to sustain our action overruling that motion. The fact being that he was not served with a copy of the suggestions and the affidavits in support thereof, upon which we acted in overruling the motion to affirm, he argues that such fact is of significance, and, taken with the present record showing, suggests and constrains further action on our part. Attending to this phase of the case, it may be said that notice lies at the root, is of the essence, of due process of law. On the other hand, a litigant is charged with notice of pleadings filed in a pending case. Vigilance is rewarded by the law. In a lawsuit one must watch, and, unless there is some court rule or statutory one requiring actual notice, a litigant stands charged with constructive notice of pleadings filed in the progress of live litigation. Notwithstanding this is so, this court has not been loth or slack in impressing upon the brethren the necessity of giving notice of their briefs or motions and suggestions, and has refused to act in the absence of notice, even where our rules are silent on the question, as they unfortunately are in this instance. See, for example, Padgett v. Smith, *infra*. Doubtless, we overlook-

ed the fact that appellants failed to serve a copy of their suggestions and affidavits upon respondents' counsel. Doubtless, too, we have the inherent power of reopening the question closed by the motion. Doubtless, also, under the spur of grave error pointed out, and in aid of broad justice, we would not hesitate to use such power. But the better plan is not to tread back, or thresh over, old straw—undoing to-day what was done yesterday. Courts, being practical tribunals for the administration of justice in a sensible way, adopt those methods of getting on with business which people of good sense employ in the sober affairs of life, and in so doing give some heed to the proverb: "The water that is passed will never turn the mill." In *Padgett v. Smith*, 103 S. W. 942 (not yet officially reported), by a motion filed at a later term, we were asked to set aside the affirmance of a judgment theretofore made on motion. This we refused to do. The point in judgment in the *Padgett Case* is the supplement of that in judgment here. There was affirmance in that case for failure, and appellant at a later term sought to be eased of the affirmance and have the motion to affirm overruled. Here the motion to affirm has been overruled, and respondents, at a later term, in effect seek to have the order overruling the motion set aside and a judgment of affirmance entered. Hence what was said there applies here. The point is ruled against respondents.

3. The burden is on appellants to show error. They assign four errors, viz.: "First. The court erred in admitting irrelevant and incompetent testimony over the objections of the defendants. Second. The court erred in admitting the deed in which the name of Sadie Gardner had been erased, and that of Sam Gardner had been substituted. Third. The court erred in not passing on the objections to testimony made at the time, but passed on to the end of the trial without having given its judgment on such objections. Fourth. The judgment was for the wrong party." Each and every of them must be disallowed, because:

(a) We are not able to put our finger on any irrelevant or incompetent testimony admitted over the objections of defendants. As appellants' counsel have not pointed out any error of that kind, we assume they labor under a like inability.

(b) The bill of exceptions contains no objections, no rulings, or exceptions to the admission of "the deed in which the name of Sadie Gardner had been erased, and that of Sam Gardner had been substituted." Indeed, there was no evidence of any erasure. Appellants' trial attorney asked a witness to explain why a certain erasure was made, and the witness disavowed any knowledge of such erasure.

(c) The third assignment of error is not predicated of anything appearing in the bill of exceptions, and therefore is bad.

(d) As to the fourth assignment of error, to wit, that "the judgment is for the wrong party," the presumption is the trial judge did not commit error of the kind charged. The presumption is the judgment went for the right party. Before judgment, the burden was on plaintiffs to show they were entitled to one; after judgment, the burden is on defendants to show plaintiffs were not entitled to one—I. e., the burden is on them to point us to reversible error.

Plaintiffs made two contentions: First, that they held title by limitations; second, that they had a good paper title. Contra, defendants denied title in plaintiffs by limitations, and in turn assert a good paper title of their own. No instructions were asked or given; no finding of facts was made; the court finding generally for plaintiffs, and leaving it at that. In this condition of things, it must have been on one or the other of plaintiffs' theories that the court found as it did, and there is nothing by which we can tell which one. If the judgment was based on plaintiffs' paper title, when placed side by side with defendants' paper title, then the conveyances are in evidence by which we could determine that view of the case. But when that point was settled it would not necessarily determine the case, for it is contended by appellants, and may very well be, that the statute of limitations controlled the decision nisi. If this be true, then it is equally true that the facts directed to that issue are confused and dark. The evidence is elusive; much of it may as well refer to one tract as another, to the land of one plaintiff as to the land of the other plaintiff. It could serve no purpose in jurisprudence to undertake to give our interpretation of even the substance of it. We will leave it where we find it, with its enigmas unsolved, its shadows not cleared away. It seems, then, to be a typical case to apply another presumption, to wit, that the trial judge, who saw and heard the witnesses, and who possibly caught the inner meaning of the questions and answers, was better able to interpret, reconcile, and apply the evidence and get at a correct conclusion than we are. So that, if the case be deemed in equity, we may defer to the chancellor; if it be deemed at law, we should defer to the trial judge.

Therefore the judgment may be allowed to safely repose in the friendly bosom of a whole family of aforesaid presumptions (using the apt figure of an erudite counsellor in open court in another case), and should be affirmed.

It is so ordered. All concur.

**NUGENT v. ARMOUR PACKING CO.**  
(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

**1. SALES—ACTION FOR PRICE—DEFENSES.**

Where, in an action for the price of goods sold, the petition did not disclose the fact that plaintiff was a partner with a third person, the issue of partnership was properly raised by the answer, for, if a partnership existed, the title to the price was in the firm.

**2. PARTNERSHIP—EXISTENCE OF RELATION—REQUISITES.**

In determining whether the relation between parties constitutes a partnership, their intention, as discovered by the whole contract, governs, and proof of participation in profits and losses of a going business is but prima facie evidence of a partnership, which may be rebutted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 3.]

**3. SAME—EVIDENCE—INSTRUCTIONS.**

Where, on the issue of the existence of a partnership between plaintiff in an action for stone sold a third person, it appeared that plaintiff held a lease on a quarry and owned the tools and appurtenances, that the third person had no interest therein, that with a view of adjusting their liability between themselves it was agreed that the third person should take plaintiff's tools as collateral, and that the third person acted for plaintiff in collecting installments for the stone, etc., an instruction that the arrangement between plaintiff and the third person, if amounting merely to the giving to the third person a portion of the profits received on the stone furnished, the third person was not a partner, etc., properly charged on the issue, and a party desiring further instructions thereon should have requested a special charge.

**4. APPEAL—EVIDENCE—AFFIDAVITS FOR NEW TRIAL.**

Facts in an affidavit for new trial on the ground of newly discovered evidence are not substantive evidence and do not touch the merits of the case on appeal.

**5. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.**

The granting of a new trial on the ground of newly discovered evidence is within the sound discretion of the trial court, exercised after considering the questions of diligence, and whether the newly discovered evidence is merely cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, New Trial, § 10.]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by David Nugent against the Armour Packing Company. The Kansas City Court of Appeals (81 S. W. 506) affirmed a judgment for plaintiff, and transferred the cause to the Supreme Court on motion of defendant. Affirmed.

A. F. Smith and Frank Hagerman, for appellant. Lathrop, Morrow, Fox & Moore and Cyrus Crane, for respondent.

LAMM, J. Nugent, a quarryman, sued defendant corporation for "1,000 perches of footing or heavy dimension stone" sold and delivered by him to it. The theory counted on was a quantum valebant—the reasonable worth put at \$1.50 per perch. Deducting payments, recovery was sought for \$935.05, with interest. The answer follows: "Defendant for amended answer to plaintiff's peti-

tion denies generally each and every allegation therein contained. Further answering, defendant says there is a defect of parties plaintiff, in that Emmett V. Starr is a necessary party hereto." Unfortunate below, defendant appealed to the Kansas City Court of Appeals from a judgment of \$1,015. At its October term, 1903, aided by the oral argument and full briefs, the following opinion by Smith, P. J., was handed down, concurred in by all his Brethren of that learned bench: [See 81 S. W. 506.]

It seems the decision was criticised with fervor and uncommon keenness in a motion for a rehearing, fortified by a formidable brief; but the motion was in turn denied. Thereat counsel filed a motion to transfer the cause to this court, and that motion was sustained. Defendant's counsel may be allowed to state the ground upon which the transfer was made in their own words, viz.: "The case \* \* \* was by that court certified to this court for the reason that in the opinion of one of the judges the case was in conflict with the case of Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823." It will do to say, in passing, that the litigation has been pending nearly as long as Solomon was building his temple at Jerusalem. That the case was tried, nisi, before an able judge (Teasdale), whose untimely death put out a bright light in jurisprudence. That at every stage, and on both sides, case and court were aided by alert counsel, adept in legal thrust and parry (every allowable carte and tierce), and soundly grounded in the law. At one stage it was contended that a constitutional point was involved, to wit, the statute permitting nine jurymen to render a verdict, and that our jurisdiction might hinge on that statute; but that question has so long been closed it is deemed obsolete and laid away on the shelf with other curios and "points, no-points" in the law. Counsel do not press it now.

We shall adopt the opinion of Judge Smith as our own, submitting, however, to further consideration the error assigned in giving instruction No. 1 for plaintiff, in which instruction there is said to be laid away the live question of our jurisdiction. Counsel argue that said instruction, which gave to the jury the rule by which to allow or disallow a partnership between Nugent and Starr, did not lay down the right standard to measure the existence or nonexistence of a partnership. They argue that, in sustaining that instruction, the opinion is in conflict with Torbert v. Jeffrey, supra. Facts going to a partnership between Nugent and Starr and the latter's connection with the case not appearing in the petition, the issue was properly raised by the answer. If that partnership existed, the title to the pay for the stone in suit was in the partnership of Nugent and Starr, and not in Nugent alone. Defendant was vitally interested in foreclosing the possibility of another suit and further

liability, and hence its challenge to the right of recovery was well made by answer.

Attending to the only evidence directed to the issue of partnership, we copy from defendant's brief in this court (pages 32, 33), viz.: "The only evidence on this proposition was the evidence of the plaintiff on the trial, his admissions contained in his deposition read on the trial, and the evidence of Emmett V. Starr in defendant's affidavit for a continuance. This evidence was as follows: Nugent (oral evidence): Q. Now then, Mr. Nugent, just getting back to the matter I asked you about, state what Starr's relation to you was at the quarry and in that business. A. Why, I told Mr. Starr when Mr. Kinlon refused to help me with the quarry—he got a big sewer contract here—I says: 'Mr. Starr, I saw Mr. Kinlon and told him I would have to have somebody to tend these cars'—there were hardly any of them loaded when I got down there— Q. Go ahead. A. I told him there weren't any of them loaded down there, and somebody would have to look after it, and Mr. Kinlon had the lease on this quarry, and was going partnership with me. I told him it was time to show up and help me out on this deal. So he told me: 'All right.' 'Very well,' he says, 'Why don't you get Starr to help you out? He has got some teams, and he can do that outside business for you, and you can do what is right with him.' So I told him: 'All right.' I says (to Starr, as we see it): 'Maybe you better go to work and let somebody else drive your team.' And I says: 'Tend to seeing these cars loaded and weighed, and see that they don't get overloaded out there on the track, and leave your teams up there,' I says, 'and I will do the right thing with you, and maybe give you an interest in that quarry, and if I don't give you an interest in it I'll do the right thing by you anyway.' So he said: 'All right.' He went and consulted his father. His father told him he could— Mr. Smith: Wait a minute. Q. Never mind what his father said. And then he went to work there? A. Yes, sir. Q. Now, when you got through with this thing, or when you stopped there, did you have any sort of settlement with him? A. Not a thing, only I just turned him over my tools. He got a job of riprapping, and I turned over my tools, and he has got them yet until I do settle with him. Q. He has got them until you compensate him? A. Yes. Q. And that was all there was to it, till you do the fair thing, whatever that is? A. Yes, sir. Q. What is agreed to, and he holds your tools as security for that? A. Well, he holds the tools anyway, I suppose, for security for it. (Abs. 24.) Nugent: (Deposition.) Q. Did you handle this contract alone, or did you have some one else with you on it? A. I took the contract alone, but the latter part I took a man in with me by the name of Starr. I told him I would give him a half interest in it, and he was to furnish the teams and look

after it. (Abs. 44.) Starr: (Affidavit for continuance.) After the making of said contract I made an agreement with Mr. Nugent by which I acquired a half interest in his contract. I was to do the hauling and delivering of the stone, and was to get one-half of the profits. This agreement with Nugent is still in full force and effect. (Abs. 203.)"

On the foregoing evidence, plaintiff's instruction No. 1 must stand or fall. It reads: "You are instructed that defendant pleads in its answer that one Emmett Starr is a necessary party to this action. With reference thereto, the court instructs you that, if you find from the evidence that said Starr was not a party to the contract or contracts, if any made between plaintiff and defendant, and that defendant did not order the stone in question from said Starr, and that the arrangement, if any, between plaintiff and said Starr was that plaintiff agreed either to do the right thing by said Starr in payment for services that said Starr might render plaintiff, or if plaintiff merely agreed to give said Starr some portion of the profits, if any, that he might receive from the defendant on stone furnished it, and this was the full extent of the arrangement between plaintiff and said Starr, then you are instructed that Starr is not a necessary party to this action, and plaintiff's right to recover cannot be defeated merely because said Starr is not joined in this action as one of the plaintiffs."

Was the instruction good? We think so, because it is not only in line with the authorities cited by Smith, P. J., but is in line with *Torbert v. Jeffrey*, supra. In that case, *Brace, P. J.*, said: "In determining whether the relation between the parties constitutes a partnership, their intention governs as that is disclosed, not by particular expressions, but by the nature and effect of the whole contract. \* \* \* 'Participation in the profits and losses of a going business or undertaking affords the usual, and perhaps the most cogent, test of the existence of an intention to form a partnership. An agreement for such participation is not, however, a conclusive test, and does not absolutely constitute a partnership as a conclusion of law, if other circumstances show that no partnership was intended. It is only prima facie proof, which may be rebutted by evidence of other facts and circumstances.' 17 Am. & Eng. Ency. of Law (1st Ed.) 835a; *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *McDonald v. Matney*, 82 Mo. 358; *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Clifton v. Howard*, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; *Thompson v. Holden*, 117 Mo. 118, 22 S. W. 905; 1 *Bates on Partnership*, §§ 25 and 29. And as a community in losses is a necessary corollary of a participation in the profits, a partnership may as well be predicated of an agreement to share net profits, as of an agreement to share the profits and losses, and the same rule applies. Hence 'participation in

the profits of a business raises a presumption of the existence of a partnership. This presumption is not conclusive, but if not rebutted is sufficient to establish a partnership.' 17 Am. & Eng. Ency. of Law (1st Ed.) 841b; *Lengle v. Smith*, 48 Mo. 276; *Phillips v. Samuel*, 76 Mo. 658; *Fourth Natl. Bank v. Altheimer*, 91 Mo. 191, 3 S. W. 858; 1 *Bates on Partnership*, § 30; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611. When both parties furnish the capital and are to share in the profits, ordinarily no question can arise as to the existence of a partnership. When one party contributes to the capital, and the other the labor, skill, or experience for carrying on a joint enterprise, such a combination constitutes a partnership, unless something appears to indicate the absence of a joint ownership of the business and profits. 17 Am. & Eng. Ency. of Law (1st Ed.) pp. 842, 943. Such absence of joint ownership is indicated when from the whole contract it appears that the party contributing his services is to receive a share of the profits merely as compensation for his services, as illustrated in some of the cases cited. But it does not appear from the fact that one part of the business is to be conducted by one of the parties, and the other part by the other party, nor by the fact that the capital is to be returned to the partner putting it in before the profits are shared. These are but the ordinary incidents of a partnership." In *Thompson v. Holden et al.* (Warren, appellant), 117 Mo., loc. cit. 128, 22 S. W. 905, it was said: "The rights of the parties must be deduced from their intention, as shown by the agreement read in the light of surrounding circumstances. It is well settled that the mere participation, by one, in the proceeds of a transaction or business, does not per se constitute him a partner therein. *McDonald v. Matney*, 82 Mo. 358; *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 597; *Gill v. Ferris*, 82 Mo. 156; *Ellsworth v. Pomeroy*, 26 Ind. 158; *Blair v. Shaeffer* (O. C.) 33 Fed. 218."

Persons may so act with, and hold themselves out to, strangers that they may be estopped to deny a partnership, though their intentions may not have been to make one. But there is no question of estoppel here. Here the question of partnership must be referred alone to the agreement between Nugent and Starr, as read in the light of their intentions and conduct. Giving heed to some other facts disclosed by the record in this connection, it appears that the agreement between Starr and Nugent was not made until some time after plaintiff and defendant contracted. It appears that Nugent held the lease on the quarry, and that Starr had no interest in that; that Nugent owned the quarry tools and appurtenances, and Starr had no interest in them. It appears that the running arrangement between Nugent and Starr for adjusting their liability interest was that Starr took Nugent's tools as collateral security and looked to Nugent for his pay.

It is shown, too, that Starr acted on behalf of Nugent in collecting installments of pay for the stone "on account." So far as the defendant's evidence discloses, it does not appear that Starr informed defendant of the by-arrangement between him and Nugent. It is true that in an affidavit in support of the motion for a new trial, *nisi*, Starr says he informed defendant that he was Nugent's partner; but the facts in that affidavit go alone to the discretion the court exercised in refusing to grant a new trial and do not rise to the plane of substantive evidence or touch the merits of the case on appeal. The instruction assailed was not a general instruction covering the whole case and requiring the jury to find for plaintiff on the hypothesis put therein. It was directed to only one phase of it, and was clearly based on plaintiff's evidence and well within the bounds of the law. If, now, defendant desired more instructions on the issue of partnership or no partnership, it should have applied to the court for further instructions, based on its own theories. This it failed to do, and may not complain of nondirection. We find no fault with the instruction. It told the jury that, if they found the ultimate facts put to them (and which there was evidence to support) to be true, then there was no partnership, and Starr was not a necessary party, and we think so ourselves.

Counsel for defendant in a new brief in this court elaborately cover the whole range of the case on every point urged, *nisi*, and in the Kansas City Court of Appeals. They argue, for instance, there was error in refusing to grant a new trial on newly discovered evidence. But that question went to the sound discretion of the trial court, was wrapped up with matters of diligence, and with the question whether the newly discovered evidence was merely cumulative, and was well disposed of.

Finally, a faithful examination of the whole record but confirms what might have been forecasted as reasonable, to wit, that the opinion of Smith, P. J., laconically, compactly, but justly outlines the case, states the contentions pro and con, and properly disposes of all assignments of error demanding judicial determination. Finding no fault with it on any score, it is approved by and large.

The foregoing being so, the judgment of the circuit court should be affirmed.

Let it be so ordered. All concur.

#### DRAKE et al. v. BOARD OF EDUCATION OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1. Nov. 27, 1907.)

##### 1. SPECIFIC PERFORMANCE—CONTRACTS—CERTAINTY.

A renewal of a lease for all time creates a perpetuity contrary to the policy of the law; and, unless it appears from the covenant in the lease by express terms or clearly by implication that the lessee is entitled to a renewal for all time, equity will not decree specific performance of the covenant for that purpose.

## 2. LANDLORD AND TENANT.

A general covenant in a lease for renewal will not be considered to imply a perpetual renewal, and the lessor is, at most, bound only to give a renewal for one term, and a covenant to renew a lease under the same covenants in the original lease is satisfied by a renewal for another term omitting the covenant to renew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 285.]

## 3. SAME.

A covenant in a lease that "at the end of the term hereby demised this lease shall be renewable" at the option of the lessee, and "every renewal lease shall contain all the covenants \* \* \* herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions," provides for one renewal only.

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Agreed case without action by George S. Drake and others, trustees of the will of Gerard B. Allen, deceased, against the board of education of St. Louis. From a judgment for defendant, plaintiffs appeal. Affirmed.

The facts of this case are agreed to, and, as they are substantially and tersely stated in brief of counsel for respondent, we will adopt their statement as the statement of the facts in the case, which is as follows: "The controversy in this case was submitted under section 793, Rev. St. 1899 [Ann. St. 1906, p. 757], without formal pleadings as an agreed case without action, and involved the single question as to the construction of the right of renewal under a certain lease made by the respondent, the board of education of the city of St. Louis, of certain property in city block 88, of the city of St. Louis on November 13, 1878, for a term of 25 years, to the late Gerard B. Allen, under whose will the appellants are the testamentary trustees. The original term of 25 years having expired, and the right to a renewal reserved in the original lease having been perfected by proper notice by appellants, the respondent tendered a renewal lease for a further term of 25 years without any covenant of further renewal. Appellants refused to accept this renewal lease as a performance of the renewal covenant in the original lease, and therefore this proceeding is in effect, for a specific performance of the covenant of renewal reserved in the original lease of November, 1878, and involves the construction of that covenant. The lease in question was drawn on one of the printed forms used by the respondent which was made to suit the particular case by cancellation of various parts and writing in the blank spaces of the printed form. The covenant of renewal as set forth in the agreed statement of facts is as follows: 'And it is covenanted and agreed, by and between the said parties that at the end of the term hereby demised, this lease shall be renewable at the option of said parties of the second part, their executors, administrators or assigns; the said party of the second part, their executors, administra-

tors or assigns, giving to the party of the first part, in every instance, a notice in writing of their wish to renew the same, at least three months before the end of the term, and in case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created. And every renewal lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions, and that the annual rents reserved on every renewal shall be six per centum upon the value of the demised premises, exclusive only of improvements placed thereon by said lessee or their legal representatives, if any, which value shall be estimated by two disinterested freeholders,' etc." Respondent conceded that under this covenant appellant was entitled to a renewal lease for 25 years, commencing November 7, 1903, but denied the right of appellants to have inserted in said renewal lease any clause whatever relating to a further renewal of the lease. Respondent, therefore, tendered to appellants a lease, being Exhibit C, as filed with the agreed statement, and claims that the same was a full compliance with the covenant of renewal. Appellants refused to accept this, and demanded a lease with a covenant for one further renewal, and this proceeding was brought for the adjustment of this difference. The circuit court held that the appellants were only entitled to the lease tendered—that is, to a renewal lease for them of 25 years with no covenant for further renewal—and entered judgment accordingly. Appeal was duly perfected. Appellants present the following assignment of errors, to wit: (1) The lower court erred in holding that appellants are entitled only to a new lease for 25 years commencing November 7, 1903, without further renewal. Said new lease should itself be renewable for at least one more like term, in accordance with the express provisions of the original lease. (2) The lower court erred in giving no effect whatever to the following express words occurring right in the covenant for renewal of the original lease here sued upon, specifying what sort of covenant of renewal (actually naming that covenant) shall go into the new lease, to wit: "The covenant for renewal shall be in conformity with the foregoing provisions." (The said "foregoing provisions" here referred to being provisions relating to the sort of notice to be given in case of renewal.)

Jos. G. Holliday and Geo. L. Neuhoff, for appellants. Judson & Green, for respondent.

WOODSON, J. (after stating the facts as above). 1. In the consideration of this case it should be constantly borne in mind, as stated by this court in the case of *Diffenderfer v. Board of Public Schools*, 120 Mo. 454, 455,

25 S. W. 542, 544, that "a renewal of the lease for all time to come is to create a perpetuity, which is against the policy of the law and which it does not favor," and it is further stated that, "unless it appears from the covenant in the lease by express terms or clearly by implication that plaintiffs are entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose." The respondent does not deny the right of the appellants to have one renewal of the lease, but does contend that they are not entitled to have inserted in that renewal a covenant for any additional renewal. This contention of the respondent is denied by appellants, and they insist that, under the express provisions of the lease, they are entitled to, at least, two, if not perpetual, renewals; that is to say, they are entitled to the renewal conceded by respondents, and have the right to have inserted in the new lease a covenant for, at least, one other renewal.

Appellants base their claim to that right upon the following provisions contained in the original lease, to wit: "And it is covenanted and agreed by and between the said parties that at the end of the term hereby demised this lease shall be renewable at the option of said parties of the second part, their executors, etc. The said party of the second part, their executors, etc. giving to the party of the first part, in every instance, a notice in writing of their wish to renew the same, etc., and in case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms hereby created. And every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions," etc. From this it is argued by appellants that they would be entitled to one renewal by the use of the general words, "this lease shall be renewable," found in the first clause of the paragraph of the lease above quoted, even though no other language regarding renewals had been found therein. And they further contend that by the insertion of the following additional covenant or agreement in the lease, to wit: "In every instance a notice, etc., and every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions," etc.—just after the general covenant above mentioned, shows that it was in the minds of the parties, and that it was their intention and understanding, that more than one renewal was provided for. This contention of appellants is presented with much force and plausibility, and the following authorities are cited in support thereof:

In the case of *Syms v. Mayor et al.*, 105 N.

Y. 156, 11 N. E. 369, the city of New York on April 10, 1810, executed to Peter Lorillard a lease demising to him certain premises for a term of 30 years, ending on the last day of May, 1840. The lease was executed by both parties, and in it the city agreed that at the expiration of the term, it would demise the premises to him, his assigns, etc., "for and during the term of twenty-one years, thereafter, with a like covenant for future renewals of the lease as is contained in this present indenture." In 1839 Lorillard assigned the lease to John Syms, who thus became substituted in his place. In April, 1840, the city executed a lease of the same premises to John Syms for another term of 21 years, in which it covenanted that at the expiration of the lease, to wit, May 1, 1861, it would again demise the premises "in pursuance of this present lease \* \* \* for and during the term of twenty-one years thereafter, upon such rents as shall be agreed upon." On April 20, 1861, the city executed a third lease to John Syms for 21 years from May 1, 1861. That lease contained no covenant for renewal, and in it Syms covenanted that at the end of that term he would peaceably and quietly leave, surrender, and yield up to city or its successors or assigns all of the demised premises. Syms died in 1868, having some years before erected a valuable building upon the premises. In 1880 the city sold the premises to John B. Haskin. Thereafter, in October, 1880, the plaintiffs, as executors of Syms, commenced a suit, alleging in their complaint, among other things, the facts before stated, and prayed that the city be adjudged to reform the leases dated April, 1840, and April, 1861, by inserting therein a covenant for a future renewal of 21 years from May 1, 1882, and that the sale to Haskin be set aside, and the plaintiffs be given a renewal lease for 21 years from May 1st, 1882. The verdict was for defendant. Upon those facts, Earl, J., speaking for the court, said: "We are of the opinion that the verdict was properly directed. The lease executed in 1810 should not be so construed as to create a perpetuity. Its language is satisfied by holding that it gave the lessee the right to two renewals, and those renewals were subsequently given; and it must be assumed that the parties so understood the first lease. The two renewals signed by both parties gave that lease a practical construction which should have great weight with any court called upon to ascertain its meaning and effect."

In the case of *Carr v. Ellison*, 20 Wend. (N. Y.) 178, Ellison leased the premises to one Corwin for a term of 21 years from May 1, 1793, at a certain yearly rent. By the lease Corwin covenanted that on or before the 1st day of November, 1793, he would, at his own expense, erect on the premises a two-story frame house, and at the end of the term would surrender same to Ellison. It was agreed that the buildings to be erected by Corwin should at the end of the term be

appraised, and Ellison covenanted that he would pay Corwin the appraised value, "or he, the said Thomas Ellison, his heirs or assigns, shall renew the lease unto the said William Corwin, his executors, administrators or assigns for the term of 21 years more, for and under the same yearly rents and under the same covenants as is hereinbefore granted." Corwin, and afterwards the defendants under him, entered and held the premises under the lease, and paid the stipulated rent down to the 1st of May, 1835, the end of the second term of 21 years, but it did not appear that the lease was, in fact, renewed at the end of the first term in 1814. The defendants insisted that the lease had, in effect, been renewed in 1814 by the act of the parties, with the same covenants as those contained in the original lease; and in April, 1835, they called on the plaintiff to appoint an appraiser and to pay the value of the buildings which the lessee had erected on the lot, or to renew the lease for another term of 21 years with the like covenants as those contained in the original lease. The plaintiff refused to do either, and, after the expiration of the second term of 21 years, in May, 1835, brought suit for the possession of the premises. The judgment was for the plaintiff, and defendants sued out a writ of error. The Supreme Court, in passing upon the case, speaking through Bronson, J., said: "On the construction for which the plaintiffs in error contended, the lessor covenanted, in case the value of the buildings was not paid, for a perpetual renewal of the lease; in other words, he agreed to renew the covenant for a renewal as well as the other covenants contained in the lease. The courts lean against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement for a second renewal from a general provision for a renewal of the lease with similar covenants. The parties did not, I think, contemplate more than two terms of 21 years. \* \* \* The good sense of the contract seems to be this: The lessee agreed to erect a frame house on the premises, and the lessor stipulated to pay him the value of the building at the end of the term, or to compensate him by a renewal for the lease, 'for the term of twenty-one years more.'"

To the same effect are the following cases: *Moore v. Foley*, 6 Ves. Jr. 231; *Hare v. Burges*, 4 K. & J. 45.

The respondent, however, contends that the rule announced in the foregoing cases is not applicable to the facts of this case, and is not the law of this state, and that under the authorities in this state the covenant of renewal in the lease in question is in legal effect the same as that contained in the lease construed in the case of *Diffenderfer v. Board of Public Schools*, 120 Mo. 447, 25 S. W. 542. In order that the covenants of the two leases may be easily and conveniently compared, we will place them in parallel

columns, and inclose with brackets the provisions found in the Allen lease, the one involved in the case at bar, and which are not contained in the Diffenderfer lease, which are as follows:

#### Diffenderfer Lease.

"And it is covenanted and agreed by and between said parties, that at the end of the term hereby demised, this lease shall be renewable, at the option of the party of the second part, his executors, administrators and assigns, he or they giving to the party of the first part, in every instance, a notice in writing, of his or their wish to renew the same, three months at least, before the end of the term. And every renewed lease shall contain all the covenants, agreements, clauses and stipulations, with this exception only, that the annual rents to be reserved on every renewal shall be six per centum upon the value of the demised premises, exclusive of any improvements thereon placed, which value shall be estimated by the public assessor of the city of St. Louis, for the time being, at the commencement of the renewed term, and to be paid quarterly."

#### The Allen Lease of 1878.

"And it is covenanted and agreed by and between said parties, that at the end of the term hereby demised this lease shall be renewable, at the option of said parties of the second part, their executors, administrators or assigns, said parties of the second part, their executors, administrators or assigns, giving the party of the first part, in every instance, notice in writing of their wish to renew the same, at least three months before the end of the term; [in case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created.] And every renewed lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with these exceptions only [that the covenants for renewal shall be in conformity with the foregoing provisions,] and that the annual rents reserved on every renewal shall be six per cent. upon the value of the demised premises, exclusive only of improvements," etc. (Then follows provisions for ascertainment of the value by the selection of freeholders, one by each party and they to select a third, if not agreeing.)

It will be observed by reading that the Diffenderfer lease that the covenant of renewal provides that "this lease shall be renewable," and that "in every instance" a notice shall be given, "and that every renewed lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with this exception only." The Allen lease contains all the covenants just quoted from the Diffenderfer lease, and, in addition, contains the following provisions which are not found in that lease, to wit: "In case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created;" and "that the covenants for renewal shall be in conformity with the foregoing provisions." We have here pointed out the distinctions between the two leases, and we will now state the ruling of this court upon the latter, and then see if the same reasoning will apply to the covenant of renewal found in the Allen lease. In disposing of the Diffenderfer Case, this court, speaking through Burgess, J., used this language: "All that is said in the covenant for a renewal of the lease for more than one



term of 50 years, either by implication or otherwise, is as follows: 'And every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with this exception only, that the annual rents to be reserved on every renewal shall be six per centum on the value of the demised premises,' etc. Do the words 'and every renewal,' as used and when used in the lease, clearly show that the lessors intended to covenant for a renewal of it for more than one term? In *Piggott v. Mason*, 1 Paige (N. Y.) 412, it was held that the holder of an original lease was not entitled to a covenant for renewal in the new lease, as that would create a perpetuity. And a lease should not be so construed. *Syms v. Mayor*, 105 N. Y. 153, 11 N. E. 369; *Carr v. Ellison*, 20 Wend. (N. Y.) 178; *Banker v. Braker*, 9 Abb. N. C. (N. Y.) 414; *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 215; *Whitlock v. Duffield*, 1 Hoff. Ch. (N. Y.) 110. So it has been said that a covenant which does not plainly imply or express a perpetual renewal will not be construed to give this right. 1 Taylor on Landlord and Tenant, § 334. In *Carr v. Ellison*, 20 Wend. 178, it is held that a covenant to renew a lease under the same covenants contained in the original lease is satisfied by a renewal of the lease, omitting the covenant of renewal. There being no clear words in the covenant for renewal in this case, nor any words relating to a perpetual renewal, we are constrained to hold that the words 'and every new lease shall contain all the covenants, agreements, clauses and stipulations,' as used in the first clause, in the absence of more positive stipulation than the covenant of renewal, means only a second lease, and not a perpetuity of leases. *Moore v. Foley*, 6 Ves. Ch. 232. Had it been otherwise intended, and the lease had been one of perpetuity at the pleasure of the lessees, it is not unreasonable to presume that some such provision would have been made in the lease." And the Supreme Court of the United States in the case of *Winslow v. Railroad Co.*, 188 U. S. 654, 23 Sup. Ct. 443, 47 L. Ed. 635, in discussing this same question, uses this language: "It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms, and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew, otherwise a perpetuity is provided for."

Mr. Taylor, in his valuable work on Landlord and Tenant, states the rule as follows: "Nor will a general covenant for renewal be considered to imply a perpetual renewal. The most a lessor is bound to give on such a covenant is a renewal for one term only. A covenant to renew a lease 'under the same covenants contained in the original lease' is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for, if the continued grant of successive

leases and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such intention. A different construction would virtually lead to a grant in perpetuity; and, where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction. \* \* \* A covenant which does not plainly imply or express a perpetual renewal will not, as we have said, be construed to give this right." 1 Taylor on Landlord and Tenant (8th Ed.) §§ 333, 334. The same rule is announced in *Jones on Landlord and Tenant*, § 343; and in 18 Am. & Eng. Enc. of Law (2d Ed.) p. 687, and cases cited. This is unquestionably the rule in this country, and it seems to us to be supported by the better reason and by the greater weight of authority; and we are therefore clearly of the opinion that the conclusions reached by this court in the *Diffenderfer* Case were correct. And, if there are no covenants to be found in the *Allen* lease materially different from those contained in the former, then the same results should be reached in this case; but counsel for appellants insist that such covenants do exist in the *Allen* lease, and points out the two following clauses (which will hereafter be referred to as first and second) which he says are not to be found in the *Diffenderfer* lease, to wit: "(1) In case of failure to give such notice, the said parties of second part shall be entitled to no further renewal of this lease or of the terms hereby created. (2) The covenants of renewal shall be in conformity with the foregoing provisions." By reading the provisions in the *Diffenderfer* lease, we find this language: "This lease shall be renewable, at the option of the party of the second part, his executors, administrators and assigns, he or they giving to the party of the first part, in every instance, a notice in writing of his or their wish to renew the same three months at least before the end of the term." While there is no express statement in the *Diffenderfer* lease to the effect that the failure to give the notice of renewal would bar all rights of renewal as is stated in the *Allen* lease, yet the clause just quoted from the former, namely, "This lease shall be renewable at the option of the party of the second part \* \* \* he or they giving to the party of the first part \* \* \* a notice in writing of his or their wishes to renew the same three months at least before the end of the term," have exactly the same meaning as the language contained in the first clause above quoted from the *Allen* Case. While the wording of the two clauses is not the same, yet their meaning is clearly identical. The meaning of each is that, if the notice is not given as required, then the right of renewal is forever forfeited. The only difference in the two clauses is the *Allen* lease in express terms provides for the forfeiture, while the other makes the same provision by clear and nec-

essary implication. The legal effect of each is the same.

It is next contended by counsel for appellants that the language used in the second clause above quoted from the Allen lease is wholly different from any provision found in the Diffenderfer lease, and that it in express and specific words provides for covenants of renewal to go into the new leases. Those words are as follows: "Second. The covenants for renewal shall be in conformity with the foregoing provisions." The clauses immediately preceding the words just quoted is in the following words: "And every renewal lease shall contain all the covenants, agreements, clauses and stipulations herein contained." These words clearly refer back to the previous general covenant of renewal, which is in the following language: "And it is covenanted and agreed by and between said parties that at the end of the term herein demised this lease shall be renewable at the option of said parties of the second part." Now, by reading the second clause before mentioned in light of the above quotations, it seems clear that it refers back to the general covenant of renewal last above quoted, because there is not to be found in the entire lease any other covenant of renewal, and for that reason the words "herein contained," above quoted, must of necessity refer to that general covenant; and this is made still clearer by reading in this connection the 2nd clause before mentioned, which is as follows: "That the covenants for renewal shall be in conformity with the foregoing provisions." To what do the words "the foregoing provisions" refer? Clearly to the general covenant of renewal before mentioned, because, as before stated, there is no other covenant of renewal contained in the Allen lease.

The same general covenant of renewal is contained in the Diffenderfer lease, and is in the following words: "And it is covenanted and agreed by and between said parties that, at the end of the term hereby demised, this lease shall be renewable, at the option of the party of the second part," etc. So it is thus seen that the covenants of renewal contained in the two leases mentioned are identically the same in meaning. That being true, and we think there can be no doubt as to the correctness of that conclusion, then the construction placed upon the Diffenderfer lease by this court is equally applicable to the lease in question. In that case this court held that the lessee was entitled to but one renewal, and we think the same is true of the lessee in the case at bar; and we will not infer an agreement for a second renewal from a general provision for a renewal of the lease with similar covenants.

We are therefore of the opinion that the trial court correctly construed the lease, and for that reason the judgment is affirmed. All concur.

#### MILLER et al. v. McCALEB et al.

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907.)

#### 1. APPEAL—EQUITY CAUSES—FINDINGS OF FACT AND LAW—OMISSION—PREJUDICE.

Equity causes being triable de novo in an appeal, and the Supreme Court being required to examine the evidence and draw its own conclusions of fact and law, a party to such an appeal is not prejudiced by the trial court's refusal to make separate findings of fact and conclusions of law under Rev. St. 1899, § 605 [Ann. St. 1903, p. 704].

#### 2. DEEDS—DELIVERY—ACCEPTANCE BY GRANTEE.

While it is essential to the validity of a deed that it should be accepted by the grantee, delivery will be presumed, in the absence of fraud, artifice, or imposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 574.]

#### 3. SAME—RECORD.

Record of a deed will not of itself constitute delivery, in the absence of acceptance by the grantee; but such acceptance after record satisfies the requirement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 136-139.]

#### 4. SAME—EVIDENCE.

Upon the transfer of certain property in controversy a deed was executed conveying the property to a wife and the lawful heirs of her husband. This deed was duly executed and recorded, but on the same day another deed to the same land was executed before the same officer, conveying the property to husband and wife jointly. The wife testified that, after the first deed was executed, it was determined to change their estate, and that the second deed was made for that purpose, and that she always claimed under it and had possession thereof, though she had no knowledge of the record of the first deed until after her husband's death. Held, that such facts were insufficient to show an acceptance by the wife of the first deed, and that it was therefore ineffective for want of delivery.

Appeal from Circuit Court, Dade County;  
L. W. Shafer, Judge.

Action by Kate Miller and others against Ara E. McCaleb and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Edwin Frieze and Sherwood & Young, for appellants. C. F. Newman, Mason Talbutt, and Edgar P. Mann, for respondents.

GRAVES, J. Action in partition by petition in the usual form, with prayer for the partition of 60 acres of land in Dade county, and for account of rents and profits alleged to have been had and received by one of the defendants. The plaintiffs Kate Miller and Lydia A. Forrest, and the defendants S. A. McCaleb and O. A. McCaleb are children of Ethelbert A. McCaleb, who died in the year 1901, and the only answering defendant is Ara E. McCaleb, the second wife and widow of the said Ethelbert A. McCaleb. The four children of the said Ethelbert, made parties to this action, are children by his first wife. The deceased, Ethelbert A. McCaleb, and the defendant Ara E. McCaleb were married in 1871. At the institution and trial of this suit

there were two children of the second marriage alive, but they were not made parties. They testify as witnesses, however. The answer of Ara E. McCaleb, the only answering defendant, was a general denial.

Plaintiffs base their claim on the following deed: "Know all men by these presents, that William F. Dry and Emily J. Dry, of the county of Dade in the state of Missouri, hath this day for and in consideration of the sum of six hundred and thirty dollars, to the said William F. Dry and his wife Emily J. Dry in hand paid by Ara E. McCaleb (wife of Ethelbert A. McCaleb) and the lawful heirs of the said Ethelbert A. McCaleb, of the county of Lawrence in the state of Missouri, granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said Ara E. McCaleb and the lawful heirs of the said Ethelbert A. McCaleb, the following tracts or parcels of land situated in the county of Dade, in the state of Missouri, that is to say: The north half of the east half of the southwest quarter and the north half of the southeast quarter of the southwest quarter of section 26, township 30, range 28; also the east half of the north half of the northeast quarter of the southeast quarter of section 33, township 30, range 27—containing in all seventy acres more or less. To have and to hold, the premises hereby conveyed, with all the rights, privileges and appurtenances there-to belonging or in any wise appertaining unto the said parties of the second part, their heirs, and assigns forever, and the said William F. Dry and Emily J. Dry, his wife, hereby covenanting to and with the parties of the second part, their heirs and assigns, for themselves, their heirs, executors and administrators, to warrant and defend the title of the premises hereby conveyed against the claim of any person whatsoever. In testimony whereof, we have hereunto subscribed our name and affixed our seals this 22nd day of April, in the year of our Lord, one thousand, eight hundred and seventy-two. William F. Dry, [Seal.] Emily J. Dry, [Seal.]" This deed was acknowledged before Wm. Van Horn, justice of the peace, on the date thereof. It was filed for record April 24, 1872, and duly recorded in Book 16, at page 519 thereof, of the deed records of said county. On the back of the original of this deed appears this indorsement: "Warranty deed from William F. Dry and Emily J. Dry to Ara E. McCaleb. State of Missouri, County of Dade—ss.: This deed was filed for record in my office on the 24th day of April, 1872, at the hour of \_\_\_\_\_ o'clock \_\_\_\_\_ M, and duly recorded in Book 16, page 519. No. Due. Paid fee \$1.00. Arch M. Long." The plaintiffs introduced the record of this deed, and the answering defendant produced the original. There is no difference between the record of the deed and the original, nor of the certificates of acknowledgment and other endorsements thereon, except on the original appears a canceled United States revenue stamp.

Defendant placed in evidence another deed, identical in form except as hereinafter noted, of the same date, acknowledged on the same date by the same justice of the peace, having the same grantors, and conveying the same land. The only difference is in the names of the grantees. In this last-mentioned deed the grantees are "Ara E. McCaleb and Ethelbert A. McCaleb, her husband," instead of "Ara E. McCaleb and the lawful heirs of the said Ethelbert A. McCaleb," as in the deed first fully set out hereinabove. This deed has indorsed on the back thereof, the following: "Warranty deed from William F. Dry and Emily J. Dry to Ara E. McCaleb and Ethelbert A. McCaleb." This deed has no revenue stamp and had not been recorded. Defendant also offered in evidence a mortgage dated April 22, 1872, to secure two notes of \$215, each. In this mortgage the grantee is William F. Dry, and he is also the payee in the two notes described therein, and the land conveyed is the same involved in this suit. The notes are signed by Ethelbert A. McCaleb, and he signs the mortgage with his wife, but the first part of the mortgage reads: "This indenture, made and entered into this twenty-second day of April, A. D. 1872, by and between Ara E. McCaleb, wife of Ethelbert A. McCaleb, in the county of Lawrence and state of Missouri, of the first part, and William F. Dry of the county of Dade, state of Missouri, of the second part, witnesseth." This mortgage was likewise acknowledged before Van Horn, justice of the peace.

Such is the documentary evidence in the case. By the oral proof it appears that about the time the land was purchased from Dry, Mrs. McCaleb received quite a sum of money from an estate, and there is testimony tending to show that a part of this money went into this land; that the four McCaleb children by the first wife paid nothing on the land; that McCaleb and wife, with these four children, then all minors, moved and lived upon this land; that the children would leave upon attaining their majority; that McCaleb lived there until his death in 1901; that after his death, his widow either occupied it in person or by her tenant up to the trial, and was occupying it by tenant at the trial; that one of the sons rented the land of the father and paid him rent. Mrs. McCaleb testified about the making of the two deeds, but upon some points she is somewhat mixed and confused. As best we gather her testimony, it is to the effect that she understood that the deed which we first herein set out in full was made to her alone; that it was concluded to make one to both of them, and the second deed mentioned above was made; that she understood that this second deed was the conveyance, and it was taken home and kept there, but not recorded; that she always claimed under this unrecorded deed; that she had no knowledge that McCaleb's heirs were parties to the first deed until told by Wheeler, the administra-

tor of her husband's estate, and did not even know that it was yet in existence, until that time. On this last point she is corroborated by testimony tending to show that the words, "Ara E. McCaleb and the lawful heirs of the said Ethelbert A. McCaleb," wherever they appear in the first deed, were in the handwriting of Ethelbert A. McCaleb, whilst other portions were not. The evidence is conflicting, as might be expected, upon what the father said about the title to the place; but the preponderance thereof is to the effect that he said the place belonged to defendant Ara E. McCaleb. At one time, when making a mortgage in an attorney's office, he refused to put in the land in dispute. The scrivener was getting the land numbers from some abstract books, and, when he called off the numbers of the land in dispute here, the deceased said: "That the Dry land?" And, being informed that it was, he then said: "I don't want to put that in. That belongs to the old woman." It should also be stated that Mrs. McCaleb testified, in cross-examination, that the deed having her name indorsed on the back was the deed which she thought she claimed under, and this is the first deed we have hereinabove set out. On this point she was evidently confused.

Upon the conclusion of the evidence we find this in the record: "At the close of the evidence, plaintiffs' counsel requested the court to state in writing the conclusions of fact found separately from the conclusions of law. Which request the court refused, stating that in equity cases the court was not required to so state its findings. To which ruling of the court, plaintiffs then and there excepted." And thereupon judgment was entered in this language: "'Kate' Miller and Lydia A. Forrest, Plaintiffs, v. Ara E. McCaleb, Samuel A. McCaleb, and Clarence A. McCaleb, Defendants. Judgment v. plaintiff for costs and dismissing petition and finding that land is owned by Ara E. McCaleb. Now at this day come the plaintiffs, Kate Miller and Lydia A. Forrest, by their attorneys, and also come the defendants Ara E. McCaleb and Samuel A. McCaleb in person, and by their attorneys, and the defendant Clarence A. McCaleb, although duly and legally notified of the commencement, object, general nature and pendency of this action by an order of publication duly published in the 'Lockwood Missourian,' a weekly newspaper regularly printed and published in Dade county, Mo., for four weeks successively, the last insertion being more than 30 days before the first day of the present term of court, now comes not, but makes default; and this cause coming on to be heard, and all and singular the matters herein being seen, heard, and fully understood, the court finds: That this is an action for partition, and that it is stated in the plaintiff's petition that the plaintiffs and defendants are the owners of and seised as tenants in common of the following described real estate in Dade county, Mo.,

to wit: The northeast quarter of the southwest quarter and the north half of the southwest quarter of the southwest quarter of section 26, in township 30, of range 28, and the northeast quarter of the northeast quarter of the southeast quarter of section 33, in township 30, of range 27, and that the five persons named as parties to this action are each entitled to an undivided one-fifth of said land; and it is also alleged in the petition that the defendant Ara E. McCaleb since the \_\_\_\_\_ day of \_\_\_\_\_, 1872, has enjoyed exclusively the rents and profits of said premises. The court from the evidence further finds that the defendant Ara E. McCaleb is the owner in fee of the above-described real estate, and that plaintiffs Kate Miller and Lydia A. Forrest and the defendants Samuel A. McCaleb and Clarence A. McCaleb have no right, title, or interest in said land, or the rents and profits thereof, and that the plaintiffs' petition ought to be dismissed at their cost. It is therefore considered, adjudged, and decreed by the court that the defendant Ara E. McCaleb is the owner in fee simple of the said above-described real estate, and that the said Kate Miller, Lydia A. Forrest, Samuel A. McCaleb, and Clarence A. McCaleb, the other parties to this action, have no right, title, or interest therein, and that the plaintiffs' petition be dismissed, and that the plaintiffs pay the costs of this action, and that execution issue therefor." We quote these matters fully for the reason that great stress is placed upon them in the briefs of plaintiff. The foregoing sufficiently states the case, except that the evidence may be noticed more in detail later.

1. The first proposition urged for a reversal of this case is the refusal of the trial court to make and file findings of fact separate from the conclusions of law. This question is vehemently pressed. The statute upon the subject is Rev. St. 1899, § 695 [Ann. St. 1906, p. 704], and reads: "Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except, generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case, the court shall state in writing the conclusions of facts found separately from the conclusions of law." This statute was borrowed from Kansas, and McFarlane, J., in *Blount v. Spratt*, 113 Mo., loc. cit. 53, 20 S. W. 967, thus describes its origin, history, and effect upon our practice: "This section was first incorporated into our Code in the revision of 1889, and has never been the subject of consideration by this court. It was borrowed almost literally from section 2135 of the Code of Procedure of Kansas (Rev. St. 1889), and the practice authorized has often been approved by the Supreme Court of that state, and has been applied in the trial of cases, both at law and in equity, though the section of Kansas law makes no provision in

express terms for taking exception to the decisions of the court upon question of equity arising in the case, as is provided by the section of our Code in question. The Supreme Court of Kansas, as we understand its decisions, not only applies the provisions of the section to the practice in equity cases, 'but will not disturb the finding if there is sufficient evidence to justify it; and this is the case though the finding of the court is contrary to the judgment of the appellate court.' *Beaubien v. Hindman*, 37 Kan. 228, 15 Pac. 184; *Well & Co. v. Eckard*, 37 Kan. 696, 15 Pac. 922. Under the practice in this state, equity cases have been practically triable de novo in the appellate court. This court, while deferring somewhat to the conclusions of fact reached by the trial courts, has not been bound by its findings of fact nor its conclusions of law thereon, but has exercised a supervisory control over both. In order that the evidence in cases of equitable jurisdiction may be reviewed upon appeal, the rules of this court require that the whole of the evidence shall be embodied in the bill of exceptions. *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; rule 7 of practice in this court (73 S. W. v). It is now insisted by respondent that as defendant, who is appellant here, has failed to embody all the evidence in the bill of exceptions, in compliance with the rules of court, his appeal should be dismissed, or the judgment affirmed. We do not think it was the intention of the Legislature, by adding this section to the Code of Procedure, to abrogate the practice of this court so long followed of supervising the findings of the trial courts in equity cases. If the evidence was before us on proper exceptions, we could review it and determine for ourselves the correctness of the findings."

And in discussing this statute, in case of *Gaines & Co. v. Whyte Grocery Co.*, 107 Mo. App., loc. cit. 532, 81 S. W. 648, 656, Smith, P. J., aptly said: "The defendant's final contention is that the trial court erred in its refusal to make special finding of the facts and conclusions of law thereon. The statute (section 695) doubtless applies to both legal and equitable actions; but, while this is so, we do not think the failure to make a special finding in an action of the latter kind constitutes a reversible error, because the supervisory courts are authorized on appeal to try and determine such actions upon the pleadings and evidence de novo. The findings of the trial court, if any, may be entirely disregarded by the former tribunal, and such findings and decree entered therein as seem to it to be meet and proper. The Legislature did not, by the enactment of the statute already referred to, intend to abrogate the well and long established practice of the appellate courts in supervising the findings of trial courts in equity cases, or to deprive the former of the jurisdiction to determine for themselves the correctness of the findings of the

latter. *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82. If the supervisory courts are not bound by the findings of the trial courts, or their conclusions of law in equity cases, but may review the whole evidence, and determine for themselves what the findings of facts and conclusions of law should be, it is difficult to see how a party could be prejudiced by the failure of the trial court to make special findings of fact in such cases. The failure therefore of the court, in the present case, to make special findings of facts, was not such an error as requires a reversal of the decree; and especially so since it was, as we think, clearly for the right party, and the only one that could have been given in the case."

This statute has been subsequently discussed in very recent equity cases. In *Fitzpatrick v. Weber*, 168 Mo., loc. cit. 562, 68 S. W. 913, Marshall, J., speaking for the court, said: "And if the circuit court had found any fact that would give support to such conclusion, this court would not have been bound by that finding, and would review the evidence and render the proper judgment in the case, notwithstanding the judgment or the finding of facts by the trial court, because this is a proceeding in equity, and section 695, Rev. St. 1899, requiring the trial court to make a separate finding of facts, was not intended to have, and did not have, any effect upon the power or duty of this court in equity cases." Approving, and to the same effect, is the language of Lamm, J., in *Shaffer v. Detlie*, 191 Mo., loc. cit. 387, 90 S. W. 131.

In the more recent case of *Patterson v. Patterson*, 200 Mo. 335, 98 S. W. 613, all of the cases above cited are approved, and the force of the rule of this court in equity cases minutely and fully discussed by Judge Valiant. In the *Patterson Case*, there was a finding of facts, which finding the clerk had copied into the judgment. Upon the finding of facts it was contended, with much force, that the judgment was erroneous. This court held, however, that we would not disturb the judgment, although we might determine that the facts found by the chancellor below did not support the judgment. We then held, and now hold, that, in equity cases, it is not only the privilege, but the duty, of this court, to examine the evidence, and draw our own conclusion of fact as well as of law. Hence the rule that requires all the evidence in such cases be laid before us.

Now, with these conditions existing in our practice, what harm has resulted to the plaintiffs by reason of the court's failure and refusal to make a special finding of facts, separate from the conclusions of law? The trial court, under the statute, giving the statute its fullest sweep, should have made the findings as requested; but, in equity cases, no prejudicial error results. We are in no way bound by such findings. The judgment

we enter here in equity cases is a judgment emanating from the conscience of this court, and not one from the conscience of the court nisi. To satisfy that conscience we must and do examine and find the facts for ourselves. Seeing no reversible error in the point made, it is, accordingly, ruled against the plaintiff.

2. Plaintiff claims their interest in this property through the deed which we have set out in full. Defendant says that such a deed was never delivered to her or any of the parties named therein. The natural order would be to take up the question of delivery first, and, if there was delivery, then we can consider the effect of the deed. This question will require a little closer review of the facts. This first deed was practically all in the handwriting of the deceased husband. The second deed was in the handwriting of the justice of the peace. Both were written on the same day. It clearly appears that the first intention of the parties was to deed the land to Mrs. McCaleb. The indorsement on the back of the first deed was that way, but the name of the grantees, written in by McCaleb, were "Ara E. McCaleb and legal heirs of Ethelbert A. McCaleb." The justice says that his impression is that the deed was practically written when the parties arrived. Mrs. McCaleb says that they afterwards concluded to change it and make the deed to both of them. Such a deed was made, and appears in the handwriting of the justice. This last deed remains there with the family until this lawsuit. Mrs. McCaleb says that she knew of no other, nor did she know of the record of another. Evidently, so far as this evidence shows, there was no delivery to her of this first deed, and no consent by her as to its record. Nor is there evidence of a delivery to any heirs of Ethelbert McCaleb, except the presumption raised by the record of the deed. There is evidence from the plaintiffs that the McCalebs were constantly quarreling over the money received by the wife from her father's and mother's estate. The evidence does not clearly disclose from what source the original of this first deed came, except that Mrs. McCaleb was told of it by the administrator of her husband's estate. She says that this is her first knowledge of its existence in the form it now stands. Her attorneys put it in evidence. Nor does the record show just how the last deed was kept at the home for these 32 years, but she says that it was there, and that she thought it was their title to the land, and she produces the deed at the trial. It must further be borne in mind that the express consideration in the deeds was \$630, and on the same day the grantor, Dry, took back a mortgage for \$430, so that evidently he was paid only \$200 on the deal. Now this mortgage is signed by both McCaleb and wife, but the grantor therein is named thus: "Ara E. McCaleb, wife of Ethelbert A. McCaleb, \* \* \* of the first part." This would indicate that Dry thought that the title was in Mrs. Mc-

Caleb, and yet it would further indicate that he knew nothing of the heirs of Ethelbert McCaleb having any interest. He would hardly be taking a mortgage back for more than two-thirds of the purchase money, knowing that Mrs. McCaleb had only a one-fifth interest at most. On the other hand, if the mortgage was made after the second deed, it would seem that both of the McCalebs would have been made grantors. This circumstance lends little light as to what deed Dry intended to deliver, but it does lend much light upon the question as to how he understood the first deed to read. If it be said that he took the mortgage in response to the first deed, thus it clearly shows that he had no idea of having granted any land to these plaintiffs, or to any heirs of Ethelbert McCaleb. On the other hand, he might have thought that, inasmuch as the name of Mrs. McCaleb appeared first in the second deed, and both of them signed the mortgage, his security was good. The only clear fact that we can draw from the circumstance is that Dry, the grantor, evidently did not intend to deed, and did not think he had deeded, property to the heirs of McCaleb. There would be more in the circumstance that McCaleb said the land belonged to his wife. But this is weakened by the fact that McCaleb had placed of record a deed giving her but little interest therein, if the deed is valid as to his heirs. He might have made a mistake, and recorded the wrong deed, and when making this statement might have thought that the second deed was the one of record. So this fragment of testimony, whilst valuable upon other aspects of the case, is of but little value upon the question of which deed was actually delivered and accepted by the grantee, Ara E. McCaleb. So that, after all, we can only take these circumstances in connection with the testimony of Mrs. McCaleb to determine this matter.

There can be no delivery of a deed, when the grantee is an adult, without an acceptance by the grantee. In 13 Cyc. p. 570, the doctrine is thus tersely stated: "It is essential to the validity of a deed that there should be an acceptance of the instrument by the grantee. But delivery of a deed implies its acceptance by the grantee, in the absence of fraud, artifice, or imposition." Nor does the recording of a deed to such a person constitute a delivery without such acceptance. The law on this proposition is summarized in 13 Cyc. p. 571, in this way: "The recording of a deed will not of itself constitute a delivery to the grantee in the absence of an acceptance by him of the instrument; but, if subsequently accepted, the deed will be valid. The same rule applies to the delivery of a deed for record." In the case of Stallings, Trustee, v. Newton et al., 110 Ga. 875, 36 S. E. 227, the syllabus, which summarizes the context of the opinion, reads: "(1) Delivery of a deed conveying real property is essential to its validity and is only complete when the deed is accepted. (2) A proper and

legal registry of an instrument raises a presumption of delivery, sufficient to establish the fact, unless rebutted. An unauthorized registry raises no such presumption, and in that case the validity of the instrument is not established until delivery is affirmatively shown." In *Meigs v. Dexter*, 172 Mass., loc. cit. 218, 52 N. E. 75, 76, Knowlton, J., said: "We are of the opinion that the instruction was erroneous in omitting to embody the requirement that there should be an acceptance of the deed by some one representing the grantee. It is well settled in this commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, or who assumes to represent him, and whose act of acceptance is afterwards ratified. *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554; *Commonwealth v. Cutler*, 153 Mass. 252, 26 N. E. 855; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379." In *Moore v. Flynn et al.*, 135 Ill., loc. cit. 79, 25 N. E. 844, 846, that court speaks as follows: "To render a deed operative to pass title, there must be not only a delivery of the deed by the grantor, but also an acceptance thereof by the grantee. The acceptance of the conveyance by the grantee is as essential as the delivery by the grantor, and where the acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass. 5 Am. and Eng. Ency. of Law, p. 446, and cases cited; *Wiggins v. Lusk*, 12 Ill. 132; *Kingsbury v. Burnside et al.*, 58 Ill. 310, 11 Am. Rep. 67; *Dale et al. v. Lincoln*, 62 Ill. 22. In respect to a grantee who is not under legal disability, the rule is that, when such grantee is aware of the conveyance, and does not dissent, and the conveyance is positively beneficial to him or her, acceptances will be presumed, but that no presumption will arise so long as the grantee is ignorant of the conveyance. 5 Am. and Eng. Ency. of Law, p. 444, and authorities there cited." And again the Indiana court, through Elliott, J. (*Bremmerman et al. v. Jennings et al.*, 101 Ind., loc. cit. 256), says: "The act of Sturdevant in placing the deed to Joseph L. Jennings on record worked no estoppel in favor of the appellants. That act did, it is true, make a prima facie case in their favor upon the question of delivery, but it did no more, and this prima facie case was explained by the evidence. It is essential to the delivery of a deed that there should be an acceptance by the grantee. A delivery does, indeed, import an acceptance, and the evidence here shows no acceptance. It cannot be presumed that Joseph L. Jennings accepted the deed, and thus divested the prior rights of his wife, and we know of no rule that will permit his creditors to insist that he shall treat the delivery as valid, to her prejudice and their gain." Our own court, in *Hall v. Hall*, 107 Mo., loc. cit. 107, 17 S. W. 811, 812, has announced the doctrine thus: "To oper-

ate as a complete and effectual conveyance of land, a delivery of the deed, actual or constructive, by the grantor, and an acceptance by the grantee, or by some one for him, are essential requisites. These are the final and crowning acts in the conveyance, without which all other formalities are ineffectual. The grantor must part with the deed and all right of dominion over it, intending that it shall operate as a conveyance and the grantee must accept it." This case has been since followed in several cases.

From the positive evidence in this record, it is clear that Mrs. McCaleb never accepted the deed placed of record; that she never authorized its record, and knew nothing about it being placed of record; that during all this time she was relying, as she had a right to rely, upon the deed, the possession of which she had, and which created an estate in her much more valuable than the other deed if it is to be given the construction contended for plaintiffs. We are not advised upon what theory the chancellor below found for her, but in our judgment there was no acceptance of the deed which was of record by her, and, if not, it is no deed for want of delivery. She would therefore hold under the second deed. This obviates further discussion of points made.

The judgment below is right, and will be affirmed. All concur.

#### LANGE v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1. Nov. 27, 1907.)

##### 1. RAILROADS — INJURIES TO PERSONS ON TRACK.

In an action for injuries to a child who was run over while on a railroad track, evidence held sufficient to show negligence on the part of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1356-1363.]

##### 2. APPEAL AND ERROR—INVITED ERROR.

A party cannot complain of an instruction which is in harmony with one given at his own request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3602-3604.]

##### 3. TRIAL — INSTRUCTIONS—APPLICABILITY TO ISSUES—EVIDENCE.

In an action for injuries to a child who was run over on the track, the petition alleged that, though the brakeman saw plaintiff in time or by ordinary care could have seen her in time to have stopped the car, but negligently and carelessly failed to stop it, though the petition contained statements that defendant's agents and servants "unnecessarily," etc., ran over plaintiff, an instruction submitting the issue of negligence, irrespective of wantonness and recklessness, was not objectionable as a departure from the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

##### 4. RAILROADS — PERSONS ON TRACK — TREES-PASSENGERS.

Where a child accompanied a passenger to a railroad station, and after the departure of the passenger's train, and while the child was standing on the platform, servants in charge of a locomotive caused steam to be discharged

therefrom, causing the child to go upon one of the tracks in an attempt to escape from the steam, a contention that while upon such tracks she was a trespasser was without merit.

##### 5. SAME—INSTRUCTIONS.

In an action for injuries to a child on the track, an instruction was that, if defendant's brakeman in charge of the car while the same was moving toward plaintiff saw her on the track in front of the car in time to have stopped the same before striking her, and paid no further attention to the situation until it was too late to stop, defendant was guilty of negligence, was not erroneous, on the ground that it did not require plaintiff to have been in a place of danger before the brakeman was called upon to use ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1388.]

##### 6. TRIAL—CONSTRUCTION OF CHARGE.

The fact that an instruction as to the circumstances under which plaintiff in an action for injuries would be entitled to recover ignored contributory negligence was not error, where the question was properly presented in another instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705, 718.]

##### 7. NEGLIGENCE—ACTION—INSTRUCTIONS.

While it is better practice to submit to the jury all the facts relied on as constituting contributory negligence in one instruction, there is no valid objection to submitting them in different instructions, especially where none of the instructions told the jury that, if they found the facts to be true, they should find plaintiff not guilty of contributory negligence, but told them that they might take them into consideration in passing on that question.

##### 8. SAME—EVIDENCE.

Where one frightens another by his negligence, and while he is in that condition he is injured, such facts should be considered in passing on the question of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 99.]

##### 9. DAMAGES—INSTRUCTION.

In an action for personal injuries, an instruction that, if the jury found for plaintiff, they might consider her physical pain and mental anguish, and such as she might suffer as shown by the evidence, and, in addition, consider to what extent, if any, plaintiff's capacity for earning a livelihood after her majority would be impaired by the injury, and return a verdict in such sum as they believed to be just, *held*, that the instruction was not objectionable on the ground that it left it to the jury to fix the amount of damages as they might deem just and proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 548-555.]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Freda Lange against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This suit was instituted in the circuit court of Lafayette county, seeking to recover \$20,000 damages for personal injuries received by plaintiff, through the alleged negligence of the defendant by running one of its cars upon and over her right leg, and so mangleing it as to render amputation thereof necessary just below the knee. There was a trial before the court and jury, which resulted in a verdict and judgment for the

plaintiff for the sum of \$5,000. After taking the proper preliminary steps, the defendant appealed the cause to this court. There is no question presented here regarding the pleadings, and for that reason they will not be further noticed.

The evidence for plaintiff tended to show: That plaintiff was a Little German girl, 9 years and 9 months old at the time of her injury and could not speak English. The injury occurred at a station on defendant's road, called "Emma." That at the station there are two tracks—the main and the switch track—and the latter was 300 or 400 feet in length and was north of the main track, and at the point of the injury they were separated about 40 feet. That these tracks ran east and west, and a public road, 40 feet in width, crossed them at right angles. That between the two tracks and just west of the public road and lying along and parallel with the main track was located a cinder platform, constructed for and used by the patrons of the road, but there was no station house. That this platform was about 40 feet long by 8 in width. That the plaintiff was struck and injured on the switch track, about 16 feet west of the public road. That she lived south of railroad, and was attending school on the north side. That school was dismissed about 4:30 p. m., and she was on her way home with 12 or 14 other school children, all of whom went down to the platform to see their teacher off on a west-bound train, due about that time. That while the children were on the platform an east-bound freight train headed in on the side track, awaiting the passage of the west-bound passenger train. That there was standing on the side track an empty freight car, which was to be placed in the freight train, and taken on east. That the entire crew, with probably one exception, saw the children standing on the platform. That after the departure of the passenger train the freight engine was disconnected from its train and coupled onto the empty car standing in front thereof, which it pushed up beyond the east end of the switch track, and some distance beyond that point onto the main track, and then the engine was reversed and ran back west on the main track, pulling the empty car, and while thus moving the engine was uncoupled from the car, and it was shunted back west on the side track to be coupled onto the freight train, and the engine passed faster on down the main line, and thereby performed what is called a "running switch." That because of the more rapid speed of the engine it reached the platform and stopped there some few seconds before the empty car reached a corresponding position on the switch track. That when the engine stopped at the platform the children were still standing thereon, and while thus standing the employees in charge of the engine caused to be discharged therefrom, three or four times, large volumes of steam, which made loud



noises and blew the dirt and cinders 10 to 12 feet from the platform. That the steam struck the children and caused them, including the plaintiff, to go backward toward the side track upon which the empty car was approaching, as a result of the momentum given it by the flying switch. That while the children were thus moving backward, the fireman was looking at them and laughing. That as the discharge of the steam was repeated the children continued to retreat therefrom backward, toward the side track, and plaintiff was looking all the time, with a sunbonnet on, at the engine and escaping steam until she reached and stepped upon the side track, where she was struck by the empty car and injured. That she never looked east or west, nor saw the approaching car which struck her. That the brakeman, who was on the west end of the car, and in charge thereof, saw the plaintiff moving backward toward him, when the car was from 60 to 70 feet from her, and there was nothing to obstruct his view of her, but he made no attempt to stop it until he was within 6 or 8 feet of her, and only then after some one hollowed to him that some one was in danger. That the car was running 3 or 4 miles an hour, and could have been stopped within 3 or 4 feet. The plaintiff then rested her case, and defendant asked a demurrer to the evidence, which was, by the court, overruled, and defendant duly excepted.

The defendant then introduced evidence which tended to prove that no steam escaped from the engine while it was standing at the platform, nor until it started east, after making the switch, and that what then escaped was necessary in the ordinary operation of the engine; that no steam was emitted for the purpose of frightening the children; that plaintiff was familiar with the station, tracks, and the operation of trains at that place; and that she was a girl of average intelligence, and crossed the tracks every day going to school.

The court then gave the following instructions, over the objections and exceptions of defendant, on behalf of the plaintiff, to wit: (1) "The court instructs the jury that plaintiff's petition charges her injuries and damages were caused by the following acts of negligence of defendant's agents, operating conjointly or severally, namely: That said agents in charge of said engine unnecessarily and negligently, purposely and wantonly, discharged at and about the plaintiff and her companions an excessively large volume of steam, thereby causing her to take fright and flee from said steam, and unconsciously to step upon the side track in front of a detached freight car moving upon a running switch, by which she was struck, and which ran over and crushed her leg. Also that the defendant negligently used said freight car while equipped with a defective or insufficient brake, rendering it more difficult to be stopped. And you are further instructed that

the plaintiff need not prove all of said acts of negligence, but that, if you find and believe from the evidence that her said injury was directly caused by either one of said acts of negligence, then your verdict should be for the plaintiff.

"(2) The court instructs the jury that, if you believe from the evidence defendant's brakeman in charge of said car while the same was moving toward her saw the plaintiff on said switch track in front of said car in time to have stopped the same before striking the plaintiff, and that said brakeman paid no further attention to the situation in which she was placed until said car ran so close upon her that it was impossible to stop it in time to prevent the accident, and if you believe from the evidence that said car knocked plaintiff down, and she was thereby injured, then the defendant is in law guilty of negligence, and your verdict must be for plaintiff.

"(3) You are further instructed that the plaintiff, Freda Lange, was bound to exercise only such care and prudence as might be reasonably expected of a girl of her age and capacity, under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years as from a person of mature years and greater discretion under similar circumstances, and, if the jury believe from the evidence that the plaintiff was at the time of the accident of about 9 years and 9 months of age, you may take that fact into consideration in considering the question of negligence, if any, on part of the plaintiff.

"(4) You are further instructed that, although you may believe from the evidence that it would have been negligence in an adult to have stopped upon said side track in front of said detached freight car while the same was in motion, if you believe from the evidence plaintiff did so stop on said side track on the occasion of her injuries, still, if the jury find that by reason of her youth and inexperience she was not aware of the danger to which she was exposed in doing so, then the jury will take this into consideration in passing upon the question of plaintiff's alleged contributory negligence.

"(5) The court instructs the jury that, if you believe from the evidence that the plaintiff, Freda Lange, was frightened by the discharge of steam from the defendant's engine on the main track in front of the cinder platform on which she was standing, and that she was caused thereby to retreat backward to the side track, and that her attention was on that account fixed upon said engine and so diverted as to cause her not to notice the empty freight car approaching her on said side track, you will take that fact into consideration in connection with her youth and inexperience in determining whether, under all the facts and circumstances, she was guilty of negligence causing her injuries.

"(6) If the jury believe from the evidence

that the car which struck and injured Freda Lange was being run at the time of the injury on a running or flying switch, and that such manner of handling said car was more dangerous to and more likely to injure persons who might be on the track or attempting to cross the track than the ordinary and usual manner of switching cars, as shown by the evidence, then the defendant's servants were bound to use more than ordinary care and caution in making such switch, and, if you believe from the evidence that the injury to Freda Lange was the result of any want of care and caution on the part of the defendant's servants in making such running or flying switch, you should find for the plaintiff.

"(7) The court instructs the jury that you are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and, if you believe that any witness has willfully sworn falsely to any material fact in issue, you may disregard such false testimony, and may disregard the whole of his or her testimony.

"(8) 'Ordinary care and caution,' as used in these instructions, mean such care and caution as a reasonably prudent person would use in his own affairs, and under the same and similar circumstances. The word "wantonly," as used in the petition and instructions, means heedless inattention to duty."

"(10) The court instructs the jury that, if you find for the plaintiff, you will, in assessing her damages, take into consideration the physical condition she was in before her injuries in question, the physical pain and mental anguish she has suffered, occasioned by said injury, and the physical pain and mental anguish, if any, you believe from the evidence she is likely to suffer in the future because of said injury, and, in addition to this, you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood, after her majority, will be impaired by said injuries, and you will return a verdict for her in such sum as you believe to be just and reasonable, not exceeding the sum of \$20,000."

And the court gave the following instructions on behalf and at the request of the defendant, to wit:

"(1) The court instructs the jury that one of the alleged acts of negligence averred in plaintiff's petition as causing plaintiff's injury is that defendant's engineer, in charge of one of defendant's engines, standing on its main track at Emma Station, unnecessarily, negligently, and for the purpose of frightening the plaintiff, opened a steam valve, and discharged from said engine a large volume of hot steam therefrom, or from the steam chest thereof, against and about plaintiff, frightening her and causing her to step back upon the side track in front of a moving car, by which she was run over and her leg crushed. This allegation the defendant has denied in its answer. You are therefore instructed that it devolves upon the plaintiff to

prove this allegation of her petition to your satisfaction, by a preponderance of the evidence. And, if the jury find from the evidence that, while said engine was standing still upon the track no steam could possibly be discharged from the steam chest of said engine, or from any valve thereof, except the safety valve, and that no steam was discharged or escaped from said valve or steam chest, then the plaintiff cannot recover herein on that allegation of her petition, and as to said alleged act of negligence, the jury will find for the defendant.

"(2) And with further reference to said alleged act of negligence and wantonness on the part of its engineer, the court instructs you that, although you may believe from the evidence that steam did escape from any part of said engine, which alarmed or frightened the plaintiff, yet, if you further believe from the evidence that said steam escaped or was thrown out by the usual and ordinary operation of the engine, and was not thrown out or permitted to escape by the engineer in charge of said engine negligently or unnecessarily for the purpose of frightening the plaintiff, then the plaintiff cannot recover herein on account of the escape of such steam, and as to that matter the jury will find for the defendant.

"(3) The court further instructs the jury that another alleged act of negligence by the defendant, charged in plaintiff's petition as causing plaintiff's injury, is that the car which run over plaintiff was equipped with a defective and insufficient brake, whereby said car was rendered less manageable and more difficult to be stopped. This allegation of the plaintiff's petition, the defendant has also denied in its answer. You are therefore instructed that it devolves upon the plaintiff to prove this allegation to your satisfaction by a preponderance of the evidence. And, if you believe from the evidence that the brakes on said car were in an ordinarily and unusually good and safe condition, and would stop and did stop said car as quickly as usual, when running at the same rate of speed on a track of the same grade, then the jury will find for the defendant as to said allegation of negligence.

"(4) The court further instructs the jury that another alleged act of negligence by the defendant, charged in plaintiff's petition as causing plaintiff's injury, is that the defendant's brakeman in charge of the car which run over plaintiff saw her, or by the exercise of ordinary care and caution could have seen her, in front of said car in time to have stopped the same before striking and running over her. With reference to this alleged act of negligence, the court instructs you that, if you find from the evidence that as said car was running west upon the side track toward the train to which it was to be attached it was in charge of a competent brakeman who stood at the brakes on the west end thereof, and that, as the car approached the plaintiff, she was standing by

the side of the track on which the car was approaching, and not in any danger of being struck thereby, and that, when said car got close to her she stepped upon the track in front of said car, and so close to it that the brakeman in charge of it could not stop it, and that he made all reasonable effort to stop it before it struck plaintiff and run over her, but could not do so, then the plaintiff cannot recover on account of this alleged act of negligence, and the jury will find for the defendant on said charge.

"(5) The court further instructs the jury that, if they find from the evidence that the plaintiff, Freda Lange, was not at the defendant's platform or station at the time or just before she was injured for the purpose of taking passage upon any of defendant's trains, but was there merely as a matter of pleasure, amusement, or curiosity, or to see her school teacher take passage on one of the defendant's trains, then she did not occupy toward the defendant the relation of a passenger, and the defendant was only bound to exercise reasonable care not to injure her, after any of its agents or servants saw her in a position of danger.

"(6) The court further instructs the jury that, if you find from the evidence that the plaintiff, Freda Lange, was old enough to know that it was dangerous to go upon or stand upon a railroad track, and that a car running on such track might strike her or run over her, and, if you further believe that the car which struck her was in her full view as it came toward her, and if she had looked she must have seen it, but that she approached the track on which she was afterwards hurt without looking to see if a car was coming toward her, and without so looking stepped upon the track immediately in front of such car and so close thereto that the brakeman in charge of said car could not stop it by the energetic and vigorous use of the brakes upon said car, and that such brakes were in ordinary good and efficient condition, then the plaintiff was guilty of such want of care for her own safety as bars her from recovering herein, and the jury will find for the defendant.

"(7) The court further instructs the jury that the brakeman in charge of the car which struck plaintiff was not bound to anticipate that the plaintiff would step upon the track in front of his car, and was not bound to try to stop his car until he saw her in a position of danger, and, if the jury find from the evidence that as the car approached the plaintiff the brakeman was at the brake on the west end of said car, looking ahead of him toward the west, and did not see plaintiff until just as she stepped on the track, and that as soon as he saw her he did all in his power to stop the car before it struck her, but could not do so, and that said car was equipped with brakes in ordinarily good and serviceable condition, then he did all the law required of him, and was

guilty of no negligence, and the plaintiff cannot recover herein.

"(8) The court further instructs the jury that the defendant did not owe it as a duty to the plaintiff, under the allegations of plaintiff's petition and the evidence in this case, to have the brakes on the car which struck her in the best possible and serviceable condition. The only duty which the defendant owed to her under the circumstances, shown by the evidence, was not to willfully and wantonly run over her, but to use all reasonable efforts and care, by the use of all means at its command, to stop the car before striking her, after the brakeman in charge of said car discovered the plaintiff upon the track in a position of peril, or after he might have so discovered her by the exercise of ordinary care."

The defendant and appellant has assigned the following errors: First, the court erred in refusing appellant's demurrer to respondent's evidence; second, that the court erred in giving instruction No. 1 for respondent, for the reason that there was no evidence that the brake of the car was defective; third, that the court erred in giving instruction No. 2 for respondent, for the reason that it leaves out of view any element of wantonness or recklessness on the part of the appellant, its agents, or employes, and also because it did not require the respondent to have been in a dangerous position and unaware or oblivious of the approaching of the car, nor did it require her to be in the exercise of any degree of care whatever; fourth, that the court erred in giving instructions Nos. 3, 4, 5, and 6 for respondent, because they are comments upon the evidence; fifth, that instruction No. 10, given for respondent, was erroneous, because it allowed the jury to return such damages as they deemed just and reasonable.

Martin L. Clardy and Scott & Bowker, for appellant. Alexander Graves and Charles Lyons, for respondent.

WOODSON, J. (after stating the facts as above). 1. The first insistence of the appellant is that the action of the trial court in refusing to sustain its demurrer to respondent's evidence at the close of her case was erroneous. The evidence tends to show that she was a schoolgirl, not quite 10 years of age, and of average intelligence; that on the day of her injury she and some 12 or 14 of her schoolmates in returning to their homes from school stopped at the station of Emma to see their teacher off on a west-bound train, and that, while they were standing on the cinder platform, the employes in charge of the engine caused large quantities of steam to be ejected from the engine for the purpose of scaring the children; that this act was repeated two or three times, and so violent were the discharges that the steam extended some 15 or 20 feet from the engine and toward and

struck the children, and blew the dirt and cinders which were on the platform some 12 or 15 feet; that, in order to escape from the steam, dirt, and cinders, the children retreated northward toward the side track, upon which was slowly approaching the empty car, with a brakeman on the west or front end thereof; that as the ejection of the steam was repeated the children retreated further north until the plaintiff and others reached the side track, where she stopped; that she retreated the entire distance backward, with a sunbonnet on, looking at the engine and the escaping steam all the while, and never looked east or west, nor saw or heard the approach of the empty car, and that, on account of the great noise caused by the escaping steam, she did not hear the warning given that some one was in danger; that the brakeman in charge of the car, when some 60 feet distant, saw her retreating toward the side track, with nothing to obstruct his view of her; that he made no attempt to stop the car, which was running 3 or 4 miles an hour, until some one hollowed that she was in danger, at which time the car was within a few feet of her, then he, for the first time, attempted to stop it and did so in a space of 3 or 4 feet, but not until the child was run over and injured. These facts were testified to by some 10 or 12 disinterested witnesses, introduced by the respondent, and substantially the same facts were testified to by 2 witnesses introduced by the appellant, the only ones introduced who were not members of the train crew which caused the injury. Not only did this evidence make out a prima facie case, which entitled her to go to the jury, but so overwhelming was the weight of the evidence in her favor that no court could conscientiously disturb the verdict because there was no evidence to support it. No disinterested and fair-minded man can read this record without reaching the conclusion that either the engineer or fireman in charge of that engine, like all practical jokers, saw nothing in the situation except the momentary amusement which the perpetration of the joke would afford him by seeing the children run and scatter by discharging the steam in their midst; but, after the steam from the engine disappeared, he saw the child writhing in agony, with a crushed leg, and for the first time, after it was too late, considered the danger to others which did attend his foolish act. The conduct of this servant is as inexcusable as are the actions of that other large class of practical jokers who are ever killing some member of the family or friend with an "empty gun." As the evidence made out a prima facie case, it was the duty of the court to submit it to the jury, and there was no error in refusing the demurrer to the evidence offered by appellant. *Baker v. K. C. Ry. Co.*, 122 Mo., loc. cit. 549, 28 S. W. 20; *Twohey v. Fruin*, 96 Mo. 104, 8 S. W. 784. The following cases

are particularly applicable to the facts of this case: *Lange v. Mo. Pac. Ry. Co.*, 115 Mo. App. 582, 91 S. W. 989; *Donhoe v. Ry. Co.*, 83 Mo. 555, loc. cit. 556, 53 Am. Rep. 594; *Reyburn v. Mo. Pac. Ry. Co.*, 187 Mo. 572, loc. cit. 575, 86 S. W. 174; *Baker v. Ry. Co.*, 147 Mo., loc. cit. 158, 48 S. W. 838. The first case above cited was by the father to recover damages for loss of services, of this same child, caused by her injuries sustained in this same accident.

2. The second assignment of error presented for our consideration is the action of the trial court in giving instruction No. 1 for respondent. The objection urged against this instruction is that it authorized the jury to find for the respondent, if they believed that the injury was caused by a defective or insufficient brake, while the record discloses no evidence that the brake was defective or insufficient, and for that reason there was no evidence upon which to base the instruction. Conceding that the instruction is open to the criticism offered, yet the appellant is in no position to take advantage of the error, for the reason its instructions Nos. 3, 6, and 7 submit the same issue to the jury. A party cannot complain of an instruction which is in harmony with one given at his own request. *Thorp v. Missouri Pacific Ry. Co.*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Olferman v. Union Depot Ry. Co.*, 125 Mo. 416, top of page, 28 S. W. 742, 48 Am. St. Rep. 483; *Hall v. St. Joseph Water Co.*, 48 Mo. App., loc. cit. 383.

3. Instruction No. 2, given for respondent, is assailed for three reasons: First, because it leaves out of view the element of wantonness and recklessness on the part of the appellant, its agents, or employes in running the car over the respondent. By this the appellant means that the issue submitted to the jury by the instruction is one of negligence, while the issue made by the pleading was one of wantonly and recklessly injuring her, which it is contended is a departure between the pleading and the instruction. It may be said of this case, as was said by Judge Black in the case of *Owens v. Railroad*, 95 Mo., loc. cit. 180, 8 S. W. 350, 6 Am. St. Rep. 39, that: "The next objection to these instructions is that the plaintiff cannot sue for an assault, and recover for negligence in failing to stop the train. The petition does make some extravagant averments; but notwithstanding it charges an assault by the servant, it also in terms charges negligence in not stopping the train a reasonable time, and negligence on the part of the servant in pulling her off. The instructions cannot be said to be a departure from the petition. The petition contains all that is in the instructions, and more too, and it follows that it is not a case of declaring upon one cause of action, and a recovery upon another." The same is true in this case. While there are some extravagant statements to be found in the petition about how the agents and servants unnecessarily, etc., ran

over and injured the respondent, yet the charge of negligence is also found therein, full and complete, as will be seen from the following allegation: "But on the contrary thereof said brakeman, although he saw the plaintiff in time, or by the exercise of ordinary care and caution could have seen her in time to have stopped said car by the timely use of said defective brake, negligently and carelessly failed to stop said car, and negligently and carelessly permitted it to run over her right leg, thereby crushing and pulverizing the bones thereof in such a manner as to require the amputation thereof just below the knee." And substantially the same allegations are made as to the acts of the engineer and fireman. It is thus seen that the instruction is not a departure from the petition; for the reason that the petition contains all the allegations of fact which the instruction requires to be found, and more too, and for that reason there is no departure. The same doctrine is announced in the case of *Conway v. Reed*, 66 Mo. 346, 27 Am. Rep. 354. But concede that there was such an omission in plaintiff's instruction, yet that omission was fully supplied by defendant's sixth and eighth instructions given, which would have cured all errors had there been any. *Owens v. Railway*, 95 Mo. 169, loc. cit. 481, 8 S. W. 350, 6 Am. St. Rep. 39; *Meadows v. Life Ins. Co.*, 129 Mo. 97, loc. cit., 31 S. W. 578, 50 Am. St. Rep. 427; *Hughes v. Railroad*, 127 Mo. 452, loc. cit., 30 S. W. 127. Nor is there any ground for the contention that respondent was a trespasser while she was standing on the side track. She went to the station to see her teacher depart on the passenger train, which she had a right to do, and, when she retreated back to the side track as a result of the escaping steam, she was doing the very thing which the evidence shows the employees intended she would do, namely, to flee from the steam for their amusement. And, in addition to this, all of the train crew saw and knew she was on the switch track. So it is therefore useless to argue the question as to whether or not she was injured by the wanton and reckless conduct of appellant's agents and servants in running over her. The second objection urged against this instruction is that it did not require the respondent to have been in a place of danger before the brakeman was called upon to use ordinary care after seeing her, or after he could have seen her by the exercise of ordinary care. After a careful reading of the instruction, we are of the opinion that the objection is not well founded. While the instruction does not use the words "In a place of danger," yet it does say that if the brakeman "saw the plaintiff on said track in front of said car in time to have stopped it," etc., which are equivalent to telling the jury that if they believed she was in "a place of danger," etc. We are unable to conceive of a case where a little girl would be in a greater place of danger than standing on a railroad track, oblivious to an

approaching freight car, if not properly controlled, and our only wonder is that she escaped with no greater injury and with her life. The third objection to this instruction is that it ignores the question of contributory negligence. While that is true, yet that question was presented to the jury in instruction No. 3, given for respondent, which properly submitted that issue to the jury. *Schmitz v. St. Louis Ry. Co.*, 119 Mo. 256, loc. cit. 269, 276, 24 S. W. 472, 23 L. R. A. 250 (court in banc); *Baker v. Railway*, 147 Mo., loc. cit. 168, 48 S. W. 838; *Blackwell v. Hill*, 76 Mo. App. 53; *Lange v. Mo. Pac. Ry. Co.* 115 Mo. App. 589, 91 S. W. 969.

4. Appellant also complains of instructions Nos. 3, 4, 5, and 6, given for respondent, as being comments upon the evidence. We are unable to concur in that view of the instructions. They simply tell the jury that, if they find the facts therein stated to be true, then they may take them into consideration in determining whether or not respondent was guilty of contributory negligence. It is not only the law that the facts which constitute contributory negligence should be pleaded, but it is the duty of the court in submitting that question to the jury to require them by the instructions to find whether or not those facts are true or false, just in the same manner as the acts of negligence are submitted to the jury. While it is better practice to submit all such facts in one instruction, yet, in the absence of some special reason pointed out, we can see no valid legal objection to submitting them in different instructions, especially when, as in the case at bar, none of the instructions objected to told the jury that, if they found the facts to be true, then they would find her not guilty of contributory negligence, but, upon the other hand, they told them that they might take them into consideration in passing upon that question. This court has uniformly held that it was proper to tell the jury that in passing upon the negligence of a child it was proper for them to take into consideration its age, intelligence, understanding, experience, and surroundings, etc. While that has generally been done in one instruction, but, as stated before, we see no prejudicial error committed by the court for having submitted those matters in different instructions. We have also held that if one person frightens another by his negligence, and that while she is in that condition she is injured, the jury should consider that fact in passing upon the question of her contributory negligence. *Selgrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 424.

5. The final ground assigned by appellant why the judgment should be reversed is the action of the court in giving instruction No. 10 on behalf of respondent. It is contended that this instruction leaves it to the jury to fix the amount of the damages as they may deem just and proper. This objection is not well founded. The instruction tells the jury that, if they find for the plaintiff, then they may take into consideration her physical pain

and mental anguish suffered, and such as she may suffer, as shown by the evidence; and, in addition, it told the jury that they might consider to what extent, if any, plaintiff's capacity for earning a livelihood, after her majority, will be impaired by said injury, and for them to return a verdict for her for such sum as they believed to be just and reasonable, not to exceed the sum of \$20,000. This instruction properly pointed out her injuries, which went to make up the elements of her damages, and told the jury that they should allow her such sum therefor as they thought was just and reasonable. This was equivalent to telling the jury to assess her damages at such sum as they found from the evidence would compensate her for her injuries. This instruction is a verbatim copy of one given and approved by this court in the cases of *Schmitz v. Railroad*, 119 Mo., loc. cit. 269, 279, 24 S. W. 472, 23 L. R. A. 250, and *Haniford v. Kansas City*, 103 Mo. 172, 15 S. W. 753. These cases properly draw the distinction between the instruction given in the case at bar and the one discussed in *Hawes v. Railway*, 103 Mo. 60, 15 S. W. 751, relied upon by appellant.

Clearly the judgment is for the right party, and it should be affirmed, and it is so ordered. All concur.

### LUCAS v. FUTRALL.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. OFFICERS—POSSESSION OF OFFICE—INJUNCTION.

Where a complaint to restrain defendant from interfering with plaintiff, as superintendent of the Arkansas School for the Blind, alleged that complainant was in possession and exercising the duties of such office, and defendant filed a cross-complaint denying complainant's possession, and pleading that defendant was in possession and exercising the duties of the office, and praying that plaintiff be restrained from interfering with defendant's possession, both complaint and cross-complaint stated a cause of action for equitable relief under the rule that, while equity will not determine disputed questions of title to a public office, it will protect the possession of an officer de facto or de jure against an adverse claimant, disturbing the discharge of his duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 114.]

#### 2. SAME—EVIDENCE.

In a suit to restrain defendant from interfering with complainant's alleged possession of the office of superintendent of the Arkansas School for the Blind, evidence held insufficient to show that complainant was in possession at the commencement of the action, and therefore entitled to recover.

#### 3. STATES—STATE OFFICERS—CONSTITUTIONAL PROVISIONS—POWER OF LEGISLATURE.

Under Const. 1874, art. 19, § 19, making it the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf, dumb, and blind, and for the treatment of the insane, the Legislature had power to make the superintendent of the Arkansas School for the Blind a public officer, notwithstanding section 9, forbidding the General

Assembly to create any permanent state offices not provided for in the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, §§ 49, 50.]

#### 4. ASYLUMS—SCHOOL FOR BLIND—STATUTES—REPEAL.

Acts 1868, p. 154 (Kirby's Dig. § 4227), providing that the board of trustees of the state charitable institutions shall elect a superintendent of the State School for the Blind, who shall hold his office during the pleasure of the trustees, etc., was repealed by Act 1907, appropriating money to pay the salary of the superintendent required thereby to be elected for a term of two years, and declaring that the board shall have power to discharge any officer or employé of the institution guilty of insubordination, drunkenness, or immoral conduct.

#### 5. OFFICERS—REMOVAL—CAUSE.

Under Act 1907, providing for the election of the superintendent of the State School for the Blind for a term of two years, and authorizing the board of control to discharge any officer for insubordination, drunkenness, or immoral conduct, the board had no power to discharge a superintendent duly elected, except on the grounds specified, and after notice and hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 96.]

#### 6. SAME—PUBLIC OFFICE.

The board of trustees of the state charitable institutions being authorized by Act 1907 to elect a superintendent for the State School for the Blind, whose compensation is fixed by the act, and whose duties of a public nature are prescribed by law, are continuous, and not affected by change in the personnel of the incumbent, who is required to give bond for the faithful performance of his duties connected with an institution established under Const. 1874, art. 19, § 19, the superintendent is a public officer, and not an employé, under the rule that if a person appointed by the government and not by contract performs a continuing duty, defined by the governmental rules, he is a public officer.

#### 7. ASYLUMS—BOARD OF CONTROL—INDIVIDUAL MEMBERS—ACTS.

Where, after plaintiff had been legally elected superintendent of the State School for the Blind by the board of trustees of the state charitable institutions, defendant, the incumbent, was directed by several individual members of the board to continue to hold the office until the succeeding meeting of the board, when defendant would be elected superintendent, such directions did not constitute action of the board, and were ineffective to entitle defendant to hold the office.

#### 8. SAME—REVOCATION OF ELECTION.

Where complainant was elected superintendent of the State School for the Blind by the board of trustees of the state charitable institutions, and was thereupon entitled to hold his office for two years, unless removed for cause, as provided by Act 1907, the board had no power at its next meeting to revoke complainant's election and re-elect another in his stead.

#### 9. OFFICERS—TITLE TO OFFICE—REMEDY.

Where complainant was not in possession of an office, and his title thereto was contested by defendant, who was in possession, complainant's remedy was an action at law to recover the office, authorized by Kirby's Dig. §§ 7981, 7983, 7987, 7988, and not a suit to restrain defendant from interfering with plaintiff's possession or management of the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 114.]

#### 10. ACTION—TRANSFER OF CAUSE.

Where complainant erroneously sued to enjoin defendant from interfering with complain-

ant's possession and management of an office, of which complainant was not possessed, complainant, when the evidence failed to establish a cause of action for equitable relief, could have had the pleadings recast, and the case transferred to the law court and prosecuted as a suit for the recovery of his office.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Suit by S. D. Lucas against T. A. Futrall. From a decree for defendant, plaintiff appeals. Affirmed.

Plaintiff filed a complaint alleging that on June 5, 1907, at a regular meeting of the board of trustees of the state charitable institutions of the state he was elected superintendent of the Arkansas School for the Blind, for a term of two years, commencing on October 1, 1907; that he gave the bond required by law, and on October 1, 1907, the president of the board of trustees placed plaintiff in charge of the institution as superintendent, and he assumed performance of his duties and continued to perform them; that the business and affairs of the institution were carried on largely by correspondence, of which plaintiff was entitled to the exclusive custody and control, but that defendant, "staying at the blind school, and holding himself out as superintendent," was exercising the functions of superintendent, and has been wrongfully receiving, accepting, handling, and opening the mails of the institution; that such illegal and wrongful acts of the defendant, in attempting to exercise the functions of an office to which plaintiff was elected, and to which he was installed, was leading to a confusion, and was a great and irreparable injury to plaintiff and the public; that plaintiff had no adequate remedy at law, and therefore prayed that defendant be enjoined from remaining on the grounds of the school, and from attempting to exercise any of the functions of superintendent, and from interfering with plaintiff in the exercise of his duties as such. Defendant answered, and filed a cross-complaint, alleging that on April 4, 1906, the board of trustees elected him superintendent, and on the 5th of June, 1906, installed him into office, the duties of which he had continuously performed, and was still performing. He denied that plaintiff was ever lawfully elected to the office, or that he had at any time been placed in charge thereof, or that he ever assumed performance of the duties or continued to perform the duties of the office. The cross-complaint alleged that on September 30, 1907, defendant received a written direction from the majority of the board of trustees to retain control of the institution until the further action of the board, and that on October 8, 1907, when the board was in regular session, he was elected superintendent for two years, or during the pleasure of the board; that he was in full possession and control of the institution as superintendent; and prayed that plaintiff be

enjoined from interfering with such control. Plaintiff introduced testimony showing his election by the board of trustees as superintendent, on June 5, 1907, and testified that he had been placed in charge of the institution by the president of the board; that he had been on the grounds a number of times, and had done all he could to take possession of the institution and exercise management of it, short of physical force and violence; that on October 1, 1907, when he interviewed defendant, the latter did not claim to be superintendent, but stated that he had been interviewed by a number of the members of the board, who had asked him to continue in charge until the next meeting of the board, when they assured him of his re-election. He also testified that defendant refused to turn over the books and papers to him; that plaintiff had issued orders to heads of the departments of the school pertaining to their duties, and received and answered letters relative to the superintendency of the institution, and to the best of his ability was discharging the duties of his office. The president of the board testified that he demanded that defendant turn over the books and papers to plaintiff, and told plaintiff to take charge of the institution, but that defendant declined to comply. Defendant's evidence tended to prove that, after plaintiff's alleged election, defendant continued to act as superintendent at the request of certain members of the board, and refused to turn over the office to plaintiff on demand, but continued in charge until the subsequent meeting of the board, when he (defendant) was re-elected superintendent.

J. H. Harrod, for appellant. M. P. Hudleston and Jones & Hamiter, for appellee.

HILL, C. J. The reporter will state the substance of the pleadings and evidence, and it will be seen therefrom that this is virtually a contest for the superintendency of the Arkansas School for the Blind, under guise of a chancery proceeding brought by Lucas to enjoin Futrall from interfering with his possession of the position, and a cross-complaint by Futrall asking an injunction against Lucas, restraining him from interfering with his possession of the superintendency. Each contestant alleges that he is in possession, and seeks to bring his case within the principle announced in *Rhodes v. Driver*, 69 Ark. 606, 65 S. W. 106, 86 Am. St. Rep. 21, which is to the effect that a court of equity will not permit itself to be made a forum for the determination of disputed questions of title to public office, but will, when necessary, protect possession of an officer, whether de facto or de jure, against an adverse claimant disturbing his discharge of duties. The complaint and cross-complaint each stated an equitable cause of action. The chancellor dismissed the suit for want of jurisdiction. Futrall has

not appealed, and the only question presented is upon Lucas' appeal.

The chancery court had jurisdiction; for, as stated, the allegations of either complaint or cross-complaint gave jurisdiction. But if this position is a public office, then the case should have been dismissed for failure to establish ground for equitable relief, as the evidence failed to sustain the allegation that Lucas was in possession, unless he is shown to be entitled to other relief which will be discussed later. Not being in possession, he was not entitled to an injunction to protect his possession, and that is the only ground for injunction in such cases.

The evidence showed that Futrall was in possession of the blind school as superintendent; that, when Lucas' term as superintendent began, he and the president of the board of trustees made apt demand upon Futrall to deliver possession to him, but that Futrall refused to surrender it. Lucas spent some time in the building, some time on the grounds, a short time in the superintendent's office, and made efforts to act as superintendent; but the evidence indubitably establishes the fact that he did not succeed in ousting Futrall, and that Futrall continued to act as superintendent of the institution, notwithstanding Lucas' efforts to obtain actual possession of the place and its functions. The failure of the evidence to establish the alleged possession of Lucas ends his right to an injunction, if this position be a public office. If it is not a public office, but is an employment for public service resting in contract, and there is no adequate remedy at law for relief, then it may be that equity could grant the relief prayed where the right was clear, and the wrong apparent and otherwise remediless. 4 Pomeroy on Equity Jurisprudence (3d Ed.) §§ 1338, 1341, 1344, 1345. Therefore it is necessary, in order to determine the case, to decide the exact nature of this position. The act of July 22, 1868 (Laws 1868, p. 154), created the Arkansas Institute for the Education of the Blind, and directed that it should be located in the city of Little Rock or its vicinity, and vested the government of it in a board of three trustees, to be appointed by the Governor, who should reside in the city of Little Rock or its vicinity. Many of the provisions hereinafter mentioned have been carried forward in the Digest as applicable to the present institution. The act of March 15, 1879 (Laws 1879, p. 83), changed the name of the Arkansas Institute for the Education of the Blind to the Arkansas School for the Blind, and provided that all laws and parts of laws then in force for the former institution should apply to the latter. Const. 1874, art. 19, § 19, makes it the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and for the blind and for the treatment of the insane. As the Constitution left it to the discretion

of the General Assembly to provide by law for these purposes, any act which in the judgment of the Legislature was necessary to effectuate these purposes would have constitutional sanction. Therefore, if the Legislature saw fit to create a public office under this authority, it would not be violating section 9 of article 19 of the Constitution, which forbids the General Assembly to create any permanent state offices not provided for in the Constitution, as the mandate to provide for the education of the blind necessarily carried with it the power to create what offices the Legislature might deem necessary to carry out the power conferred. Hence, there can be no constitutional objection to this being a state or public office, and the question recurs whether from its very nature it is an office or an employment.

It is difficult to draw a precise line between a public employment and a public office. It may be best not to attempt any hard and fast rule upon the subject, but rather to keep in mind the controlling principles, and apply them to the individual cases as they arise. The most frequently quoted statement of the principle is from U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747, wherein Chief Justice Marshall said: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. \* \* \* Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." This was quoted with approval and applied in Vincheller v. Reagan, 69 Ark. 460, 64 S. W. 278. In U. S. v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830, it was said: "An office is a public station or employment conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties." In Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302, it was said: "Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required." Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169, contains the following: "And we apprehend that it may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a



charge or employment is an office, and the person who performs it is an officer." The following authorities may be consulted with profit on this subject: *Mechem on Public Officers*, c. 2; *Throop on Public Officers*, c. 1; 21 Am. & Eng. Enc. 322-324; U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; U. S. v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *Shelby v. Alcorn*, 36 Miss. 273, same case in 72 Am. Dec., where there is an extensive note reviewing the authorities, pp. 179-189; U. S. v. Schillerholz (D. C.) 137 Fed. 616; *State ex rel. v. Brennan*, 49 Ohio St. 33, 29 N. E. 593; *State ex rel. v. Wilson*, 29 Ohio St. 347.

Turning to the case at hand: The various duties of the superintendent are prescribed by statute. Sections 4231-4233, 4237, 4238, 4240, 4241, Kirby's Dig. The act of 1907, providing for the support of the blind school, also lays duties upon the superintendent. Section 3 provides that all the teachers, officers, and employes shall perform such other duties as the superintendent may direct. Section 4 provides that the superintendent is empowered, upon approval of the president of the board, to purchase all supplies of an emergency nature. The superintendent is required to give bond to the state, with surety to be approved by the trustees, for the faithful performance of his duties, which bond shall be filed with the Auditor of State. Section 4238, Kirby's Dig. The act of 1907 appropriates in the first section certain sums of money for the support and maintenance of the school for two years, and divides the appropriations into 67 different items, the first of which is as follows: "To pay the salary of the superintendent, who shall be elected for a term of two years, \$1,500 per annum, three thousand dollars." In the third section it is provided: "The board of control shall have power, and is hereby directed, to discharge an officer or employe of this institution who may be guilty of insubordination, drunkenness, or immoral conduct." Section 6 of said act reads as follows: "The board of trustees of the state charitable institutions shall elect all teachers, officers, and employes provided for in section 1 of this act, and they shall discharge the same for failing to faithfully perform their duties, and for any conduct unbecoming one holding their positions." In the tenth section it is provided that "the salary of no person connected with the institution shall be increased during the period for which they have been elected or employed." Section 11 contains the usual repealing clause of all inconsistent acts. In the act of 1868 was this provision relating to the powers of the trustees: "They shall have power to elect a superintendent, physician, matron, teachers and steward, who shall hold their offices during the pleasure of the trustees, and receive an annual compensation to be fixed by such trustees, the amount thereof to be reported to the general assembly." This is

found in section 4227 of Kirby's Digest. This part of the act of 1868 is unquestionably repealed by the aforesaid provisions in the act of 1907.

It is said that these acts can stand together, and it is the duty of the trustees to remove for the causes mentioned, and yet that the superintendent holds at their pleasure. But that is not the rule. Mr. Mechem says: "So it is frequently provided that the executive shall remove only for a specified cause or for cause generally. Where the cause is thus specified, it amounts to a prohibition to a removal for a different cause." Mechem's Public Officers, § 450. But aside from this reason, the later statute covers the ground of the former one, wherein it fixes the tenure, ground of removal, and compensation different from what they were in the former act; and, under the long settled rule of statutory construction, this necessarily repeals the older act to that extent. Therefore, it is seen that this position is one where the tenure is fixed by law, and removal only for causes mentioned in the statute; where the compensation is fixed by law; where the duties are prescribed by law, although there may be additional ones prescribed by the board. The duties are continuing, and not affected by a change in the personnel of the incumbent. An official bond is required, and the position is filled by election and not by contract. The duties to be performed are of a public nature, being the control of one of the eleemosynary institutions of the state, which was established and is maintained in obedience to constitutional mandate. It is thus seen that every criteria of a public office adheres to this position, and it must be held that the superintendency of the school for the blind is a public office.

This leads to the remaining question, whether Lucas is entitled to the office, and, if so, can he have a remedy in this action under the prayer for general relief? The evidence shows that certain persons, purporting to be a majority of the board of trustees, directed Futrall to continue to act as superintendent, and that his possession was under that authority at the time that Lucas made demand for the possession of the office. It is well settled that individual members of a public body possessing deliberative functions have no authority to bind the body by individual action. The public "have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters intrusted to them in the session provided for by the statute." 1 Beach on Public Corporations, 275; *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758; *Texarkana v. Friedell*, 82 Ark. 531, 102 S. W. 374; *School District v. Bennett*, 52 Ark. 511, 13 S. W. 132; *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499. Therefore, the action of the individual members, even if they be a majority of the board, amounts to naught.

It is said that the board on the 8th of October, two days prior to the institution of this suit, by resolution revoked the appointment of Lucas and re-elected Futrall. The determination of this question involves two propositions: First, whether Lucas' tenure could be thus terminated; and, second, whether it was thus terminated. The second proposition involves the determination of the membership of the board, as the proceedings of the board show that the membership from one district was claimed by two gentlemen; and the attempted re-election of Futrall is dependent upon the vote of one of these contestants. But it is unnecessary for the court to go into this matter, even if it be open to question, in this collateral issue, the rights of contesting members of the board; for, as already shown, the superintendent does not hold subject to the pleasure of the board, but can only be removed subject to the causes mentioned in the statute. It is thoroughly settled that where an officer does not hold at pleasure, but holds during good behavior or subject to removal for specified causes, then, before he can be removed, there must be notice and a hearing given to him. *Mechem's Public Officers*, § 454; 23 *Amer. & Eng. Enc.* 437, 438; *State v. Hixon*, 27 Ark. 398; *Lee v. Huff*, 61 Ark. 494, 33 S. W. 846.

There has been no notice to Lucas of any charges preferred against him, and no citation to appear before the board to answer them. The case then stands in this way: Lucas has been elected to public office for a term of two years, with certain duties prescribed by statute and at a fixed compensation. He can only be removed from that office for the causes specified in the statute authorizing the board to remove him, and then only after notice and a hearing. He is not in possession of his office, and asks relief of the chancery court; but it is elemental that a chancery court cannot proceed to give relief where there is a plain, complete, and adequate remedy at law. Under sections 7981, 7983, 7988, 7987, *Kirby's Dig.*, as construed in *Payne v. Rittman*, 66 Ark. 201, 49 S. W. 814, and *Whittaker v. Watson*, 68 Ark. 555, 60 S. W. 652, Lucas' remedy is an action at law in the circuit court for the recovery of his office. That being true, the suit in equity fails. Had Lucas in this action, when his evidence failed to establish an equitable ground of interference, asked to have his pleadings recast and have the cause transferred to the law court, he would have been entitled to it. But it has not been asked; and, as the chancellor was right in refusing equitable relief, his decree is affirmed without prejudice to a suit at law.

**Affirmed.**

HART, J., presided in chancery court, and did not participate herein.

## CROFTON v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

### 1. CRIMINAL LAW — APPEAL — REMARKS OF PROSECUTING ATTORNEY—EVIDENCE—HARMLESS ERROR.

Where, in a prosecution for homicide, the jury by finding defendant guilty of manslaughter found that he did not act in self-defense, and the punishment was moderate, remarks of the prosecuting attorney that, if defendant put in issue his good character, he, the prosecuting attorney, would show that a short time before the killing defendant beat his wife unmercifully, together with testimony, over objection, that he had stated that he whipped his wife, did not prejudice defendant; he having testified without objection that he whipped his wife and was arrested for so doing.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Criminal Law, § 8127.]

### 2. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

In a trial for homicide, the court instructed, in substance, that, if deceased made a demonstration as if to draw a gun for the purpose of doing defendant some violent injury, it was defendant's duty to do whatever he could consistent with his safety to avoid the necessity of the killing; but, if deceased first assaulted defendant with a murderous intent, he was not bound to retreat, but might slay his assailant; or, if the assault was under such circumstances as made it reasonable for defendant to believe that he was in immediate danger of losing his life or of receiving great bodily injury, and he so believed, and fired the fatal shot, he would be excused. *Held*, that the court evidently did not mean to include under "a demonstration as if to draw a gun" a first assault with a murderous intent, and that defendant could not complain of the instructions as thus construed.

### 3. SAME—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* sufficient to sustain a conviction for manslaughter.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 26, Homicide, §§ 539-541.]

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Hence Crofton was convicted of manslaughter, and appeals. **Affirmed.**

W. P. Feazel, for appellant. William F. Kirby, Atty. Gen., and Danl. Taylor, Asst. Atty. Gen., for the State.

BATTLE, J. Hence Crofton was indicted for murder in the second degree, committed in Howard county, in this state, on the 26th day of August, 1907, by killing Warren McGee, shooting him with a pistol. He pleaded not guilty, was tried, and convicted of manslaughter. His punishment was assessed at three years' imprisonment in the penitentiary, and he appealed.

The prosecuting attorney, in stating his case to the jury, said: "I presume the defendant is going to put in issue his good character. If he does, I am going to show you that a short time before the killing he stripped his wife and beat her unmercifully." The defendant objected to the remarks, which objection the court sustained, remarking to the prosecuting attorney, in the presence of the jury, that "he could not establish one crime by the proof of the commission of an-

other," to which remark the defendant also objected.

Susanna Nelson, a witness in behalf of the state, testified substantially as follows: Knew the defendant and the deceased, Warren McGee. On the 26th day of August, 1907, the deceased and witness were sitting on the gallery of her house. While there the defendant passed three times. The first time he passed he spoke to McGee. After he passed the last time, he came back in about half an hour. Witness and McGee were then eating dinner. He came in, and witness asked him "If he would have some dinner," and he said, "Yes." Heard no words spoken by any one after that. "Got up to fix a plate." Turned her back on them. Reached over under the kitchen shelf to wash the plate, and as she did so the shooting took place. Was shocked. Did not see the defendant after the shooting, but heard him running out of the house. After recovering from the shock she looked at McGee. He was sitting in a chair, dying.

The defendant testified: He knew the deceased, Warren McGee. He (McGee) lived or was staying in Texas in November and December, 1906. Saw two letters from him to his wife, written while he was in Texas, in 1906. He offered to read the letters to the jury, to show improper relations between McGee and his wife, and, the state objecting, the court refused to allow him to do so. McGee returned to Howard county, in March or April, 1907, when defendant saw him about the letters, and he (McGee) promised to "have nothing more to do with his (defendant's) wife." He still visited her, and defendant's wife finally left him. On the day of the shooting, when on his way to visit his wife at the residence of Ike Garland, where she was making her home, he saw McGee go into the house where his wife was. He (defendant) did not go into the house, but went to his brother's, and, not finding him at home, "went past Susanna Nelson's" to the Porter Place for his brother, and as he (brother) was not there he returned to his brother's house, and still his brother was not at home. He then went to a store, and went down by Susanna Nelson's. He saw McGee leave Ike Garland's house and go to Nelson's, and he (defendant) went home, got his gun, and came back to where McGee was. He went there to talk to McGee about his relations to his wife, and carried his gun with him to protect himself against any attack that might have been made upon him. When he walked into Mrs. Nelson's house, McGee was sitting at the table eating. She asked him if he would have some dinner, and he said, "Yes," and she arose to fix a plate, and he spoke in a friendly manner to McGee, and he (McGee) in an instant threw his hand to his hip pocket like he was going to draw his pistol, and defendant shot him, and ran, thinking McGee might shoot

him. As he ran he threw his pistol into Mine creek.

The prosecuting attorney asked the defendant while testifying as follows: "I will ask you if it is not a fact that, three or four weeks before you killed Warren, if you did not take your wife into the room and strip her naked, and literally wear her out about one Joe Thomas?" He answered: "No." The defendant objected to this testimony, and the court overruled the objection. Without objection he testified that he whipped his wife about Warren McGee; that he was arrested for whipping her.

Other witnesses testified about improper relations existing between McGee and defendant's wife, and that defendant was a peaceable and law-abiding man, and that McGee was dangerous.

No pistol was found upon the person of McGee when he was killed.

W. S. Scherley and W. C. Stone testified that the defendant admitted to them that he had whipped his wife. To the admission of this testimony the defendant objected, and the court overruled his objection.

The court, over the objection of the defendant, instructed the jury, in part, as follows: "The jury are told that the law has such a regard for sanctity of human life that no one may kill another in self-defense except as a last resort, and when all other means have failed. So in this case, although you may believe from the evidence that the deceased made a demonstration as if to draw a gun for the purpose of doing the defendant some violent injury, still it was the duty of the defendant to have done all that was reasonable in his power and consistent with his safety to prevent the deceased from shooting him, and if you find that he could by leaving the house, by closing the door, or in any other way, have averted the necessity for the killing consistent with his safety, it was his duty to have done so, and if he failed to do this he would be guilty of murder in the second degree; if he acted with malice in firing the shot he would be guilty of murder in the second degree; or of voluntary manslaughter if he acted without malice as defined in these instructions."

And, at the request of the defendant, instructed the jury, in part, as follows:

"(2) You are instructed that if you believe from the evidence that the defendant went to the house of Susanna Nelson, where he thought the deceased was, for the purpose of only remonstrating with him, and persuading him to cease his attentions to and his relations with the defendant's wife, and that deceased first assaulted the defendant with a murderous intent, then the defendant was not bound to retreat, but might stand his ground, and if need be kill assailant, and if you believe the defendant fired the fatal shot believing at the time that it was the intention of the assailant to kill him, or to do him some great bodily harm, without fault or

carelessness on his part, then he would be justifiable and should be acquitted."

"(4) If the jury believe from the evidence that at the time of the shooting the deceased was making, or attempting to make, an assault upon the defendant under such circumstances as made it reasonable for defendant to believe that he was in immediate danger of losing his life, or of receiving great bodily injury at the hand of the deceased, and if the defendant did so honestly believe and fire the fatal shot while acting in good faith, under such belief, in order to protect himself, then under the law he is excused."

The jury in finding the defendant guilty of manslaughter necessarily found that he did not act in self-defense when he killed McGee. Under the evidence the assessment of the punishment at three years' imprisonment in the penitentiary was moderate, below what it could have been reasonably fixed, and shows the absence of prejudice. In this view of the facts the remarks of the prosecuting attorney as to the whipping of defendant's wife and the evidence upon the same subject could not have been prejudicial, and was not prejudicial for the further reason the defendant voluntarily, and without objection, testified that he had whipped his wife because of her illicit relations to McGee, and had been arrested for so doing.

The instruction objected to and those given at the request of the defendant must be construed together. Construed in this manner, the jury were told that, if the deceased made a demonstration as if to draw a gun for the purpose of doing the defendant some violent injury, it was his duty to do whatever he could consistent with his safety to avoid the necessity of the killing; but, if the deceased first assaulted the defendant with a murderous intent, he was not bound to retreat, but might stand his ground, and if need be slay the assailant, or if the assault was under such circumstances as made it reasonable for the defendant to believe that he was in immediate danger of losing his life or of receiving a great bodily injury at the hands of deceased, and he so believed, and fired the fatal shot, he would be excused. While, under the instructions given at the instance of the defendant, he was not bound to retreat if the deceased first assaulted him with a murderous intent, he was, nevertheless, under the instruction objected to, bound to do what he could consistent with his safety to avoid the killing, and at the same time hold his ground. The court evidently did not mean to include under "a demonstration as if to draw a gun" a first assault with a murderous intent. Construed in this manner, the appellant has no right to complain of the instructions.

The evidence was amply sufficient to sustain the verdict of the jury, and shows that they were free from malice against the appellant.

Judgment affirmed.

106 S.W.—43

## COLE v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

### 1. PARDONS — CONSTITUTIONAL PROVISIONS — AUTHORITY TO PARDON.

Under Const. art. 6, § 18, giving the Governor power to grant reprieves, commutations of sentences, and pardons after conviction, etc., the Governor has power to pardon a criminal while the latter's case is pending a final determination in the Supreme Court, since an appeal only suspends the conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Pardon, § 12.]

### 2. SAME—EFFECT OF PARDON—COSTS.

A pardon pending appeal from a conviction wherein a fine was imposed, absolves defendant from the payment of the fine to the state, and takes away the criminal character of the judgment for costs, preventing their collection through imprisonment, but leaves in force the judgment of costs to be collected as a civil debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Pardon, §§ 18, 19.]

Appeal from Circuit Court, Sebastian County.

W. H. Cole appeals from a conviction of Sabbath breaking, and moves to dismiss his appeal. Appeal dismissed.

Sam Edmondson and Rowe & Rowe, for appellant. William F. Kirby, Atty. Gen., and A. A. McDonald, Pros. Atty., for the State.

**PER CURIAM.** Cole was convicted in the Ft. Smith district of Sebastian county for the crime of Sabbath breaking, and fined \$50, and has appealed. While his appeal was pending in this court, the acting Governor issued him a pardon, which appears to be in the usual form, pardoning and absolving him from the said judgment and of the effects and consequences thereof. Appellant thereafter filed a motion, exhibiting said pardon in court, praying that his appeal be dismissed and that judgment be rendered against the state for the cost of the briefs.

The Constitution gives the Governor the power "to grant reprieves, commutations of sentence and pardons after conviction; and to remit fines and forfeitures under such rules and regulations as shall be prescribed by law." Section 18, art. 6, Const. Ark. It has been questioned whether, when a case is pending in an appellate court on appeal, the Governor has a right, in advance of the final decision, to issue a pardon. An appeal to this court only suspends, and does not vacate, a judgment of conviction, and it cannot be said that the Governor has not the power, if he sees fit to exercise it, to pardon a criminal while the case is pending a final determination in the Supreme Court. Authority for it may be found in *State v. Alexander*, 78 N. C. 231, 22 Am. Rep. 675; *State v. Carson*, 27 Ark. 469.

The only other matter in the case is the effect of the pardon, and this was settled by the decision of this court in *Ex parte Purcell*, 61 Ark. 17, 31 S. W. 738. Briefly stated, this pardon absolves Cole from the payment of

the fine to the state, and takes away the criminal character of the judgment for costs, preventing its collection through imprisonment, but leaves in force the judgment of costs to be collected as a civil debt, and not subject to be enforced by imprisonment on default of payment.

The order of the court is that the appeal be dismissed, at the cost of the appellant, and that the judgment of the lower court, in so far as the costs are concerned, remain in force as a debt. Its character as a criminal judgment has been taken away by the pardon.

Dismissed, at the cost of the appellant.

#### McNEELY et al. v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

LEWDNESS — ELEMENTS OF OFFENSE — STATUTES.

Under Kirby's Dig. § 1810, providing that, if any man or woman cohabit together as husband and wife without being married, each of them shall be guilty of a misdemeanor, proof of sexual intercourse between persons not married, though living in the same house, is insufficient to constitute the offense defined, without evidence that they cohabited and dwelled together and deported themselves toward each other as husband and wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Lewdness, §§ 1-4.]

Appeal from Circuit Court, Little River County; James S. Steel, Judge.

S. W. McNeely and Ella Paxton were convicted of illegal cohabitation, and they appeal. Reversed and remanded.

Scott & Head, for appellants. William F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State.

BATTLE, J. S. W. McNeely and Ella Paxton were indicted for and convicted of illegal cohabitation. The Attorney General confesses error because the verdict is not sustained by evidence.

The statute provides that "if any man and woman cohabit together as husband and wife without being married each of them shall be deemed guilty of a misdemeanor," etc. Kirby's Dig. § 1810. Sexual intercourse between persons not married, though living in the same house, is not sufficient to constitute the offense of "cohabiting together as husband and wife, without being married." Taylor v. State, 36 Ark. 84. "If they live together in the same house, in like manner as respects bed and board as marks the intercourse between husband and wife, they, in sense and meaning of the statute, cohabit as husband and wife." Sullivan v. State, 32 Ark. 191. They must "cohabit together as husband and wife"; must dwell together as if conjugal relations existed between them; must deport themselves toward each other as husband and wife.

In this case there is no evidence that the defendants ate at the same table or slept in

the same room, or cohabited together as husband and wife.

The confession of error is sustained.

Reverse and remand for a new trial.

#### COOKSEY v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

OBSTRUCTING JUSTICE—RESISTING ARREST—OBSTRUCTING SERVICE OF WARRANT—SUFFICIENCY OF EVIDENCE.

In a prosecution of defendant for resisting arrest by refusing and obstructing the service of a warrant on him, evidence that defendant at first refused to accede to the officer's request to go to court, but finally agreed to and did go, was insufficient to authorize a conviction, in the absence of evidence of an attempt to arrest defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Obstructing Justice, §§ 1, 32.]

Appeal from Circuit Court, Sevier County; James S. Steel, Judge.

Frank Cooksey was convicted of resisting arrest, and appeals. Reversed.

Otis T. Willgo, for appellant. William F. Kirby, Atty. Gen., and Dan'l Taylor, Asst. Atty. Gen., for the State.

BATTLE, J. This prosecution was commenced before a justice of the peace by filing the following affidavit:

"State of Arkansas, County of Sevier.

"Comes J. J. Jackson and states that on the 14th day of June, 1905, Frank Cooksey did then and there resist arrest by refusing and obstructing the service of a warrant upon him, the said J. J. Jackson then and there being duly sworn and acting marshal of the town of Horatio. J. J. Jackson.

"Subscribed and sworn to before me this 14th day of June, 1905.

"[Signed] T. S. Tribble, J. P."

—and was taken to the circuit court of Sevier county by appeal. He was convicted in that court, and appealed.

The evidence against him was embraced in the testimony of the prosecuting witness, J. J. Jackson. He testified "that about June, 1905, he was marshal of Horatio, and called on the appellant and demanded 50 cents scavenger fees, which he refused to pay. I reported his refusal to the mayor. The first time I went to Mr. Cooksey he was running a drug store, and he wouldn't pay any attention to me, but said he went to a higher court. He walked in behind the counter and pulled out a drawer, and I told him 'twas no use to get contrary, to just go down there (to the mayor's court). He wouldn't go, and I called in a couple of men, and then I had an understanding with him that he would come down there. He went on, but didn't come to court, and the next time I saw him he was in the butcher shop, and I went in there and told him he hadn't gone, and that he must go, and he said I couldn't carry him, and I told him he was too large for me to

'tote.' He and his brother walked off. Later in the evening he came and set down by the blacksmith shop, and I walked up and said to him, 'Mr. Cooksey, you must go down to the court with me,' and he said, 'All right, I will go up and appear, but I don't want you to go with me,' and I said, 'All right.' He then got up and went to court."

There was no evidence of an attempt to arrest appellant, and consequently there was no resistance or an obstruction to an arrest. The officer's effort seems to have been to persuade him to go of his own volition to court, and he finally agreed and did go.

There was no evidence to sustain the verdict of the jury.

Reverse and remand for a new trial.

### EARL v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. RAILROADS—INJURY TO ANIMALS—STATUTORY LAW.

Kirby's Dig. § 6776, provides that the owner of stock killed or wounded by any railroad train may recover the damages sustained in any court having jurisdiction in the county where the killing or wounding occurred. *Held*, such section only included the killing or wounding of animals by an actual contact or collision with railroad trains within the state, and did not cover injuries to animals sustained by their mere fright, caused by the operation of the trains.

#### 2. SAME—COMMON-LAW LIABILITY.

A railroad company is under a common-law liability for injuries to animals caused by fright due to the negligent operation of trains.

Appeal from Circuit Court, Conway County; J. H. Basham, Judge.

Action by R. D. Earl against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. P. Strait, for appellant.

**BATTLE, J.** This action was commenced on the 18th day of September, 1906. Plaintiff in his complaint alleged as follows: "That on or about the 15th day of April, 1906, the exact date and hour of the day being to this plaintiff unknown, and therefore cannot be alleged, and at a point about two miles east of Morrilton, on the Plummerville and Morrilton road, where the same approaches near and in close proximity and parallel to the said defendant's railroad track and right of way, and at a point upon said wagon road where the plaintiff had a right to be and to have his team, and while he was driving along said road, at said point, in pursuance to this right, the said defendant company, by its agents and employes, on a west-bound train, the exact number and character of which is unknown to plaintiff, except that same was a 'pay train,' and at a time when they knew, or were in possession of such facts as would inform a reasonable person of, the danger occasioned thereby and of the probable injury to said team, did negligently and willfully, and as this plaintiff

believes, and therefore alleges, for the purpose of frightening and scaring said team and causing it to do injury to itself, deliberately and purposely commenced to permit steam to escape from its engine and sound its whistle, by which negligent permitting of said steam to escape and sounding of whistle, the said team of horses, the property of plaintiff, became frightened and scared; and that, after said defendant company saw, or could have seen, this condition, and at a time when they were not required by law to make any alarm and were not approaching any crossing, continued to purposely and negligently sound said whistle and permit said steam to escape long after they had passed said plaintiff's team, by reason of which the said horses were so frightened as to cause them to rear, plunge, and attempt to run away, by reason of which they were entangled in their harness, one of which was thrown to the ground and received, by reason of said fright, plunging, and falling, serious wounds and injuries, all of which was the proximate and direct effect of the negligent and willful sounding of said whistle and escaping of said steam, to the plaintiff's injury and damage in the sum of \$175."

The defendant, St. Louis, Iron Mountain & Southern Railway Company, in part, answered as follows: "(2) For further answer, the defendant says that if plaintiff's horse was injured at the time and place alleged, it was an injury from the running of trains alleged; and such injury occurred more than 12 months before the filing of the suit or the bringing of the action, and therefore this suit is barred by the statute of limitation, which defendant proves as a defense to plaintiff's alleged cause of action."

To this paragraph of the answer plaintiff demurred, which demurrer the court overruled. To this ruling of the court the plaintiff excepted, and, electing to stand upon his demurrer, judgment was rendered in favor of the defendant, and plaintiff appealed.

The answer was based and sustained upon the following statute:

"Any person who owns stock, as aforesaid, in his own right, or who has a special ownership therein, having any such horses, mules, cattle or other stock killed or wounded by any railroad trains running in this state, may sue the company running such trains for the damages sustained by the killing or wounding, in any court, having jurisdiction of the damages, in the county where the killing or wounding occurred, at any time within twelve months after the killing or wounding occurred, and recover such damages as the court or jury trying the case may assess." Kirby's Dig. § 6776.

A statute of Texas provides: "Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways which may be recovered

by suit before any court having competent jurisdiction of the amount. If the railroad company fence in their road, they shall only then be liable in case of injury resulting from the want of ordinary care." In construing this statute in *Railway Company v. Hughes*, 68 Tex. 290, 4 S. W. 492, Mr. Justice Stayton, in delivering the opinion of the court, said: "This statutory liability is based on an injury caused by locomotives and cars. It certainly was never intended that such a liability should exist even in case of contact between a locomotive or car and an animal, if the contact was by the movements of the animal while the engine or car was stationary, and, to make clear the manner in which the injury must be caused by the locomotive or car, the statute declares that it must be incurred in running over their respective railways. This involves the idea of contact between a running engine or car and the animal, and not an injury resulting in some indirect manner from the operation of a railway."

In construing the Texas statute, he refers to similar statutes of Indiana, Missouri, and Illinois and the construction placed upon them by the courts. The statute of Indiana provides: "That whenever any animal shall be killed or injured by the car or locomotives or other carriages used on any railroad in this state, the owner thereof, may sue the railroad company before a justice of the peace." "Under this statute," he says, "it has been steadily held that a railroad company was not liable for an injury which resulted from an act of the injured animal caused by fright induced by the cars, and not from actual contact between the car, locomotive, or other carriage of the railway, and the animal." *Railroad Company v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Railway Company v. Smith*, 58 Ind. 575.

Missouri has a statute similar to the Texas statute. Under it the courts have held that a "direct or actual collision was contemplated, that when the agents of the road ran the locomotives or cars against any animal, and thereby injured it, or in any other manner it was hurt by actual contact or touch, then the company would be responsible for the penalty, otherwise, not." *Laferty v. Railroad Company*, 44 Mo. 291; *Croy v. Railway Company*, 19 Am. & Eng. Ry. Cas. 608.

A statute of Illinois provides, when the fences it requires to be erected by railroad corporations are not made as therein required, or when such fences are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the "agents, engines or cars" of such corporations, to cattle, horses, or other stock. It has been held the railroad company is liable under the statutes only for injuries done by the agents, engines, or cars of the company, and not merely caused by the act of the animal, induced by fright caused by a train—the injury must be caused by actual collision. *Schertz v. Indianapolis, Bloomington*

*ton & Western Ry. Co.*, 107 Ill. 577; *Id.*, 15 Am. Ency. R. R. Cas. 523.

Construing section 6776 of Kirby's Digest according to the authorities cited, the killing and wounding therein referred to are only such as are caused by an actual contact or collision with railroad trains running in this state, and not by fright caused by a train. This we hold to be the correct construction of the statute. But we do not mean to say that in no case can damages be recovered for injuries to animals caused by trains where there is no collision. Injuries to animals may occur without contact or collision with running trains of which the proximate cause may be the negligence of the railway company or its employes, in which cases there would be a right to recover damages, but not under the statute.

The judgment of the court is reversed, and the cause is remanded, with direction to the court to sustain the demurrer and for further proceedings.

#### UNION SAWMILL CO. et al. v. FELSENTHAL LAND & TOWNSITE CO.

(Supreme Court of Arkansas. Dec. 9, 1907.)

##### 1. APPEAL—SUPERSEDEAS—EFFECT AS STAY—INJUNCTION.

The execution of a supersedeas bond does not stay so much of a decree as grants or dissolves an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2277, 2278.]

##### 2. SUPERSEDEAS—RIGHT TO WRIT—GROUNDS.

Injunctions and writs of supersedeas are issued by the Supreme Court to preserve the status quo, where the justice of the case requires it.

Appeal from Union Chancery Court; E. O. Mahoney, Chancellor.

Action between the Felsenthal Land & Townsite Company and the Union Sawmill Company and others. From the judgment the sawmill company appeals, and the Felsenthal Land & Townsite Company moves to quash or modify the writ of supersedeas issued. Stay of proceedings under the judgment appealed from ordered until hearing on the merits.

Bunn & Patterson, for appellant. Smead & Powell and Campbell & Stevenson, for appellee.

**PER CURIAM.** The material part of the judgment in this case is as follows: "That the Union Sawmill Company is a corporation engaged in the manufacture of lumber, and for more than one year prior to the institution of this suit it has unlawfully and without right operated its log train across the said lands in controversy, the property of the plaintiff, for the purpose of conveying logs to their sawmill; that said trespass has continued for some length of time, and will continue unless prevented by order of this court, and that the Union Sawmill Company should be perpetually restrained from passing over

or interfering with said land in any way; \* \* \* that the defendants, the Union Sawmill Company, its agents, employes, and servants, are perpetually enjoined from further entering upon said land for any purpose whatever, except that within ninety days the said defendants, the Union Sawmill Company, can use said lands for the purpose of taking and removing its steel therefrom." The sawmill company appealed to this court, and filed a supersedeas bond in the statutory form, and the clerk issued a supersedeas in usual form. Appellee now files a motion to quash the supersedeas, in so far as it stays so much of the judgment as enjoins the sawmill company from operating the log road, as above set forth.

It is well settled that the execution of a supersedeas bond does not stay so much of a decree as grants or dissolves an injunction. 2 Cyc. 913, 914, and notes; *Payne v. McCabe*, 37 Ark. 318. From its very nature, an injunction is not such a judgment as can be stayed by a supersedeas bond. It has been the practice of this court to issue injunctions pendente lite or writs of supersedeas pending litigation, where the justice of the case required the status quo to be preserved. The appellee's rights are fully protected by the supersedeas bond which has been filed, and the status quo should be preserved pending the appeal, and the bond cannot do that. It is therefore ordered that the clerk issue a stay of proceedings under the judgment appealed from until the hearing of this case upon the merits, or until the further orders of the court.

#### NASHVILLE LUMBER CO. v. CORBELL et al.

(Supreme Court of Arkansas. Dec. 16, 1907.)

#### APPEAL—SUPERSEDEAS OR STAY OF PROCEEDINGS.

Injunctions and writs of supersedeas are issued by the Supreme Court to preserve the status quo pending an appeal, where the justice of the case requires it, but not for the purpose of creating a temporary right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2215.]

Appeal from Howard Chancery Court; Jas. D. Shaver, Chancellor.

Action between the Nashville Lumber Company and J. M. Corbell and another. From the judgment the lumber company appeals. Motion for an injunction pending appeal denied.

**PER CURIAM.** This is a motion for an injunction pending appeal. The chancery court refused to enjoin Corbell and wife from preventing the lumber company from laying a tramway across their homestead, on the ground that the conveyance under which the lumber company claimed was void because the wife had not joined therein, and dissolved a temporary injunction which had been granted. Injunctions and writs of su-

persedeas are issued by this court to preserve the status quo pending an appeal, where the justice of the case requires it, but not for the purpose of creating a temporary right. This case is the converse of *Union Sawmill Co. v. Felsenthal Land & Townsite Co.*, 106 S. W. 676. For the reasons there given, this application is denied.

#### CLARKE v. SCHOOL DIST. NO. 16 et al. (Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS—DIRECTORS—CLERK—SALARY.

Under Kirby's Dig. §§ 7630, 7631, providing that one of the directors of a school district shall act as clerk, and prescribing the duties he shall perform, but containing no provision for his compensation, a board of school directors has no authority to vote a salary to a director appointed to act as clerk, since in the absence of legislation he took the position with its burdens, and without pay.

#### 2. SAME—FUNDS OF SCHOOL DISTRICT—UNLAWFUL PAYMENT—RECOVERY.

Funds in the hands of a county treasurer belonging to a school district, illegally paid by the county treasurer for salary of a clerk of a board of school directors, may be recovered back by such treasurer on discovery of his mistake.

#### 3. LIMITATION OF ACTIONS—TIME OF ACCRUAL OF ACTION—TIME.

Where a county treasurer illegally paid money belonging to a school district in his hands to a member of the board of school directors for salary as clerk of the board, limitations began to run against the right of such county treasurer and the school district to recover the money so paid from the date of the payment, and barred such right of recovery after three years. [Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 269.]

#### 4. SCHOOLS AND SCHOOL DISTRICTS—FUNDS OF DISTRICT—UNLAWFUL PAYMENT—RECOVERY—ACTION—PARTIES.

Where a county treasurer, having illegally paid money belonging to a school district as salary to the clerk of a board of school directors, reimbursed the fund from his individual property, the school district, though not a necessary party to a suit to recover the amount so paid from the clerk of the board, was not an improper party; it being entitled to sue for the county treasurer's benefit.

#### 5. LIMITATION OF ACTIONS—PERSONS SUBJECT—MUNICIPAL CORPORATIONS.

The statute of limitations will run against a school district as well as a county, state, or town.

#### 6. SCHOOLS AND SCHOOL DISTRICTS—CORPORATIONS—RIGHT TO SUE.

Under the express provisions of Kirby's Dig. § 7541, a school district is a corporation, and may sue in any court of the state having competent jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 271.]

#### 7. SAME—PARTIES.

The state is not a necessary party to an action by a school district to recover funds illegally paid out on a warrant of its directors by the county treasurer, for the latter's benefit; he having reimbursed the fund for the amount so paid.

Appeal from Circuit Court, Clark County; J. M. Carter, Judge.

Action by school district No. 16 of Clark county and another against George W. Clarke to recover from defendant \$90 and interest



alleged to have been paid to defendant by plaintiff Benjamin Bussell, treasurer of said county, on six school warrants issued to Clarke while he was one of the school directors of such district. The complaint charged that defendant Clarke drew from the county school funds of the district on warrants presented to the treasurer and signed by the directors of the school district the sum of \$90, on annual warrants of \$15 each, for services rendered by him as clerk of the school district while defendant Clarke was one of the directors thereof; that such warrants were issued without authority of law, and that the sum of \$90 had been drawn by Clarke unlawfully and without authority. The case originated in the justice court, and no demurrer or answer was filed until it reached the circuit court, where defendant filed a demurrer, alleging that the complaint did not state facts sufficient to constitute a cause of action, that there was a misjoinder of parties, and that the complaint on its face shows that the claim was barred by limitations. The demurrer was overruled, whereupon defendant answered, admitting that, while one of the directors of the school district, he accepted warrants for \$15 annually, beginning October 26, 1899, and extending up to and including April 24, 1905, for services rendered as clerk of the board of directors, that his services were reasonably worth such sum, and that the amount was paid and allowed with the full knowledge of the board and the consent of the patrons of the district in accordance with a custom of the district to pay like sums for similar services. Defendant on demand failed to refund any part of such sum at the request of the county treasurer, whereupon the latter repaid the amount so drawn into the county treasury, in order to have his account as treasurer approved by the county commissioners. From a judgment for plaintiffs, defendant appeals. Reversed in part.

G. R. Haynie, for appellant. J. E. Bradley and Hardage & Wilson, for appellees.

WOOD, J. The questions presented by this appeal are: (1) Can the directors of a common school district employ one of their number as clerk of the board at a salary of \$15, payable out of the school fund? (2) If the sums are illegally paid, can the treasurers of the county who pays warrants drawn for such amounts recover same back from the person to whom the sums were paid? (3) Does the statute of limitations run against the treasurer, Bussell, or the school district to recover the funds? Was the district a proper party?

Answering these in the order named:

(1) We find no statute authorizing the directors of a common school district to employ one of their number as clerk and to contract to pay such clerk a salary for his services as clerk of the board. The law provides

that one of the directors shall act as clerk and prescribes various duties for him to perform. Sections 7630, 7631, Kirby's Dig. But we find no express provision for his compensation, and none from which such compensation could be implied. In the absence of statutory authority expressly conferred upon the board of directors or some general provision from which such authority must be implied, such contracts of the board with one of their number cannot be upheld. It would seem from the onerous duties required of the clerk of the board that some provision should be made for his compensation; but, in the absence of legislation upon the subject, must simply take the position cum onere, and without pay.

(2) Although the treasurer illegally pays the warrants for such services, he may, when his mistake is discovered, recover the same back into the treasury. The funds in his hands are trust funds belonging to the district, and he or the district may sue to recover same back into the treasury where they have been illegally paid out. There is no question of having paid money on an executed contract in the case, neither the treasurer nor the district whose funds are in his hands are parties to any contract that was beyond the power of the directors to make.

(3) The statute of limitations would run against Bussell and the district for all sums paid out by him more than three years before the institution of the suit. There was a liability on the party receiving the funds illegally from the treasurer immediately upon receipt of the same; and suit could have been brought and maintained for the recovery of the money at once. The statute began to run at once, and after three years effectually barred the action. The school district, having been reimbursed by Bussell, was not a necessary party. It was not, however, an improper party, for the funds belonged to it, and, as it had been paid, it could sue for Bussell's benefit. The statute of limitations will run against a school district as well as a county, city or town. See *Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Helena v. Hornor*, 58 Ark. 151, 23 S. W. 966. A school district is a corporation, and may sue in any of the courts of the state having competent jurisdiction. See section 7541, Kirby's Dig. The state is not a party here, and the school district in seeking to recover funds illegally paid out on the warrant of its directors is not exercising any of the functions of the sovereign power. *May v. School District*, 22 Neb. 205, 34 N. W. 377, 3 Am. St. Rep. 266, and note, and cases cited 19 A. & E. Ency. 191, 192, note 1. In reality the school district here was only a party for the benefit of Bussell; it having already been paid.

The judgment is reversed for all except \$30, with interest, and, as to that, is affirmed.

## BROWN v. SMITH.

(Supreme Court of Arkansas. Dec. 9, 1907.)

## 1. SCHOOLS AND SCHOOL DISTRICTS — COUNTY EXAMINERS—LICENSES.

Under Kirby's Dig. §§ 7559, 7562, 7565, requiring county examiners to stand the same examination as is required of applicants for first-grade teachers' licenses, and providing for the revocation of their licenses by the state superintendent of public instruction, the issuance of licenses to such county examiners, though not expressly provided for, is required by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 101.]

## 2. SAME — STATUTES — REPEAL — INCONSISTENT ACTS.

Act May 6, 1905, p. 753, § 7, authorizing the state superintendent of public instruction to revoke the license of any county examiner for failure or neglect to comply with the provisions of the act or to perform any of the duties required of him by law, and declaring that, on notice of the revocation of the license of a county examiner, the county judge shall appoint another within 20 days, and section 8, repealing conflicting acts, repealed Kirby's Dig. § 7583, authorizing the county judge to remove any county examiner for incompetence or frequent neglect of duty.

Appeal from Circuit Court, Ashley County; H. W. Wells, Judge.

Barton R. Smith was appointed at the October, 1906, term, of the Ashley county court, county examiner for Ashley county for the ensuing two years, and afterwards, having been licensed by the superintendent of public instruction, entered on the discharge of his duties. J. C. Brown at the September, 1906, election, having been chosen judge of the county court, was inducted into office November 1, 1906, and thereupon issued a call for a special term of the county court, and cited Smith to appear and show cause why his license should not be revoked for incompetence and frequent neglect of duties. Smith appeared, and moved to dismiss the action for want of jurisdiction, which objection being overruled a committee was appointed to examine Smith as to his scholastic attainments. He then filed a motion, which, after reciting his examination and appointment as county examiner, offered, in order to satisfy the court, to attend within 10 days at the office of the superintendent of public instruction and there submit to such further examination as the superintendent should name, or to attend before any person deputed by the superintendent and answer questions propounded. This offer was rejected, and the examining committee filed questions on the studies required by statute, and, in addition, propounded questions in rhetoric, geometry, latin, and general history. Smith offered to be examined on all branches required by law, and refused to be examined on the other branches, which offer was rejected, and an order was made removing him from office, from which he appealed to the circuit court. The circuit court held that the county judge had no juris-

diction to remove the county examiner, and ordered that defendant remain in his office, from which order the county judge appeals. Affirmed.

T. E. Mears, for appellant. George & Butler, for appellee.

WOOD, J. Several questions are presented on this appeal, but the only one we need consider is: "Has the county judge power to remove from office a county examiner?" The act of March 11, 1881 (Acts 1881, p. 53), "to render more efficient some of the provisions of the school laws and for other purposes," provides, *inter alia*, that, "if any county examiner shall be found incompetent or shall be frequently neglectful of his duty, upon satisfactory proof, the county judge shall remove him from office, and shall immediately appoint his successor." Section 7583, Kirby's Dig. County examiners under the law are named by the county court. They must possess "high moral character and scholastic attainments," the latter to be ascertained by an examination conducted by the state superintendent of public instruction, in person, or by his representative. If the county examiner passes a satisfactory examination upon the subjects named in the law, he is licensed by the superintendent of public instruction. The law does not expressly provide that the superintendent of public instruction shall issue a license to the county examiner, but that is clearly implied; for they are required before entering upon their duties to stand the same examinations as is required of teachers who receive first-grade licenses. Act March 7, 1893, p. 76; section 7562, Kirby's Dig. And the act of May 1, 1905, provides for a revocation of their license by the state superintendent of public instruction showing that the previous issuance of a license to them was contemplated. Upon the issuance of this license by the state superintendent of public instruction its appointment becomes complete, and he may enter upon his duties. Act March 11, 1883, p. 53; Act March 7, 1893, p. 76, found in Kirby's Dig. §§ 7559, 7565. This was the law concerning the appointment, qualifications, and removal of county examiners, when Act May 6, 1905, p. 751, entitled, "An act to improve the character of teachers in the state of Arkansas," was enacted. That act, after prescribing certain duties for county examiners and the superintendent of public instruction and teachers, in addition to those already prescribed, among other things, provided as follows: Section 7. "The state superintendent of public instruction is hereby authorized and empowered to revoke the license of any county examiner who fails or neglects to comply with the provisions of this act or who fails to perform any of the other duties required of him by law. Upon receiving notice of such revocation of the license of a county examiner the county judge shall within twenty days appoint another ex-

aminer in accordance with the law regulating the appointment of county examiners." Section 8 provides: "All laws and parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage."

Passing the question as to whether section 7583, Kirby's Dig. (Laws 1905, p. 753), supra, contravenes section 27, art. 7, Const., it is certain that it is repealed by section 7, p. 753, Act 1905, supra, for the latter is inconsistent with the act of March 11, 1881, and the two cannot stand together. The provisions of the act of 1905, taken in connection with the provisions of former laws, in pari materia, and not repugnant to the act of 1905, cover the whole subject-matter of the appointment, qualifications, duties, and removal for cause of the county examiners. The act of 1905, supra (the last upon the subject), in regard to the revocation of the license of the county examiner, is wholly repugnant to the act of March 11, 1881. Both acts cover the same subject, for the revocation of the license of the county examiner is ipso facto a removal from office, as contemplated by the act, for the county judge is required, upon receiving notice of such revocation, to appoint another examiner within 20 days. Such revocation is for a failure to comply with the provisions of the act of 1905, or for failure "to perform any of the other duties required by law." The clause quoted does not come under the rule of ejusdem generis, and refers only to other duties in regard to teachers' institutes and duties similar to those mentioned in the act of 1905, as contended by appellant. It was clearly the intention of the Legislature to give to the state superintendent of public instruction the full power to remove county examiners for the neglect of any duty required of them by law, whether similar to those commanded by the act of 1905 or not. Certainly the Legislature could not have intended that the county examiner was subject to removal by the county judge for one cause and by the superintendent of public instruction for another and different cause or the same cause. The power of removal is not vested in two functionaries, having wholly distinct and separate duties to perform. It is clear to us that the Legislature intended by the act of 1905 to vest the power of removal in the state superintendent of public instruction, and in so doing to take it away from the county judge, where it had been formerly lodged. This is in entire consonance with the rule that usually obtains, giving the power of removal to the one who really appoints, and is more in accord with one general educational system, over which the state superintendent of public instruction has supervision.

The judgment of the circuit court holding that the county judge was without jurisdiction in the premises is correct; and it is affirmed.

## FRANKLIN LIFE INS. CO. v. MORRELL et al.

(Supreme Court of Arkansas. Dec. 9, 1907.)

### 1. INSURANCE—MUTUAL BENEFIT CERTIFICATE—SURRENDER—VALIDITY—ESTOPPEL.

A mutual benefit certificate was expressly conditioned that the member should pay certain mortuary assessments and annual dues, and that if the same were not paid when due the certificate would be void. After surrender of a certificate for a valuable consideration, no further assessments or dues were paid or tendered by the member or his beneficiary, or any notice given of the member's mental incapacity when he executed the surrender, until after his death. The beneficiary, either at the time, or immediately after the surrender, was informed thereof, but made no objection until after the member's death. *Held*, that she was then estopped to assert that the surrender was void because of the member's incapacity.

### 2. SAME—CONSTRUCTION—WHAT LAW GOVERNS.

Where a mutual benefit certificate was executed in Illinois, where the society was domiciled, and where the member resided at that time, it was an Illinois contract, and should be construed according to the laws of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 173-175.]

### 3. SAME—VESTED INTEREST.

Where a certificate in an Illinois mutual benefit society authorized the holder to surrender his certificate by paying the association all claims thereunder and returning the certificate to the secretary, the term "certificate holder" being used to represent the member and not the beneficiary, the latter had no vested interest in the certificate under the Illinois law.

Appeal from Monroe Chancery Court; Jno. M. Elliott, Chancellor.

Action by Mina Wetzel, revived after her death in the name of Annie M. Morrell and others, against the Franklin Life Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed and dismissed.

Thomas & Lee (R. H. McNulty and Walter M. Allen, of counsel), for appellant. H. A. Parker and Pettit & Pettit, for appellees.

McCULLOCH, J. This is an action instituted, first at law, and on a motion of plaintiff transferred to equity, by Mina Wetzel, widow of Fritz Wetzel, deceased, to recover the sum of \$1,000 alleged to be due from the defendant, Franklin Life Insurance Company, on a benefit certificate or policy of insurance, issued by the Franklin Life Association, a fraternal insurance society, to Fritz Wetzel, one of its members; the defendant, Franklin Life Insurance Company, after the issuance of the certificate, having succeeded to the business of the former association and assumed its contracts. It is alleged in the complaint that, prior to the death of said Fritz Wetzel, a surrender of said benefit certificate was procured from him by defendant's agent by fraud and misrepresentation. The court was asked to set aside the act of Fritz Wetzel in surrendering the benefit certificate on account of such fraud, and also on the ground that he was

of insufficient mental capacity to enter into a contract. Plaintiff tendered into court the sum of \$190 paid to Wetzel for the surrender of the certificate. Defendant filed its answer, denying the charges of fraud or of mental incapacity of said Wetzel, and also alleged that the plaintiff thoroughly understood the terms and effect of the surrender, and that she expressly consented thereto. During the pendency of the action, the plaintiff, Mrs. Wetzel, died, and the cause was revived in the name of her children, who are the appellees here. On final hearing of the cause, the court rendered a decree in favor of the plaintiffs, and the defendant has appealed.

It appears from the evidence that the Franklin Life Association was incorporated in the year 1884, under the laws of the state of Illinois, as a fraternal insurance society, and that on the 21st of June, 1888, Fritz Wetzel, who then resided in the state of Illinois, became a member of said association, and the benefit certificate was issued to him in the sum of \$1,000, payable to his wife, Mina Wetzel, upon his death. The certificate of membership contains the following provision: "(11) The certificate holder may surrender his certificate by paying the association all claims against said certificate, and returning the same to the secretary, and shall then be relieved from all further liabilities and payments whatsoever." Other parts of the certificate show that by the term "certificate holder" is meant the member, and not the beneficiary. Fritz Wetzel afterwards removed to the state of Arkansas, where he resided for a time in the town of Stuttgart. He later removed to Clarendon, in this state, where he died on September 8, 1901. The surrender of the certificate was made on February 28, 1901, by indorsement thereon executed by Fritz Wetzel in consideration of \$190, which was paid by the defendant's agent on that date by draft upon the home office in Springfield, Ill., payable to Fritz Wetzel and Mina Wetzel. The consideration paid for the surrender was the estimated amount previously paid by Wetzel as dues and assessment on his policy. It is shown by the evidence that Fritz Wetzel addressed a letter to the defendant dated at Stuttgart, Ark., February 4, 1901, as follows: "Dear Sirs: Please explain your method of insurance, as I cannot understand the increase on my dues every year. How much will they (dues) increase from now on, and how long will my dues be as high as they are now? And oblige, Yours respect, [Signed] F. Wetzel." On the date the surrender was made, one of appellant's agents, who was employed as a solicitor and inspector, and who testified that it was his duty to "visit policy holders, see that they were satisfied with their policy, and report to the company their condition physically, financially, and morally," etc., appeared at Stuttgart and interviewed Wetzel. During

the course of this interview, it was proposed by the agent that, if Wetzel desired to surrender the policy, the company would, in consideration of such surrender, refund to him the estimated amount previously paid by him. This was agreed to by Wetzel in the presence of his son, who was then a man about 25 years old, and the surrender was duly executed by indorsement upon the certificate. The agent gave Wetzel a draft on the home office, payable to himself and his wife; and subsequently this draft was presented to a local bank bearing the indorsement of Wetzel and his wife, and the amount was paid. There was testimony tending to show, and the chancellor so found, that at this time Wetzel was mentally incapable of transacting business or of executing contracts, but the evidence does not warrant a finding that appellant's agent knew of this condition of his mind, or that he was guilty of any fraud or misrepresentation of facts in procuring the execution of the surrender. The preponderance of the evidence also establishes the fact that the indorsement of the name of Mrs. Wetzel upon the draft was not made by her, but was written by her husband, who presented the draft to the bank and received payment thereof. Proof introduced by the plaintiff establishes the fact, however, that Mrs. Wetzel was a few days later apprised of the fact that her husband had surrendered the certificate. After the death of Wetzel, his widow addressed a letter to appellant, which also shows that she was informed of the surrender very soon after it was executed. The letter is, in part, as follows: "I sent you to-day a paper of this place publishing my husband's death. You will no doubt remember that he sold to you his policy No. 1,536, which was made out in my favor. Well, since that time I have found out that my husband's mind was unbalanced when he sold it, and I can prove that by all of the doctors in Stuttgart, Ark., that treated him, and also by some of the people in that town, as well as doctors in Hot Springs, Ark., Brinkley, Ark., and in Clarendon, Ark. We were not aware of the fact that his mind was not right when he lived in Stuttgart, and we listened to what he said and what he wanted done."

There can be no doubt under the proof that Mrs. Wetzel either knew at the time, or was informed immediately thereafter, that her husband had surrendered this certificate for a valuable consideration. The proof introduced on behalf of the plaintiff shows that the surrender was executed and the negotiation leading up to it was made in the presence of Wetzel's son at his place of business in Stuttgart, and that the son went to the home of his parents to procure the certificate. The benefit certificate issued by the society was upon the express condition that the member should pay certain mortuary assessments and annual dues; and said certificate expressly stipulated that, if said as-

assessments and quarterly dues were not paid when due, then the certificate of membership should be null and void and of no effect. No assessments or dues were paid by Wetzel after the surrender. None were offered either by him or by the beneficiary. No notice was, in any manner communicated to the defendants of the mental incapacity of Wetzel until after his death. The certificate was treated by all parties as having been surrendered, and no rights were asserted there until after the death of the member. This court holds that, under those circumstances, Mrs. Wetzel was estopped to assert the invalidity of the surrender. Her acquiescence therein prevented her from asserting any rights under the certificate.

It is unnecessary, for the purposes of this case, to determine whether the beneficiary had vested vested rights in the certificate or not. According to the terms of the contract, however, it seems plain that she had no vested interest. The contract was executed in the state of Illinois, where the insurance society was domiciled, and where this member then resided. It was therefore an Illinois contract, and must be construed according to the laws of that state, according to which laws the beneficiary had no vested interest in the certificate. *Grand Legion v. Beaty*, 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124; *Middeke v. Balder*, 198 Ill. 590, 34 N. E. 1002, 59 L. R. A. 653, 92 Am. St. Rep. 284; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620. But, as we have already said, whether the interest of Mrs. Wetzel was vested or not, she is estopped by her acquiescence in the surrender of the certificate to assert any rights under the contract.

The chancellor therefore erred in his conclusion, and his decree is reversed, and the cause dismissed.

#### LONGINO v. BALL-WARREN COMMISSION CO.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. MORTGAGES — FORECLOSURE — NECESSARY PARTIES.

Where a debtor conveys real estate to another, who mortgages it to secure a debt, and the creditor brings suit to cancel the conveyance as being in fraud of creditors and to subject it to the satisfaction of his judgment obtained against the debtor, which action was begun prior to an action to foreclose the mortgage, the creditor has an inchoate lien on the property which is perfected by a judgment in his favor ordering the property sold to satisfy his debt, so that he is a necessary party to a foreclosure of the mortgage, if his right to redeem is to be barred thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1272-1287.]

#### 2. SAME—REDEMPTION—RIGHT TO REDEEM.

Where the holder of a lien against property on which a mortgage has been foreclosed is not made a party, he cannot demand another foreclosure and a resale, but his only right is that of redemption.

#### 3. SAME—OPERATION—JUNIOR INCUMBRANCER.

A senior mortgagee, who takes possession as a purchaser at a valid foreclosure sale, holds as a purchaser, and not under the mortgage, and cannot be held accountable for rents and profits before an offer to redeem is made by a junior incumbrancer who was not a party to the foreclosure proceedings.

#### 4. SAME—FORECLOSURE BY ACTION—PARTIES.

Where a person has a lien against certain real estate under a judgment, and after a suit has been brought to foreclose a mortgage against the real estate acquired the mortgagor's right to redeem by purchasing at a sale to satisfy the judgment, the fact that he is not made a party to the foreclosure proceedings does not invalidate that action.

#### 5. SAME—REDEMPTION—TENDER.

A tender of the amount due, while being essential to the maintenance of an action to redeem from a mortgage foreclosure, may be made after commencement of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1788.]

#### 6. SAME—ACTION TO REDEEM—COSTS.

Plaintiff, in an action to redeem from a mortgage foreclosure, cannot recover any costs incurred before tender of the amount due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1875.]

Appeal from Columbia Chancery Court; E. O. Mahoney, Chancellor.

Action by Ball-Warren Commission Company against H. A. Longino. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

On October 23, 1893, A. J. Dennis, a debtor of appellee, Ball-Warren Commission Company, was the owner of the real estate in controversy situated in the town of Magnolia, Ark., and on that day conveyed it to J. M. Dennis, who on November 19, 1894, by mortgage deed conveyed it to appellant, H. A. Longino, to secure the payment of a debt of \$1,000. In February, 1896, appellee obtained a judgment in the circuit court of Columbia county against A. J. Dennis for the sum of \$2,071 and cost of suit, and on July 3, 1899, commenced suit in equity against A. J. Dennis and J. M. Dennis to cancel said conveyance from the former to the latter, on the ground that the same was executed for the purpose of defrauding creditors of said grantor, and to subject the said real estate thereby conveyed to the satisfaction of appellee's judgment. The chancery court rendered a final decree in that cause on October 28, 1899, canceling said conveyance on account of fraud, and the real estate was ordered sold to pay the judgment. It was sold by a commissioner pursuant to the decree and purchased by appellee, the sale was duly confirmed by the court, and the commissioner executed a deed to appellee pursuant to the sale. Appellant was not a party to that suit, and it is now admitted that he accepted the mortgage from J. M. Dennis without notice of the fraud and that his mortgage was valid. Appellant instituted suit in the chancery court against the widow and heirs at law of J. M. Dennis to foreclose his mortgage and on August 30, 1900, a decree of foreclosure was rendered, and the

real estate was subsequently sold under the decree by a commissioner of the court and purchased by appellant. The date of the commencement of the last-named suit is not disclosed either in the pleadings or proof in the present case, but the recitals in the complaint and answer in the present suit, to the effect that appellee's suit to cancel the deed was instituted in the lifetime of J. M. Dennis, and appellant's foreclosure suit was not instituted until after the death of J. M. Dennis, establish the fact that appellant's foreclosure suit was not commenced until after the institution of the other suit. Appellee was not a party to said foreclosure suit, and instituted the present suit in equity on October 1, 1901, against appellant to have an accounting of the rents and profits of the real estate received by appellant and to redeem from the mortgage. It is alleged in the complaint that appellant (defendant) had collected rents of said premises to an amount in excess of his mortgage debt and interest, and a decree against him is asked for the excess; or that, in the event it should be found that the amount collected was not sufficient to discharge the mortgage, the plaintiff (appellee) is ready to pay the balance found to be due. It is also alleged in the complaint that appellant, at the time he accepted the mortgage, well knew of the fraudulent character of the conveyance of A. J. Dennis to J. M. Dennis, and that the mortgage was on that account invalid as against appellee's rights. Alternative relief is prayed, either for cancellation of the mortgage or for an accounting and redemption as above set forth. Appellant filed his answer admitting the truth of all the allegations of the complaint, except those concerning the amount of rents collected and of his knowledge of fraud in the conveyance from A. J. Dennis to his mortgagor. He disputed the right of appellee to redeem or to have an accounting of rents on the ground that appellee had actual knowledge of the pendency of his foreclosure suit and took no steps to redeem until after the sale, and then made no tender of the amount necessary to redeem. At the trial of the cause below appellee admitted that appellant had no knowledge of the fraud, and that his mortgage was valid. The court rendered a decree in favor of appellee establishing its right to redeem the property from appellant's mortgage upon payment of the balance due thereon which the court found, after deducting rents collected, to be \$419.52. The defendant appealed.

Stevens & Stevens, for appellant. Gaughan & Sifford, for appellee.

**McCULLOCH, J.** (after stating the facts as above). At the time of the commencement of the foreclosure suit by appellant, the suit instituted by appellee, as a judgment creditor of A. J. Dennis, to set aside the conveyance to J. M. Dennis, appellant's mortgagor, was pending. Appellee, by the commencement of

his suit to set aside the conveyance, acquired an inchoate lien on the property which was perfected on the rendition of the decree in his favor setting aside the fraudulent conveyance and ordering the property sold for the satisfaction of his debt." *Jones v. Ark., Mech. & Agl. Co.*, 38 Ark. 17; *Stix v. Chaytor*, 55 Ark. 117, 17 S. W. 707; *Dostre v. Manistee Nat. Bank*, 61 Ark. 325, 55 S. W. 187, 48 L. R. A. 334, 77 Am. St. Rep. 116; *Wallace v. Treacle*, 27 Grat. (Va.) 487; *Freeman on Judgments*, § 350. Appellee was therefore a necessary party to the foreclosure suit, and, not being a party thereto, it was not bound by the decree, and its right to redeem from the mortgage was not barred. 9 Am. & Eng. Enc. P. & P. p. 324; *Dickinson v. Duckworth*, 74 Ark. 188, 85 S. W. 82; *Turman v. Bell*, 54 Ark. 273, 15 S. W. 836, 28 Am. St. Rep. 35; *M. & L. R. R. Co. v. State*, 37 Ark. 632. Its right was confined, however, strictly to that of redeeming from the mortgage. It could not demand another foreclosure and resale of the mortgaged premises. *Dickinson v. Duckworth*, supra.

In sustaining appellee's right to redeem from the mortgage, the chancellor was clearly correct, but the next question which arises is whether or not appellant is chargeable with rents and profits of the property collected by him after his purchase at the foreclosure sale and before redemption by appellee. It is well settled that a purchaser at a mortgage foreclosure sale which is defective, and therefore does not divest the title of the mortgagor, is in effect a mortgagee in possession and is accountable as such for rents and profits of the mortgaged premises. "He is treated," reason some of the authorities, "as a bailiff of the mortgagor, and necessarily sustains the same relation to one who holds an interest in the equity by a title derived from the mortgagor." *Clark v. Paquette*, 67 Vt. 681, 32 Atl. 812. But if the foreclosure is valid as against the mortgagor, and the purchaser at the sale takes possession of the premises, he is not deemed to be in possession under the mortgage and cannot be held accountable for rents and profits before an offer to redeem is made by a junior incumbrancer, who was not a party to the foreclosure proceeding. *Adler-Goldman Commission Co. v. Herran*, 65 Ark. 229, 45 S. W. 543; 2 *Jones on Mort.* § 1118a; *Rogers v. Herron*, 92 Ill. 583; *Daniel v. Coker*, 70 Ala. 260; *Van Dune v. Sharum*, 41 N. J. Eq. 812, 7 Atl. 429; *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; *Gault v. Equitable Trust Co.*, 100 Ky. 573, 38 S. W. 1065. The possession of the purchaser, under those circumstances, is that of a purchaser, and not as mortgagee. The sole right, as we have already shown, of the subsequent purchaser or junior lienor, who has been omitted from the foreclosure proceeding, is not to have the foreclosure sale set aside, but is to have an opportunity to redeem from the mortgage. *Dickinson v. Duckworth*, supra; *Allen v. Swope*, 64 Ark. 576, 44 S. W. 78. It is conceded by counsel for appellee that this would

be true if appellee was only a junior lienor and had not acquired the mortgagor's equity of redemption by purchase of the property at the sale ordered by the chancery court to satisfy its judgment against A. J. Dennis. They contend that appellee's purchase of the mortgagor's equity of redemption before the foreclosure sale under appellant's mortgage substituted it in the place of the mortgagor, and that the foreclosure without making appellee a party to the proceeding was no foreclosure at all. We think the case of *Adler-Goldman Com. Co. v. Herran*, supra, is decisive against that contention. At the time of the commencement of appellant's foreclosure suit, appellee was only a lienor, though it became, before the foreclosure sale was made, the absolute owner of the equity of redemption. Appellant nevertheless purchased the title of his mortgagor and entered into possession as purchaser, and not as mortgagee. Appellee had the right to redeem, at any time, from the mortgage, because it had, as lienor, been omitted from the foreclosure proceeding; but until it offered to redeem it had no right to disturb appellant's possession or call him to account for the rents and profits while in possession under his purchase. In *Adler-Goldman Commission Co. v. Herran*, supra, the junior mortgagors foreclosed their mortgage before the attempt to redeem from the prior lien of Herran, yet the court denied their right to require the latter to account for rents. This is not an attempt, within the statutory period of redemption, to redeem from the foreclosure sale. The statute giving the right of redemption from mortgage foreclosure sales under decrees of court (Act May 3, 1899, Acts 1899, p. 279), having been passed

subsequent to the execution of appellant's mortgage, is by its express terms excluded from operation as to mortgages executed prior thereto. If that statute was applicable to the mortgage in question, appellee could, within the prescribed period of redemption, have tendered the amount required to redeem, and then appellant would have been chargeable with rents and profits received while in possession. *Danenhauer v. Dawson*, 65 Ark. 129, 46 S. W. 181, 44 L. R. A. 193.

The only question remaining for our consideration is regarding the contention of appellant that a suit to redeem cannot be instituted until after a tender of the amount due. This is true, but the tender can be made at any time, and the time of making the tender would only affect the question of costs of suit. Of course, until there has been an offer to redeem by paying the amount due, the suit cannot be successfully maintained; but a court of equity should not dismiss a suit on account of the failure to make a tender so as to require the institution of a new suit, when the plaintiff is willing and makes an offer during the pendency of the suit to pay the amount necessary to redeem. That is one of the distinctions between the right of redemption from a mortgage and the statutory right of redemption from a foreclosure sale. *Wood v. Holland*, 57 Ark. 193, 21 S. W. 223. Appellee is not entitled to recover any costs of suit incurred prior to an offer to pay the amount of the mortgage debt and interest.

The decree is reversed, with directions to enter a decree establishing appellee's right to redeem from appellant's mortgage, but only on the terms indicated in this opinion.

## STEWART v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1907.)

## 1. WITNESSES—COMPETENCY—CROSS-EXAMINATION OF WIFE OF ACCUSED.

While a wife testifying in behalf of her husband on trial for homicide may be cross-examined as to matters about which she has testified, the state cannot interrogate about new matter, as that would be making the wife a state's witness, in violation of Code Cr. Proc. 1895, art. 775, providing that a husband and wife shall not testify against each other except in a criminal prosecution for an offense committed by one against the other.

## 2. SAME—CROSS-EXAMINATION—NEW MATTER ON CROSS-EXAMINATION—EFFECT.

Where one side examines a witness, and the other side after cross-examining goes into new matter, the witness as to the new matter becomes the witness of the party eliciting it.

## 3. HOMICIDE—MANSLAUGHTER—KILLING WIFE'S INSULT IN HEAT OF PASSION.

If a husband, after being informed by his wife that a person has insulted her, kills that person the first time he meets him while so overcome by rage as to be incapable of cool reflection, his offense is no more than manslaughter, and it is immaterial whether the insulting conduct had or had not occurred, so long as she so informed him and he believed it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 73.]

## 4. SAME—EVIDENCE—ADMISSIBILITY.

In a prosecution of accused for killing a person in heat of passion after being informed by his (accused's) wife that several months before decedent had driven his horse over a wire fence into accused's pasture and insulted her, testimony of witnesses that some time after the insult was alleged to have been offered accused had inquired of them if they had seen anybody in his pasture on a certain day, and had stated that he had seen where somebody had driven a horse over his fence, was inadmissible as having no bearing on the case.

## 5. SAME—TRIAL—INSTRUCTIONS.

Accused killed decedent upon their first meeting after being informed by his (accused's) wife that decedent had insulted her several months previously. The statute provides that homicide will be reduced to manslaughter if committed in such heat of passion as to render the mind incapable of cool reflection as a result of decedent's insulting conduct toward a female relative, if the killing occurs at the time of the insult, or as soon as the parties meet after the slayer has been informed of it. *Held*, that a charge that to render a homicide manslaughter the passion must not be the result of a former provocation, that manslaughter is voluntary homicide committed under the immediate influence of sudden passion, which must arise at the time of the killing, and if accused was actuated by sudden passion, such as rendered his mind incapable of cool reflection arising from his belief in good faith of the information given him by his wife, then he is guilty of manslaughter, was erroneous, since whether the killing would be manslaughter does not depend upon the suddenness of passion, but upon whether accused was informed of the insult, and at the time of the killing his mind was incapable of cool reflection.

## 6. SAME—SELF-DEFENSE.

In a homicide case, the evidence showed that decedent had threatened to assault accused. At the time of the killing decedent, who was unarmed, was running to a camp shouting for a gun, and accused, who was armed, was pursuing him. The shooting took place before decedent had possessed himself of weapons which were being brought to him. *Held*, that a failure

to charge on the law of self-defense was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 624-626.]

## 7. SAME—EVIDENCE—SUFFICIENCY—PROVOCATION.

Evidence in prosecution for homicide held to show that the cause of the killing was an insult by deceased to defendant's wife, of which defendant had just been informed, reducing the crime to manslaughter.

Appeal from District Court, Young County; A. H. Carrigan, Judge.

A. P. Stewart was convicted of murder in the second degree, and appeals. Reversed and remanded.

C. W. Johnson and Kay & Akin, for appellant. F. J. McCord, Asst. Atty. Gen., P. A. Martin, Dist. Atty., and Miller & Dycus, for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given five years in the penitentiary as his punishment. The facts show that defendant and deceased had been neighbors and friends for over 20 years, living in the same neighborhood.

The state's case is, in substance, that on the 17th of January, 1907, appellant killed the deceased Rutherford. Mrs. Workman was the only eyewitness to the homicide, and testified that she, her husband, J. E. Workman, and their two children had just arrived in Young county from the Indian Territory, and had bought some land from the deceased and moved out to it and unloaded their wagon, preparatory to erecting a temporary camp. Deceased had gone with them to the place of their camp for the purpose of repairing a fence between his (deceased's) land and that purchased by the husband of witness. This camp was about three-fourths of a mile northwest of the home of deceased, and about 75 yards west of witness' east fence. This fence marked the boundary between witness' land and that of the deceased. Deceased left the camp and went to the southeast corner of witness' land, and she went about arranging her household matters, her husband busying himself by fixing the fence on the north and east of the camp. After her husband had finished this job, he returned to the camp, and with his wagon started in a westerly direction to haul some water to the camp. Just at this juncture the witness' attention was attracted by hearing some one hollering, "Hey! hey! hey!" She turned and called her husband, and sent her little girl for him. Then, looking east, she saw deceased running in her direction and hollering to the witness, "For God's sake, bring me a gun." She ran to the other side of her camp, picked up an automatic shotgun, and a breach-loading shotgun, and started to the deceased with both guns, and as she started she saw appellant for the first time, who was also running towards the camp. Witness saw no weapons in appel-



lant's hands at that time. The men were not running from the same direction, appellant being north of deceased. Witness here made a map and gave it to the jury which showed the appellant and deceased were both approaching the camp, their line of approach being to a common center, leaving the tracks, as in the diagram, as they approached the camp in the shape of the letter "V." The map indicates that the horse of appellant was hitched to the fence above the gate, and that appellant apparently came from the gate towards the camp. The distance from the gate and where the horse was hitched to the fence was not given, but it formed the opening part of the letter "V," the point of it being at the point of contact between the parties. Witness ran to the deceased with the two guns. Deceased ran up to witness, threw his arms about her, and held witness between himself and appellant. Witness was still holding the guns in her hand between her body and the deceased when appellant began firing with a pistol over the witness' head and shoulder at the deceased. Deceased was struggling to keep witness between appellant and himself, and was moving around for this purpose. It threw deceased facing appellant, with witness' back to appellant. Deceased stooped in his efforts to keep the witness between himself and appellant, and after being wounded sank to his knees and turned witness loose, and the firing ceased. Up to this time not a word had been spoken by any of the parties, except when the deceased called to the witness to bring the gun. While on his knees after being shot, deceased reached out his hand, and said to appellant, "Forgive me." Appellant came up, and they shook hands. The deceased then said to witness, "Pray for me," and asked for water. When witness returned with the water, deceased was lying on the ground, and by this time the husband and son had arrived. The deceased never spoke after his request for prayer and water, and lived but a few moments. Appellant was asked, "What on earth did you do this for?" He replied that deceased had done him the dirtiest crime that one man ever did to another. At the time witness first saw the parties they were inside of her husband's inclosure, about halfway between the camp and the fence. This would seem to indicate that the fence was probably 75 or a 100 yards from the camp. Deceased was a large man of heavy build, strong and healthy.

The husband, J. E. Workman, testified about their moving to the camp, and stated that his son had been at the gate, working on the fence just southeast of the camp. Witness had made repairs on the fence just north of the camp. While working on the fence, witness saw a man riding on the prairie, on a bay horse, some 800 yards southeast of where witness was at work. The man stopped, looked towards witness' camp, and then turned southeast toward a little field,

and rode out of sight. He finished his work, went to the camp, got some vessels, put them in his wagon, and went off west in a trot to haul water to camp. After witness had gone 200 or 300 yards, he heard his wife and little daughter screaming and hollering, "Fire!" saw his little daughter coming toward him, turned his team around, and drove rapidly back. Arriving at the camp he saw appellant standing about 10 feet from his wife. Did not see deceased at that time. Appellant had a pistol in his hand, and was probably loading it or extracting shells. Witness then saw a man lying on the ground, and said, "Who shot him?" Appellant said, "I shot him." Appellant pointed to the guns, and said, "Look there, see those guns?" "I had to shoot him. I would not have shot him if she had not brought those guns." Witness then turned deceased over, and discovered it was Rutherford, and remarked, "What on earth is the matter?" "I thought you and Mr. Rutherford were the very best of friends." Appellant replied, "We have been close neighbors for the past 20 years, but he has done me the dirtiest crime that one man could do another." Appellant was pale and excited. Witness afterwards found deceased's horse near the southeast corner of witness' place near the fence, and witness said that appellant had told him that he had gone to deceased to talk to him about it, and that deceased would not talk to him, and that deceased wanted to settle it with the guns. Witness did not tell this at the examining trial. Witness said to appellant, "I certainly hate this," and appellant said, "You do not hate it half as bad as I do. I would not have shot him if she had not brought those guns."

There are some other details in regard to facts that may be necessary to state in the illustration of some questions. The defendant introduced his wife. Her testimony is to the effect that on the morning prior to the homicide in the evening she was at her home up stairs; that defendant came into the house looking for her, came up stairs and found her crying, and urged that she tell him the cause. That she then related to the defendant the following: "That on the afternoon of July 6, 1906, witness went to the mail box to get the mail. Witness did not look at the clock, but thought it was between 3 and 4 in the afternoon. That just as witness reached the fence near the mail box she heard deceased say: 'Wait, Mrs. Stewart, I'll get your mail for you.' Deceased then got the mail for witness, and handed it to her over the fence, deceased being at that time in the road. Witness then took the mail. She was riding a boy's saddle and sideways. She then turned her horse around to go home. After turning around toward home she stopped her horse because there was a considerable quantity of the mail and she desired to tie the mail on the saddle. While tying the mail on the saddle deceased pushed down

the wire fence and stood on it and led his horse across the wire and came up behind witness and asked if he might go part of the way home with witness and at the same time took hold of witness with both arms around the waist and dragged witness off her horse and drew witness up to his breast. Witness said, 'Mr. Rutherford, you are seeking trouble,' and tried to push loose from him. Deceased said, 'No, I am not seeking trouble, but one wife is not enough for me, and I want to borrow Pick Stewart's wife awhile.' Witness then said that if deceased did not turn her loose that she would scream. Witness was struggling all the time deceased held her. Deceased said, 'What are you going to do about it?' Witness said, 'I am going to tell Pick [appellant] just as soon as I can find him.' Deceased then said, 'Don't you dare do it' [pointing his finger at witness]. Witness said, 'I will tell him as soon as he gets home.' Deceased then said, 'Don't you do it. I will be ready for him. If he can get a gun any quicker than I can, he is welcome to use it.' Witness then started to get on her horse, and deceased asked if he might help her. Witness told deceased that he must not touch her again. Deceased then went off through the fence like he had come in." This was detailed as the matter which she had related to her husband on the morning of the day of the homicide. The state then took her up on cross-examination rather fully and rigidly, asking many questions as to why she hadn't told her husband prior to the 17th of January when this thing should have occurred on the 6th day of July previous. The matters developed on cross-examination may be more fully stated in disposing of a bill of exceptions later.

The state's cross-examination of appellant's wife took a wide range, mainly for the purpose of discrediting the truth of her statement as to the insult and indignity, and inferentially to discredit the truth of the statement that she had told her husband on the morning prior to the homicide. Several grounds of objection were urged, among others, that she could not be forced to give evidence against her husband on matters pertaining to him in regard to the trial and to discredit the truth of the statement on immaterial matters which did not tend to discredit the truth of the statement she made to her husband, and that this cross-examination was with reference to collateral matters, immaterial to the case, and around which necessarily a fierce contest would be waged, and if determined against the truth of her statement made to defendant, her husband's rights and attitude before the jury would be greatly and unjustly imperiled and impaired. All these objections, and others that are not here stated, were overruled, and the state was permitted to ask questions suggesting a private interview at the Fourth of July celebration between the deceased and appellant's wife, which was denied by her, and she stat-

ed that the only conversation she had with deceased was in a crowd in the presence of her niece, when she asked him about the tournament then going on at the gathering, in which Boyd Street was trying to keep the people back out of the way. She was also asked if she had invited the deceased, over the phone, to come over and have soup, and witness answered that she had invited the family to dinner, which was long before the outrage perpetrated by the deceased. She was asked if she had in any way encouraged the deceased, which the witness denied. She was asked if the ground 500 or 600 yards east of the place of the alleged indignity was not thick with brush and grass and obscure from view from the road. Witness said she did not know. Further, she was required to answer that appellant, her husband, had begun to sell his land and had sold 500 or 600 acres of it after the 6th of July. She was further made to testify as to the appearance and demeanor of defendant, and what it was after she told him of the insult, stating among other things that he said nothing, but sat with his head in his hands, and that he went to the table but did not eat anything except perhaps drink a cup of coffee. That appellant left home some time in the afternoon, but witness did not see him leave. She was required to testify, further, that appellant had several guns and pistols at different times, and told where he kept them. Parts of this testimony elicited by the state on the cross-examination was not admissible through the mouth of the wife as against her accused husband. It has been held that a wife, testifying in behalf of her husband, may be legitimately cross-examined in regard to matters about which she has testified, but it has not been held, so far as we are aware, that the state can depart from the line of investigation elicited from the wife by her husband, and interrogated about new matter, for this would be making the wife a state's witness. This would be true, even if the witness were not the wife of the accused. Wherever one side places a witness upon the stand and elicits evidence, the other side crosses upon it, and then goes out into new matter, the witness, as to the new matter, becomes the witness of the party eliciting it. As to the ordinary witness, the party would have a legal right to do this, provided the subject of investigation was legitimate; but this rule does not apply to the wife. See *Jones v. State*, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 710. There are matters here which are clearly not within the legitimate sphere of cross-examination. For instance, the wife was forced to testify against her husband that after the 6th of July he was selling land, and had sold some 500 or 600 acres of it with a view of moving away, and that he had arms, guns, and pistols, at different times about his place, and other matters that are unnecessary to detail. On cross-examination of the wife the state will

be held to matters brought out in chief. See Code Cr. Proc. 1895, art. 775; Jones v. State (Tex. Cr. App.) 101 S. W. 995 (rehearing opinion); Messer v. State, 43 Tex. Cr. R. 97, 63 S. W. 643; Washington v. State, 17 Tex. App. 197; Hoover v. State, 35 Tex. Cr. R. 345, 33 S. W. 337; Jones v. State, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; Gaines v. State, 38 Tex. Cr. R. 216, 42 S. W. 385; Creamer v. State, 34 Tex. 173; Greenwood v. State, 35 Tex. 587; Merritt v. State, 39 Tex. Cr. R. 79, 45 S. W. 21; Johnson v. State, 28 Tex. App. 26, 11 S. W. 667; Hamilton v. State, 36 Tex. Cr. R. 375, 37 S. W. 431; Owen v. State, 7 Tex. App. 332; Red v. State, 39 Tex. Cr. R. 423, 46 S. W. 408; Bluman v. State, 33 Tex. Cr. R. 64, 21 S. W. 1027, 26 S. W. 75.

The theory of the appellant, as made by his wife's testimony, and she seems to be the only one that throws any light upon the motive or the reason for this killing, was that he believed his wife's story about the matter, had no reason to disbelieve it; and, if her testimony was to be discredited, it could only be, if even to that extent, that she never made such statement to him. We believe this contention is correct. If she made this statement to appellant, and he believed it and acted upon it, to him it was true, whether in fact it was false or true. That the insulting conduct towards appellant's wife in this case was the real cause cannot be the subject of doubt from reading this record. These parties had been neighbors for 20 years or more, on friendly terms, and there was no occasion and none is shown why there should have been any difference between them, except as shown by the testimony of appellant's wife. And if, in fact, her statement to him was untrue, that information was never conveyed to him, and in fact no one can read this record and come to any legitimate conclusion other than that it was true; but if it was a mistake, his defensive matter against murder and in favor of manslaughter was just as strong. As was said in Jones' Case, 33 Tex. Cr. R., at page 496, 26 S. W., at page 1084 (47 Am. St. Rep. 46): "If the insulting conduct towards Mrs. Jones by Veal was the real cause of the homicide, or there was a reasonable doubt of that fact, and the killing occurred at the first meeting after the accused had been informed of such conduct, and at the time of the killing appellant's mind was in such a state of anger, rage, or resentment as to render it incapable of cool reflection, then his offense would be of no higher grade than manslaughter. This would be the case, although such insulting conduct had never occurred, provided appellant actually believed it had. The homicide on the trial must be viewed from the standpoint of the accused. The facts and circumstances should be analyzed and passed upon as they were reviewed by him at the time he acted upon them. If, in this case, appellant

believed the insulting conduct communicated to him by his wife actually occurred as detailed by her, then to his mind such conduct was a reality, and the charge should have been so framed as to submit this important issue to the jury. Men often act upon the most important affairs and interests in life upon the mistakes of fact. They often risk honor, reputation, fortune, and life upon mistakes of fact, of course, believing at the time they are not mistaken. The guilt of the accused party in such state of case should not depend upon the existence or non-existence of the fact itself, but upon the circumstances as they appeared to and were understood by him at the time of his acting upon them. Such questions are matters of fact to be solved by the jury under appropriate instructions. That the insulting conduct had or had not occurred would have been immaterial if she had so informed Jones, and he believed her. If the jury should believe that Mrs. Jones informed her husband of the conduct of deceased towards her, and that his passions were thereby aroused to the extent of rendering his mind incapable of cool reflection, and that, while his mind was thus inflamed, he shot and killed Veal upon first meeting with him after receiving such information, his offense would be of no higher grade than manslaughter."

That the above extract correctly states the law under the circumstances as detailed in this record would not admit of a doubt at this date in Texas. We think there was error in the action of the court in permitting the state to go out into matters not drawn out in the original examination of the wife. The state offered to, and did prove, over appellant's objection by Mrs. John Steen, that in the month of August, 1906, defendant inquired of her whether she had seen anybody on the first day they thrashed wheat that came out of his (appellant's) pasture, and stated to her that he had seen where some one on that day had crossed his fence. The witness told appellant that she had not seen any person and did not know who had interfered with his fence. Many grounds of objection are stated here, which are unnecessary to repeat. The state also permitted John Steen, husband of the former witness, to state that some time after July 6, 1906, appellant inquired of him whether he knew who had been in his (appellant's) pasture that day, that he had seen horse tracks crossing his fence, and seemed like the tracks had come back into Steen's pasture, and Steen told appellant he had not seen any party and did not know. Various objections are urged to this testimony. What this had to do with the case we do not understand. Under the ruling of this court in Gaines v. State, 38 Tex. Cr. R., 202, 42 S. W. 385, this testimony was inadmissible. See, also, State v. James, 90 N. C. 702. There is nothing to connect this testimony

with the reason or motive for the killing. There is nothing to indicate that appellant had ever suspected anything wrong between deceased and his wife so far as we can ascertain, and there is no fact in this whole record which indicates that there was a meeting between deceased and appellant's wife, except the one she details, and she testifies positively that she had not returned to that pasture since the unfortunate 6th of July, and she states as a reason why she did not tell her husband prior to the time she did inform him was that deceased had threatened to take her husband's life if she did inform him. This testimony from the Steens was clearly inadmissible. This disposes of some other matters in regard to the introduction of testimony without going in to a further discussion of them.

Error is assigned upon the charge on manslaughter, and especially that portion of it which informs the jury that the passion must not be the result of a former provocation, and that manslaughter is the voluntary homicide committed under the immediate influence of sudden passion; that the passion must arise at the time of the killing. And further the court charged the jury if they "found at the time of the killing, the defendant was actuated by sudden passion, such as rendered his mind incapable of cool reflection, arising from his belief in good faith of the information so given him by his wife, then you will find the defendant guilty of manslaughter." These are grouped without going into a separate discussion of them. These matters are mainly statutory, but as has often been held do not apply where the facts are like those contained in this record. In regard to insulting conduct toward a female relative, the statute provides that it is adequate cause if the passion be engendered thereby, if the killing occurs on the happening of the insulting conduct or as soon as the parties may meet after the slayer has been informed of such insulting language or conduct. Now appellant was not present when the insulting conduct happened, so he comes within the second clause—the killing must occur at the first meeting after being informed of these matters—and he would be entitled to a verdict for manslaughter, if he was actuated by such passion as rendered his mind incapable of cool reflection. The time elapsing between the happening of the insulting conduct and meeting with the party giving the insult has nothing to do with the suddenness of the passion. And the court's limiting the jury to the sudden passion happening at the time of the insult is a fatal error, under our authorities, wherever that question has been discussed, as applied to the facts of this case so far as we are aware. The court was not entirely harmonious, perhaps, in the Orman Case, in 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662, on one phase of the question, as we understand it, but

were on the main proposition, because Judge White and Judge Wilson, who disagreed with some of the observations of Judge Hurt in that case, have emphatically written the other way in cases, and some of them occurring subsequent to the Orman Case. Wherever the insulting conduct is relied upon to reduce the killing to manslaughter, and the information is conveyed to the slaying relative the question is not one of suddenness of passion, but it depends, first, upon the fact that he was so informed, and, second, that at the time of the killing his mind was incapable of cool reflection, that is, the condition of his mind as to its incapacity for cool reflection is not relegated to that portion of the statute which requires it to be sudden, for that only applies where the killing occurs upon the happening of the event. Without going further into this question, we cite in support of this, *Bays v. State*, 99 S. W. 561, 17 Tex. Ct. Rep. 981, *Eanes v. State*, 10 Tex. App. 421, *Niland v. State*, 19 Tex. App. 166, *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333, *Richardson v. State*, 28 Tex. App. 217, 12 S. W. 870, *Martin v. State*, 40 Tex. Cr. R. 665, 51 S. W. 912, and *Whaley v. State*, 9 Tex. App. 306.

It is contended that the law of self-defense should have been given. The cases are on a remarkably close line in regard to this matter, but we are inclined to the opinion, under our authorities, that the question under the facts stated is not presented. The only eyewitness testifies that her attention was called to deceased by his calling for a gun. Looking up, she observed him coming rapidly in the direction of her camp. She obtained two guns and went, meeting him with the guns. As she approached the deceased with the guns, she observed appellant coming in the direction of the deceased, but at the time without visibly having arms. Of course, the movements were very rapid, and when he reached the deceased and the witness he had his pistol and began firing and continued until the deceased fell to his knees. As this matter is presented, it puts appellant rather in the attitude of chasing the deceased to prevent him getting to the camp to arm himself. It is true that he stated at the time that he would not have killed deceased but for the fact that the witness brought the guns, yet, it would seem that he was rather chasing or pursuing the man he so shortly slew. As has been said by this court, self-defense is a defensive and not an aggressive act. The facts at this particular point are very unsatisfactory indeed. He had the right to approach the deceased and talk with him about this matter, and to go armed against an anticipated assault by the deceased as he had threatened to make, and if the deceased made the assault or attempt to take his life, appellant did not forfeit his right of self-defense. See *Shannon's Case*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17.

It is made to appear that appellant stated that he approached the deceased in order to talk with him. If the chase began from that point, and deceased holloed for a gun and appellant followed him up, it would not be present self-defense. That deceased was very much excited is shown by all the evidence bearing upon his condition at the time of the homicide. We are of opinion that the testimony is hardly sufficient to suggest the theory of self-defense, although it is a very close question. The facts upon another trial may be brought out more fully. In regard to the sufficiency of the evidence, we wish to say that the state's theory that this killing may have occurred for some other reason than that imputed, or testified, by the wife, has, in our opinion, no standing in this record; that the parties had been friends through 20 years or more is thoroughly established; and that they had been neighbors and interchanged visits and that up to the 6th of July there had been no break in the harmony and so far as appellant was concerned, he never knew of that occurrence until the 17th of the following January. Deceased had not been to appellant's house after the 6th of July. The impartial mind, in our judgment, can take the scene and the occurrences at the time of the homicide, and reach no other conclusion from the acts and utterances of the parties at the time than that the insult to Mrs. Stewart was the foundation for the killing. When appellant had shot his antagonist to his knees, that antagonist, facing the awful solemnity of impending death, reached out his hand to his slaying adversary with the request for forgiveness, and the friend of the 20 years preceding, even then, under those circumstances, extended that hand in forgiveness. Having obtained this forgiveness of the man whom he had so fearfully wronged, he turned to the witness and interceded that she pray for him. If dying declarations are sanctified by the solemnity of approaching death and the awfulness that envelopes the man with sanctity of the obligation to tell the truth, here we have a dying statement of the man who had wronged appellant, in conformity to the statement made by the wife. Under all these circumstances, as before detailed, and as shown as occurring around the death scene of this tragedy, there occurs to us but one conclusion and that is, that the original moving cause for this homicide was as detailed by Mrs. Stewart. No more solemn corroboration could well have been obtained than was given by her insulter when he had but a few moments to live. This case is not one of murder under the facts detailed.

For the errors discussed, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

**J. M. GUFFEY PETROLEUM CO. v. HOOKS et al.\***

(Court of Civil Appeals of Texas. Nov. 21, 1907. Rehearing Denied Dec. 19, 1907. Additional Findings of Facts Dec. 20, 1907.)

**1. ADOPTION—REQUISITES—RECORD OF INSTRUMENT.**

Act 1850 (Acts 1849-50, p. 36, c. 89), regulating adoption, provided that a person might adopt another by filing in the office of the clerk of the county court of the county in which he resided a statement in writing by him signed and acknowledged as deeds were required to be, reciting in substance that the adopted person named is his legal heir, and that the instrument should be admitted to record in such office, and section 2 declared that such statement in writing, signed and authenticated or acknowledged and recorded "as aforesaid," should entitle the party adopted to the rights and privileges of a legal heir of the adopter. *Held* that, where an instrument of adoption was duly executed, and filed for record in the proper office, with intent that the clerk should immediately record it, the adoption was complete, notwithstanding the clerk failed to enter it of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, § 14.]

**2. RECORDS—DEPOSIT FOR RECORD—SUFFICIENCY.**

If a paper required to be recorded in the office of the clerk of a county court is handed to the clerk outside of his office to be filed in the office for record, and is then taken by the clerk to the office and filed there, it will be considered as filed for record as required by law, from the time of its actual deposit and filing in the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Records, §§ 5-7.]

**3. VENDOR AND PURCHASER—OUTSTANDING TITLE—UNRECORDED DEED—NOTICE—PRESUMPTIONS.**

Where H. paid his vendor a satisfactory price for an entire tract, and there was no evidence that it was not its full value at the time, it will be presumed that he acquired title to the whole tract, without notice of a prior unrecorded deed from his vendor to another of three-sevenths of the tract, and this though the four-sevenths may have been worth as much as he paid for the whole.

**4. SAME—BURDEN OF PROOF.**

The burden was on those claiming under such purchaser to show want of knowledge on his part of such unrecorded deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 604.]

**5. ADOPTION—INSTRUMENT—RECORD.**

Under Act 1850 (Laws 1849-50, p. 36, c. 89) §§ 1, 2, regulating adoption, requiring the instrument to be filed and recorded in the office of the clerk of the county court of the county of the adopter's residence, the filing of an instrument of adoption with such clerk, with instructions not to record it, is fatal to the adoption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, § 14.]

**6. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE.**

Where an instrument of adoption was properly executed and filed for record, one taking title to land previously belonging to the adopting parent is charged with notice that the adopted child was one of such parent's legal heirs.

**7. TRIAL—INSTRUCTIONS—INSTRUCTIONS PREVIOUSLY GIVEN.**

Appellant cannot complain of the refusal of an instruction, where the court gave an instruction on the issue in question which was

\*Writ of error denied by Supreme Court Jan. 22, 1908.

more favorable to appellant than the instruction requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

#### 8. POWERS — EXECUTION — CONVEYANCE OF LAND.

Where a grantor in a deed had no interest in land, but held a power of attorney duly executed from the holder of the title, the deed would be referred to such power, and would convey the title of the grantor of the power, though there was no reference thereto in such deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Powers, § 105.]

#### 9. ESTOPPEL — ESTOPPEL BY DEED — AFTER-ACQUIRED TITLE—DEEDS WITHOUT COVENANTS.

Though a power did not authorize the grantee to make a warranty deed, such deed passed the after-acquired title of the grantor of the power by estoppel.

#### 10. LOST INSTRUMENTS—DEEDS—ESTABLISHMENT—EVIDENCE.

Where it is sought to establish the execution of a lost deed by circumstances, it is admissible to prove that there had been sales and resales of the land under such title, and claim of ownership by the vendees, together with general reputation of ownership and nonclaim by those who would have been the owners if such deed had not been executed.

#### 11. WITNESSES—CONTRADICTION—EVIDENCE.

Where a witness testified that an adopting parent instructed the clerk of the county court not to record the deed of adoption, evidence that the parent intended to adopt the child, and that he thought he had done everything necessary to that end, was admissible to contradict such testimony.

#### 12. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the act by which plaintiff was adopted was uncontrovertibly established by the instrument of adoption duly executed, the admission of evidence that the adopting parent intended to adopt plaintiff, and thought he had done so, was not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from District Court, Hardin County; L. B. Hightower, Jr., Judge.

Action by Charles Guy Knight, by C. R. Hooks, his guardian ad litem, and another, against the J. M. Guffey Petroleum Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. Edward Greer and F. C. Proctor, for appellant. John L. Little, V. A. Collins, and W. D. Gordon, for appellees.

REESE, J. This is a suit by Charles Guy Knight suing by C. R. Hooks, his next friend, and H. A. Hooks, against the J. M. Guffey Petroleum Company for the recovery of an undivided one-fourth interest in 553 acres of land, the Champion Choate survey. Plaintiffs also sought to recover damages for the extraction of oil from the land; but by agreement this was eliminated, and the suit, as tried, was only for the recovery of the land. Upon the trial, with a jury, there was a verdict and judgment in favor of the said Charles Guy Knight for an undivided one-eighth interest in the land, from which judgment defendant appeals.

Both parties claim title under A. B. Hooks, some time deceased—appellant by deed from the widow and three children of said Hooks, and appellee Knight as the adopted child of said Hooks. A. B. Hooks died intestate in 1900, leaving surviving him his widow and three children, who were his sole heirs and entitled to his whole estate, unless the said Charles Guy Knight was legally adopted by said Hooks under sections 1 and 2 of the Acts of 1849-50, p. 36, c. 39; Hart. Dig. p. 88. Appellant also claimed title under deed from the heirs of one E. B. Harper to all of the land, and under deed from the heirs of A. Richardson to three-sevenths thereof. The particular nature of these claims with reference to this appeal will be explained hereafter. It was also claimed by appellee that a certain deed from Tom Moore, only child of D. D. Moore, under which appellee claims, if valid at all, only conveyed an undivided one half of the land, leaving the other half as an outstanding title. The first, second, and third assignments of error attack the validity of the instrument of May 4, 1897, as an act of adoption, under the statute, upon the ground that it was not actually entered upon the record until after the death of A. B. Hooks, the alleged adopter. If appellant is correct in this, appellee has no title. This instrument is sufficient in its terms, if properly executed as required by the statute, to create appellee the adopted child and legal heir of A. B. Hooks. It was signed by Hooks on May 4, 1897; was on said date duly and properly acknowledged by him for record, and deposited by him with the county clerk for record. It has upon it the indorsement of the clerk that it was filed for record May 4, 1897. The instrument was never entered upon the record until 1905. Hooks died in 1900, and appellant acquired by deed of his widow and three children their title to the land previous to such record. In 1905 this instrument was found among certain papers not intended to be recorded in the clerk's office by the attorney of appellee, and by his direction recorded. The jury found upon sufficient evidence that it was deposited with the clerk by Hooks for record, and we find this to be a fact. It must be conceded that if the actual entering of the instrument upon record was essential to give it validity, as between the parties, such recording after the death of Hooks was not sufficient for that purpose. The question arises, does the statute require, as an essential condition of the act of adoption, that the instrument, in addition to having been acknowledged and filed for record, should have been also entered upon the record by the clerk? The evidence is clear that A. B. Hooks intended to adopt appellee as his child and heir, and that he thought he had done so by signing, acknowledging, and filing the instrument for record. This intention, however, must fail, if the essential conditions of the statute were not complied with. The statute upon the subject

is embraced in an act passed in 1850 and is as follows:

"Section 1. Any person wishing to adopt another as his legal heir, may do so by filing in the office of the clerk of the county court of the county in which he may reside, a statement in writing, by him signed and duly authenticated or acknowledged, as deeds are required to be, which statement shall recite in substance that he adopts the person named therein as his legal heir, and the same shall be admitted to record in said office.

"Sec. 2. Such statement in writing, signed and authenticated or acknowledged, and recorded as aforesaid, shall entitle the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him; provided, however, that if the party adopting such heir have, at the time of such adoption, or shall thereafter have a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the party adopting him."

The question is one of some difficulty, and appellant's contention is presented in its brief with much ability, by way of argument and authority. It is clear that all of the conditions imposed by the statute must be complied with, else the right does not attach, but this helps us not at all to a proper determination of the question as to whether it was the intention of the statute to make the recording a condition of the act of adoption. Among the cases relied upon by appellant is *Rorer v. Roanoke National Bank*, decided by the Court of Appeals of Virginia (83 Va. 589, 4 S. E. 820). That case arose upon the construction of a statute of that state upon the subject of the execution of deeds by married women. The statute referred to in the opinion is section 7, c. 117, Code 1873, and is as follows: "When the privy examination, acknowledgment, and declaration of a married woman shall have been so taken and recorded, or when the same shall have been taken and certified as aforesaid, and the writing to which such certificate is annexed, or on which it is, shall have been delivered to the proper clerk, and admitted to record as to the husband as well as the wife, such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were at the said date an unmarried woman; and such writing shall not operate any further upon the wife or her representatives by reason of any covenant, or warranty contained therein." The court holds that under this statute a deed of a married woman is not effective until actually recorded, with its certificate of acknowledgment. A careful reading of the entire opinion, which is quite

lengthy, clearly shows that this conclusion was reached, in view of the general policy of the state as shown by former laws on the subject, that recording was essential to the validity of such deeds. All of the statutes on the subject, of which there were several, beginning with that of 1674, are reviewed; all showing this settled policy. For instance, in the act of 1734 (page 828) occurs the following language: "And whereas, it has always been adjudged that when a deed has been heretofore acknowledged by a feme covert, and no record made of her privy examination, that such deed is not binding upon the feme or her heirs, yet the reason of those judgments is much questioned, and the same point is still constantly disputed. For settling the peace in that matter, be it further enacted, that the law shall always be held, and it is hereby declared to be therein, according to the said judgments, and shall never hereafter be questioned; and the clerks of the courts before whom any deed of a feme covert shall be acknowledged shall always hereafter record her privy examination." The same language is carried into the act of 1748 and the act of 1792 (page 830). It is declared by the court that the language of the act of 1873, then being discussed, shows an intention not to depart from this settled policy. Clearly, we think the case cannot be considered an authority upon the proper construction of our statute, and the same must be said of *Sewall v. Haymaker*, 127 U. S. 719, 8 Sup. Ct. 1348, 32 L. Ed. 299, cited by appellant, which is really bottomed upon the *Rorer* Case. Another case cited by appellant is *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902. In this case a statute of Iowa providing for the adoption of children was the subject of discussion, and it was decided that the filing of the instrument of adoption was essential to make the act of adoption effective. The act in question is as follows: "Such instrument in writing \* \* \* shall be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged; and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantor, and the child as grantee in its original name if stated in the instrument. Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." It will be seen that the terms of the statute with regard to filing are much more imperative than those used by our statute with regard to recording. The language is that, "upon the execution, acknowledgment and filing for record," etc. Appellant gives to the language of section 2 of our statute the same signifi-

cance, but the language does not require, if it permits, such an interpretation. Other Iowa cases are cited to the same effect construing this statute. It is not without significance, we think, that the filing for record, required by the statutes of Iowa, is the act of the party himself executing the act of adoption, and not, like recording, the act of an officer over whom he has no control. We distinguish those cases, however, on the ground that the language of the statute in providing that when the instrument is filed for record it shall be effective is materially different from our own, showing, as it does, that from the time of such filing for record by the adopter, and not before, the act of adoption becomes complete and effective.

Appellant also relies upon certain decisions of our own Supreme Court construing the statute with regard to judgment liens. *Belbaze v. Ratto*, 69 Tex. 639, 7 S. W. 501, *Evans v. Frisbie*, 84 Tex. 343, 19 S. W. 510, and others. A very slight consideration of the terms of that statute will suffice to show that these decisions have no application. Articles 3287, 3288, 3289, Rev. St. 1895. To make effective the lien, a copy of the judgment is required to be indexed, which could not be done until it was recorded. The emphatic language is used that, "when any judgment has been recorded and indexed, as provided in the preceding articles, it shall, from the date of such record and index, operate as a lien," etc. The intention of the Legislature is made clear by emphatic declaration that the lien shall take effect from the date of the recording and indexing, and not until this is done. Now the language of our statute with regard to adoption is entirely different. Section 1 of the act provides that any person may adopt another as his legal heir "by filing in the office of the clerk of the county court of the proper county in which he may reside a statement in writing, signed and duly authenticated, or acknowledged, as deeds are required to be, which statement shall recite, in substance, that he adopts the person named therein as his legal heir, and the same shall be admitted to record in said office." We think this section prescribes, as its language indicates, everything that had to be done by the adopter to render the act of adoption complete.

Appellant contends that section 2 prescribes an additional act to be done by the clerk before the adoption is effective. Having by section 1 prescribed the acts to be done to enable one person to adopt another, section 2, in prescribing the rights growing out of the act of adoption, provides that "such statement in writing, signed and authenticated or acknowledged and recorded as aforesaid, shall entitle the party so adopted to all of the rights and privileges, both in law and equity, of a legal heir of the party so adopting him," etc. It is a familiar rule of interpretation of statutes that their purpose and object must be kept in view in order to determine the

legislative intent. If it had been the intent of this statute that any person wishing to adopt another should, in addition to signing, acknowledging and filing for record the written statement, also have it recorded, we think such provision would have been made in the first section, and in the same clear and unambiguous terms as are used in that section, the purpose of which was to prescribe the essential requisites of the act. To have intended that such effect should be given to the word "recorded" in the second section was but to set a trap for the ignorant and unwary. Section 1 prescribes that the written statement shall be "signed, acknowledged, and filed for record" by the adopter. We are of the opinion that it better harmonizes the two sections to construe section 1 as prescribing what was to be done in adopting a child, and section 2 as prescribing the right attaching to such act of adoption. There is nothing in the language of either section to require the conclusion that it was intended that, having done what he was required to do by section 1, the adopter had also to require the clerk to record the instrument before his intention could be given legal effect. We the more readily adopt this interpretation of the statute, reasonable in itself, because it carries out instead of defeating the clear intention of the parties. It is conceded, indeed it is insisted upon, by appellant that the purpose of such record was not to give notice. Surely the adopter, by executing, with the formalities prescribed, the act of adoption, and filing it with the clerk to be recorded, and thus putting the instrument beyond his power to recall, had given sufficient evidence of his intention. It would have added nothing to this to require him to see that it was actually entered upon the record. The statute might have so required, but we do not think it has done so. We take the liberty of quoting here the following from the opinion of the Supreme Court of Wyoming in the case of *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17, from note to *Van Matre v. Sankey* (39 Am. Dec. 216): "It must be admitted in the beginning that a proceeding in adoption was wholly unknown to the common law, and in our system of jurisprudence it is purely a statutory matter. Hence it follows that in order to give any validity to such proceedings they must have been conducted in substantial conformity with the provisions of the statute, and its requirements observed; but, notwithstanding this, it ought not to be overlooked, in the examination of cases growing out of the exercise of this statutory right, that the right is a beneficial one, both to the public and to those immediately concerned in its exercise. Since its incorporation into our system (and the fact is such statutes have been adopted in nearly every one of our states), the homes of many childless parents have been brightened and made happier because the law enabled them to bring to that home a child upon whom



their affections could center and develop. Many an orphan child, and many a child whose parents were unable, by misfortune or their own infirmities, to care for, have, by means of this statutory right, found good homes, loving and affectionate parents, and thereby grown up to be good and valuable members of society, when otherwise they would have spent their early years in ignorance and vice, and in such surroundings grown up to young manhood or young womanhood simply to swell the overflowing ranks of the vicious and criminal classes of society; and hence it seems to me that in cases of this kind it is not the duty of the court to bring the judicial microscope to bear upon the case, in order that every slight defect might be enlarged and magnified, so that a reason might be found for declaring invalid an act consummated years before, but rather approach the case with the inclination to uphold such acts, if it is found that there was a substantial compliance with the statute." We find the view here expressed supported by the opinion of the Supreme Court of Alabama in *Abney v. De Loach*, 84 Ala. 393, 4 South. 757. The statute under discussion in that case provided that the act of adoption should be filed and recorded in the minutes of the probate court. The language is much more imperative than that of our own statute. The act of adoption in question was recorded in a book kept for recording deeds and wills. Clearly such record, as a compliance with the statute, was no record at all, and in the discussion of the case it is so treated. The court, however, holds that the adoption was effective; that the neglect of the probate judge to do his duty by properly recording the paper would not operate to destroy its legal validity, when the maker and beneficiary had done all that the law required them to do, and which they possibly could do, towards perfecting it. We think the reasoning of the court, in that case, applies forcibly to the present case. Our conclusion is that the act of adoption of Charles Guy Knight by A. B. Hooks was only required to be filed for record by Hooks, after its proper execution as prescribed by section 1 of the statute, and that the failure of the clerk to record it did not invalidate it.

As to the second proposition under the first, second, and third assignments of error, *Tebbs* testified that Hooks delivered the instrument to the county clerk in his office. He further testified that he told the clerk not to record it until he directed him to do so. The jury found that this latter statement was not true. It does not follow that they did not credit the first statement. If Hooks did not give it to the clerk in his office, but handed it to him elsewhere, it is clearly established by the evidence that it was in fact immediately afterwards deposited in the clerk's office. If a paper is handed to the clerk elsewhere than in his office to be filed in his office for record, and is then

taken by him to his office and filed there, from the time of such actual deposit and filing in his office it must be considered as deposited there for record as required by law. *Withrow v. Citizens' Bank*, 55 Kan. 378, 40 Pac. 639. What has been said disposes also of the fourth assignment of error, which is overruled.

Under the authority of *Rogers v. Pettus*, 80 Tex. 423, 15 S. W. 1093, and *Eastham v. Hunter*, 98 Tex. 560, 86 S. W. 323, the fifth assignment of error is overruled. Hooks paid Mrs. Taylor \$150, at least, for the land. This must be taken as a satisfactory price for the entire tract. There is no evidence that it was not in fact its full value at that time. He did not pay this price for the four-sevenths interest which remained in his vendor, irrespective of the unrecorded deed to Richardson, but for the whole. We do not think the fact that he, at all events, recognizing the deed to Richardson for three-sevenths, got a good title to four-sevenths, which may have been worth as much as he paid for the whole, would take the case out of the rule announced in the cases cited. Both of the parties to the transaction were dead. After the lapse of years the very great difficulty of proving actual lack of knowledge by Hooks of the unrecorded deed should have some weight. We fully recognize that the burden was upon appellee to show want of knowledge of the unrecorded deed on the part of Hooks.

There was no error in refusing the instruction referred to in the sixth assignment of error. Whether or not Hooks instructed the clerk not to record the instrument of adoption had no bearing upon the question of notice to appellant of appellee's claim. Such instruction on the part of Hooks would have been fatal to appellee's claim, and the jury were so instructed by the court, and told that if Hooks, when he delivered the instrument to the clerk, instructed him not to record it, to find for defendant. This charge was given upon the correct theory that filing the instrument for record by Hooks was essential to its execution. Under this charge they found that no such instruction was given. We must assume that they would have made the same finding if the issue had been presented to them as a matter of notice, as in the charge requested. The charge could not have been justified on any other theory than that the purpose of such filing for record was to give notice. If this be true, then it follows logically, from the finding of the jury that the instrument was properly deposited with the clerk for record, that, under article 4299, Rev. St. 1895, it must be considered as recorded from that time, a conclusion against which appellant strenuously contends. We have not found it necessary to decide whether this contention is correct. The proper execution of the instrument established the status of appellee as the adopted child and one of the

legal heirs of Hooks, and of this status appellant was bound to take notice, as though he were an actual, instead of an adopted, child. This must be true, unless the purpose of the filing and record was to give notice, and if this be so it comes under the general provisions of the registration laws and the filing for record operated as such notice. In this latter view the charge of the court that the filing with instruction not to record rendered the act of adoption void *inter sese* was more favorable to appellant than the instruction requested. This also disposes of the eighth assignment of error.

If we are to disregard the plain, unqualified statement in the statement of facts that "plaintiff introduced in evidence a power of attorney from Tom Moore to John W. Leonard, authorizing him to sell and convey by general warranty deed the land in controversy," and assume from this evidence having been excluded, which is nowhere shown by the record, but appears incidentally from the charge of the court, plaintiff undertook to establish the execution of this instrument by secondary evidence, the evidence was sufficient to prove the execution of the power of attorney, and that the deed executed by Leonard to Murphy Taylor in his own name, although not referring to the power of attorney, was in fact executed under it and in pursuance of its authority. Leonard is shown to have had no interest in the land. In such case the deed will be referred to the authority under which it was made, and will suffice to convey the title of the grantor in the power of attorney. *Hill v. Conrad*, 91 Tex. 341, 43 S. W. 789. See, also, *Rye v. Guffey Co.* (Tex. Civ. App.) 95 S. W. 622, in which this power of attorney was under discussion. The deed of Leonard under the power of attorney, even if the latter did not authorize him to make a warranty deed, passed the after-acquired title of Moore by estoppel. *Lindsay v. Freedman*, 83 Tex. 263, 18 S. W. 727. We are inclined to think, however, that we must look to the unqualified statement in the statement of facts for the evidence upon which appellee insists in his brief, and that shows, as we have said, that the power of attorney authorizing the agent to sell and execute warranty deed was itself introduced in evidence, and without objection. What has been heretofore said disposes of the question raised by the tenth assignment of error, which is overruled.

One of the links in the Hooks title was a deed from E. B. Harper to D. D. Moore. Appellee undertook to establish the execution of this deed by circumstances, among them nonclaim by Harper or his heirs after its alleged execution and acts of ownership under claim of title by the owners under the Harper deed. Leonard, the holder of a power of attorney from Moore, who claimed title under the Harper deed, testified, and his testimony is not contradicted, that Tom Moore, when he gave him the power of attorney,

showed him, and he examined, a power of attorney and a subsequent deed from Harper to D. D. Moore, his father, both of which were acknowledged for record, and both covering the land in controversy. As tending to show claim of title under the Harper deed by Murphy Taylor, to whom Leonard conveyed the land under the power of attorney, appellee offered the testimony of Pedigo and Roberts as to the general reputation in the neighborhood that the land in controversy was Murphy Taylor's land, to which appellant objected, which, being overruled, exception was taken. This testimony was also explanatory of the nonclaim on the part of Harper or his heirs. If Harper had not executed the deed in question, such general reputation that the land belonged to another called upon him, or his heirs after him, to assert their claim, and lends emphasis to their failure to do so, as a circumstance tending to establish the execution of the alleged lost deed. Where it is sought to establish the execution of a lost deed by circumstances, it is admissible to prove, as circumstance tending to prove the main fact, that there have been sales and resales of the land under such title, and claim of ownership by such vendees. The general reputation in the neighborhood that the land belonged to Taylor necessarily involved the fact that Taylor asserted his ownership openly and notoriously, and this, coupled with testimony of witnesses living in the neighborhood that Taylor claimed to own the land and offered to sell it, and that the witnesses had never heard of any claim asserted by the heirs of Harper, was all admissible to show claim of title under the alleged lost deed and nonclaim by those persons who would have been the owners, if such deed had not been executed—both pregnant circumstances to show that the deed had been in fact executed. Assignments of error from 11 to 16, inclusive, presenting these questions, are overruled.

The evidence referred to in the seventeenth and eighteenth assignments of error was admissible, if for no other purpose, to contradict the testimony of Tebbe that Hooks instructed the clerk not to record the deed of adoption. This evidence showed that Hooks intended to adopt appellee, and thought that he had done everything necessary to that end. Besides the act of adoption was incontrovertibly established by the instrument itself, duly executed, and the admission of the evidence, if erroneous, was harmless.

The testimony referred to in the nineteenth assignment was of a purely negative character, and could not in any way have affected the verdict.

We find no error in the record, and the judgment is affirmed.

Affirmed.

#### Additional Findings of Fact.

Appellant has requested additional findings of fact, under his fifth assignment of error,

upon the issue of want of notice to A. B. Hooks, at the time of his purchase from Elizabeth Taylor, of the former unrecorded deed from Taylor to Richardson, for an undivided three-sevenths interest in the land. Upon this issue we find that there was no direct evidence of want of notice to Hooks. Both of the parties to the transaction were dead. The deed from Mrs. Taylor to Hooks was dated October 9, 1889. The consideration recited as received in the deed was \$553. The only evidence of payment of consideration was that the consideration was paid in property, the property being a flock of sheep consisting of 100 head, the witness testifying to the fact that there might have been one or two more. There was no price put on the sheep. "We just made a lump trade" is the language of the only witness testifying on this point, a son of Mrs. Taylor who got the sheep for his mother. The witness did not know the value of the sheep at that time, but supposed they would sell for from \$1.25 to \$1.50 per head. There was no evidence as to the value of the land at the time of the purchase by Hooks from Mrs. Taylor. The consideration recited in the deed to Murphy Taylor in 1872, 16 years before, was \$250. There was no other evidence bearing upon the issue of want of notice to Hooks except the payment of the purchase money as hereinafter recited.

#### J. B. LLOYD & SON v. KERLEY.

(Court of Civil Appeals of Texas. Dec. 19, 1907.)

##### 1. EVIDENCE—RELEVANCY—CUSTOM.

In an action by a broker for compensation, on an issue as to whether the contract with the principal called for a commission of a certain percentage of the proceeds of the sale or all the proceeds over a specified price, evidence as to defendant's dealings with other real estate agents and the terms under which he had listed the land with them was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 254-257.]

##### 2. WITNESSES—IMPEACHMENT.

It is only where a witness denies having written a certain letter that the letter itself can be introduced as impeaching evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1248-1251.]

Appeal from Hardeman County Court; J. C. Marshall, Judge.

Action by J. B. Lloyd & Son against J. C. Kerley. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

Fires & Decker and Diggs & Clark, for appellants. M. M. Hawkins, for appellee.

LEVY, J.: The appellants sued the appellee to recover 5 per centum of the price on a sale of land made by them for the appellee, alleging that amount to be due them as commissions, upon express agreement with the appellee, for making the sale of his land. The case was tried to a jury, and there was

a verdict and judgment for the appellee, which the appellants seek to have reversed in this court for errors assigned upon the admissibility of evidence in the trial and the giving of a special instruction to the jury by the court.

The first, second, and third assignments of error complain of the admission of evidence. The three bills of exception in the record show that the appellee introduced three different real estate agents to testify that they were separately engaged in the real estate business and that the appellee had listed his land generally with each of them for sale during the year 1906, and stated the price that appellee had listed the land for sale by them. The evidence in the record shows, without substantial contradiction, that the appellee made an agreement with the appellants to sell the land. The appellants procured a purchaser and made a sale of his land; and the appellee, joined by his wife, executed a conveyance of the land to the purchaser. The appellants declare that the appellee employed them specially to sell this land at \$17 per acre, and expressly promised to pay them 5 per centum of the proceeds of the sale of the land as commissions. The appellee declares that he listed the land with appellants at that time for sale at \$17 per acre net to him, and that the appellants were to get any overplus of the price of the sale of the land that they might secure as their commissions. The land was sold to the purchaser at \$17 per acre by the appellants, which price was accepted by the appellee. It is evident that the controversy between the parties is as to how the commissions to be earned by the appellants were to be paid by the appellee, whether at 5 per cent. of the proceeds of the sale of the land at \$17 per acre, or all over and above the proceeds of the sale of the land at \$17 per acre net to the appellee, which evidences a particular negotiation between the appellants and the appellee. Looking to the record in the case, all evidence of the appellee's dealings with other real estate agents and the price at which he listed this land with them generally would be immaterial and irrelevant to the issue in this case. The evidence was inadmissible, and reversible error in this case. *Smye v. Groesbeck* (Tex. Civ. App.) 73 S. W. 972; *Yarborough v. Creager* (Tex. Civ. App.) 77 S. W. 645.

The appellants complain of the introduction in evidence of the letter written by the witness Bondurant to the appellee. Where a contradictory statement that is to be used is contained in a letter written by a witness himself at a prior time, the witness must be asked the preliminary question whether he made the particular statement asked about, to lay the foundation for the production of the letter itself, or pertinent excerpts therefrom, in denial of his statement in the trial. The proper predicate for the admission of the letter itself was not made in this case; the witness having admitted, and never denied,

writing the letter. This ruling, however, is not to be taken on another trial of this case, if the same evidence be offered, as precluding the using of pertinent excerpts from the letter in the form of a question to be asked the witness of whether he made such particular statement. Such questions are pertinent for the purpose of showing that the witness had made previous statements out of court contradictory to those made in the trial. It is only when there is a denial of having made the statements that the letter itself can be read as evidence of the contradictory statements. *Dooley v. Miller*, 2 Tex. Civ. App. 132, 21 S. W. 157.

The special charge No. 1, complained of, was not applicable to this case as made by the evidence, and should not have been submitted to the jury.

For the errors mentioned, the case is ordered reversed and remanded.

### MEMPHIS COFFIN CO. v. PATTON.

(Court of Civil Appeals of Texas. Nov. 27, 1907. Rehearing Denied Jan. 8, 1908.)

#### 1. INFANTS—NOTES—LIABILITY.

Where a father conducted a business in the name of his son, who was a minor between 15 and 16 years old, and procured a note sued on to be given to plaintiff for goods purchased in such business, purporting to have been signed by both father and son, but the son had no benefit of the goods and was not in possession thereof, he was not liable, not being within the rule that if a minor uses property for purchasing necessities he must restore or account for its equivalent, and if he disaffirms a contract during minority he must restore the property, etc.

#### 2. SAME—FRAUD—EVIDENCE.

In an action against a minor for goods purchased by his father in the minor's name, in which the father was doing business, evidence held to justify a finding that the minor had no actual knowledge of the transaction and was not guilty of fraud.

#### 3. BILLS AND NOTES—ACTIONS—PLEA—NON EST FACTUM.

In an action on a note alleged to have been given by a minor, a plea of non est factum put in issue the minor's execution of the note, and required plaintiff to prove the same.

#### 4. SAME—QUESTION FOR JURY.

In an action on a note, evidence held to require submission of the issue of execution to the jury.

#### 5. APPEAL—REVIEW—HARMLESS ERROR.

In an action against a minor on a note alleged to have been given by him, in which he pleaded infancy and non est factum, it is harmless error as to plaintiff to submit the latter issue to the jury without evidence sufficient to sustain it, where the defense of infancy was fully made out.

#### 6. TRIAL—INSTRUCTIONS—REQUESTS.

Where a charge given was correct in its presentation of the matters of defense, if plaintiff desired presentation of the converse of the proposition, it should have requested such charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 623-641.]

Appeal from Liberty County Court; T. C. Crane, Judge.

Action by the Memphis Coffin Company

against Randolph Patton. From a judgment for defendant, plaintiff appeals. Affirmed.

Marshall & Marshall, for appellant. H. B. Tucker, R. D. Wright, and Stevens & Pickett, for appellee.

FLY, J. This is a suit on a promissory note for \$168.13, instituted by appellant in the justice's court, where it recovered judgment for \$116.50. The cause was appealed to the county court, where judgment was against appellant on its demand. Appellee pleaded infancy and non est factum.

The proof showed that a furniture and coffin business was conducted in Dayton, Tex., by A. J. Patton in the name of his minor son, Randolph Patton, who at the time the note forming the basis of the suit was executed was working in Liberty, Tex. Appellee, at the time of execution of the note, was 15 or 16 years old, and was still a minor when the cause was tried. It was not shown that appellee received any benefit from the coffins, which circumstances tend to show were ordered by his father. A. J. Patton seems to have been lost sight of in both of the lower courts, although the note, which was sought to be proved up under a showing that it was lost, was signed by him as well as by appellee, and the former wrote a letter in which he renewed his promise to pay the note. It does not appear from the evidence that appellee ever had any of the goods sold by appellant in his possession, or any of the proceeds arising from the sale of the same, or that they had been expended by or for him in the purchase of necessities. *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 328, 77 Am. St. Rep. 849; *Williams v. Sapleha*, 94 Tex. 430, 61 S. W. 115. The rule as laid down in the *Bullock-Sprowls* Case is that if a person while a minor uses money or other property for purchasing necessities he must restore or account for its equivalent, if he seeks to set aside an act performed by him during minority, or if he retains possession or control of property obtained by him during minority he must restore such property if on reaching majority he seeks to avoid the contract through which he obtained the property. The facts of this case do not bring appellee within the province of that rule.

Appellee was a boy 15 or 16 years old when the note was executed as evidencing a debt for goods for which he received no benefit whatever, so far as disclosed by the record. He is presumed to have been under the complete control of his father, and could not have been guilty of fraud arising from the use of his name by his father without showing his consent thereto. A boy of that age would know nothing of the legal fraud that might be perpetrated by the use of his name, and, if he did, how could he have prevented such use, if he had desired to do so. There is not a fact that tends to show any active

agency on the part of appellee in perpetrating a fraud. If it had appeared that A. J. Patton had been using the name of appellee with his knowledge and consent, or if it had been shown that appellee ordered the goods in his name, knowing that they were to be delivered to his father and would be appropriated by him, the case would probably have been brought within the scope of the decision in *Harseim v. Cohen* (Tex. Civ. App.) 25 S. W. 977, which goes as far, perhaps, as any Texas case in binding a minor on the ground of fraud. Appellant contends that the facts of this case are the same as in the case last cited; but in that case the facts are thus stated: "It is true there is no evidence that she made any direct representation as to her age. Her father, with her knowledge and consent, was using her name, and doing business under cover of it. She ordered the goods for him in her name, knowing they were to be delivered to him, and to be appropriated by him." Appellee, in this case, was not shown to have known anything about the ordering of the goods; but, on the other hand, it appears that he was living in another city, and knew nothing about them, unless he ascertained it after the goods had been delivered, when he signed the note, if he ever did sign it. The letter inclosing the note to appellant was not in his handwriting, as appeared from the uncontradicted testimony. The question of fraud was submitted to the jury, and they were justified in finding against appellant on that issue.

The effect of the plea of non est factum was to require appellant to prove the execution of the promissory note by appellee. *Brashear v. Martin*, 25 Tex. 203; *Railroad v. Chandler*, 51 Tex. 416. Appellant introduced evidence to the effect that appellee had admitted that he executed the note; but it was shown that he was not in Dayton when the note was executed, and that the letter inclosing the note to appellant was not written by him. The issue should have gone to the jury, and we cannot hold that there was no evidence of no execution. But, if that defense should not have gone to the jury, it would not matter, because the note was fully avoided under the plea of minority, and the facts would have sustained no other verdict. There was not a fact in the record that tended to show that appellee received any benefit from the goods sold by appellant, or that he ever at any time had them in his possession, or that he received any of the proceeds arising from the sale of the goods. There was really but one issue made by the evidence, outside of the issue of non est factum, and that was as to whether fraud was committed by appellee. The charge complained of could not, therefore, have injured appellant, though it should be open to the criticism advanced by appellant in the seventh assignment of error. In this connection it may be said that the charge was correct in its presentation of the matters of defense, and if appellant desired

a presentation of the converse of such propositions it should have requested it.

The judgment is affirmed.

#### WESTERN UNION TELEGRAPH CO. v. GULICK.\*

(Court of Civil Appeals of Texas. Dec. 4, 1907. Rehearing Denied Jan. 15, 1908.)

##### 1. TELEGRAMS—DELAYED TELEGRAMS—QUESTION FOR JURY.

In an action against a telegraph company for delay in delivering a message resulting in the addressee not reaching his son's bedside until after his death, *held*, under the evidence, proper to refuse to direct a verdict for the company.

##### 2. SAME—PROXIMATE CAUSE.

An act may be proximate cause, without being the sole cause, of an injury, and where, when a telegram announcing the addressee's son's illness should have been delivered, the addressee was accessible, and, had he received it, he could have arrived at his son's bedside before his death, the company cannot escape liability for the addressee's injury in being unable to reach his son before his death because he was inaccessible when the telegram was delivered to his brother in whose care it was addressed, though he would have arrived before the death had he been accessible.

##### 3. SAME—INSTRUCTION.

In an action against a telegraph company for delay in delivering a message, it was proper to refuse to instruct that the company was not required to deliver the message outside the town to which it was addressed, though plaintiff was absent therefrom; the only negligence charged being the delay in delivering it in such town to him in whose care it was addressed.

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by A. P. Gulick against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. L. Lindsley and Webb & Goeth, for appellant. R. L. Ball and F. J. Kearful, for appellee.

**FLY, J.** This is a suit for damages based on the negligence of appellant in failing to promptly deliver a message to appellee conveying information to him of the sickness of his son. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for \$750.

It appears from the evidence that a telegram was delivered by Joe Gulick, a son of appellee, to appellant in San Antonio, Tex., addressed to "A. P. Gulick, care of Sim Gulick, Sarcxie, Missouri," as follows: "Come immediately. Jess is sick. Doctor went out this evening." Jess was a son of appellee, who was very sick with pneumonia, near San Antonio where appellee lived. Appellee was at the time on a visit to Sim Gulick, a brother, and other relatives in Missouri. The message to appellee was delivered to appellant about 1 o'clock p. m. on Sunday, January 3, 1906, but was not delivered to Sim Gulick, who lived in Sarcxie, not more than three or four blocks from ap-

pellant's office, until 3:45 p. m. on January 4, 1906, more than 26 hours after it was delivered to appellant in San Antonio. It was shown that the message should have been delivered in about one hour. It did not reach the office of appellant in Sarcoxie until 8:50 a. m. January 4th, over 19 hours after it had been received at San Antonio, and then was not delivered for nearly 7 hours, although Sim Gulick lived in five minutes' walk of the office, and was at home most of the day. If the message had been delivered to Sim Gulick on the afternoon of January 3, 1906, he would have conveyed its contents to A. P. Gulick by telephone, as he had arranged to convey any telegraphic messages to him during his absence from Sarcoxie. If the message had been delivered on January 3d, appellee would have reached the bedside of his son on Tuesday, and would have been with him for at least 36 hours before his death, which occurred at midnight on January 6, 1906. If the message had been delivered on January 4th, to Sim Gulick at any time before 2 o'clock p. m. it would have reached appellee at such time that he could have left at 8 p. m., and have reached San Antonio at 11 p. m. on January 5th, at least 24 hours before his son died. Appellee at 2:30 p. m. on January 4th, called at the telephone office, at the place where he had arranged for his brother to communicate with him, and, finding that there had been no call for him, went to a point 12 or 15 miles further from Sarcoxie, which could not be reached, on account of the telephone being out of order at the latter place, and appellee did not learn about the telegram until 4 or 5 o'clock p. m. on January 5th, when he returned to the first place mentioned. After getting the message, he returned at once to Sarcoxie, and took the first train for San Antonio, arriving there about 11 o'clock a. m. on January 7th, about 12 hours after the death of his son. Appellee failed to reach the bedside of his son before his death on account of the negligence of appellant in failing to deliver the telegram on the afternoon of January 3d, or up to 2 o'clock p. m. on January 4th.

It follows from the foregoing conclusions of fact that the court did not err in refusing to instruct a verdict for appellant as contended in the first, second, third, and fourth assignments of error. There is no force in the contention that the negligence of appellant was not the direct proximate cause of the failure of appellee to reach the bedside of his son; and it cannot avoid the results of its gross negligence by the plea that appellee could not be reached by telephone when the message was delivered, more than 24 hours after it should have been delivered. If appellant had performed its duty, appellee could have been reached, and it is directly responsible for appellee not being at the bedside of his dying son. No excuse is shown

for the long delay in sending the message to Sarcoxie, and adequate efforts were not made to deliver it after it reached that point, and such negligence cannot be excused by the fact that appellee was not accessible when Sim Gulick called at the office and got the message at 3:45 p. m. on January 4th. He was deprived of the consolation of being with his son at least 36 hours longer than he could have been with him had he left Sarcoxie on the night of January 4th, and appellant was directly responsible for that deprivation if nothing more. The failure to promptly deliver the telegram was the proximate cause of appellee being unable to reach San Antonio until after the death of his son. Appellant's negligence actively aided and concurred in producing the result, and, in fact, the failure to reach San Antonio would not have occurred save for appellant's negligence. "An act may be a proximate cause, without being the sole cause, the only requirement being that it is a concurring cause such as aided in producing the injuries." *Shippers' Compress Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032; *Ray v. Railway* (Tex. Civ. App.) 88 S. W. 466. As quoted in the *Davidson* case from an Indiana case: "Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but, as a rule, the agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one does not exculpate the other, because it would still be the efficient cause of the injury." The negligence of appellant was the efficient, moving cause of appellee's injury, and it cannot justify its inexcusable failure to perform its duty on the ground that some other cause may have concurred with its negligence in producing the result. If that negligence deprived appellee of the consolation of being with his son for twelve or twenty-four hours, it was liable, even though appellee might, had the telephone been in order, have reached his son a while before his death. *Telegraph Co. v. De Andrea* (Tex. Civ. App.) 100 S. W. 977.

It is clear from the testimony that, if appellee could have been reached by telephone, he could not have reached Sarcoxie, being 30 miles distant, in time to have taken any train earlier than the one on the morning of January 5th, and that he could not then have reached the bedside of his son until about 12 hours before his death. But for the negligence of appellant, however, he would not have been that far distant, but would have been easily accessible by telephone, and would have gone to his son on the night of January 3d, the morning of

January 4th, or at the furthest on the night of January 4th. Such being the state of the evidence, the court did not err in refusing to submit the question of appellee's absence from the town of Sarcosie as the proximate cause of his inability to reach the bedside of his son, as requested by appellant. Appellant's negligence consisted in its failure to deliver the message to Sim Gulick, who lived in Sarcosie, and the court very properly refused to instruct the jury about appellant not being required to deliver the message outside the town. No one is complaining because appellant did not know that appellee was not in the town nor, that the message was not delivered outside the town, but the complaint is of its conduct in taking about the same time in delivering a telegraphic message as it would have taken for the message to have gone by mail under favorable circumstances. The court also properly refused to instruct the jury that appellant's negligence would be excused by the fact that, if appellee had been accessible when the message was hunted up by Sim Gulick, he might have reached the bedside of his son before his decease. The negligence of appellant brought about the circumstances that rendered appellee inaccessible, and it would be a singular conception of justice that would excuse negligence by reason of circumstances produced by such negligence. What has been herein written disposes of all the assignments of error; and the judgment will be affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. PRICE.\***

(Court of Civil Appeals of Texas. Nov. 11, 1907. Rehearing Denied Jan. 9, 1908.)

**1. CARRIERS — INJURIES TO PASSENGERS — ALIGHTING AT INTERMEDIATE STATION.**

Where a passenger alights at an intermediate station on his trip for any purpose consistent with the character of a passenger, with the express or implied consent of the carrier and the knowledge by it that he expects to return and continue his passage on the same train, he does not lose his character as a passenger, and is entitled to the protection due a passenger in his efforts to board the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 984-993.]

**2. SAME.**

It is within the scope of the authority of the conductor of a railroad train to announce to a passenger, at his request, the name of the station at which the train is then stopped, to state to him the length of time the train will remain there, and to hold the train, in accordance with the answer, for the time so designated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121.]

**3. SAME.**

A passenger having made known to the conductor his desire to alight to get a lunch during the time the train stopped, and the conductor having informed him that he would have time to do so and consented to his alighting for that purpose, the passenger, on alighting, con-

tinued to sustain that relation, and, not having boarded the train sooner, it was the duty of the conductor to hold the same in accordance with his answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 993, 1121.]

**4. APPEAL—REVIEW — HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.**

Error, if any, in the admission of evidence as to the general reputation of plaintiff for truth and veracity, was harmless where other witnesses testified to the same facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4161-4170.]

**5. TRIAL — ADJOURNMENTS PENDING TRIAL — DISCRETION OF COURT.**

Where the witness to secure whose attendance a postponement of the trial was sought by defendant had not been subpoenaed, and had not been sworn as a witness, and had not been placed under the rule as a witness, and was not so under the rule when excused by plaintiff's counsel, it was not an abuse of the court's discretion to refuse the postponement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 74-93.]

**6. CARRIERS — INJURIES TO PASSENGERS—ACTIONS — QUESTIONS FOR JURY — CONTRIBUTORY NEGLIGENCE.**

Whether a passenger was guilty of contributory negligence in attempting to board the train while it was moving held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1367-1369.]

**7. DAMAGES — EXCESSIVENESS—PERSONAL INJURIES.**

Where plaintiff when injured was 32 years old, had a life expectancy of practically 34 years, was a carpenter, and earned \$60 a month, and was employed about two-thirds of the time, and his injury resulted in the loss of a leg, and he could not thereafter efficiently follow his occupation, a verdict for \$8,500 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 868, 886-894.]

Appeal from District Court, Montague County; Clem. B. Potter, Judge.

Action by Frank Price against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee brought this suit against the railway company to recover damages for personal injuries received by him while riding as a passenger on one of the defendant's trains. The case was tried in the district court to a jury, and resulted in a verdict and judgment for the appellee for the sum of \$8,500, which the appellant seeks to have reversed for errors assigned.

The evidence in the case establishes the following: That in the nighttime of December 20, 1905, the appellee boarded, at St. Jo, a mixed train of the appellant's that carried passengers. He was going to Gainesville, Tex., over the appellant's railway. The night was dark, and the caboose of the train poorly lighted. He paid the conductor his fare on the train. There being lady passengers in the caboose, he went out on the platform of the caboose to smoke. After passing the station of Muenster, the train made a halt. Thinking the halt or stop was at the station

\*Writ of error denied by Supreme Court.

of Myra, and desirous of getting a lunch at that place, the appellee asked the conductor in charge of the train if this was Myra where the train had stopped, and whether or not the train would stop long enough for him to get a lunch. The conductor replied to him that this was Myra where the train had arrived, and that the train would stop long enough for him to get off and get a lunch, and that he would have time to go and get a lunch before the train would leave, and that he could go and get a lunch. The appellee, relying upon these statements of the conductor, alighted from the caboose, and was proceeding in the direction in which he understood the lunch counter was located; but, before he had gone very far in this direction from the train, he heard the train begin to start, and ran to get aboard it. The train was moving slowly when he reached it, and he reached the hand rails of the front end of the caboose to get upon the caboose, and as he was getting upon the caboose, endeavoring to board it, the train suddenly increased its speed and hurled or jerked him to the ground, throwing him under the car in such a way that the wheels passed over his leg, mangling it so that it had to be amputated above the knee. The conductor in the trial denied that he told the appellee that the halt was at Myra, or that he could get off for the lunch, or that the train would wait for him, and that he knew the appellee had gotten off. The evidence shows that the place where the train was then halted was not in fact at Myra, but was at a water tank for the purpose of having the engine take water; but the evidence does not show that the appellee in fact knew the place the train was then stopped was not in fact Myra. The evidence is conflicting as to whether the appellee was intoxicated at the time; there being some evidence that he was, and some that he was not. There is evidence in the record to support the findings that the conductor told the appellee that the stop was at Myra, and that the conductor knew the purpose of appellee in getting off the train at the time, and that the conductor informed appellee he would have time to get off and get a lunch, and that appellee could get off and get the lunch and return before the train left, and that the conductor knew that the appellee had gotten off the train for the purpose, and that the train did not wait a sufficient time for appellee to re-enter the car after he had alighted. The conductor in charge of the train, after appellee had made known to him his desire to alight at Myra to get a lunch, and knowing that appellee had alighted from the train for the purpose, was guilty of negligence in moving the train before appellee had time to re-enter, and the railway company was guilty of negligence in failing to exercise sufficient care and caution for the safe transportation of appellee, a passenger on its train. That the appellee was not guilty

ty of contributory negligence either in alighting at the point he did, or in endeavoring to board the car.

Jas. A. Graham, for appellant. Stewart & Bell, for appellee.

LEVY, J. (after stating the facts as above). In his first assignment of error, the appellant contends that the court erred in not sustaining the general demurrer to the petition. Appellee in his petition alleged that he was a passenger on the train; that after the train had passed Muenster, going east, it made a stop, and it was dark; that when the train stopped appellee, thinking the train had arrived at the station of Myra, and desiring something to eat, asked the conductor in charge of the train if the train had arrived at Myra, and whether or not the train would stop long enough for him to get a lunch; that the conductor announced to him that the train had arrived at Myra and would stop long enough for him to alight and get a lunch, and he would have time to go and could go and get a lunch before the train left; that appellee, relying upon the announcement and statement to him by the conductor, alighted from the train and proceeded in the direction where he was informed there was a lunch stand; that before he had proceeded very far from the train, and without any notice to him, the train started up and proceeded to move; and that, realizing that the train was going to leave him, he started back at once to the train and endeavored to board the same, and while he was endeavoring to board the same it suddenly increased its speed and hurled him under the wheels of the car and mangled his leg. He further alleged that the conductor knew he had gotten off of the train for the purpose that he did, and knew that he was proceeding to get the lunch, and knew that he had not returned to the car, or by the exercise of ordinary care could have known that he had not re-entered the car. There is a distinguishment in the case of *Railway v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785, and in the facts pleaded in this petition. In the *Foreman* Case the conductor was merely asked the question how long the train would stop at Dodge. But here the appellee asked the conductor, and was told by him after the train stopped that it would stop long enough for him to go and get a lunch, and that he could go and get a lunch before the train left the place where it then was. It is the well-settled law that carriers of passengers owe a high degree of care for the safety of passengers. Likewise it is a well-settled rule requiring of passengers, in endeavoring to board cars, to use such care and caution as a person of ordinary prudence would use under similar circumstances. Where a train stops at an intermediate station of a passenger's trip, and the passenger, using proper care, alights from the train for a proper purpose



consistent with the character of a passenger, intending to return and continue his passage upon the same train, he does not lose his character as a passenger, and is entitled to the protection due to a passenger in his efforts to board the train. *Parsons v. Railway*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450; *Railway v. Cooper*, 2 Tex. Civ. App. 308, 20 S. W. 993; *Railway v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684; *Railway v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 792. The railway company does not engage in the contract of passage to give the passenger an opportunity to leave the cars at intermediate stations of his journey, nor would it be required that a conductor in charge of the train presume that he will leave the car. Yet it is the law that, where the passenger does alight at an intermediate station for any purpose consistent with the character of a passenger, with the implied or express consent of the carrier, and with the knowledge on the part of the carrier that he expects to return and continue his passage on the same train, then the relation of carrier and passenger does not cease, but continues to exist as to that train, and the obligation rests upon the carrier to afford him an opportunity to safely re-enter the car. A conductor put in charge and control of a train by a railway company is acting within the scope of his employment and authority when discharging towards a passenger on his train any duty the railway company owes to him. *Railway v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902. Negligence of the conductor in charge of the train, in respect to the duties required of the company to a passenger, renders the company liable for the negligence. *Railway v. McGowan*, 65 Tex. 640. It was within the scope of the authority of the conductor in charge of the train that appellee was riding upon to announce to him, as a passenger on the train, at his request, the name of the station that the train was then stopped at, and to state to him the length of time the train would remain there, and to hold the train standing there in accordance with the answer of the time so designated. *Railway v. Elliott*, 26 Tex. Civ. App. 106, 61 S. W. 726. The appellee having made known to the conductor his desire to alight and get a lunch during the time the train stopped, and the conductor having informed him he would have the time to do so, and having consented that he might alight for the purpose, appellee, when he alighted for the purpose, did not cease, but continued, to sustain the relation of passenger to the railway company. Appellee being still a passenger at the time and under the circumstances, it was required of the conductor in charge of the train that he exercise for the company its obligation of prudence and care for appellee's safety, and, if appellee did not re-enter sooner, to delay the train in accordance with his answer of the time designated to appellee in order to ac-

complish that end. The acts of the conductor and his announcements to appellee were done in the course of the performance of his services as conductor operating the train for the railway company, and show a violation of a duty that the carrier owed appellee in that respect, and were not an independent personal obligation of the conductor to the appellee omitted to be done as an accommodation, like awaking a sleeping passenger. The petition stated an actionable case, and did not show contributory negligence as a matter of law, and the demurrer was properly overruled.

The second assignment of error is overruled.

The third and fourth assignments complain of the admission of evidence. Appellee was permitted to prove his general reputation for truth and veracity. Appellant asserts that the appellee was not warranted in this case to make such proof. The record shows that the appellee proved his general reputation for truth and veracity by two witnesses before any objection was made to such evidence, and the same fact was proven by two witnesses after the objection was entered. The bill of exception in this case only reaches an objection to this evidence as to two witnesses. The appellant did not offer to dispute the evidence upon this collateral issue. In this attitude of the evidence on this question, if the court had sustained the objection to the evidence of the two witnesses complained of, the same facts testified to by these two witnesses would have yet remained unobjected to before the jury in the evidence of the other four witnesses used on the same question. So, it appears to us that, if there was error in not excluding the evidence on objection of the two witnesses here objected to, it was harmless, and the assignments must be overruled. *Railway v. Porterfield*, 92 Tex. 442, 49 S. W. 361. Also, the further contention under the fourth assignment should be overruled. *Boone v. Weathered*, 23 Tex. 675, 681.

The appellant complains, in the fifth assignment, of the action of the court in refusing to suspend further proceedings in the trial of the cause until the attendance of a witness could be had. The bill of exception does not show an abuse of the discretion of the court in refusing to grant this postponement, nor does it show any misleading or improper action of the appellee's attorneys. As incorporated in the record, it appears that the witness for which the postponement or delay was sought had never been subpoenaed as a witness, and was not sworn as a witness, and was never placed under the rule as a witness, and was not under the rule when excused by appellee's counsel. The assignment is overruled.

Appellant's sixth and seventh assignments complain of the overruling of the motion for new trial, especially upon two paragraphs

contained in the motion. These two grounds urge that the evidence as a whole does not show negligence on the part of the railway, and does show contributory negligence on the part of the appellee. Appellee testified to the facts pleaded in his petition, and the jury, under a correct and applicable charge of the court, found in his favor on these facts. The evidence was conflicting between him and the conductor. These facts pleaded therefore came to us on findings of fact by the jury as the established facts in the case. The ruling upon the demurrer settles the question that, if the facts pleaded were true, they would constitute actionable negligence. The fact that the train was shown by the conductor to be at a water tank, instead of at Myra, would not relieve the negligence of the appellant acting through its agent in charge of the train. If he misled the passenger to his injury, we do not think the company could claim exemption from the act. It was for the jury to decide whether or not appellee was guilty of contributory negligence in attempting to board the train on the night he was injured. The appellee says the train was going at the rate of four or five miles per hour when he first attempted to get on it, and he thought he was safe in trying to get on it at that speed. There is sharp conflict of evidence on the issue of whether or not appellee was intoxicated at the time. Appellee says he was not. The jury rendered a general verdict in favor of appellee on all issues submitted. One of the issues was his negligence, which involved drunkenness. We assume the truth of the finding that he was not drunk at the time of his injuries. As a matter of law we cannot say he was guilty of contributory negligence. It therefore being established by evidence sufficient to support the finding that the appellant was guilty of negligence, and that appellee was not guilty of negligence, and the negligence of the appellant's conductor was the proximate cause of appellee's injuries, we overrule these assignments. *Railway v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 859; *Railway v. Murphy*, 46 Tex. 362, 26 Am. Rep. 272; *Mills v. Railway*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; *Railway v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. 770.

The eighth assignment complains of the amount of the verdict. The appellee was 32 years old, had a life expectancy of practically 34 years, was a carpenter, and earned \$60 per month, and was employed about two-thirds of the time, lost a leg, and could not efficiently follow his avocation any more. It may be true that he might be able to labor at other work of some kind. Yet the jury evidently and properly considered that feature of the evidence in making the award. We are not prepared to say the verdict is excessive.

The case is ordered affirmed.

#### SMITH et al. v. LANDER.\*

(Court of Civil Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 15, 1908.)

#### 1. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action by a vendee to recover earnest money, there was a verdict for vendee, error, if any, in that part of the charge which declared the measure of damages in event of a verdict for vendors on their plea in reconvention is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4230.]

#### 2. VENDOR AND PURCHASER—JOINT AND SEVERAL LIABILITY.

Vendors in a contract of sale of real estate may be held jointly and severally liable to vendee for earnest money paid under the contract on failure of performance by them.

#### 3. SAME—EVIDENCE—ADMISSIBILITY.

In an action by vendee to recover earnest money paid under a contract stipulating that title was to be perfect, or to be made perfect and satisfactory to vendee's attorneys, vendee and his attorney were properly permitted to testify that they acted in good faith in rejecting the title.

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Action by F. B. Lander against J. L. Smith and others to recover earnest money paid under a contract of sale of real estate. Judgment for plaintiff, and defendants appeal. Affirmed.

Dibrell & Mosheim, for appellants. Joe L. Hill and Dupree & Pool, for appellee.

NEILL, J. This is the second appeal from a judgment in favor of appellee, who was plaintiff below, the first being reported in 89 S. W. 19, 21, where will be found a full statement of the nature of the case. It is sufficient to state here, in connection with the statement referred to in the other opinion, that plaintiff, F. B. Lander, sued the defendants J. L. Smith, H. R. Morrow, El. M. Stebbins, and J. M. Abbott to recover \$1,100 with interest at the rate of 6 per cent. per annum as earnest money advanced them by plaintiff to close the sale to him of 10 acres of land in Jefferson county, Tex. He based his right of recovery on the fact that the title to the land was to be perfect or to be made perfect to the satisfaction of his attorneys, and that defendants were to furnish him an abstract of the title, and that the abstract of title furnished him by them showed that the title was not perfect to the satisfaction of his attorneys. The defendants claimed that they furnished plaintiff with an abstract of title to the land in question which showed a perfect title, and that plaintiff and his attorneys were, in fact, satisfied with the title, and that it was perfect, but expressed their dissatisfaction in bad faith for the purpose of assisting plaintiff in his refusal to take the land, which was made because land values were on the decline, and for that reason alone the plaintiff refused to accept the deed tendered

\*Writ of error denied by Supreme Court.

him by defendants, and pay the balance of the purchase money and consummate the purchase. The defendants pleaded in reconvention that the contract was breached by the plaintiff, and that they were entitled to recover of him the difference between the contract price, \$11,000, which was the market value of the land at the time of the breach of the contract. The court, in its charge, thus presented the issues to the jury:

"(1) The written contract of May 4, 1901, obligated the plaintiff to take the land in question, and pay the defendants therefor the sum of \$11,000 (\$1,100 of which had been paid as earnest money), provided the abstract of title furnished by the defendants showed in them a perfect title, to the satisfaction of plaintiff's attorneys, or which was, within a reasonable time, made perfect to the satisfaction of plaintiff's attorneys. On the other hand, if the abstract of title furnished by defendants to plaintiff did not show a perfect title to the land in defendants to the satisfaction of plaintiff's attorneys, and was not made perfect to the satisfaction of plaintiff's attorneys within a reasonable time, then the plaintiff had a right to decline to carry out the contract, and would be entitled to recover the earnest money paid by him, provided the dissatisfaction with the title was in good faith.

"(2) What is meant by an 'abstract of title,' as the term is used in the agreement between the parties, is that the defendants obligated themselves to furnish plaintiff a written or printed short methodical summary of the documents and facts which affect the title to the land in question. It was not necessary that the documents affecting the title should be copied in full in the abstract, but only a brief, but sufficient, summary of such documents, and of the facts bearing upon the title not shown by the record. The abstract of title which defendants obligated themselves to furnish plaintiff must have shown a perfect title, or one capable of being made perfect, to the satisfaction of plaintiff's attorneys, by a brief and sufficient reference to the documents relating to the said title and to the facts pertaining thereto not of record. If, after the abstract was presented to the plaintiff (that is, the second abstract), the same failed to show a perfect title in the defendants, as the term 'a perfect title' will be hereinafter defined, but was capable of being made perfect and satisfactory to the attorneys of plaintiff, and the attention of the defendants was called to the defect in the abstract by the plaintiff or his attorneys or any one acting for him and by his authority, then the defendants had a right to perfect the title to the land, and they were entitled to a reasonable time within which to do this from the time such defects, if any, were pointed out by plaintiff's attorneys or agent to defendants. What would be a reasonable time in which defendants were permitted to remedy the defects in the abstract title, if any

there were, is to be determined by the jury from all the facts and circumstances of the case. What is meant by a perfect and satisfactory title, or one to be made perfect and satisfactory, is such a title as is free from grave and reasonable objections, and such title as would satisfy a person of ordinary prudence who is capable of passing upon the title.

"(3) You are to determine from the evidence whether the abstract of title furnished by the defendants showed a perfect title and a title satisfactory to plaintiff's attorneys, or which within a reasonable time was capable of being made perfect and satisfactory to plaintiff's attorneys. If you find the negative of this proposition, then you will find for the plaintiff the sum of \$1,100, with interest at the rate of 6 per cent. per annum from the 15th day of May, 1901. But if you find from the evidence that the abstract furnished showed a perfect title in the defendants, or one capable of being made perfect to the satisfaction of plaintiff's attorneys, within a reasonable time, then you will find for the defendants the difference between the sum of \$11,000 and the market value of the land in question at the time of the breach of the contract by the plaintiff, if it was breached by him, and, you find that the market value at that time was less than the purchase price, deducting from the sum thus found the \$1,100 paid to the defendants as earnest money. In this connection, however, you are instructed that the contract between the parties makes the opinion of plaintiff's attorneys final as to whether the title as shown by the abstract was perfect or capable of being made perfect to their satisfaction, provided such opinion was given in good faith, and, if you so find, you will find a verdict for the plaintiff as hereinbefore directed, although you may find that the title was perfect or capable of being made perfect. On the other hand, if the abstract showed a perfect title, or one capable of being made perfect to the satisfaction of plaintiff's attorneys, and you find that the plaintiff's attorneys rejected the title for the purpose of aiding the plaintiff to get out of what he or they considered a bad bargain, then the defendants would be entitled to recover their damages, if any, which they have sustained by the breach of the contract, according to the rule hereinbefore set out. You are further instructed that fraud (or bad faith, which is the equivalent of fraud) is never presumed, but must be established by evidence, like any other fact necessary to be proven; but in passing upon the question of bad faith you are to take into consideration all the facts bearing upon the issue, if such there be, and the burden is upon the defendants to prove such bad faith by a preponderance of the evidence."

The evidence was sufficient to support the verdict, which is as follows: "We, the jury find a verdict for the plaintiff for the sum of \$1,100, with interest at the rate of 6

per cent. per annum from the 15th day of May, 1901."

The first, second, and third assignments of error complain of that part of the charge which gives the measure of damages in the event of a verdict for defendants upon their plea in reconvention. Inasmuch as the verdict was for plaintiff and is fully supported by the evidence, and, as we shall hold, there is no other error assigned which will require a reversal of the judgment, it is immaterial whether the portion of the charge complained of by these assignments is erroneous or not. The questions of law presented by them would only require decision if the verdict had been in favor of defendants on their plea in reconvention, and for a less amount than the difference between the purchase price and the part thereof paid by plaintiff as earnest money. As it is, the assignments present purely moot questions, which would be puerile for us to consider.

The fourth and fifth assignments of error complain of the court's construction in the charge of the written contract upon which this action is founded. It seems to us that the construction given the contract, as well as the law enunciated, when viewed in the light of the evidence, is as favorable to the defendants as they could ask. See Greer v. International Stockyards Co. (Tex. Civ. App.) 96 S. W. 79; Bowles v. Umberson (Tex. Civ. App.) 101 S. W. 842.

It is contended by the sixth assignment of error that, as the contract sued on was a joint obligation of defendants to return plaintiff \$1,100 in case title to the land was not perfect or capable of being made perfect and satisfactory to plaintiff's attorneys, the judgment should have been rendered against each for only one-fourth of the amount recovered, and not against them jointly and severally for the whole sum. The law is too well settled in this state against the contention to admit of discussion. Austin v. Clapp, 5 Tex. 134; Horton v. Wheeler, 17 Tex. 52; Shipman v. Allee, 29 Tex. 20; Willis v. Morrison, 44 Tex. 27; Congdon v. Monroe, 51 Tex. 109; Keithly v. Seydell, 60 Tex. 79; Miller v. Sullivan, 89 Tex. 480, 35 S. W. 362; Bute v. Brainard, 93 Tex. 139, 53 S. W. 1017; McFarlane v. Howell, 91 Tex. 221, 42 S. W. 853; McDonald v. Cabiness (Tex. Sup.) 102 S. W. 721.

The seventh assignment of error complains of the court's refusal to strike out, on defendant's motion, the testimony of plaintiff and of his attorney, J. L. Dupree, who examined the abstract and passed upon the title of the land, that each acted in good faith in rejecting the title. No reason is shown why this testimony was not objected to by defendants when it was offered in evidence. But, waiving the question as to whether the objection came too late, we think the testimony was properly admitted. In cases like this, where the motive or intention

actuating a party is subject of inquiry, such party can testify what his motive or intention was. *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623; *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783; *Robertson v. Gourley*, 84 Tex. 575, 19 S. W. 1006; *Sweeney v. Conley*, 71 Tex. 545, 9 S. W. 548; *Wade v. Odle*, 21 Tex. Civ. App. 656, 54 S. W. 788; *Peightal v. Cotton Bldg. Co.*, 25 Tex. Civ. App. 283, 61 S. W. 432. The question as to whether the plaintiff and his attorney acted in good faith in rejecting the title was the main issue in the case; and as to whether each, in rejecting it, acted in such faith, was best known to himself.

There is no error assigned which requires a reversal of the judgment; and it is affirmed.

#### GALVESTON, H. & S. A. RY. CO. v. WALKER et al.\*

(Court of Civil Appeals of Texas. Dec. 4, 1907.  
Rehearing Denied Jan. 8, 1908.)

##### 1. DEATH — RIGHT OF ACTION — PERSONS ENTITLED TO SUE.

The statute giving a right of action for the death of a mother to her children embraces her illegitimate children.

##### 2. STATUTES — CONSTRUCTION — STATUTES IN DEROGATION OF COMMON LAW.

The rule that a statute in derogation of the common law is to be strictly construed has been abolished by statute in this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 320; vol. 10, Common Law, § 12.]

##### 3. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction that if, when decedent endeavored to cross defendant's tracks, the gates were up, and if this indicated that no cars or engines were about to cross the street, and if defendant was negligent in leaving the gates up at that time if they were left up, etc., is not on the weight of the evidence, as assuming that the gates were up and that, being up, indicated that no cars or engines were about to cross the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-439.]

##### 4. RAILROADS — INJURIES AT CROSSINGS — NEGLIGENCE.

A person is not guilty of negligence as a matter of law in entering a railroad crossing while the gates are down; but whether the act is negligence depends upon the attendant circumstances.

##### 5. RAILROADS — ACCIDENT AT CROSSING — INSTRUCTIONS.

Where the evidence showed that a watchman at defendant's railroad crossing where decedent was killed shouted to her to cross, and was sufficient to warrant the conclusion that she was acting upon his invitation when killed, a requested charge that it was wholly immaterial as bearing on defendant's negligence whether the watchman invited her to cross was properly refused.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Ethel Rosalie Walker, Clarence Edwin Canfield, and in behalf of Joe Canfield, if living, against the Galveston, Harrisburg & San Antonio Railway Company. From judg-

\*Writ of error denied by Supreme Court Jan. 29, 1908.

ments for the plaintiffs, except Canfield, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, Newton & Ward, and W. B. Teagarden, for appellant. J. R. Norton, James Routledge, and Bertrand & Arnold, for appellees.

JAMES, C. J. The action was brought by a next friend for the minors Ethel Rosalie Walker and Clarence Edwin Canfield, who were children of Mrs. Lena Leeseaman Canfield (also known as Lena Leeseaman Walker). The petition alleged that she was married first to James Walker, who was dead, and married the second time to Joe Canfield, the father of the minor, Edwin; that said Joe Canfield had abandoned the said Lena and said minors, and has not been heard of for seven years, and his whereabouts cannot be discovered, and is believed to be dead, but, in the event he be living, the action is brought in his behalf also. The cause of action was the death of said mother, who was killed by being run over by one of appellant's cars in its yards, in San Antonio, on or about March 20, 1897. It was alleged, among other things: (1) That at this place, which was a public crossing at Burleson and Walnut streets, defendant had gates, and that its agent or watchman at said crossing gates negligently failed to give any warning of the approach of said cars, and negligently opened the gates, and negligently invited said decedent to cross at a time when cars were about to or were in the act of crossing, thus negligently inducing the public and decedent to attempt to cross when there was great danger of her being killed by the cars. (2) That at the time she was invited by defendant's servants to cross when they knew, or ought to have known by the exercise of ordinary care, that she would probably be killed if she attempted to do so. (3) That the night was dark and impossible for decedent to see approaching cars, as said place was poorly lighted, and that she, relying on the said invitation and customs, endeavored to cross; that defendant negligently backed or shoved over said crossing some cars, having negligently failed to place any light or watchman at the end of the cars to notify persons of its approach, and negligently failed to ring a bell or blow a whistle for that purpose, and negligently failed to comply with a certain city ordinance with regard to ringing the bell. Defendant pleaded by general demurrer, and special exception, general denial and contributory negligence, and also by plea of limitation against any claim in behalf of Joe Canfield. There was a verdict against Joe Canfield, and in favor of the plaintiff Ethel for \$2,000 and of the plaintiff Clarence for \$2,500.

There was evidence that the two children were illegitimate children of the decedent Lena, and that she was killed through the negligence of defendant, without contributory

negligence on her part. The facts upon which these general conclusions concerning negligence are based will be referred to in connection with the appropriate assignments.

The first assignment of error, also the second, third, and fourth, complain of refused instructions and present the question whether or not our statute giving a right of action for the death of a mother to children of such person embraces illegitimate children. The view of the trial judge was that the right extended to such children, and he refused all instructions that were asked to the contrary. We are of opinion that he did not err. It has been the legislative policy in this state to treat illegitimates as children, as far as a relationship to or through their mother is concerned. In our statute of descent and distribution such a child is given inheritable blood, and placed on the same footing as a legitimate child, with reference to its mother. *Berry v. Powell*, 19 Tex. Ct. Rep. 718,<sup>1</sup> and cases there cited. There can be no doubt that in this state the mother of such a child is legally entitled to its custody, its services, and bound for its support. Under these circumstances, it is difficult to see, in fact, we fail to see, wherein the status of such a child in reference to its mother is in law any different from that of a legitimate child. In other words, the law regards it as her child. Having clothed it with the relationship and attributes of a child, it is believed that the Legislature intended by the use of the word "children" in the statute to include illegitimate children as parties entitled to maintain the action in so far as they claim with reference to their mother. The rule that a statute in derogation of the common law is to be construed strictly is responsible for the decisions cited by appellant sustaining the contrary view. That rule had been abolished by statute in this state. *Turner v. Cross*, 83 Tex. 223, 18 S. W. 578, 15 L. R. A. 262. We regard the opinion in the case of *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, which reviews the decisions and discusses the question, as stating the rule that properly should obtain in this state. For these reasons, we overrule the above assignments, and also the fifth and sixth assignments.

The seventh assignment complains of the following charge: "Or if you find from the evidence, that on or about the 20th day of March, 1897, the deceased, mother of said minor plaintiffs, endeavored to cross defendant's tracks at Burleson Street crossing, and that, while she was attempting to cross said track, defendant shoved a car against her, causing her death, and you further find that at the time the said deceased mother of said minor plaintiffs attempted to cross said track that the gates were up, and that this indicated that no cars or engine were about to cross said street, and you further find that said defendant company was guilty of negligence in permitting said gates to be up at said time,

if you find they were in such position, and that such negligence, if any, was the direct cause of the death of said minors' mother, and you further find that said minors have been damaged peculiarly by the death of their mother, and you further find that the deceased mother of said minors was not guilty of any negligence that either caused or contributed to her death, then I charge you said minor plaintiffs are entitled to recover, and you will so find." The point is that it was on the weight of evidence, by assuming that at the time she attempted to cross the railway track the gates were up, and that being up, indicated that no cars or engines were about to cross the track. There is no assumption of such facts in the charge.

The eighth alleges error in the refusal of the following instruction: "You are further charged that should you find and believe from the facts in this case that at the time Mrs. Walker went on the crossing of Walnut and Burleson streets defendant's gates were down, and she went around or under them and passed on the crossing to the tracks while the gates were down, then plaintiffs are not entitled to recover on this case, and, if you so find the facts to be, you will return a verdict for defendant." The fact of her entering the crossing while the gates were down and going upon the tracks would not constitute negligence per se, as this charge would have announced. Whether or not the act was negligence would depend on the circumstances attending her act. She may have gone through while the gates were down, and then induced to proceed to cross by the fact that the gates were temporarily raised; there being testimony that just before she was struck the gates were raised, and a wagon was allowed to pass over. Appellees' brief undertakes to cite us to other testimony as going to show that defendant's foreman, Hesse, induced her to leave a place of safety and endeavor to cross the track by beckoning her to do so, but we need not stop to investigate this here, as evidence of the fact that the gates were raised, and a wagon crossed just before she was struck, would be sufficient to demonstrate the impropriety of giving the charge asked.

The ninth complains of the refusal of this charge: "You are charged, gentlemen of the jury, that, respecting the statement of the witness Hesse that he invited or told the deceased to come across, whether you find this to be true or not, it is a matter which cannot be charged against defendant in this case in passing upon the issue as to whether or not its agents or employes were guilty of negligence. On that issue it is wholly immaterial whether he invited her to cross or not. In your deliberations you will so treat it." The proposition is, as we comprehend it, based upon the contention that there was nothing in the evidence to show either that Mrs. Walker saw or heard Hesse's invitations, or,

if she did, that she acted upon them, and was led by them into danger, and consequently they had nothing to do with her being killed. This we find does not represent the true condition of the evidence. His testimony was that she was standing on this track when he first saw her. He also stated that she may have been standing between the tracks, that she was facing in his direction, and had the appearance of looking at him. "I said all right lady come over, and beckoned to her. She didn't seem to notice me at the time, and I made a step or two towards her, and I says, 'All right madam, come over.' \* \* \* At the same time I noticed two cars coming, and I then ran towards her, and beckoned and shouted as loud as I could to step back, \* \* \* and she realized I was talking to her and looked over her right shoulder, and made a kind of a half turn, and about that time the drawhead struck her." He also stated that she made a step and a half turn. It would seem that if she was standing between the tracks, which would be a place of probable safety, his inducing her to change her position a step and a half turn may have had something to do with the result. However, it was in evidence by the witness Beaumont that she was not standing still, but in the act of walking across the track, when struck. It was shown that Hesse had testified at the inquest that Mrs. Walker was about 30 feet from him when he first saw her. It seems to us that the jury who had the right to believe such of Hesse's testimony as they saw fit, and to believe Beaumont where they saw proper, having evidence before them that she was in the act of crossing the track walking, and facing Hesse, who was only 30 feet from her, and going towards her when he shouted to her, and that as he states he first shouted to her, "All right, lady, come over," and beckoned to her, that these circumstances would have warranted the conclusion that she was in the act of crossing in response to his invitation.

The remaining assignments complain of the overruling of the motion for new trial, for the reason that the verdict was against the evidence and the great weight of the evidence, both as to the negligence of defendant and to the contributory negligence of Mrs. Walker. We overrule all these assignments, and also the assignment that the recovery allowed is excessive.

Affirmed.

GALVESTON, H. & S. A. RY. CO. v. GILLESPIE.\*

(Court of Civil Appeals of Texas. Dec. 4, 1907. Rehearing Denied Jan. 15, 1908.)

1. MASTER AND SERVANT—DEATH OF ENGINEER—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action against a railway company for the death of an engineer in a derailment, whether the company was negligent in maintaining a defective rail, and whether he was guilty of

\*Writ of error denied by Supreme Court.

contributory negligence in running his engine too rapidly held, under the evidence, questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1021, 1122.]

**2. EVIDENCE—EXPERT TESTIMONY—CONCLUSIVENESS.**

In an action against a railway company for the death of an engineer in a derailment, expert opinions as to the speed the engine was running when derailed were not conclusive upon the jury, where the facts upon which the opinions were founded were before the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2392-2394.]

**3. MASTER AND SERVANT—DEATH OF ENGINEER—CONTRIBUTORY NEGLIGENCE.**

If an engineer ran his locomotive at a speed of 50 or 60 miles an hour when it left the track on a curve, and such speed proximately contributed to the derailment, no recovery can be had for his death resulting from the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 752.]

**4. APPEAL AND ERROR—IMPROPER INSTRUCTIONS—ESTOPPEL TO ASSERT ERROR.**

A party cannot complain of an improper instruction, where at his request an instruction subject to the same objection is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3610.]

**5. MASTER AND SERVANT—RAILROADS—DEATH OF ENGINEER—INSTRUCTIONS.**

In an action against a railway company for the death of an engineer in a derailment, an instruction that, if the derailment was not due to the company's negligence in failing "to furnish rails in a reasonably safe condition," but was due to the risk ordinarily incident to the business, plaintiff could not recover, as decedent assumed the risk, was not objectionable as requiring the company to furnish rails in a reasonably safe condition, whereas it was only bound to exercise ordinary care to that end.

**6. JUDGMENT—CONCLUSIVENESS.**

In an action for negligent death, the widow being the statutory representative of her minor children, a judgment for defendant as against one of the minors is conclusive in defendant's favor, except for fraud participated in by it.

**7. MASTER AND SERVANT—RAILROADS—DEATH OF ENGINEER—EVIDENCE.**

Where a railway company defended an action for the death of an engineer in a derailment on the ground he negligently ran the engine at excessive speed, it was proper to admit in evidence his watch, which stopped at the time of the accident, where it tended to show that the average speed between the last station and the place of accident was not excessive, though it did not show the speed when the derailment occurred.

**8. APPEAL—HARMLESS ERROR—EVIDENCE—SIMILAR TESTIMONY WITHOUT OBJECTION.**

In an action against a railway company for the death of an engineer in a derailment, any error in admitting in evidence the watch found on his body, tending to show when the accident occurred, was harmless, where the same evidence as to the watch of the fireman, also killed, was offered without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

**9. MASTER AND SERVANT—DEATH OF ENGINEER—EVIDENCE—ADMISSIBILITY.**

Where a railway company defended an action for an engineer's death in a derailment on the ground that he negligently ran the engine at an excessive speed, it could not show he had been previously disciplined for negligently running his train at high speed in violation of the company's order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 941.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Ollie M. Gillespie against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Beall & Kemp, for appellant. Beauregard Bryan and R. V. Bowden, for appellee.

JAMES, C. J. The action was brought by Ollie M. Gillespie for damages in reference to the death of her husband, Wm. H. Gillespie, which occurred about two miles west of the station of Finley, at a curve in defendant's track, by reason of the engine which he was operating leaving the track. Plaintiff sued for herself and the two minor sons of Gillespie. The court's charge states the pleadings correctly and substantially as follows: "Plaintiff alleges that the said William H. Gillespie, her husband, was on or about the 2d day of February, 1904, engaged in the employ of the defendant railway company as locomotive engineer; that on said date, in pursuance of his employment as such locomotive engineer, he was operating one of the defendant's locomotives under the orders of the defendant company, and when he reached a point about three miles west of the station of Finley on the defendant's railway line said engine which said Gillespie was running suddenly left the track and was badly wrecked, and the said William H. Gillespie killed; that said wreck occurred upon a curve, and the engine went off said track as it was rounding said curve; that at the place where the said engine left the track and was wrecked the track had become defective and in bad repair, in that the inside rail of what is known as the outside rail of the curve became worn to such an extent as to render it dangerous for locomotives to run thereon; that the permitting of said rails to become so defective and ball-worn was negligence on the part of the defendant company, and such negligence was the proximate cause of the said engine leaving the said track and becoming wrecked, and said Gillespie's death; and that the said Gillespie himself was guilty of no negligence contributing to cause the derailment of the said engine or his said injury and death." "The defendant company answers by a general denial, and specially answering says: That if Gillespie was killed by his engine being derailed, his death was not caused by any negligence or want of care on the part of the defendant, but was caused by the negligence of the said William H. Gillespie himself, who was at the time in charge of and operating the said engine; that at the time the said William H. Gillespie's engine left said track and he sustained said injury causing his death he was running his engine at a high rate of speed upon a sharp curve of more than six degrees, and at a speed in excess of the speed described by the rules of the defendant then in force; that

the rules and bulletins of the defendant company then in force required that no freight trains in running around said curve should exceed a rate of 18 miles an hour, and no passenger trains should exceed 24 miles an hour in running around said curve; and that the said Gillespie was running said engine when injured at a high rate of speed in violation of said rules, and that he was guilty of contributory negligence in so running, and that such negligence was the proximate cause of the said engine leaving said track, and said Gillespie's death, and that the said Gillespie's negligence contributed to cause his said death." The following issue was submitted as presenting the only ground of negligence of defendant authorizing a recovery: "Now, if you believe from a preponderance of the evidence that at the place where said engine ran off and left the track and was wrecked the inside ball or balls of what is known as the outside rails or rail of the curve had become so badly worn and impaired as to render it dangerous for locomotives to run thereon, and that the permitting of said ball or balls of the rails or rail to become so worn and defective, if they did become so worn and defective, and not replacing same with new rails, was, under all the surrounding facts and circumstances, negligence, on the part of the defendant company, and that such negligence, if any, was the proximate cause of the said engine leaving the said track and becoming wrecked, and of deceased's consequent death, and further believe from the evidence that the said deceased was not himself guilty of negligence contributing to cause such derailment and his injury and death, as that question is hereinafter submitted to you, then and in that event your verdict should be for the plaintiff, but if you do not so believe your verdict will be for the defendant company." The remainder of the charge presented theories upon which defendant would have been entitled to a verdict. There was a verdict for plaintiff in the sum of \$5,000, and for the son, Guy Gillespie, for \$2,000, and nothing for the son, Frank F. Gillespie.

The first assignment is that the court erred in refusing a peremptory charge for defendant, appellant submitting this to us upon four propositions: (1) There was no evidence which warranted the court in submitting the issue that defendant did not exercise ordinary care in furnishing its engineer Gillespie with a reasonably safe track. (2) The undisputed evidence shows that Gillespie, at the time of the derailment, was running on a curve of more than six degrees at a speed exceeding 24 miles an hour, in violation of an established and absolute rule of the company. (3) Said rule regulating engineers was designed for the protection of employes, as well as passengers, and the negligent act of decedent in violating same was so opposed to the dictates of common prudence as to establish,

of itself, contributory negligence. (4) The violation of such rule without circumstances creating an emergency that will excuse it, will preclude a recovery, when it appears from the undisputed evidence that the injury in whole or in part was caused by the violation.

The following facts and circumstances were in evidence: Gillespie, on Feb. 2, 1904, was running a light engine with tender, but without any cars, and was proceeding westward towards El Paso. The station of Finley had been passed. The distance to the place of the accident was about 2 miles. A witness made it  $2\frac{1}{4}$ , and stated it was "a little up grade about a mile and a half from Finley, then a little level place, then it starts down again (it was a one-half of 1 per cent. grade). The engine was going down this grade when the wreck occurred." The track was curved at the place, it being the maximum curve of ten degrees, which character of curve requires constant watching on the part of the company, and it was dangerous for the employe to run over it at a greater speed than the time limit for six degree curves or over. The rule in force at the time prescribed on curves over six degrees the limit of 18 miles for freight trains and 24 miles for passenger trains. A witness testified that Gillespie, running an engine and tender, was classed as running a passenger train. No one witnessed the accident. Both Gillespie and his fireman were killed. It was in proof that when this engine passed Finley it was going at about 20 miles an hour at Finley at 12:27 o'clock in the daytime, that the watches of both Gillespie and his fireman were stopped at 12:35, and the distance between Finley and the curve in question was  $2\frac{1}{2}$  miles, this making the rate of speed observed between the points in the neighborhood of 18 miles an hour. It was in proof also that the reverse lever of Gillespie's engine was, when found, fixed about the center notch, which had the effect of shutting off steam, and admitting of motion of the engine only by momentum. The evidence showed that Gillespie had been promoted to engineer in April, 1903, and was a good man, sober and industrious. There was nothing unusual in his appearance or conduct when last observed. The evidence showed that the life of a T-rail of  $61\frac{1}{2}$  pounds, with which this curve was laid, was three or four years, according to whether the traffic was light or heavy, and they were renewed that often. The traffic was heavy and getting heavier all the time. In this instance the rails had been down about three years. The tendency of use on the ball of the outer rail, which was elevated, was to wear it off on the inside, which would widen the gauge and cause the wheels there to ride the rail, and give them a tendency to leave the track. Defendant's witness (Tanhuser) testified as follows: "So the tendency would be to render easier the derailment on the inside curves the more play you give it to go on the out-



side? Ans. No, sir; it would have a tendency to climb over the outside rail more than the inside rail to drop in. Q. The tendency would be to cause it to ride the rail rather than drop off the inside rail? Ans. Yes, sir. Q. But it would have a tendency to make derailment easier when it has more play? Ans. Yes, sir." The rails at the place of the accident were not produced, but had been disposed of by defendant as scrap iron. Another worn rail was used at the trial for purposes of illustration, and the effect or extent of the testimony of witnesses upon this feature of the case was that the ball of the outer rail, where this derailment occurred, had worn off something like one-fourth of an inch, some of the testimony was five-sixteenths of an inch. Defendant's witnesses testified that such a rail on such a curve would be a safe piece of rail to operate on, meaning if the proper speed was observed, and that a rail becomes dangerous when it is worn half an inch, and they are then removed. The road master had warned employes that the track at this place was dangerous. Defendant's witness testified, from seeing the wreck and the existing conditions, that it had the appearance of the engine and tender going off the track at a speed of from 40 to 50 miles, one witness stated 60 miles an hour. It appeared, however, that a freight train of 29 cars, which closely followed Gillespie's engine, arrived at the curve at 12:55 o'clock, going at the rate allowed for freight trains. The engineer, on perceiving that a rail in the curve ahead of him had been displaced, applied the air, went off the track, and was wrecked. Several of the cars of this train were injured, and the engine, though it remained standing, reached a point and stood, according to one witness, about 7 or 8 feet from where Gillespie's engine was found. It appears that several hours after these wrecks S. P. Hawks, division superintendent, E. H. Tanhauser, resident engineer, P. E. Kelly, road master, H. C. Borchering, foreman of car repairers, and Samuel Marks, superintendent of the El Paso division, repaired to the scene, and proceeded, with others, to look at the situation and ascertain the cause of the wreck. All of said persons testified to the conditions they found, qualified themselves as experts, and gave it as their conclusion that excessive speed was the cause of Gillespie's derailment, Marks testifying that he must have been going over 50 miles an hour. Hawks, Tanhauser, and Kelly said the same. Borchering said between 50 and 60 miles an hour. It appears from their testimony that after they got there and examined the rails and saw the conditions all said persons considered and discussed the matter and agreed that the engine was running not less than 50 miles an hour. Defendant's witness (Ross), who at the time of the wreck was its superintendent of bridges and buildings, also went to the wreck, and testified that very little examina-

tion could be done, as the track was torn up and littered with cars, and the ground was covered with cars, but it looked to him that fast running had caused the derailment, he thought 50 miles, it might have been 60. Witness was there with the above-named person and others, who looked the situation over to find the cause of the wreck. He says they passed their different opinions and, after talking it over, they agreed upon not less than 50 miles an hour. These expert witnesses differed as to how far the engine was found from the place it left the rails, or how many times it had turned over. Marks stated that it was 60 feet from where the engine left the track to the place it left the rail, and that it was found about 300 feet from the point of derailment. Ross said it was possibly 300 feet from where the track was torn up. Marks stated that from where he noticed the marks on the rail where the engine left the track to where it was lying was about 180 feet. Borchering stated that the engine that Gillespie was killed on was lying about 150 or 170 feet from where the engine left the rail. Hawks stated from where it appeared to have left the track to where it finally landed was about 180 feet. Tanhauser stated about 200 feet from where the first marks were on the track. Some testified that the engine had, from appearances, turned over once or  $1\frac{1}{2}$  times; others, 2 and  $2\frac{1}{2}$  times. Marks testified that whether or not the engine would turn over would depend on whether it had gotten off the ties or not. He could not say, running at 18 miles an hour, whether it would have gotten off the ties or not. That nobody could tell whether running at 18 or 25 miles an hour an engine would go off that curve. That he could not state at what speed it would have to be going to turn over just once. Tanhauser did not believe the engine would have turned over at all running at 18 miles an hour, or even at 25 miles an hour. At 30 miles it might have turned over on one side. That to make two turns he did not know how fast it would have to be going. That it took 40 miles an hour to throw an engine on its back. McCamant, conductor of the other wrecked train, testified that the indications were that the engine turned over only once. That from the situation down there—tracks, engine, lay of the land, and everything—he could not tell at what speed the engine was going when it went off the track. Drodge, division master mechanic at that time, stated it turned over once. Borchering stated that running at 30 miles the engine would not have turned over; that it turned over once and a half, and must have been going pretty fast. Drodge stated that he was reasonably sure it was going over 20 miles an hour, and not sure that it was going over 30, although it was his belief that it must have been between 40 and 50 miles.

We are of the opinion (1) that the testimony was sufficient to warrant finding that

the rail had become worn on this curve to such an extent as made it liable to derail an engine going at the rate of speed permitted this engine by the rule, and that defendant had failed to exercise ordinary care in having it in that condition for the use of its servants. Defendant's witnesses brought the wearing-off of the rail to near the point of danger. It had been in use for the length of time such rails could with safety be used, in view of the testimony of the increasing heavy traffic over the road, of the fact that the tendency of the ball wearing off was to make derailment easier, and that the road master (Kelly) had warned employees that its condition was dangerous. (2) That while the consensus of opinion expressed by the expert witnesses is strongly in favor of the theory that Gillespie was allowing the engine to run so much in excess of the prescribed speed, that his conduct was reckless, and was responsible for his death, yet there were circumstances which seem to us might prevail to the contrary. He was shown, when last seen, to have not been in any condition that was indicative of anything but a careful person; that he had just observed a time limit of 18 miles an hour in traversing the distance between Finley and the place of the disaster, which, while it would not show that he was not going at a higher speed than 24 miles an hour at the moment of the derailment, does tend to show that his disposition, while making that run, was that of a careful person, and it would be an admissible inference that this did not suddenly change at least to such an abnormal extent as is indicated by the testimony of defendant's witnesses. In addition to that the reverse lever of his engine was set so as to show that he had the steam shut off, which indicated the exercise of care. These circumstances the jury was entitled to consider, especially when the testimony of excessive speed was by expert witnesses, who, while they agree in their conclusions as to excessive speed, did not support each other as to the facts upon which they founded their conclusions. For example, if the engine turned over only once, as two of them testified, what effect would this have upon the testimony of those witnesses who stated that the speed was 50 miles an hour, which was based in part upon the fact that it turned over twice or  $2\frac{1}{2}$  times? Again, the distance the engine went from the point of derailment was a subject of a material difference in the testimony of these expert witnesses, and the judgment of those who formed any idea of its speed by considering the distance of 800 feet would not be of much reliability if the jury believed the witnesses who testified that the distance was much less. Although there was unanimity in the opinion formed of the speed at which the engine must have been moving, there was a want of unanimity as to the conditions on the ground from which the estimate of speed was formed. The witness (McCamant), who

had been in the railroad service 20 years as brakeman and conductor, and had seen a good many wrecks, admitted that he could not tell at what speed the engine was going when it left the track, from what he saw there, the tracks, the engine lying on the ground, the lay of the land and everything. Save that when McCamant's train went off, the far end of the rail was loose and his engine went through it, instead of over the rail, there was no explanation of the fact, except what the jury could make out of it, that his engine which was moving at only 18 or 19 miles an hour (which was less than Gillespie was allowed to run) with the air applied, and with a number of cars attached, landed within a few feet of where Gillespie's engine was found lying.

We conclude that there was no error in submitting the case to the jury, both as to defendant's negligence and Gillespie's contributory negligence. No one testified from having witnessed the speed that Gillespie was making. The testimony of witnesses as to the speed was that of experts, which character of evidence the jury is not always compelled to adopt as their own conclusions, particularly when they have the very facts before them upon which the experts say they formed them. In such a case the jury are supposed to be able to form their own conclusions, rejecting the others, if their judgment is to the contrary. Here the experts concur on a high rate of speed, each one giving the facts and conditions upon which he bases it, and they differ materially on what the jury might think are conditions material to the conclusion. Expert testimony may be discredited as any other testimony. *Railway v. Hadnot*, 87 Tex. 505, 4 S. W. 138; *Railway v. Bowhan* (Tex. Civ. App.) 47 S. W. 1053; *Kennedy v. Upshaw*, 68 Tex. 442, 1 S. W. 308; *Rapalje on Witnesses*, § 300; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028. The jury could properly in this case have found, as they must have done, under the charge and from their verdict, that Gillespie was not guilty of negligence on this occasion.

The second assignment complains of the seventh paragraph of the charge, which told the jury that if they believed Gillespie was running 50 or 60 miles an hour at the time the engine left the track, and that such running was in excess of the speed allowed on such curves by the company's rules, and proximately contributed to cause the engine to leave the track, to find for defendant. The proposition is, "If Gillespie was running his engine at a greater rate of speed than 24 miles an hour, he was guilty of contributory negligence." The only possible ground for a claim of error on the instruction is its requiring the jury to find more than the fact of such excessive speed. That the charge is not erroneous, as misstating the law, in what it states about the speed proximately contributing to cause the engine to leave the track, appears to be settled in *Parks v. Trac-*

tion Co. (Tex. Sup.) 94 S. W. 332. Besides, defendant requested a charge, which was given, and which was subject to the same objection, and told the jury that if plaintiff failed to establish due care in the operation of the engine, and that such want of due care, if any, caused or contributed to plaintiff's injuries, to find for defendant.

The third assignment complains of the following paragraph of the charge: "Therefore, if you believe from the evidence that the leaving of said track by said engine was not due to any negligence on the part of the railway company, if any, in failing, if it failed, to furnish rails in a reasonably safe condition for the operating of its engines and trains thereon, under its rules, but was due to a risk ordinarily incident to the business, then, and in that event, your verdict must be for the railway company, as he would have assumed the risk in that case." The proposition is that the above instruction is erroneous in imposing upon the defendant the duty to furnish rails in a reasonably safe condition for the operation of its trains and engines, when the duty is to exercise ordinary care to that end. The charge is clearly not subject to the objection.

The fourth is directed to this charge: "If you believe from the evidence that the said son, Frank Gillespie, sustained no pecuniary loss by reason of the death of his father, you should find nothing in his favor in any case, and, if you find for defendant as to one or all of said plaintiffs, you will so state in your verdict." This is claimed to have been prejudicial to defendant in that, if Mrs. Gillespie could recover, then Frank, "being a minor at the time of his father's death, was entitled to recover, without other proof of pecuniary loss, than that disclosed by the evidence, and the defendant in this case is not protected against another suit by Frank Gillespie, as he is not bound by the judgment against him." The evidence warranted the conclusion that deceased did not contribute toward the support of Frank, who was then between 18 and 20 years of age, and that he therefore sustained no pecuniary loss. It seems to us that the court could do no more or less than submit the issue. Plaintiff was authorized by the statute, which creates this form of liability, to bring the action on behalf of all interested in the claim. She was the statutory representative of the other parties, and the judgment entered in the action is conclusive upon all in favor of defendant, except for fraud participated in by defendant. *De Garcia v. Railway Co.* (Tex. Civ. App.) 90 S. W. 670.

There was no error in admitting in evidence Gillespie's watch. It is contended that the time when his watch stopped did not show, or tend to show, the rate of speed at which he was going at the time of the derailment. While the time indicated by the watch at which the train went off did not show the rate at which he was then going, it was ma-

terial, in view of the time at which he passed Finley and the distance between the two points, as showing the speed he had observed in going from Finley to this curve, and this was, as we have already stated, a circumstance entitled to be considered upon his probable conduct, or disposition, in respect to care or recklessness at the time of the derailment, along with other circumstances. The fifth assignment, to which the above remarks refer, was simply that the court erred in admitting Gillespie's watch in evidence, as not material to any issue in the case. It was shown that the watch was in the same condition as it was when found on Gillespie's person. Now it seems that this assignment would not be permitted, in any event, to reverse the judgment, for the reason that the same testimony in respect to the fireman's watch went in without objection.

The sixth assignment is that the court erred in refusing to admit certain testimony from witness Marks, in substance that Gillespie was on July 15, 1903, disciplined by an order from the superintendent for negligently running his train in a station at too great a rate of speed in violation of an order that engineers should have their engines under control coming into a station, and was laid off two months therefor. This testimony was not admissible. *Railway v. Johnson*, 92 Tex. 382, 48 S. W. 568; *Railway v. Parrott* (Tex. Civ. App.) 96 S. W. 951.

The other assignments of error are directed to the overruling of the motion for a new trial. If what is said in this opinion, in connection with the assignments already discussed, be correct, the remaining assignments must be overruled.

Judgment affirmed.

#### HOFFMAN v. LEMM.

(Court of Civil Appeals of Texas. Dec. 12, 1907. Rehearing Denied Jan. 2, 1908.)

#### 1. WITNESSES—EXAMINATION—ANSWERS—RESPONSIVENESS.

In an action to recover land, or for judgment on a note given for the price thereof, the defense was that at the time of the conveyance to defendant plaintiff held the land in trust for defendant, and that the note was executed under duress consisting of plaintiff's refusal to convey unless defendant would execute the note. In taking the deposition of plaintiff, defendant interrogated him as to whether at and before the execution of the note plaintiff did not know that none of the land belonged to him, and that all of it belonged to defendant, and had been paid for by him long before, and that defendant, in fact, owed plaintiff nothing for it, that plaintiff was simply "holding up" defendant because title stood in plaintiff's name, to which plaintiff responded, in part, that about two months before the note became due he wrote defendant, who replied, that the money would be promptly paid, which letter plaintiff had lost. The answer was objected to because it gave the contents of a letter without notice to produce it, because it was not responsive, and because it was evidence of the ratification of a note executed under duress without a plea of ratification. *Held*, that the objections were without

merit, since plaintiff's statement did not tend to show such ratification, since the letter referred to had been lost, and, though the answer was not categorically responsive, the question itself was argumentative.

## 2. PLEADING — AMENDMENT — AMENDMENT OF ANSWER.

District court rule 27 (87 S. W. xxii) provides that, when exceptions have been presented and decided, leave may be granted to either party to file an amendment in one instrument separate from those which have been previously filed which shall close the pleadings in the case, and Rev. St. 1895, art. 1262, provides that a defendant may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause, provided that he shall file them all at the same time and in due order of pleading. *Held*, that the rule did not authorize defendant to present before trial new matter supplementary to that contained in his answer then on file.

## 3. VENDOR AND PURCHASER — RECOVERY OF LAND — INSTRUCTIONS.

In an action to recover land or for judgment on a note given for the purchase price thereof, the defense substantiated by evidence was that plaintiff had held the land in trust for defendant, and had refused to make the conveyance to defendant, unless he would execute the note in question, and that plaintiff had threatened, in case defendant would not do so, to convey the land to an innocent purchaser. *Held*, that an instruction requiring the jury to find as prerequisite to a judgment for defendant that he was influenced to execute the note sued on by reason of plaintiff's threats, that plaintiff was insolvent, and that the note was without consideration was erroneous, as mere want of consideration would have been sufficient.

Appeal from District Court, Randall County; L. S. Kinder, Judge.

Action by August Lemm against F. Hoffman. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Turner & Boyce, for appellant. Rollins & Cranfill, for appellee.

HODGES, J. The appellee, Lemm, sued the appellant in the district court in an action of trespass to try title, in which he sought to recover title and possession of two tracts of land designated as "sections 56 and 22 in Randall county," both of which had been patented to him by the state. He alleged that on the 2d day of May, 1905, he was the owner in fee simple of the above-mentioned tracts of land, and on that day sold and conveyed the property to the appellant by a general warranty deed. The consideration recited in the deed was \$10,000 in cash; but he alleges that no cash was in reality paid, but that the appellant executed a note for the sum of \$3,500, due six months after date, and payable to the appellee, without interest; that \$3,000 of this note was the consideration for the conveyance of the two tracts of land referred to, and that the remaining \$500 was in consideration of some cattle which appellee had before that time sold to the appellant. Appellee prayed for judgment for the restitution of the land; and, in the event the court should decide he was not entitled to recover the land, asked for judgment upon the note for \$3,500, with interest and costs. Appellee answered by general and spe-

cial exceptions and a general denial, and especially pleaded that the note sued on was executed under duress, and was without consideration; that it was executed by the appellant for the sole purpose of obtaining a deed to the lands described, which were, in fact, owned by appellant at the time. He says the naked legal title was in the appellee, and he was forced to make the note in order to get the conveyance of that title from appellee. Defendant further specially alleged that on the 25th day of March, 1901, he purchased the land in controversy from the appellee for a consideration of \$2,000 which was paid to and accepted by the appellee in full satisfaction for said land; that at the time said sale was made it was mutually agreed between the parties that the deed should be made by the appellee to one F. M. Lester, who should hold the same in trust for the appellant. It was also alleged by the appellant that on the 25th day of May, 1903, the said F. M. Lester, by and with the consent of both appellee and appellant, made, executed, and delivered to the appellee, Lemm, a deed to said land reciting a consideration of \$2,000 paid, but that, in fact, no consideration whatever was paid by the appellee, but the purpose of said conveyance, as agreed on by and between the parties, was to pass to the appellee the naked legal title to said land. He avers that it was understood that the appellee was to hold the same in trust for the appellant; that, by reason of said conveyance, appellee had no interest or title to said land, except as above stated, but that appellee thereafter, at the time the note was executed which is here sued on, refused to convey the legal title to the appellant without the payment of a large sum of money or the execution of the above-described note; and that in order to procure the legal title from the appellee, and fearing that the latter would convey said land to an innocent purchaser as he had threatened to do, the appellant executed the note. It appears also from the record that the appellant filed what he termed a "trial amendment," in which he alleges that after his purchase of the land from the appellee in March of 1901, as set out in his original answer, relying upon the good faith of the appellee in making said sale, he placed valuable and permanent improvements on said land after going into possession thereof, having received possession from the appellee under and by virtue of said purchase. He alleges said improvements to be of the reasonable value of \$1,000, and that all of them were placed on said lands after the 25th day of March, 1901, and prior to the 20th day of September, 1906. He also alleges that he held absolute, unconditional, and adverse possession of said land, exclusive of the claims or possession of any other person or persons, from the date first above named continuously until the present time, and that he now still holds such possession. Appellant further alleges that, by virtue of these facts, he became and is the absolute

and unconditional owner of said land, and that such improvements were placed thereon and his possession continuously held with the knowledge and consent of the appellee, and claims that the latter is now estopped from asserting any interest in said tracts of land. In submitting the matter to the jury the court ignored that portion of the appellee's petition asking for the restitution of the land, but submitted only appellee's right of recovery upon the note.

The material facts offered in evidence show that appellant did on the 2d day of May, 1905, as alleged by the appellee, execute the note sued on and deliver the same to the appellee, and that appellee did on that day convey the two tracts of land hereinbefore described, together with two other tracts, to the appellant by a general warranty deed, reciting the consideration of \$10,000. It is admitted by both parties that no consideration of \$10,000 was paid. It seems that the appellant and the appellee were both Germans; that the appellant resided in Randall county, and was there engaged in the business of stock raising and farming. About the year 1898 the appellee, fresh from the old country, impelled by a disposition to hunt congenial society among people of his own nationality, became acquainted with and was employed by the appellant as a farm hand on his premises. While there he availed himself of the opportunity to purchase some school lands from the state of Texas, and acquired a right, as such a purchaser, to four sections of land—the lands described in the deed executed by him to the appellant in May, 1905. Appellant admits that in March, 1901, the appellee was the owner of these four sections of land. Two of them he had purchased from a man by the name of Sims, and had filed on the other two as a purchaser from the state. Subsequently he made his proof of three years' occupancy on his home section, and acquired a right to a patent from the state. Appellant says that Lemm then told him that he wanted to sell all of this land and go back East; that appellant thereupon agreed to take the land, provided they could agree upon the price. In his testimony appellant says that he did not have the money at that time to pay for the land, but procured it from the bank. After some negotiations, appellant says, it was agreed that he should have the land from Lemm for the sum of \$2,000; that he paid about \$1,000 of this to Lemm, and retained the balance to reimburse himself for loans previously made to Lemm in assisting him to procure the land from the state. In order to secure the bank, he says, he had appellee to make a conveyance of the land to F. M. Lester, who held the legal title thereafter until the debt was settled off and the land reconveyed. Shortly after that he avers appellee left the country and remained away about one year, after which he returned and again went to work for the appellant, and continued in

his employ until the 2d of May, 1905. Appellant further says that, after he paid the \$2,000 back to the bank (which seems to have been done about two years after the loan was obtained), he had Lester to make the deed back to Lemm. In explanation of this conduct he says he did so "because Lemm said he would make him a clear title to the land; that Lemm had before that time agreed to give him a 'clear title' no matter where he (Lemm) was, even if he had to have the deed sent to Germany for that purpose, or words to that effect"; that, when he bought the land of Lemm in 1901, the latter had made him the promise to give him a clear title to it, and that Lemm had never made any claim to the land, as far as he knew, after he deeded it to Lester in 1901. It appears from the deeds offered in evidence from Lemm to Lester, and from Lester back to Lemm, that both instruments contained a special warranty, and we assume that they differed in that respect only from a general warranty deed. It is true that the appellee refers to the deeds as being mere quitclaims; but, by reason of the fact that the habendum clauses were in the usual form of conveyances under special warranty, we have concluded that that was probably the character of the instruments by which the transfers were made. Appellant says that after he bought the land he paid the balance due the state, which was 97½ cents per acre, and the patent fees; that the money for this was paid out of the loan above referred to. He denies that Lemm paid any of this money, and reiterates that Lemm knew of his getting the money from the bank at the time, and knew that he was giving a mortgage on all of the four sections among other lands, and never raised any objection to it. He says the first time Lemm ever demanded any money on the land was on the 2d of May, 1905, the day he executed the note; that on that day Lemm expressed a desire to leave his employ and go elsewhere, stating that he had become offended at some conduct of the appellant's children; that, upon being notified of Lemm's desire to leave, appellant told him they had better go to Canyon City and get their land matter fixed up; that appellee thereupon told him that he would have to pay him (Lemm) \$4,000 if he got the land. An altercation resulted between the two as to whether or not this demand on the part of Lemm was fair or otherwise. Finally Lemm told appellant, as the latter states, that he would throw in his cattle and deed him the land for \$4,000, and demanded \$500 of that in cash and a note for the remainder. Appellant says that the last conversation they had was in Amarillo, in Potter county, and that he was afraid at that time that Lemm would sell the land that day to some one else, for he knew that he could easily sell it for that amount; that the country was full of buyers and land agents; that the land was worth from \$2 to \$4 per acre. The testimony shows that there

were four sections of 640 acres each, with a surplus of about 14 acres in one section. He testifies that Lemm finally agreed to "throw in the cattle" for \$500 cash, and take a note for \$3,500; that they then went to the office of an attorney, where the deed was drawn up and the note executed and delivered; that he executed his note for \$3,500, and on the next day, at the First National Bank in Canyon City, paid Lemm \$500 for his cattle, and took a bill of sale for them. Appellant says that he afterward received a letter from Lemm about two months before the note became due, but never replied to it; that after he bought the four sections of land in 1901 he inclosed them, and put on the land a cement tank and some other improvements, amounting to about \$1,000 in value; that there were about 50 or 60 acres in cultivation; that those lands were inclosed ever since he bought them from Lemm in 1900, and that he had been using and cultivating them all that time, and had the exclusive possession of them; that he had paid all of the taxes each year, and all the interest to the state, none of it having been paid by Lemm; that he had never asked Lemm to pay any of it, nor had Lemm ever mentioned to him anything about paying any of it back. He denies that Lemm ever requested him to pay anything on the land after he bought it from him, in the way of taxes or interest, until he made the demand of him for the \$4,000. Appellant says he rendered the land for taxes each year. He rendered it in Lemm's name, and did this until after the deed was made to him, that he thought this was the proper way to render the land. On cross-examination appellant stated that, when he made the note, he did not intend to pay it unless he had to; that he did not feel that he ought to pay it; that he had already paid for the land once; and that Lemm had agreed to make him a deed. He further stated that he leased this land from Lemm before the 25th of March, 1901, and was to pay the interest and taxes for the use of it; that he paid \$40 a year on each section.

Much of this testimony on the part of appellant is contradicted by the appellee, Lemm, who testified by deposition. Lemm tells how he acquired the land, which is substantially in accord, upon that issue, with the testimony of Hoffman. He says that he depended absolutely and implicitly upon the advice of Hoffman in all his business transactions; that in May, 1905, he conveyed the land in controversy to Hoffman; that the consideration for the land was \$3,000, and \$500 for some cattle sold by him to Hoffman, making a total of \$3,500; that the sale had been talked about for some time; that he had asked Hoffman \$4,000 for the land and cattle; that Hoffman only wanted to buy the land and offered him \$3,000 for it, but that he (Lemm) did not want to sell the land without selling the cattle also; that he wanted cash, and Hoffman wanted to give

him a note; that ultimately a conclusion was reached and Hoffman carried him to the office of a lawyer in Amarillo—he did not remember the name of the lawyer, although Hoffman told him the name at the time—that the attorney drew up the papers and they were signed; that Hoffman suggested the acceptance of the note for the consideration for the land and cattle; that subsequently he placed the note in the German Bank in Baltimore for collection, and payment was refused. He avers that he would not have conveyed the land to Hoffman had the latter not given him the note. He wanted cash, but upon the representations of Hoffman accepted the note. He says he had never previously received anything of value for the two sections of land; that he had deeded it to Hoffman, because he did not care to live in Texas and decided to move to Maryland. He did not understand all that took place between the attorney and Hoffman at the time the deed was written, on account of his defective understanding of the English language. Lemm denied that Hoffman had ever before that time bought the land from him or had paid him anything for it. These are substantially the facts as testified to by Hoffman and Lemm upon the issue of a want of consideration. There was other testimony more or less tending to corroborate Hoffman's version of the dealings between him and Lemm; but, that being upon an issue of fact, it is unnecessary to here repeat it.

In his third assignment of error appellant complains of the refusal of the court to strike out certain testimony of the appellee, who had testified by deposition. This assignment is overruled, because we think that, even if there was error, it could not have affected the appellant injuriously in the finding of the jury upon the real issue in this case. In taking Lemm's (appellee) testimony, appellant propounded the following cross-interrogatory: "Is it not a fact that at and before you signed the deed to F. Hoffman you well knew that none of the land therein mentioned belonged to you, but that every acre of it, in fact, belonged to F. Hoffman, and had been paid for by him long before you made the deed, and that he, in fact, owed you nothing for it, but that you were simply holding him up because the naked title stood in your name, and you took advantage of his confidence in you to try to force him to pay you something that he did not justly owe?" To this question, or rather questions, Lemm made rather a lengthy answer, some portion of which was considered by the trial judge as not responsive, and for that reason caused to be stricken out. But the following portion objected to by the appellant was permitted to remain: "About two months before the note came due, I wrote Mr. Hoffman. He sent me a reply to this letter, which letter I have, however, lost, and in this letter Hoffman told me that he had sold no land and cattle as yet, but my money would be

paid promptly." Objection is made to this answer (1) because it gave the contents of a letter without notice to produce it having first been given the opposite party; (2) because the answer was not responsive to the interrogatories propounded; (3) because it was evidence of the ratification of the making of a note executed under duress, after duress had ceased, when no such ratification had been pleaded. We do not understand that the witness undertook to testify as to the contents of the letter written by him to Hoffman, which is the only one mentioned that was likely to be within the power of the appellant to produce if called upon. He merely said that he had written Hoffman a letter, without any attempt to say what the contents of the letter were. He did mention facts said to be contained in the reply from Hoffman; but these were clearly not subject to that objection, because he stated that this letter had been lost. It may be that this answer was not categorically responsive to the interrogatory propounded to the witness; but, when we take into consideration the nature of the questions embodied in that interrogatory, their argumentative character, and the evident intent to convict the witness, if possible, out of his own mouth, of both moral and legal wrongs toward Hoffman in this land transaction, we do not think the court erred in refusing to strike it out. When an attack, such as was couched in those questions, is made upon a witness, it is but natural that he should seek to vindicate himself by narrating such facts within his knowledge as are calculated to have that effect. That the witness should state, if such fact existed, that Hoffman had himself acknowledged the justness of his debt, in response to the insinuation that the witness was undertaking to collect a debt which he, the witness, knew to be unjust and without consideration, should not have been unexpected; nor are we prepared to say that it was subject to the legal objection that it was not responsive to the interrogatory. If not called for, it was certainly provoked by the form and nature of the interrogatory propounded. But appellant contends that its tendency was to show a ratification of a contract made under duress in the absence of pleadings setting up a ratification. We do not think such was its effect.

In his fifth assignment of error appellant says the court erred in permitting counsel for appellee to read to the jury the facts set out in an opinion in another case heretofore decided by the Court of Civil Appeals for the Fifth District. Neither the bill of exception nor the statement of facts inform us of what the facts in the case complained of were, and we are unable to say whether it was error or not. Ordinarily such proceedings are within the discretion of the trial court, and his action will not be revised in the absence of a showing that he has abused that discretion. While the assignment of

error charges that the case objected to was read to the jury, the bill of exceptions shows that it was merely read in the presence of the jury, probably to the court.

The fifth assignment of error complains of the failure of the court to set forth in his general charge the defenses and claims of ownership to the land in controversy set up by the appellant in his trial amendment. This will be considered in connection with the appellant's tenth and eleventh assignments, which complain of the refusal of the court to give appellant's special charge No. 1, calling the attention of the jury to that defense. This case appears from the record to have been tried on the 8th day of February, 1907. On the 7th day of February, the day preceding, appellant filed what he termed his "trial amendment." This does not purport to have been filed by leave of the court, nor does it seem to have been required, or called for, to cure any defect in appellant's answer caused by a ruling of the court in sustaining objection thereto after the case was called for trial. Trial amendments are authorized by rule 27 (67 S. W. xxii), adopted for the government of county and district courts. This rule provides: "When the exceptions have been presented and decided, leave may be granted to either or both parties, to file an amendment in one instrument of writing separate from those which have been previously filed by each, which shall close the pleadings in the case to be then determined by the court so as to decide all the questions of sufficiency arising upon them." This language has reference to proceedings occurring after the case is called for trial, as is shown by the provisions of rule No. 26 (67 S. W. xxii). The statute gives the defendant in an action the right to "plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; provided that he shall file them all at the same time and in due order of pleading." Article 1262, Rev. St. 1895. The only departures permitted from this requirement that the pleadings of the defendant shall all be filed at the same time are under the terms of the rule above quoted, where exceptions have been sustained after the case is called for trial. This latitude is allowed for the purpose of preventing an injustice to the defendant in the presentation of his defense, and to avoid delay in the trial. We do not think it was ever contemplated that it should be resorted to by defendants as a means of presenting new matter, supplementary to those contained in the answer then on file, as was done in this case. Such departures from the well-established rules of pleading should be discountenanced, rather than encouraged, by trial courts. In the case before us the court had the undoubted right to refuse permission to file the "trial amendment" in the form presented, and, if filed without its permission, might have ordered it stricken from the file, or might disregard it in



presenting the issues to the jury. The exercise of this authority could not be complained of, for the reason that the conditions had not arisen under which trial amendments should have been permitted. The amendment does not purport to have been filed under leave of the court, nor is there any order of the court to that effect. It may be that the failure of the court to present the phase of the defense embodied in that instrument was a judicial disapproval of the nonconformity to the rules of pleading. At any rate, we are not prepared to say, owing to the peculiar circumstances of this case, that this failure was reversible error, even if the facts therein grouped were not sufficiently presented in the court's main charge. But, be this as it may, this amendment sets up matter somewhat at variance with the defense made by the testimony of the appellant himself. The trial amendment sets up matters which, if true, would take a parcel of the land out of the statute of frauds, and seeks to have the appellant's ownership of the land prior to the deed to him from Lemm found upon those facts. Prior to the execution of the note sued on, the appellant either owned the real beneficial interest in the land or he did not. If he in fact did own it, then it is immaterial whether he acquired it by purchase and payment of purchase price, and having the deeds made, as he states, to another party to hold for him as trustee, or, by having purchased, paid the price and gone into possession, and afterwards made valuable improvements thereon, and by having thereby acquired a title to the property. The disputed issue lies back of what appellant claims to have done after his claimed purchase from Lemm—the fact of purchase itself. There was no dispute about his being in possession, nor apparently any about the improvements made by him afterward. But the issuable fact in controversy was: Had there been a sale and purchase as testified to by appellant? If there had been, then it follows that the deed of conveyance from Lemm to appellant was merely the act of a trustee obeying the demands of the cestui que trust, and the note given therefor was without consideration. If appellant had once paid Lemm for the land, then a subsequent promise to again pay for the land merely to secure a conveyance to which the purchaser was already entitled to have would be without consideration. Hence we think the real substantial issue was whether or not there had been such payment from Hoffman to Lemm. Had the court presented this issue unincumbered with other required findings, appellants could not complain of the failure to also tell the jury the effect that possession and valuable improvements would have in perfecting his title to the land. Previous purchase and payment, and not perfection of title, was the issue for the jury to pass upon.

In presenting appellant's defenses the court instructed the jury as follows: "You are fur-

ther charged, however, that if you believe from the evidence that when Lemm conveyed said lands to Hoffman at Amarillo, Tex., on May 2, 1905, that the said Lemm had no title or interest in said lands, although the title stood in the name of the said Lemm, and that the said Lemm had theretofore, to wit, on March 25, 1901, sold said lands to the said Hoffman for the sum of \$2,000, and he the said Lemm then and there received and accepted said sum of \$2,000 in full payment of said land, and deeded the same to F. M. Lester, and you further believe that, when the said Hoffman executed and delivered to the said Lemm the note for \$3,500, he was moved and influenced to make and deliver the same by reason of the threats of the said Lemm to convey the said lands to other parties and defraud the defendant of the title thereto, and that the plaintiff was insolvent and said note was without consideration, and, if you so believe, you will find for the defendant." In his eighth assignment of error the appellant contends that this charge was too onerous, that the court required the jury to find that the appellant was influenced to execute the note sued on (1) by reason of the threats of the plaintiff, (2) that the plaintiff was insolvent, (3) and that the note was without consideration, before returning a verdict in favor of defendant, when, as a matter of fact, either the first or the third ground would be sufficient to defeat recovery on the note. We think the charge is subject to the objection urged, and that it should not have been given in that form. The giving of this charge will necessitate the reversal of this case, unless we can conclude as a matter of law, from the record, that the plaintiff below was entitled to recover notwithstanding such error. This we cannot do.

There was no controversy about the fact that the note was executed by the appellant and delivered to the appellee, and that the latter was entitled to a judgment for the amount sued for, unless the note was without consideration. The acts relied on to show duress, in our opinion, are not such as to require the submission of that issue to a jury, and might have been disregarded by the court in its instructions. If the land had previously been sold to the appellant by Lemm and paid for by the former, as testified to by the appellant, and the legal title thereafter permitted to remain in Lemm, in trust for Hoffman, then the conveyance upon the occasion when the note was executed furnished no consideration for the note given by appellant to Lemm. This is a sharply contested issue, and should have been presented to the jury unincumbered with the additional duty of finding that the appellee was insolvent, or that the making of the note was procured by duress. If there was no consideration for the note, then its collection could be defeated regardless of whether its execution was procured by threats to sell the land to other parties, or whether or not Lemm was insolvent,



and appellant had the right to have the jury so instructed.

Appellant complains of the charge of the court in telling the jury that the burden of proof was on the defendant, appellant. Strictly speaking, this charge should not have been given in this form, but the jury should have been instructed that the burden rested upon the defendant to establish the facts relied on by him to defeat recovery on the note. Perhaps this portion of the charge was tantamount to that, but the language was possibly susceptible of a different construction, and the jury might have inferred that the court meant the burden of proof in the entire case was imposed on the appellant. Upon another trial this should be avoided.

For the errors indicated, the judgment is reversed, and the cause remanded.

### TEXAS & P. RY. CO. v. BLOCKER.

(Court of Civil Appeals of Texas. Nov. 7, 1907. Rehearing Denied Jan. 9, 1908.)

#### 1. STATUTES—CONSTRUCTION—PENAL STATUTES.

Sayles' Ann. Civ. St. 1897, arts. 4497-4502, as amended by Laws 1899, p. 67, c. 48, imposing a penalty for failure of a railroad company to furnish cars on application, being penal, must be strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

#### 2. CARRIERS—CARRIAGE OF GOODS—FAILURE TO FURNISH CARS—PENALTIES.

Under Sayles' Ann. Civ. St. 1897, arts. 4497, 4498, 4499, providing for a penalty against a carrier for failure to furnish cars on application, and requiring the application to state the time when they are desired, and allowing the carrier three days after receiving the application in which to furnish the cars, an application for cars requiring them to be furnished the day after the date of the application is not a sufficient compliance with the statute to subject the carrier to the penalty.

#### 3. SAME—DAMAGES.

Where plaintiff sued to recover the penalty imposed by Sayles' Ann. Civ. St. 1897, arts. 4498, 4499, for failure of a carrier to furnish freight cars on application, which statute also provides that the shipper could recover actual damages occasioned by such failure, and fails to recover the penalty, he will be precluded from recovering damages.

Appeal from Bowie County Court; Sam. H. Smelser, Judge.

Action by B. F. Blocker against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for appellant.

Glass, Estes & King, for appellant. J. E. Garland, for appellee.

**WILLSON, C. J.** This was a suit brought by appellee against appellant to recover damages claimed to have been suffered by him as the result of appellant's failure to furnish him cars in which to ship certain cotton seed; and also to recover penalties claimed to have accrued in his favor against appellant by reason of its failure to furnish such cars. The

case was tried before the judge and without a jury, in the county court of Bowie county. The trial resulted in a judgment, rendered February 6, 1907, against appellant and in favor of appellee, for the sum of \$650 as penalties and for the sum of \$262 as damages.

The evidence shows, and the court found as facts, that on October 23, 1906, appellee owned and operated a gin at Oak Grove, a switch on appellant's line of railway; that appellant did not maintain a depot and did not have an agent at said switch; that the depot nearest to said switch on appellant's line of railway was at De Kalb, five miles distant; that at the time mentioned appellee, in connection with the operation of his gin, was engaged, and for some time theretofore had been engaged, in buying and selling cotton seed and shipping same over appellant's line of railway either to Paris or Texarkana; that for use in storing seed to be so shipped appellee maintained on the edge of appellant's right of way, and about 50 feet from his gin, a house capable of holding about three car loads of seed; that on said October 23, 1906, having seed on hand which he desired to ship out, appellee in writing applied to appellant's station agent at De Kalb for two freight cars to be placed for his use in shipping such seed on the switch near his seedhouse, on or before October 24, 1906; that appellant's station agent at De Kalb, at the time appellee's order or application for the cars was presented to him in writing, acknowledged receiving from appellee the sum of \$10 to be applied on "freight charges on two cars cotton seed from Oak Grove to Texarkana or Paris"; that the \$10 paid by appellee to appellant's said agent and covered by the latter's receipt was sufficient to pay one-fourth of the freight charges on said cars when loaded with cotton seed from Oak Grove to either Paris or Texarkana, stations on appellant's line of railway; that on the night of said October 23, 1906, appellant placed two cars on the switch at Oak Grove, in response to appellee's demand; that the two cars so placed were stock cars, and, because too open and too filthy, were not suitable for shipping the cotton seed; that appellee at once notified appellant that he could not use the cars so placed for him, because they were not suitable for his purpose; that no other cars were furnished to appellee by appellant in response to his order of October 23d therefor, until November 7th following, when appellant furnished him one car; that on November 10, 1906, appellee in writing applied to appellant's said station agent at De Kalb for three freight cars to be placed for his use on said switch on or before November 11, 1906; that appellant's said station agent, at the time this application or order was presented to him in writing, acknowledged receiving from appellee the sum of \$15 to be applied "on freight charges on three cars cotton seed to Paris or Texarkana"; that the \$15 so paid by appellee to appellant's said agent and covered by the latter's receipt was

sufficient to pay one-fourth of the freight charges on said cars when loaded with cotton seed from Oak Grove to either Paris or Texarkana; that on November 18, 1906, appellant furnished appellee with two cars; and that after October 23, 1906, his storage house being filled with cotton seed, he had to place seed purchased by him on the ground, where, by exposure to rain, etc., they were damaged.

From the foregoing facts found by him, the court concluded as matter of law that appellee was entitled to recover of appellant the penalties and damages awarded to him by the judgment. We are unable to concur in this conclusion. The law denounces a penalty against a railroad company in favor of the owner of any freight, when such owner, in accordance with its terms, makes a demand for cars in which to ship such freight, and the railroad company fails to furnish them. To bring himself within the terms of the law, the owner of the freight to be shipped must in writing make an application for the cars desired by him to a superintendent, agent, or other person in charge of transportation for the railroad company, and in such application state (1) the number of cars desired, (2) the place—which must be at some station or switch on the railroad company's line of road—at which they are desired, and (3) the time when they are desired; and he must deposit with the agent of the railroad company one-fourth of the amount of the freight charges for the use of such cars, unless the company agrees to deliver the cars without such deposit. When the owner of the freight to be shipped has so complied with the requirements imposed on him by the law, it becomes the duty of the railroad company, within a reasonable time thereafter, not to exceed six days from the date of its receipt of the application, to supply the number of cars demanded, "provided," the law declares, "if the application be for ten cars or less, the same shall be furnished in three days." For a failure to discharge such duty the statute denounces in favor of the shipper, against the railroad company, a penalty of \$25 per day for each car it fails to furnish as so applied for. The same statute makes it the duty of the shipper, within 48 hours after the car or cars have been placed for him by the railroad company in compliance with his demand, to fully load the same; and, upon his failure to do so, declares "he shall forfeit and pay to the company the sum of \$25.00 for each car not used; provided, that where applications are made on several days, all of which are filled upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day, until the period within which they may be loaded has expired. And if said ap-

plicant shall not use such cars so ordered by him, and shall so notify the company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." Sayles' Ann. Civ. St. 1897, arts. 4497 to 4502, as amended by Gen. Laws, 1899, p. 67, c. 48.

Being highly penal both as to the railroad company and as to the shipper, the statute must be strictly construed. The penalty provided for should not be awarded at the suit of either the railroad company or the shipper, unless the complainant brings himself clearly within its terms. *Railway Co. v. Hughes* (Tex. Sup.) 91 S. W. 568; *Railway Co. v. Campbell*, 91 Tex. 557, 45 S. W. 2, 43 L. R. A. 225. The entire statute should be looked to, and its provisions so construed as to make it effective alike in favor of and against each of the parties affected by it. That portion of it prescribing the duties of the railroad company should be given such meaning, under the rules controlling in its construction, as will effect the purpose designed (that is, the furnishing to the shipper of proper facilities for the transportation of his property); and that portion of it prescribing the duties of the shipper should be given such meaning, under the same rules of construction, as will effect the purpose designed (that is, the protection of the railroad company against his improvident or improper demand for cars, or his failure to make use of same when furnished to him); and further than may be necessary to accomplish these purposes the penalties denounced should not be held to apply. The law requires the shipper in his application to name the time when he desires the cars. Article 4498, Sayles' Ann. Civ. St. 1897. It requires the railroad company, if ten or a less number of cars are applied for, to furnish them in three days from the receipt by it of the application therefor. Article 4497, Sayles' Ann. Civ. St. 1897. It requires the shipper to fully load the cars furnished within 48 hours after they are furnished. Article 4500, Sayles' Ann. Civ. St. 1897. In the case now before us the time designated in the shipper's application for the delivery of the cars was the day following the day it was received by the railroad company. The railroad company was entitled to three days from the time it received the application in which to place the cars. It need not therefore have placed them at the time designated by the shipper. The question then arises: Had it placed them for the shipper, not at the time designated by him, but within the time allowed to it by the law, and had the shipper then refused to receive and load them, would the shipper be liable to it for the penalty and damages denounced against him by the statute? Again, as illustrative of the point, had the shipper in his application designated October 30th, instead of October 24th, as the time for the de-

livery of the cars, and had the railroad company furnished them within three days from October 23d, the date the shipper's application reached it, would the shipper be liable to the penalty and damages denounced, had he failed to fully load the cars within 48 hours from the time they were so delivered? It seems to us the statute should not be so construed as to make him so liable in either of the cases suggested, nor the railroad company liable for failure to deliver cars in such instances, if it can be given a construction which, while accomplishing the purposes of its enactment, will protect both him and the railroad company, in instances where those purposes are not being subverted, from incurring the penalty and damages denounced. We believe it can be given such a construction. The law, we think, should be construed to carry a penalty, as against the railroad company, when 10 cars or a less number are demanded, only when, the shipper having in his application named as the time for the delivery of the cars a date not earlier than three days in advance of the time when the application therefor is delivered to it, it fails on that date to furnish the cars, and, as against the shipper, only when, the cars having been furnished on that date, he fails to use them. The effect of this construction of its meaning, it seems to us, would be to impose on the parties a liability for the penalties and damages denounced, only when necessary to do so to accomplish the purpose of the statute—that is, to insure the furnishing of cars to the shipper when needed by him, and, when so furnished, the use of same by him—and such a construction would relieve the respective parties from a liability to penalties and damages because of the failure of the one to furnish cars at a time when it knew they might not be needed, and of the failure of the other to use cars furnished at a time when he did not need them.

If the statute should be so construed, the trial court erred in holding that appellee was entitled to a judgment for penalties sued for. The record shows, as was found by him, that the application for the two cars desired by appellee was presented to appellant's station agent at De Kalb on October 23d, and that October 24th was the day therein designated as the day appellee would need the cars, and that the application for the three cars was presented to said agent November 10th, and that November 11th was the day designated therein as the day appellee would need these cars. Under the law, as we have construed it to be, appellant was not required on October 24th to furnish cars demanded on October 23d, nor required on November 11th to furnish cars demanded on November 10th. In *Railway Co. v. Hughes*, (Tex. Sup.) 91 S. W. 568, the application was for a car to be delivered "as soon as possible." The Supreme Court held the application to be insufficient as a basis for penalties claimed, because it did not meet the requirement

of the law that it should specify a time. We think the specification of a time unwarranted by the law as effective as a failure to specify a time, in denying to the shipper a recovery of penalties claimed under the statute referred to. We therefore conclude that appellant's fourth assignment of error should be sustained.

As grounds for a recovery of the damages claimed by him, in his petition appellee alleged that, relying upon appellant's furnishing the cars demanded by him, he purchased more cotton seed than he could store in his seedhouse, and was compelled to place the excess upon the ground near his seedhouse, where same was exposed to the weather; and that as a result of rain falling on them in their exposed condition the seed became heated and rotten, and thereby were depreciated in value. There is in the petition no allegation of a contract with appellant whereby it became bound to furnish him cars for the shipment of his cotton seed, nor any allegation of a negligent failure on the part of appellant to discharge any duty it owed to him, whereby he suffered the damage complained of. His suit was based entirely upon the provision of the statute denouncing the penalties he sought to recover, which declares that, in addition to such penalties, on the failure of the railroad company to furnish the cars demanded, the shipper may recover the damages suffered by him by reason of such failure. From the conclusion reached by us, that the penalties sought are not recoverable on the facts in the record, it follows that the damages sought, also, are not recoverable, and that appellant's seventh assignment of error should be sustained.

It also follows that the judgment of the trial court should be reversed, and judgment here rendered for appellant; and it is so ordered.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. GROCE.

(Court of Civil Appeals of Texas. Dec. 14, 1907. Rehearing Denied Jan. 9, 1908.)

##### 1. CARRIERS — SALE OF GOODS CARRIED — VALIDITY.

The right of a carrier to sell goods on the refusal of the consignee to accept them can only be exercised after notice to the consignor, and such notice of sale as will reasonably assure a sale at the reasonable market value.

##### 2. SAME.

A sale of goods by a carrier, on the refusal of the consignee to accept them, is unauthorized, where the sale is for much less than the market value and is made without notice of sale, and immediate sale is unnecessary to protect the carrier in its freight charges, and it is liable for the fair market value at the time of sale.

Appeal from Waller County Court; J. D. Harvey, Judge.

Action by J. E. Groce against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiff against defendant the Missouri, Kansas & Texas

Texas Railway Company of Texas, it appeals. Affirmed.

Lane Jackson, Kelley & Wolters, and Charles A. Warnken, for appellant. A. G. Lipscomb and W. J. Poole, for appellee.

**PLEASANTS, C. J.** This suit was brought by appellee against the Houston & Texas Central Railroad Company and the appellant to recover the sum of \$746.60, the alleged value of a car load of potatoes delivered to the Houston & Texas Central Railroad Company at Waller, Tex., for shipment to Kansas City, and which it is alleged was converted by defendants to their own use. The trial in the court below without a jury resulted in a judgment in favor of appellee against appellant for the sum of \$571.30, and that appellee take nothing against the other defendant.

It is admitted by appellant that the potatoes were received by its codefendant at Waller, Tex., on the 18th day of May, 1906, for shipment to C. C. Clemmons & Co., at Kansas City, Mo., and transported by it to Denison, Tex., and there delivered to appellant, and by it transported to Kansas City, reaching said place on the 21st or 22d of said month. The evidence shows that the consignees were promptly notified of the arrival of the potatoes and refused to receive same. On the 23d of May appellant notified the agent of the Houston & Texas Central Railroad Company at Waller that the consignees refused to accept the shipment, and this information was conveyed to appellee. At 9 o'clock the next morning appellee also received a telegram from appellant notifying him that the potatoes had been refused by the consignees, and he thereupon telegraphed the firm of McGuire, Urban & Co. to take charge of said potatoes and dispose of them for his account. This firm, after receiving the telegram from appellee, went to appellant's freight office and demanded that the potatoes be delivered to them, and were informed that the potatoes had been sold by appellant at 11 o'clock that morning, and therefore could not be delivered to them. The potatoes were sold for 80 cents per bushel, and appellant tendered into court the sum of \$255.40, which amount was the net proceeds of said sale, after deducting the freight charges. No report of this sale and no tender of the proceeds is shown to have been made to appellee before appellant filed its answer in this suit.

The evidence sustains the finding of the trial court that the potatoes at the time they were sold by appellant were reasonably worth on the Kansas City market at least the sum of \$1.35 per bushel, or the gross sum of \$677.70, and that said potatoes were in good condition at the time they were received at Kansas City and at the time they were sold by appellant.

Upon these facts, we cannot say that the trial court erred in holding that the sale by appellant was unauthorized, and that it was liable to appellee for the fair market value of the potatoes at the time they were sold by it. The right of a carrier to sell goods refused by a consignee can only be exercised after due notice to the consignor, and after such notice of the sale as will reasonably assure that the goods to be sold will bring their reasonable market value. Whenever, as in this case, the evidence shows that the goods were sold for much less than their market value, and fails to show any legal notice of the sale, or that the goods were in such condition that immediate sale without such notice was necessary to protect the carrier in its freight charges, such sale is unauthorized, and the carrier will be liable for the fair market value of the goods at the time they were sold.

We have considered all of the assignments presented in appellant's brief, and none of them in our opinion presents any error which would authorize a reversal of the judgment. All of said assignments are therefore overruled, and the judgment of the court below affirmed.

Affirmed.

#### CHICAGO, R. I. & P. R. CO. v. CLEAVER.\*

(Court of Civil Appeals of Texas. Nov. 11, 1907. Rehearing Denied Jan. 9, 1908.)

#### 1. DAMAGES—MEASURE OF DAMAGES—INJURIES TO WIFE—LOSS OF SERVICES.

In an action by a husband for injuries to his wife, specific proof of the value of her services is not necessary to take the question to the jury as an element of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 239.]

#### 2. TRIAL—DEMURRER TO EVIDENCE—ADMISSIONS.

Where defendant demurs to the evidence and plaintiff joins issue thereon, every fact and conclusion which the evidence tends to prove will be taken as admitted by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, *Trial*, § 356.]

#### 3. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—TAKING UP AND SETTING DOWN PASSENGERS.

It is not negligence per se to board a slowly moving train or to alight from one which merely slows up at the station, instead of stopping.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, *Carriers*, §§ 1309, 1391-1393.]

#### 4. SAME—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

In an action by a husband to recover for injuries to his wife while alighting from a railroad car, evidence held insufficient to show that the wife was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, *Carriers*, § 1401.]

Appeal from District Court, Montague County; Clem. B. Potter, Judge.

Action by S. T. Cleaver against the Chicago, Rock Island & Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

\*Writ of error denied by Supreme Court.

Jas. A. Graham, for appellant. J. L. Rudy and Chambers & Cook, for appellee.

**HODGES, J.** This suit was brought by Cleaver, as plaintiff, in the district court of Montague county, against appellant, to recover the sum of \$1,999 on account of personal injuries sustained by his wife on the 6th day of December, 1904, while leaving one of the appellant's passenger trains at Sugden, Ind. T. At the conclusion of the plaintiff's testimony in the court below, appellant demurred to the evidence, upon which the appellee joined issue. The demurrer was overruled by the court, and the jury instructed to return a verdict for the appellee in such sum as they might believe from the evidence would be a reasonable and fair pecuniary compensation for the injuries sustained by his wife, if any. A verdict was rendered in favor of the appellee for the sum of \$1,000, from which appellant has appealed.

#### Findings of Fact.

Plaintiff and his wife were passengers on board one of the appellant's trains passing through the Indian Territory, intending to stop at Sugden, a station on the appellant's line of railroad. Just before reaching that place, the name of the station was called out by one of the trainmen, in the usual way of calling stations; and the conductor, passing through, took the check out of the hatband of the appellee, and called his attention to the fact that they were approaching Sugden. At that time plaintiff was dozing, it being early in the morning, but the conductor's conduct aroused him. He and his wife immediately began to make their preparations to leave the train. They gathered up their baggage, and got their two children ready and arose to leave the car. At this juncture they noticed that the aisle leading toward the rear end of the car in which they were riding was full of people, who seemed to be intent also on getting off of the train. Thinking that they could get out sooner and more easily by going to the front end of the car, both the plaintiff and his wife then went to that end for that purpose. The train by that time had reached the depot, and, if it stopped at all, stopped only a few seconds, and not a sufficient length of time to permit the appellee and his wife to alight therefrom when it was standing. Appellee's wife in leaving the train carried in her arms their youngest child, a baby about 18 months of age, her husband having in charge the older child, and some of the baggage. In going out of the car the appellee preceded his wife by only a very short distance, she following close after him. Just before getting on the platform of the car, he told her to come on, indicating for her to follow him on off the train. When the appellee and his wife reached the platform of the car, they both observed that the train was in motion, but thought it was going sufficiently slow

to enable them to get off in safety. The husband was the first to step off; and, as he did so, perceived that the motion of the train was faster than he at first thought. He alighted upon the platform of the depot, being opposite that point at the time, was slightly thrown off his balance by the motion of the train, but did not fall. His wife, who followed close after him, also stepped off before her husband had time to warn her not to come, or to inform her that the train was going faster than he thought. When she stepped to the ground, she fell upon some cinders, about 10 or 15 feet farther in the direction in which the train was then going than where her husband had alighted. The fall was occasioned by the motion of the train, and from this she sustained the injuries for which this suit was brought. After the fall of the appellee's wife the train was stopped, and the trainmen came back to where she was, made some inquiries as to how the accident happened, rendered some assistance, and then left. While there, however, the brakeman or porters, who seem to have had charge of the exits from the train, made the statement that she did not get off at the points where they were stationed, indicating thereby that the train had stopped, and at the time appellee and his wife got off had started up again.

At the time and before her injuries appellee's wife was a healthy woman, about 44 years of age, and weighed about 145 pounds. It is unnecessary to detail the extent of her injuries or the other elements of damage for which judgment was recovered, as no question is raised as to their having resulted directly from the fall or of being sufficiently serious to justify the finding of the jury.

#### Conclusion of Law.

The first assignment to which our attention is called by the appellant is the refusal of the court to give the following special charge: "You are instructed that you cannot find for plaintiff anything for damages, if any, resulting from diminished capacity to labor, if you believe the evidence shows a diminished capacity to labor." The appellee contends that by reason of the fact that both the appellee and his wife testified that she was not quite herself for a day or two after the injury, and that since her injury she has been unable to do her housework which she had formerly done, this would authorize the jury to take those things into consideration in fixing the amount of their verdict. Appellant's counsel insists that the jury could not do this, because there was no testimony anywhere in the record that attempts to point out to what extent she was disabled or what was the extent of this disability in a pecuniary way; in other words, as we suppose, because there was no testimony as to what the value of the services she was prevented from performing were.

No complaint is made of the general charge of the court, but it is conceded, on the contrary, that it was correct in so far as it went; but, by reason of the failure of the general charge to instruct the jury that they could not take such things as those referred to above into consideration in estimating the amount of damages to which the appellee would be entitled, the jury might have considered these items in making up their verdict. We do not think there was any error in refusing this special charge. The legal proposition here involved has been so frequently decided in this state against the contention of the appellant that it is unnecessary to further discuss it. It is sufficient, in disposing of the question, to refer to the following authorities as holding contrary to the contention of appellant: *G., S. & S. F. Ry. Co. v. Booth* (Tex. Civ. App.) 97 S. W. 128; *G., H. & W. Ry. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269; *S. A. & A. P. Ry. Co. v. Jackson* (Tex. Civ. App.) 85 S. W. 445; *Northern Texas Tractor Co. v. Mullins* (Tex. Civ. App.) 99 S. W. 433.

The remaining assignments of error upon which the appellant relies for a reversal of this case are directed at the legal sufficiency of the evidence to sustain the action of the court in overruling the appellant's demurrer to the evidence, or to support the finding of the jury in favor of the plaintiff for any amount. In its answer appellant relied upon the defense of contributory negligence, and now insists that the plaintiff's wife is, by the testimony offered by plaintiff, shown to have been guilty of such an act of contributory negligence in getting off of the moving train at the time and under the circumstances she did as will effectually preclude the plaintiff's right to recover, notwithstanding the negligence of the appellant's servants in failing to stop the train at Sugden long enough to permit her to alight in safety. Appellant having elected to demur to the evidence, and the plaintiff having joined issue thereon, every fact and conclusion which the evidence conduces to prove will be taken as admitted by the appellant. While a forced or a violent inference cannot be indulged from such proceeding, yet the testimony is to be taken most strongly against the party demurring, and such conclusions as the jury might justifiably draw from the evidence will be sustained. *G., H. & S. A. Ry. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; 6 Ency. Plead. & Prac. 443. It follows, therefore, that unless upon a consideration of all the testimony adduced by the plaintiff, and after drawing all of the justifiable inferences therefrom in favor of the plaintiff upon the issue of contributory negligence, we reach the conclusion that appellee's wife was guilty of contributory negligence, as a matter of law, in attempting to alight from the train at the time she did, the verdict and judgment in this case must be sustained. In the case of *Texas Midland Ry. Co. v. Ellison* (Tex. Civ.

App.) 87 S. W. 214, cited and relied upon by the appellant, the rule is thus laid down by Mr. Justice Talbot: "The criterion, as we understand it, for determining whether the act of the passenger in attempting to board or alight from a moving train shall be deemed negligence per se is, was the act, under the circumstances, dangerous, and was the danger known to the passenger or so obvious that it can be said that no person of ordinary care and prudence would have committed it? The essential fact to be ascertained in determining the question is the knowledge of the danger incident to the act. If the danger was known to the party or so apparent that any rational person must have known it, then in either case, if he voluntarily incurs the risk, we think he should be held guilty of contributory negligence as a matter of law, and a right to recover denied." In that case the plaintiff was injured in an attempt to board a moving train, and upon the trial testified that he not only knew that the train was in motion, but that he also knew that it was dangerous to undertake to board it at the time and under the circumstances he did. He sought, however, to justify his action by showing that he was invited, or directed, by one of the railroad employees to get on the train at the time he made the attempt. It is not negligence per se to attempt to board a slowly moving train. *Mills v. M., K. & T. Ry. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497. Neither is it negligence per se to step from a moving train which checks its speed at a station instead of stopping as required by law. *G., H. & S. A. Ry. Co. v. Smith*, 59 Tex. 407. We think the rule above announced by Justice Talbot is as liberal as appellant could claim, and maybe more so than should be adopted in all cases without qualification. Applying that rule to the facts in this case, we are unable to say that Mrs. Cleaver was guilty of contributory negligence as a matter of law in attempting to alight from the appellant's train at the time and under the circumstances she did. It is true that she knew that the train was in motion, but the other essential element to constitute contributory negligence was lacking—a knowledge of the fact that it was dangerous to make the attempt. Certainly the testimony was not sufficient to show conclusively that the danger was so apparent that any person of ordinary care and prudence ought to have known that it was dangerous. Appellant's servants in charge of the train owed the appellee and his wife the duty of stopping the train long enough to permit them to alight therefrom in safety when they reached the depot at Sugden and both appellee and his wife had a right to expect that this duty would be observed. The testimony tends to show that the train stopped only a few seconds and then started on, not allowing sufficient time for these passengers to get off. When Mrs. Cleaver reached the platform of the car, preparatory to alighting, and saw

that the train was in motion, she had a right to conclude, and probably did, that the train had just started up again after the short stop, and was going at a rate sufficiently slow to permit her to alight without danger. She was a healthy woman near the prime of life. Her husband had just preceded her and stepped upon the platform of the depot without any injurious results. It was but natural, under the circumstances, that she should follow after him and also get off of the train. By nature a woman is more prudent and cautious than a man, and ordinarily shrinks from the appearance of danger more readily than the stronger sex. Her condition in life and her surroundings all tend to develop habits of caution and prudence far beyond that which characterizes men. We do not feel disposed to go so far as to say, after considering the facts of this case, that an ordinarily prudent person would not have done as Mrs. Cleaver did, or that the danger was so apparent that no person of ordinary prudence should have undertaken the risk.

Finding no error in the judgment, it is accordingly affirmed.

#### PITMAN v. BLOCH QUEENSWARE CO.

(Court of Civil Appeals of Texas. Jan. 2, 1908.)

##### 1. SALES—REMEDIES OF BUYER—BREACH OF CONTRACT—DAMAGES.

Where the seller knew that the goods had been ordered for the retail holiday trade and were not otherwise valuable to the buyer, the buyer was entitled to recover the loss of profits arising from a failure to deliver as required by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1196.]

##### 2. SAME.

The buyer was not entitled to recover damages for extra clerk hire, as such additional expense would have been incurred if the seller had complied with the contract.

##### 3. PLEADING—DENIAL UNDER OATH.

Where defendant denied under oath the correctness of plaintiff's sworn account, it was not evidence of any fact.

Appeal from McLennan County Court; J. W. Baker, Judge.

Action by the Bloch Queensware Company against H. T. Pitman. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Jas. E. Yeager, for appellant. Sluder & Neal, for appellee.

KEY, J. Appellee brought this suit against appellant in a justice of the peace court, but the case was appealed to and finally tried in the county court, where appellee obtained a judgment against appellant for \$93.65. The suit was originally brought upon a verified account. The defendant filed a verified answer denying the justness and correctness of the account. It is stated in appellee's brief, though not otherwise made to appear, that in the county court appellee pleaded orally that the goods were sold to the defendant upon a

written order. However, that is not material. According to the statement of facts agreed to by the parties and approved by the judge, the only testimony that was introduced was the plaintiff's sworn account, the defendant's denial under oath, and the original contract or written order for the goods and a price list accompanying said order.

We sustain the second assignment of error, which complains of the action of the trial court in sustaining an exception to the defendant's cross-action or counterclaim, wherein the defendant sought to recover as damages the loss of profits which would have been made upon the goods ordered from the plaintiff. According to the averments of the plea referred to, the goods were ordered for the Christmas holiday trade solely, and were not otherwise valuable to the defendant, and the plaintiff was aware of such facts. In such cases, loss of profits is recoverable as special damages. *Jones v. George*, 61 Tex. 354, 48 Am. Rep. 280; *W. U. Tel. Co. v. Edsall*, 63 Tex. 677; *W. U. Tel. Co. v. Sheffield*, 71 Tex. 574, 10 S. W. 752, 10 Am. St. Rep. 790; *Watkins v. Junker*, 4 Tex. Civ. App. 629, 23 S. W. 802; *Chisholm v. U. S. Canopy Co.*, 111 Tenn. 202, 77 S. W. 1062. The latter is a Tennessee case quite similar to the one in hand, and in an elaborate opinion it was held by the Supreme Court of that state that the measure of damages included the loss of profits which would have been made if the goods had been delivered according to contract. However, the defendant was not entitled to recover anything for extra clerk hire. Such additional expense would have been incurred if the plaintiff had complied with the contract pleaded by the defendant, and therefore failure to comply with the contract did not cause such additional expense.

We also sustain the fifth assignment, which complains of the trial judge's finding of fact to the effect that the plaintiff delivered the goods to the railroad company. There is no evidence in the statement of facts that warranted the court in making such finding. The defendant having denied under oath the correctness of the plaintiff's sworn account, such account was not evidence of any fact, and there was no proof that the plaintiff had delivered the goods to the defendant or to any railroad or other carrier.

On the other questions presented we rule against appellant.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### UNITED STATES GYPSUM CO. v. SHIELDS.\*

(Court of Civil Appeals of Texas. Nov. 27, 1907. Rehearing Denied Jan. 8, 1908.)

##### 1. EVIDENCE—PAROL EVIDENCE—FRAUDULENT REPRESENTATIONS.

Though a contract for sale provides, "It is agreed that this written order and printed terms

\*Writ of error granted by Supreme Court.

hereon constitute the entire contract, \* \* \* and there are no verbal statements or agreements varying the terms," evidence of fraudulent representations, not tending to vary the terms of the writing, by which the purchaser was induced to sign it, is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2005–2020.]

## 2. SAME—CONTRACTS.

A contract, executed at the same time as the one sued on, and which was a part of the same transaction, may be admitted, in connection with other testimony, as evidence that defendant was induced by fraudulent representations to sign the one sued on.

## 3. SALES — FRAUDULENT REPRESENTATIONS — EVIDENCE.

On the defense, in an action for damages for defendant's refusal to complete a contract for purchase of material, that he was induced to sign it by the false and fraudulent and material representation that all the contractors on certain work, of whom he was one, would be required to use it, evidence that it was not used by such contractors on such work is admissible.

## 4. APPEAL—ASSIGNMENTS OF ERROR — SEPARATE PROPOSITIONS.

Where an assignment of error involves several points, they should, under the rules, be exhibited in the shape of separate propositions.

## 5. WITNESSES — EXAMINATION — LEADING QUESTIONS.

A question which no more suggests a negative than an affirmative answer is not leading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837, 838.]

## 6. SALES — FRAUDULENT REPRESENTATIONS — EVIDENCE.

On the question whether defendant was induced to enter into a contract for purchase of material by fraudulent representations of plaintiff that the government representative in charge had informed him the contractors for certain government work would be required to use such material therein, defendant's testimony, that, if he had known such representative had not told plaintiff that he would require such material to be used, he would not have given the order therefor, is material.

## 7. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Allowing testimony to be given over objection that the matter had all been gone over before is harmless.

## 8. SAME—OBJECTIONS NOT MADE BELOW.

An objection to a question indicated by appellant's "remarks" under his assignment of error, not having been made in the trial court, cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258–1280.]

## 9. FRAUD—REPRESENTATIONS—KNOWLEDGE OF FALSITY.

The unqualified statement by plaintiff of the existence of a fact, which is material, and induces defendant to make a contract with him, has the effect of a fraudulent representation, even if he did not, when making it, know of its falsity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 3–5.]

## 10. SAME—DUTY TO INVESTIGATE.

Fraudulent representations inducing one to enter into a contract, not having been false on their face, or known to him to be false, are a defense to his refusal to comply with it, though he could by investigation have discovered their falsity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19–23.]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by the United States Gypsum Company against P. T. Shields. Judgment for defendant. Plaintiff appeals. Affirmed.

Keller & Keller, for appellant. Ogden, Brooks & Napier, for appellee.

NEILL, J. This suit was brought by appellant against the appellee to recover \$1,345.70 damages, alleged to have accrued by reason of the failure and refusal of the appellee to accept 2,796 barrels of adamant plaster ordered by him from appellant under a written contract of sale dated June 18, 1904. The defendant pleaded that he was induced to sign the contract sued on by false and fraudulent representations, which were material, made him by the plaintiff's agent who procured the alleged contract. The case was tried before a jury, which resulted in a verdict in favor of the defendant.

## Conclusions of Fact.

As an inducement for the defendant to enter into the contract sued upon, W. F. Watson, the agent and representative of plaintiff, represented to him that he had seen the quartermaster in charge of constructing certain buildings for the United States at Ft. Sam Houston, and that he had been informed by the quartermaster that the material described in the contract would be used in all buildings then under contract of construction for the government at that place; that relying on said representations, and believing them to be true, the defendant made the order through said agent for said material, which was represented by Watson to be the amount necessary to be used in the buildings which defendant was then under contract with the government to build at Ft. Sam Houston; that the representations so made by plaintiff's agent were false, none of the contractors for the erection of such buildings being required to use such material in their construction; that such representations were material, and fraudulently made, and induced defendant to make said order, but for which it would not have been given, for the material was worthless to defendant, in the absence of a requirement to use it in the buildings he was under contract to construct at Ft. Sam Houston.

## Conclusions of Law.

1. The first, second, and third assignments of error complain of the court's admitting over the plaintiff's objections certain testimony of the defendant as to what was said in a certain conversation between him and plaintiff's agent (Watson) just prior to the time the contract sued upon was signed, which testimony tended to show that Watson, for the purpose of inducing defendant to enter into the contract, represented to him that he had seen the quartermaster in charge of the construction of buildings then being erected by the United States at Ft. Sam Houston, and had been informed by him that



the material embraced in the contract would be used in all buildings then under construction at that place, and that defendant relied upon such representations and was induced thereby to sign the contract sued on. It is contended, under these assignments, that it was error to admit such testimony, because (1) it was immaterial and irrelevant, in that the representations testified to were made prior to signing the contract, and therefore merged in the writing; (2) the testimony was an attempt to change or vary the terms of a written contract, which could not be done by parol evidence; and (3) the contract upon its face bears the following stipulation: "It is agreed that this written order and printed terms hereon constitute the entire contract between the parties, and there are no verbal statements or agreements varying the same." These assignments are followed in appellant's brief by propositions of law so elementary that no one can gainsay any of them. The gist of them is that parol evidence is inadmissible to vary the terms of a written contract. This rule, however, has no application to extrinsic evidence, when used to attack the validity of a contract, as, in this case, by showing fraud in its inception. If a party were denied the right to show facts which prevent a writing from constituting a contract, such a writing would be free from all defenses, and outside of all rules which determine the validity of contracts. *Parsons on Contracts* (9th Ed.) 708; *Barrie v. Miller*, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171; *Howie v. Platt*, 83 Miss. 15, 35 South. 216. The evidence objected to was not introduced for the purpose of varying the terms of the writing sued upon, which it did not tend to do, but to the end of showing that defendant was induced to sign the paper by the fraudulent representations of the plaintiff. On this issue it was clearly admissible.

2. The contract, the admission of which is complained of by the fourth assignment of error, was executed at the same time as the one sued on, was a part of the same transaction, and was properly admitted, in connection with other testimony, as evidence tending to show that the defendant was induced to sign the instrument sued upon by fraudulent representation of plaintiff's agent.

3. If, as is alleged by defendant in his answer, the plaintiff falsely represented to defendant that all contractors who had contracts to construct buildings for the government at Ft. Sam Houston would be compelled to use the kind of material described in the writing sued on, and such representation was material and induced defendant to execute such contract, testimony that such material was not used by such contractors in the buildings was admissible as tending to prove such allegations. We, therefore, overrule plaintiff's fifth and sixth assignments of error, which complain of the introduction of such testimony.

4. The seventh assignment of error, which is submitted in appellant's brief as a proposition, is as follows: "The court erred in allowing defendant as a witness for himself, when recalled, to testify as follows: 'Q. Well, I will put it in this form: If you had known that the quartermaster captain in charge had not told Mr. Watson that he would require his material, the gypsum material, to be used on all of the buildings, would you have entered into an agreement or would you have given this order, I mean? A. I certainly would not'—because it assumes that the quartermaster had not told Mr. Watson that gypsum material (adamant) would be used is suggestive to the witness, and is immaterial and irrelevant, and the objection to the question and the answer should have been sustained." The statement under the assignment is as follows: "The assignment embraced the objectionable testimony, which can be found at bottom of page 39 of stenographer's transcript, together with plaintiff's objections thereto and the court's ruling thereon." In turning to the page referred to, we find in parenthesis, after the question embodied in the assignment, these words: "Same objection, ruling and exception by plaintiff." We presume the words refer to objections, rulings, and exceptions which relate to the next preceding question to the witness. When this question was asked, plaintiff's counsel said: "I object to the substance and form. It is leading and suggestive, and has been gone all over two or three times already. I objected to it at the time as irrelevant and immaterial, etc., and I don't believe he should open the question up." After the objections were overruled plaintiff's counsel said: "I want to enter the further objection, upon the ground he don't plead any agreement. He puts it as a representation. We will be compelled to— Now he is trying to show by this witness and put it in shape that he had an agreement with the government by which it would be used, and nothing but that." Whereupon the question embraced in the assignment was asked. In view of this, it seems to us that the assignment involves several points, which, under the rules, should have been exhibited in the shape of separate propositions. However, we do not think the question was leading, for it no more suggested a negative than an affirmative answer. It is apparent from the question, as well as the answer, that the testimony sought to be elicited was material on the question as to whether the defendant was induced to enter into the contract by the alleged fraudulent representation of the plaintiff. But, if the matter of inquiry had been "gone all over before," as indicated by one of the objections, the plaintiff was not prejudiced by the question and answer, even if it should be held that the objections were well taken. The further objection that the defendant "didn't plead any agreement" has

no application to the question in the form it was put, for it makes no reference to an agreement, nor does the answer. The objection that the question assumes "that the quartermaster had not told Mr. Watson that gypsum material would be used," indicated by appellant's "remarks" under the assignment, was not made in the court below, and cannot be considered here.

5. The eighth assignment of error is aimed at this paragraph of the charge: "You are instructed, however, that, if you find from the evidence that prior to and at the time defendant gave the written order in evidence before you for the 2,796 barrels of adamant, one W. F. Watson, agent for plaintiff, represented to this defendant that the quartermaster in charge of the construction of certain buildings that were to be erected by the United States government at Ft. Sam Houston would require the same character of material set out in said written order to be used on all buildings then under contract to be constructed there, and that the contractors who had contracts to build any of said buildings would be compelled to use said material, and that by reason thereof and by virtue of his agency for said adamant this defendant would make 10 cents per barrel on all adamant so sold by defendant to the other contractors who were to erect any of said buildings, and you further find that such representations, if any, were untrue, and that such representations, if any, were material inducements to defendant to execute said order, and defendant relied upon said representations, if any, in making said order, then you will find for defendant." We cannot perceive that it is calculated to mislead the jury, as is urged by the only proposition advanced under the assignment. On the contrary it appears to pointedly direct the jury to the only issue made by the pleadings and evidence, and to clearly enunciate the law regarding it.

6. By the ninth assignment of error the part of the charge above quoted is assailed upon the ground that, if the jury found the representations of Watson, plaintiff's agent, untrue, and that such representations were material inducements to defendant's execution of the order, and such representations were relied upon by him in making the order, it required a verdict for defendant, without regard to whether Watson knew the statements to be untrue or not, or made them with the intent to induce the defendant to sign the contract. The evidence can lead to no other conclusion than that Watson made the representations to defendant with the intent to induce him to sign the contract. And we understand the law to be, that an unqualified statement that a fact exists, made for the purpose of inducing another to act

upon it, implies that the one who makes it knows it to be true and speaks from such knowledge, if the facts represented do not exist, and the person states of his own knowledge that they do, and induces another to act upon his statement, the law imputes to him a fraudulent purpose. *Collins v. Chipman* (Tex. Civ. App.) 95 S. W. 667; *Hamlin v. Abell*, 120 Mo. 188, 203, 25 S. W. 516. A man is deemed in law to be guilty of willful falsehood when he asserts as of his own knowledge a matter of which he knows he is ignorant. *Wright v. Mortgage Co.* (Tex. Civ. App.) 42 S. W. 789; *Hall v. Grayson Nat. Bank*, 86 Tex. Civ. App. 317, 81 S. W. 766. That a party making the representations was himself deceived by another is no defense, as he has expressly or impliedly represented that he has knowledge of such facts. *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329; Page on Cont. § 109.

7. The tenth and eleventh assignments of error complain of the refusal of the court to grant plaintiff a new trial upon the ground that the evidence is not sufficient to support the verdict. Under them are advanced the propositions: "(1) Where parties have equal opportunity to judge, one who reposes in the opinion of others does it at his peril. (2) A contract cannot be avoided, because a party is influenced by a mere expression of opinion found to be incorrect. (3) If the statement made by Watson was true at the time made, the plaintiff was entitled to a judgment, even though defendant relied thereon, and was induced thereby to sign the order." The two first propositions assume that the representations of plaintiff's agent were merely statements of his opinion, and not a representation as to the existence of a fact. If this assumption were true, the propositions should be maintained. But the evidence shows that such representations were that a certain fact then existed, which the jury found was material, and induced the defendant to sign the contract and that such statement was untrue. The weight of authority is that it is no defense that the person to whom the false statement was made could, by such investigation or inquiry for himself, have discovered its falsity, as long as the representations were not false on their face or known to be false. Page on Contracts, § 119; *Schram v. Strouse* (Tex. Civ. App.) 28 S. W. 263; *Katzenstein v. Reid* (Tex. Civ. App.) 91 S. W. 360. It is a sufficient answer to the third proposition to say that, if the statement made by Watson was false, as found by the jury, it was not true at any time.

There is no error in the judgment, and it is affirmed.

**SEXTON RICE & IRRIGATION CO. et al. v. SEXTON et ux.\***

(Court of Civil Appeals of Texas. Dec. 11, 1907. Rehearing Denied Jan. 15, 1908.)

**1. LIMITATION OF ACTIONS — AMENDMENT OF PLEADINGS.**

The original petition in an action by a landlord demanded foreclosure of his lien on a crop raised on the premises. The first amended petition, filed in June, stated a cause of action for conversion of the crop, based on acts committed in the fall of the preceding year. Subsequent amended pleadings demanded judgment for conversion. *Held*, that the cause of action alleged in the amendments was not barred by the two-year statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

**2. SAME.**

Where the first amended petition in an action by a landlord, claiming a landlord's lien on a crop, set up a cause of action for conversion against the tenant and others receiving the crop, a subsequent amended petition setting up a cause of action for conversion against the tenant and one of the other defendants after the cause of action had been settled with the other did not state a new cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

**3. DISMISSAL—TORTS—DISMISSAL AS TO ONE OR MORE CODEFENDANTS.**

One injured by several persons concerned in a tort may sue one or all of them, and though he sues all, he may discontinue the action as to any of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 46.]

**4. SAME.**

The court, where wrongdoers are jointly sued and a joint and several judgment is demanded, need not assess judgment against defendants jointly, according to the equitable interests of defendants, and plaintiff may dismiss as to one and deprive the other of such right, unless the pleadings of a defendant set up some state of facts creating a right in its favor as against another defendant.

**5. APPEARANCE—GENERAL APPEARANCE.**

Where, in an action for conversion against several, a defendant, after having been dismissed by plaintiff, entered an appearance and answered a pleading of a codefendant, he entered a new appearance, and was before the court in respect to any relief asked by codefendant.

**6. SAME.**

In an action for conversion against several defendants, plaintiff settled with a defendant, and several days thereafter, on June 5th, an order of dismissal was made. On the day previous, plaintiff filed an amended petition against codefendants. One of the codefendants sought relief by his pleading, filed the same day, against defendant, who, on June 5th, demurred to the codefendants' right to retain defendant as a party after the dismissal without pleading the order of dismissal, only pleading an agreement by plaintiff to dismiss. *Held*, that defendant did not, by its answer to the pleading of the codefendant, make itself a party after its dismissal, especially where thereafter the codefendant asked that it be made a party.

**7. APPEAL—FAILURE TO EXCEPT.**

Where a defendant allowed the court to enter an order of dismissal of the suit as against a codefendant, and did not except thereto, it could not thereafter complain of the order by virtue of the court overruling a motion to have the codefendant brought in as a party, and the utmost defendant could obtain from the last ruling was the right to complain of being refused the privilege to have the codefendant made a party.

\*Writ of error denied by Supreme Court.

**8. PARTIES—BRINGING IN NEW PARTIES.**

The court did not abuse its power in refusing to allow a defendant to bring in a new party for its benefit, where the case had been progressing for several years and the parties had announced that they were ready for trial, and the person sought to be made a new party had been a party, and the cause of action had been dismissed against him without exception to the order, and where defendant, if entitled to relief against such person, could maintain a separate suit.

**9. WITNESSES—STATEMENT OF FACT—RECOLLECTION OF WITNESS.**

In an action by a landlord for conversion of a crop delivered by the tenant and subtenants to third persons made defendants, the testimony of a witness, based on his best recollection, without data, of the quantity of the crop delivered, is competent as the testimony of a fact, and the objection that the testimony is based on recollection goes only to its weight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 82.]

**10. SAME.**

In an action by a landlord for conversion of a crop delivered by his tenant and subtenants to third persons made defendants, the testimony of a witness that the crop was delivered within two or three weeks after the same was threshed, and that the delivery did not take over two weeks, was competent as a statement of a fact, and not a mere conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2185.]

**11. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

Where a cause was tried by the judge and there was competent evidence to establish a fact, the error in admitting erroneous evidence to prove the fact was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

**12. DEPOSITIONS—ADMISSION IN EVIDENCE.**

A party cannot object to the admission in evidence of a deposition taken at his instance without order of the court, after the adverse party had taken the deposition of the same witness, and the latter deposition had been read in evidence.

**13. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF DEPOSITION IN EVIDENCE.**

Where a cause was tried by the judge, the error in admitting in evidence a deposition in support of a fact otherwise established by competent testimony is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

**14. SAME.**

Where, in an action by a landlord for the conversion of a crop produced on the premises, the petition alleged that 200 acres had been sold off the tract, and that the proportionate amount of the rental price of \$4,000 for the 1,800 acres remaining was \$3,600, the admission of evidence that the tenant was to pay \$2 per acre as rent was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

**15. LANDLORD AND TENANT—LIEN—CONVERSION—ACTION—EVIDENCE.**

Where, in an action by a landlord for conversion of a crop removed from the premises by the tenant and delivered to a third person made a party defendant, the books of the tenant and third person showed that the crop reached the third person in less than 30 days after its removal from the premises, and showed the quantity delivered, and the evidence showed that the crop received by the third person was disposed of by him, a judgment for the landlord was authorized as against the objection that the evidence did not show the quantity of the crop received by the third person, that it had not

been removed from the premises for more than 30 days prior to the receipt thereof by him.

**16. ACCORD AND SATISFACTION—TORTS—PERSONS BETWEEN WHOM MADE.**

In an action by a landlord for conversion of a crop removed from the premises by his tenant and delivered to a defendant and codefendant, it appeared that the tort committed had reference to different parts of the crop and was not a joint tort, and that the landlord settled with defendant, reserving his right to proceed against the tenant and the codefendant for the balance due for rent. *Held*, that the settlement did not affect the landlord's right to maintain the action against the codefendant, the rule that a satisfaction by one joint tort-feasor discharges the other not applying.

**17. LANDLORD AND TENANT—CONVERSION OF CROP SUBJECT TO LANDLORD'S LIEN.**

The receipt of a crop by a mortgagee in a mortgage executed by a tenant is a conversion of the crop as against the landlord having a lien thereon for rent, where the mortgagee receives the crop within 30 days after its removal from the premises, whether the landlord brings suit within 30 days, or fails to assert a claim thereto or to take any other steps, the mortgage being subject to the landlord's lien.

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by Manley Sexton and wife against the Sexton Rice & Irrigation Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

A statement of the pleadings is necessary. Manley Sexton and his wife filed their original petition on December 31, 1903, alleging a written contract of lease of 2,000 acres for 10 years from January 1, 1902, to the Sexton Rice & Irrigation Company, the rental for the year 1903 being \$4,000, payable on December 1, 1903. That 200 acres had been sold, and 1,800 acres remained under the lease, the proportionate part of which rental for 1903 is \$3,600, and the sum now due is that amount less a payment of \$1,000 on December 10, 1903, to wit, \$2,600. The defendants were the Sexton Rice & Irrigation Company, the Bay City Rice Milling Company, and the Houston Rice Milling Company; that said 1,800 acres has been cultivated in rice by the defendant during 1903; that about 1,600 sacks raised by the defendant on said land has been removed from the premises and delivered to, and is in possession of, the Bay City Rice Milling Company, to be milled and prepared for market, which milling company is asserting some claim thereto. And in addition to said 1,000 sacks a large amount of rice raised by defendant's subtenants has been delivered to said milling company, in whose warehouse it is; and plaintiffs are unable to give a more exact description of all said rice, and that about 10,000 sacks raised upon said 1,800 acres by defendant and its subtenants had been removed from the premises, and delivered to the Houston Rice Milling Company to be prepared for market, and that the latter is claiming to have a lien of some nature thereon; that plaintiffs have a statutory landlord's lien on all of said rice so produced on the land in 1903, to secure said balance of rental of \$2,600, and pray for

judgment against the Sexton Rice & Irrigation Company for said sum with interest from December 1, 1903, and against each and all of defendants for a decree establishing and foreclosing plaintiffs' landlord's lien on all the rice raised upon said 1,800 acres, and now in the possession of said Bay City Rice Milling Company and the Houston Rice Milling Company, for order of sale, and general relief. The fifth paragraph of said original petition contained allegations concerning plaintiffs' inability to obtain exact information as to the number of sacks of rice in the hands of said milling company and description thereof, such exact information being wholly in the knowledge of defendants, their agents and employees, and books, which defendants were unwilling to disclose, and there was a prayer for an order to compel defendants and each of them to produce such books and other memoranda. This fifth paragraph was verified by affidavit. The Irrigation company answered by general demurrer and general denial. On June 13, 1904, plaintiffs filed their first amended original petition, changing the pleading by alleging that about 3,000 sacks of said rice, of the value of \$9,000, had been converted by the Bay City Rice Milling Company to its own use and benefit within 30 days after its removal from the premises, without the consent of plaintiffs, and while plaintiffs had a lien thereon; that about 5,000 sacks, of the value of \$15,000, had been removed from the rented premises with the consent of plaintiffs, and had been converted by the Houston Rice Milling Company to its own use and benefit, while plaintiffs had their lien thereon. This pleading also alleged that, by reason of the premises, each of the defendants had become jointly and severally liable to plaintiffs for the payment of the \$2,600, and interest, and prays for judgment for said sum against defendants jointly and severally, with interest and costs, and for general relief. No foreclosure of lien was asked in this amendment. On July 9, 1904, plaintiffs filed a pleading, indorsed, "plaintiff's first original petition praying that the Colorado Valley Rice Milling Company be made party defendant." This, upon allegations, prayed that said Colorado Valley Milling Company be cited and made a party, and on the trial that plaintiffs have judgment against it, together with the other defendants, jointly and severally, for said sum of \$2,600, and interest and costs, and general relief. In January, 1905, the Colorado Valley Milling Company answered by general demurrer and denial, and on January 18th, upon plaintiffs' motion, said company was dismissed. On April 24, 1905, plaintiffs amended by a second amended petition. This was the same as the first amended original petition, except that the Bay City Rice Milling Company was alleged to have converted 4,000 sacks of rice, delivered to it by the irrigation company and tenants, of the value of \$12,000, and that the Houston Rice Mill-

ing Company had received and converted 8,000 sacks of the value of \$24,000. The prayer of this petition was for money judgment of \$2,600, and interest, against defendants jointly and severally, and for general relief. No foreclosure of lien was asked in this pleading. On June 4, 1906, plaintiffs filed their third amended petition, upon which this trial was had, alleging the same with reference to the rice contract, cultivation of rice, and their lien, etc., and further alleging that the rice had been harvested and sacked, and that about 2,500 sacks, valued at \$7,500, had been removed from the rental premises, and delivered to, and converted by, the Houston Rice Milling Company within 30 days after removal, and while plaintiffs had a lien thereon, and that the Sexton Rice & Irrigation Company was insolvent at the time. It stated a payment made on April 30, 1900, and asked for judgment against defendants jointly and severally for the sum of \$2,104.52 with interest and costs, and general relief. In this petition the Bay City Rice Milling Company was not complained of in any way. (It may be advisable to state here that on May 30, 1906, the Bay City Rice Milling Company had paid plaintiffs \$875, and had been discharged in reference to plaintiffs' claims against it.) On the same day, June 4, 1906, the Houston Rice Milling Company filed its third amended original answer, alleging, in addition to a general demurrer and denial, that it acted as a broker without notice of plaintiffs' claim, and that the sales made by it were made more than 30 days after the removal of the rice from the rental premises. Also, by special plea alleging the insolvency of the irrigation company and appointment of a receiver thereof in 1905, that its property had been sold, and the proceeds applied to the payment of debts due by it to other parties than defendants; that on May 1, 1903, said irrigation company had executed in its favor a first mortgage lien upon the crop raised on the premises in 1903, to secure the payment of \$15,000 then advanced and such further advances as might be made, which mortgage provided that such loan and advances were to be repaid by shipping to it at its mill in Houston, on or before December 1, 1903, all rough rice grown on the premises, either their own or controlled by them, the proceeds—the market price—of which were to be applied to the payment of said debt, but that the irrigation company had the right at its option to have said rice milled and sold by this defendant and the proceeds applied; that it elected to have the rice milled and sold, and defendant did so, and rendered account of sales to the irrigation company, and credited the net proceeds on such indebtedness; that there remained a balance due this defendant; that at a former term the Bay City Rice Milling Company and the Colorado Valley Rice Milling Company were made parties to this suit; that the former had answered ad-

mitting having received rice from the irrigation company and selling and appropriating same to its use and benefit, and that the answer of said Milling Company did not claim any lien on such rice, and in fact had none, and the value thereof exceeded the amount of plaintiff's demand; that a large portion of the rice grown on said premises had been delivered to tenants and to the Bay City Rice Milling Company and to the Colorado Valley Rice Milling Company, all of which plaintiffs well knew, and well knew that their landlord's lien attached also to such rice, and well knew, or could have known, that this defendant was advancing large sums to said irrigation company under said mortgage, and if plaintiffs had any landlord's lien upon any rice, they knew, or could have known, that this defendant had a junior lien thereon, and it was the duty of plaintiffs to collect their debt so as to least interfere with this defendant in the collection of its debt; that the claims against the tenants and the Colorado Valley Rice Milling Company are now barred, and the voluntary dismissal by plaintiffs of said milling companies was laches, and caused it and plaintiffs to both lose their cause of action against them unless they were again made parties; that by reason of the premises plaintiffs are estopped from asserting further claim against this defendant; that it was entitled to a marshaling of securities, and to have plaintiffs first satisfy its claim out of the rices in the hands of said companies, or if sold by them, then this defendant would be entitled to have the judgment so entered that said parties would be first required to pay the judgment, or so much thereof as the proceeds would warrant, and that this defendant pay only what balance might remain, if any, etc. The prayer was that said milling companies be made parties defendant, and that the judgment, if any, be rendered so that it will fully protect this defendant, and also that as to this defendant plaintiffs take nothing. On June 5, 1906, plaintiffs filed a motion stating that, as shown by the second amended supplemental petition, they entered into an agreement with the Bay City Rice Milling Company to dismiss their action against it. Plaintiffs now formally dismiss same, and ask that an order be entered to that effect, which was done as follows: "Now on this 5th day of June, 1906, the plaintiffs in this cause asked for and obtained permission to file second amended first supplemental petition, and afterwards the plaintiffs dismissed this cause as to the Bay City Rice Milling Company, according to terms of agreement between plaintiffs and Bay City Rice Milling Company, dated April 30, 1906. Houston Rice Milling Company asked for and was given leave to file fourth amended answer."

There appears to have been no exception taken to this order of dismissal. However, on same date, June 5, 1906, the Bay City Rice Milling Company filed a supplemental answer to

said third amended petition of the Houston Rice Milling Company demurring thereto, upon the ground that the answer shows no cause of action against it, nor any right to retain it as a party, after being dismissed by plaintiffs; and setting up the said agreement of April 30, 1906, and pleading it in bar of any further prosecution of the suit against it by plaintiffs. On June 11, 1906, the Houston Rice Milling Company filed its fourth amended answer upon which the trial was had. The pleading is voluminous, and in substance was as follows: General demurrer and denial and plea of the statute of two years before the filing of the third amended petition. Special plea, referring to previous pleadings, and alleging that its liability, if any, to plaintiffs was for a joint tort committed by it and the Bay City Rice Milling Company, and pleading the execution of said agreement for dismissal of April 30, 1906, alleging that said agreement enured to its benefit, and operated to release it from any liability to plaintiffs. Also a reallegation of its special plea that it acted as a broker in selling the rice without any notice of any claim of plaintiffs, and that the sales made by it were all made more than 30 days after the removal of the rice from plaintiffs' premises. Also, substantially, the matters that were set up in the third amended original answer. The prayer of this pleading was that the Bay City Rice Milling Company be made a defendant and be required to answer herein; that on final hearing plaintiffs take nothing against this defendant, and if any judgment against defendant be entered that it be so worded as to fully protect the interests of this defendant, and that it have judgment over against the Bay City Rice Milling Company for any amount it may be required to meet on account of said judgment. This was the first pleading by which this defendant asked for a judgment in its favor against the Bay City Rice Milling Company.

On June 25, 1906, plaintiff filed another amended supplemental pleading: "On June 25, 1906, the plaintiffs filed their second amended first supplemental petition, consisting of general demurrer and two special exceptions, a general denial of all the allegations contained in defendant Houston Rice Milling Company's fourth amended answer; reaffirming the allegations of its third amended petition, and denying the right to the special relief prayed for said fourth amended answer, because the plaintiffs had alleged a several conversion of property upon which the plaintiffs had held a lien, and that the plaintiffs believed that they would be unable to show definitely the amount of rice appropriated by the Bay City Rice Milling Company, and believed that \$875 would exceed the value of the rice, and that a settlement for such sum would be advantageous to the plaintiffs; that, acting upon such belief, they made the contract attached to said supplemental answer, dated April 30th, 1906, and

marked 'Exhibit A,' and made a part of said answer; alleging that such agreement was made in good faith, and denying the intention of the parties to release the Houston Rice Milling Company by such settlement, and alleging that the contract obliged them to dismiss said cause as to the Bay City Rice Milling Company, and that they did so on the 5th day of June, 1906, setting up that the settlement inured to the benefit of the Houston Rice Milling Company to the extent of the amount received, and that the Houston Rice Milling Company had asserted no right of contribution or other relief against the Bay City Rice Milling Company prior to June 4, 1906, such date being subsequent to the making of the agreement relied upon; pleading that the relief prayed for came too late, was a stale demand, and setting up estoppel; setting up that to grant the relief, in so far as the making of the Bay City Rice Milling Company a party, would delay the trial of the cause, and pleading that the rice converted by the Bay City Rice Milling Company was covered by a chattel mortgage given by the Sexton Rice & Irrigation Company for moneys loaned to the Sexton Company by the said milling company, and that the rice so converted was insufficient to reimburse such advances, and alleging that the dismissal was had without objection from the Houston Rice Milling Company, and that J. W. Gaines, one of the attorneys for the Houston Rice Milling Company, withdrew his objections in open court. On the 25th day of June, 1906, the Houston Rice Milling Company filed its first supplemental petition, answering the pleadings of the plaintiffs, consisting of a general demurrer and five special exceptions, and a general denial of all the allegations of the second amended first supplemental petition, except those admitting the settlement with the Bay City Rice Milling Company, its co-defendant, and alleging that such settlement was a full and complete adjustment of all the matters in controversy between the parties and the several defendants, and specially denying that it ever acquiesced in and agreed to the dismissal of the Bay City Rice Milling Company as a party defendant from the cause, or that it ever announced in open court such admission or agreement, but specially denying such admission. And on the 25th day of June, 1906, both parties announcing ready for trial on the law of the case, the prayer of the defendant Houston Rice Milling Company that the Bay City Rice Milling Company be again made a party defendant to the suit was considered by the court, and such prayer was refused, to which action of the court defendant excepted; the court on the same day overruled all of the general and special exceptions of the Houston Rice Milling Company, except exception No. 2 to the plaintiffs' supplemental petition, to which action of the court the defendant Houston Rice Milling Company excepted, except as to the sustaining of exception No. 2, and as to

that the plaintiffs excepted, and on the same date the demurrers and exceptions of the plaintiffs to the defendant Houston Rice Milling Company's pleadings were overruled, to which action of the court plaintiffs excepted. The causes having been submitted to the court without the intervention of a jury, and after plaintiffs had submitted their testimony, the defendant Houston Rice Milling Company filed its motion requesting the court to render a judgment for the defendant, for the reasons set out in said motion, which motion was by the court overruled and refused, to which action of the court the Houston Rice Milling Company, defendant, excepted. And the trial proceeded and resulted in a judgment in favor of the plaintiffs and against the Sexton Rice & Irrigation Company and Houston Rice Milling Company for \$2,124.14."

Gaines & Corbett for appellants. E. F. Higgins and J. W. Conger, for appellees.

JAMES, C. J. (after stating the facts as above). The second and nineteenth assignments raise a question of limitations, appellant contending that plaintiffs' cause of action was barred by the two years' statute. The pleadings of plaintiffs show that the suit, as originally brought, was for a money judgment against the irrigation company and against all parties then made for foreclosure of a statutory lien on the rice in the hands of the Bay City Rice Milling Company and the Houston Rice Milling Company.

The first amended petition changed this into a demand based on a conversion of the rice, and all of plaintiffs' subsequent amended pleadings preserved the form of demand. The first amended petition was filed on June 13, 1904. The testimony showed that appellant and the Bay City Rice Milling Company received the rice in September, October, November, and December, 1903. Consequently there is no ground for the claim that two years had run. We regard as of no merit whatever the contention that the third amended petition set up a new cause of action. We overrule said two assignments.

The ninth and tenth assignments are in effect that the court erred in dismissing the Bay City Rice Milling Company as a party because appellant had the right to have it continued as a party defendant, the pleadings of plaintiffs having alleged a joint tort and asked for a joint and several judgment, and that the court also erred in refusing to grant the prayer of appellant contained in its fourth amended answer, in which it asks that the Bay City Rice Milling Company be again made a party. Appellant in this connection presents the following propositions: (1) Where the pleadings of one defendant ask for affirmative relief against a codefendant, the plaintiff cannot dismiss such party. (2) Where wrongdoers are jointly sued, and a joint and several judgment is asked, it is the duty of the court to assess judgment against the defendants jointly, according to

the equitable interests of the defendants, and the plaintiff cannot dismiss as to one and deprive the other of such right. (3) Where more than one person is concerned in the commission of a wrong, the injured party may sue one or all, but when he makes his choice he is concluded by it. The last of these propositions is unsound, particularly in cases of tort. The second is likewise an erroneous declaration of the law, unless the pleadings of a defendant set up some state of facts recognized as creating a right in its favor as against the other defendants. The first of these propositions is the only one which professes to present such a matter and this we shall discuss.

It appears that on June 5th the Bay City Rice Milling Company answered appellant's third amended answer, which was filed June 4, 1906. Whether or not this was after the order had been made dismissing it on June 5th does not expressly appear. If it entered an appearance, and answered a pleading of appellant after having been dismissed, this would have constituted a new appearance, and it would have been before the court in respect to any relief asked of it by appellant in such pleading. But inasmuch as its said pleading demurred to appellant's right to retain it as a party, after its dismissal, and did not plead the order of dismissal, but only an agreement by plaintiffs to dismiss it as a fact, we take it that such demurrer had reference to the fact that plaintiffs' amended petition then in force had omitted it as a party, and sought no judgment against it (the Bay City Rice Milling Company). The view, that the Bay City Rice Milling Company did not, by its said answer, make itself a party after its dismissal from the case, is corroborated by the fact that on June 11th, when appellant filed its fourth amended answer, it asked to have the Bay City Rice Milling Company made a party, and when the case was reached for trial appellant did not treat it as having appeared again after dismissal, but, on the contrary, treated the dismissal as effective, and alleged it, and moved the court to have it made a party defendant, and required to answer as prayed for in the fourth amended answer of appellant. It is evident from appellant's own pleadings that the Bay City Rice Milling Company did not appear after the order of dismissal. It seems to us that having allowed the court to enter an order of dismissal without excepting thereto, appellant could not afterwards, when the trial was reached, place itself in a position to complain of such ruling, by having the court overrule a motion then made to have the dismissed party cited and excepting thereto. The utmost benefit appellant could obtain from the last-stated ruling and exception would be the right to complain of being refused the privilege or right to have the Bay City Rice Milling Company made a party at that time as an original matter. It would



hardly be seriously contended, after the case had been progressing for several years, that it was an abuse of the court's power to refuse, after announcement of ready, to allow a defendant to have new parties brought in for its benefit, and especially where they had been parties, and were recently dismissed without exception taken to such order. There are cases, such as partition, where every person interested is a necessary party, and cases of indispensable parties, in which such a course would be required although productive of delay. But this was not of that character of cases. If appellant was entitled, by reason of its mortgage contract, to relief against the Bay City Rice Milling Company, it might as well be asserted in a separate suit as in this one. We therefore overrule the tenth, ninth, and eleventh assignments.

Under the twelfth, thirteenth, fourteenth, and fifteenth assignments several questions are raised in reference to testimony. First. That T. A. Stone was allowed to testify that the rice was all delivered to the Houston Rice Milling Company and the Bay City Rice Milling Company, and that from the best of his recollection without data that less than half of the four or five thousand sacks was delivered to the latter and more than half to the former. Also, that same witness was allowed to testify in answer to the question: "How many days was it at the greatest calculation from the time the rice was threshed until it was received by the Houston Rice Milling Co.?" that "it would not take over two or three weeks at the most; if a car went straight it would not take more than two or three days, but cars are subject to delays; it certainly never would take over two weeks." Also asked: "Would it be more than 30 days or less than 30 days from the date of threshing before it was received by the Houston Rice Milling Co. from the Sexton Irr. Co.?" Ans. "It would be less than thirty days." The testimony first quoted was objected to because the answer showed the witness had no data by which he could testify, and because the testimony was an estimate based on recollection and did not purport to be facts. We overrule this, as the testimony was of a fact, and his stating it from recollection did not serve to condemn it as testimony, as witnesses generally testify to facts from recollection. The objection went more to its weight. The other testimony quoted was more of a fact than of a mere conclusion. However, the case was tried by the judge, and there is no charge made by appellant that there was not ample other testimony to establish the facts indicated by the above answers. *Railway v. Rutherford*, 28 Tex. Civ. App. 590, 68 S. W. 826; *Beham v. Ghio*, 75 Tex. 90, 12 S. W. 996; *Smith v. Lee*, 82 Tex. 120, 17 S. W. 598.

The fourteenth is that there was error in admitting a deposition of T. W. Ford, over

the objection that said witness' deposition had been taken on June 4, 1904, which had been read in evidence, and the deposition in question—a second deposition—was taken by the Houston Rice Milling Company without an order of court. It appears that plaintiffs had the first deposition taken, and that appellant itself had the second one taken. We think appellant could not object, on the ground stated, to a deposition taken by itself. However this may be, it appears that the testimony contained in it existed in the evidence given by other witnesses, and under the cases just cited, the trial being by the judge, its presence would not constitute error that should affect the judgment. Appellant does not pretend to allege in its brief that there was not other testimony to the same effect.

The fifteenth complains of testimony of Manley Sexton that he negotiated the lease with the president of the Sexton Rice & Irrigation Company, and that said company was to pay him \$2 an acre for the land, which was admitted over the objection that there was no allegation in the petition as to the rental value of the land, or that it was rented by the acre, or alleging the relative value of the land sold (200 acres), or to the remainder (1,800 acres). There was an allegation that 200 acres had been sold off the tract, and also that the proportionate amount of the contract rental price of \$4,000 for the 1,800 acres remaining was \$3,600. This would be the prima facie effect of the fact that 200 acres of a tract of 2,000 acres leased for \$4,000 had been sold off, in the absence of evidence indicating the propriety of a different understanding; consequently the testimony was harmless. The assignment is overruled, and in this connection the twenty-seventh also.

The eighth assignment is that the court refused to instruct the jury to find in appellant's favor, after plaintiffs rested their case. First. It is asserted that the evidence fails to show what quantity, if any, of the rice was received by appellant, and fails to show that the rice had not been removed from the premises for more than 30 days prior to its receipt by appellant; and it fails to show that any part of the rice it received was milled and sold prior to 30 days from the date of its removal from the premises; and, further, that the testimony shows that the landlords made no claim or took any steps to protect their Men, and shows that all the rice received by appellant was received at Houston "not later than December 1, 1903." The books of the Sexton Irrigation Company and those of appellant afforded evidence that the rice reached the hands of appellant in less than 30 days after its removal from the rental premises, and the quantities thereof. The evidence shows that the rice received by it was disposed of by appellant. The fact that the landlords made no claim nor took steps to prevent a conversion may be conceded. It



appears that appellant took a mortgage on the crop which was subject to the landlords' lien, and by virtue of the provisions of this mortgage received rice in sufficient quantity and value to satisfy the demands of the landlords, and disposed of it. These facts were against the propriety of an instructed verdict for appellant. In the motion for such instruction there were other grounds stated, none of which are tenable, viz.: That the undisputed evidence was that appellant was acting in the capacity of a broker in milling, preparing for market and selling the rice. This was not the undisputed evidence, for it appeared to have been acting under its mortgage contract and in its own interest. Further, that the action was originally for a joint tort against appellant and the Bay City Rice Milling Company, and plaintiffs had dismissed the latter when the latter had received more rice than was sufficient to satisfy plaintiffs' rent claim. The facts showed tort committed by both, but in reference to different lots of rice, not a joint tort, but if there had been a joint tort committed, neither wrongdoer could complain of a dismissal of the other. Further, that the Bay City Rice Milling Company had settled with plaintiffs and received a discharge so far as its liability was concerned, and that this operated as a discharge of appellant. This was not so. If the Bay City Rice Milling Company converted any of the rice grown on the premises, it was of other rice than that received by appellant. There was no joint act of conversion though both were in fraud of plaintiffs' lien; and the rule that satisfaction by one joint tort-feasor discharges the other does not seem to have any application whatever. See *Railway v. Darr*, 93 S. W. 186, 15 Tex. Ct. Rep. 146, and cases there cited and discussed. The agreement was, however, in express terms a mere covenant not to sue, and expressly stipulated that "It is a covenant not to sue said Bay City Rice Milling Company on account of the matters and things set up in plaintiffs' petition, and that plaintiffs expressly reserve and retain the right to proceed against the Sexton Rice & Irrigation Company and the Houston Rice Milling Company for the recovery of the balance due upon the indebtedness set up and described in plaintiffs' petition, and that nothing herein contained shall be in any wise construed as affecting or releasing the liability of the Sexton Rice & Irrigation Company and Houston Rice Milling Company for said balance due plaintiffs," and that the amount received for the release was to be applied as a credit on said indebtedness. Other grounds appear in the motion, but they have been practically disposed of by what has already been discussed.

The receipt of the rice by appellant, under a mortgage for its own benefit, and for the purpose of using it to satisfy its mortgage, within 30 days after its removal from the premises, was a conversion within that

time as respects the landlords' lien. That plaintiffs did not bring suit within 30 days after the removal makes no difference. Nor that they failed to assert a claim or to take any other steps. *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 861; *Mensing v. Cardwell*, 33 Tex. Civ. App. 16, 75 S. W. 347. In view of these decisions and what has been said, we overrule also the sixteenth, seventeenth, eighteenth, twentieth, twenty-first, and twenty-fifth assignments.

The twenty-second, twenty-third, twenty-fourth, and twenty-eighth assignments insist that there was no evidence that plaintiffs had a landlords' lien on the rice received by appellant; that there was no evidence that such rice came from the lands belonging to plaintiffs, and that there was no evidence that plaintiffs' rice was converted by appellant. Our conclusions of fact dispose of these matters.

We conclude as facts, in view of what was done by the trial judge, that plaintiffs had a landlord's lien on the rice grown on the lands leased to the Sexton Irrigation Company, that while said lien was in force—that is, that within 30 days after its removal from the lands—the appellant, by virtue of a mortgage which included the crops, which mortgage was subordinate to the landlords' lien, received under the terms of said mortgage for its own benefit enough of the rice grown upon the premises to more than satisfy plaintiffs' demand for rent, and disposed of the same.

The judgment is affirmed.

**WILL A. WATKIN MUSIC CO. v. BASHAM.**  
(Court of Civil Appeals of Texas. Dec. 14, 1907. On Rehearing, Jan. 11, 1908.)

**1. RELEASE—OF JOINT DEBTOR—CONSTRUCTION—AGREEMENT NOT TO SUE.**

Defendant and S. having signed certain notes jointly, plaintiff, the holder of the notes, executed a release to S., reciting that the notes were to be maintained and payment demanded from defendant, and that the instrument did not release defendant, the right to collect from him being reserved. *Held* not a technical release, but an agreement not to sue S., and therefore the instrument did not discharge defendant from liability.

**2. CONTRIBUTION—CO-OBLIGORS.**

Where defendant and S. were co-obligors on certain notes, and the holder released S. from liability by an agreement not to sue her on the notes, such release did not relieve her from liability to contribute to defendant in the event he was required to pay more than his just proportion of the debt.

**3. BILLS AND NOTES—CO-MAKERS—EXTENT OF LIABILITY.**

Where defendant and S. signed certain notes jointly, and the holder executed a covenant not to sue S., the court erred in rendering judgment against defendant for only one-half of the amount of the notes, he being primarily liable for the whole debt.

**4. APPEAL—REVERSAL—RENDITION OF JUDGMENT.**

Where a case has been tried by the court without a jury and conclusions of fact found, and the court erroneously rendered judgment

against defendant for one-half of the debt when he was in fact liable to plaintiff for the entire debt, the court of appeals, on reversal, will render such judgment as should have been entered in the trial court.

Appeal from Dallas County Court; H. F. Lively, Judge.

Action by the Will A. Watkin Music Company against T. J. Basham. From a judgment for plaintiff for less than the relief demanded, it appeals. Reversed and rendered.

This suit was brought in the county court of Dallas county, Tex., by appellant, the Will A. Watkin Music Company, against appellee, T. J. Basham, to recover upon 12 promissory notes, executed on the 18th day of April, 1906, by appellee and one Mrs. Nina Shinn, and made payable to the appellant at Dallas, Tex., 11 of which are for the sum of \$30 each, and 1 for the sum of \$20, and to foreclose a chattel mortgage upon a certain piano for the purchase price of which said notes were given. Appellee by first amended original answer pleaded that appellant, without his knowledge or consent, had released Mrs. Nina Shinn, who had also signed the notes; that he was surety on the said notes and not principal, and that the release of Mrs. Shinn released him of all liability upon the notes; and further pleaded in the alternative that, if he was not a surety, he was a joint maker, praying that, in the event the court found he was a joint maker, he be held liable for one-half of the amount of notes. Appellant by first supplemental petition pleaded that Mrs. Shinn had never been liable upon the notes; that it was understood by all the parties at the time of execution of notes that appellee alone was to be looked to for payment of same; that, after the execution of notes and while the piano in question was in the possession of Mrs. Shinn, appellee had promised appellant to pay the full amount of the notes, if the piano was delivered to him; that the release given by plaintiff to Mrs. Shinn in no way released appellee of his liability on the notes, as all of its rights against appellee were expressly reserved therein; that after obtaining the piano from Mrs. Shinn it had tendered the same to appellee, but that the latter refused to receive the piano or pay the notes, or any part of them. Appellant tendered the piano to appellee at the trial. The case was tried before the court on the 20th day of December, 1906, without the intervention of a jury, and judgment rendered in favor of plaintiff for one-half of the amount of the notes, principal, interest, and attorney's fees, \$203.44, with foreclosure of lien upon piano. To which judgment plaintiff excepted, and perfected an appeal. The facts appear in the opinion.

Jno. M. McCoy and G. D. Hunt, for appellant. Guynes & Golgin, for appellee.

BOOKHOUT, J. (after stating the facts as above). On the 18th of April, 1905, T. J. Basham and Mrs. Nina Shinn executed and

delivered to the Will A. Watkin Music Company, in the city of Houston, 11 promissory notes for \$30 each and 1 for \$20. Said notes drew 6 per cent. per annum interest to maturity and 10 per cent. after maturity, and also 10 per cent. additional for attorney's fees, if placed in the hands of an attorney for collection. Said notes retained a lien on one Watkin Art Style Piano, No. 324,050, and further provided that the failure to pay one or either of said notes, when the same became due, matured the unpaid notes, and that said Will A. Watkin Music Company should have the right to take said piano on the failure of the makers to pay said notes, or either of them. These notes with the check of Basham for \$25 were given in payment of the piano upon which the lien was retained. They were the joint obligation of T. J. Basham and Mrs. Nina Shinn. When the first note became due and payable on July 18, 1906, it was presented to both T. J. Basham and Mrs. Nina Shinn for payment, and payment was refused by each of them, and plaintiff then declared each and all of said notes due and payable. On August 11, 1906, Will A. Watkin Music Company, plaintiff, through its agent E. I. Conkling, secured possession of said piano from Mrs. Nina Shinn by and through the execution of the following instrument, to wit: "Houston, Texas, August 11, 1906. This is to certify we hereby agree to release Mrs. Nina Shinn of her obligation in payment for Watkin Art Style Piano. The notes of signature, bearing T. J. Basham and Mrs. Nina Shinn, will be maintained, holding said payment on said T. J. Basham until paid by him. This does not release said T. J. Basham of obligations to the said Will A. Watkin Music Company. They reserve the right to collect notes as prescribed therein. (Signed) Will A. Watkin Music Company, E. I. Conkling, Manager." Said instrument of release of the said Mrs. Nina Shinn was executed and delivered by the plaintiff to said Mrs. Nina Shinn without the knowledge and consent of defendant, T. J. Basham.

The question raised by this appeal is, what construction is to be given to this instrument? The trial court, in effect, held that the same not only released Mrs. Nina Shinn from the payment of the notes as to plaintiff, but also released T. J. Basham, except as to his proportionate part, which he held was one-half of the amount of the notes, and proceeded to render judgment against him in plaintiff's favor for one-half the amount called for in the notes. This release expressly states that it does not release T. J. Basham, but the said Will A. Watkin Music Company reserves the right to collect the notes as therein described. There can be no question, then, that the parties to the release did not intend to release T. J. Basham from the notes. Such release did not have the effect of a technical release, but must be construed as only an agreement not to charge the party to whom it is given.

It is, in effect, a covenant not to sue Mrs. Shinn upon the notes, but leaves her co-obligor, Basham, liable thereon the same as if no release had been given. *Merchants' Nat. Bank v. McAnulty* (Tex. Civ. App.) 31 S. W. 1091; *Merchants' National Bank v. McAnulty*, 89 Tex. 124, 33 S. W. 964; *Elgin City Banking Co. v. Self* (Tex. Civ. App.) 35 S. W. 953; *Parmelee v. Lawrence*, 44 Ill. 405; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; 24 A. & E. Ency. of Law (2d Ed.) p. 293; *Parsons on Contracts*, vol. 1, p. 25 (9th Ed.). As between Basham and the plaintiff, he is liable for the full amount called for by the notes, but the notes being the joint obligation of himself and Mrs. Shinn, should he pay more than his just proportion of the same, he is entitled to contribution. The instrument does not deprive Basham of the right to demand contribution of Mrs. Shinn in the event he pays more than his just proportion of the debt, notwithstanding she had been released by the music company. *Merchants' Nat. Bank v. McAnulty*, 89 Tex. 124, 33 S. W. 963.

We are asked to reverse the judgment and render the same in favor of appellant for the full amount of the notes sued on. The case having been tried by the court without a jury, and conclusions of fact filed, we will proceed to render such judgment as should have been entered in the trial court. It is ordered that the judgment be reversed, and judgment here rendered for appellant for the amount of the notes sued on, with 6 per cent. per annum interest to their maturity, and 10 per cent. per annum interest from maturity to the present time, with 10 per cent. on the amount for attorney's fees, and that appellant's lien on the piano described in the petition be foreclosed.

Reversed and rendered.

#### On Rehearing.

Complaint is made in the motion for rehearing that we failed to consider the cross-assignments of error filed by appellee. The cross-assignments were fully considered by this court, and because we were of the opinion they were without merit they were overruled. The remarks in the opinion are applicable to many of the cross-assignments, and those not discussed were not considered well taken. The motion for rehearing is overruled.

#### FRUGIA et al. v. TRUEHEART et al.\*

(Court of Civil Appeals of Texas. Nov. 21, 1907. On Rehearing, Jan. 15, 1908.)

#### 1. TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF—DEEDS IN CHAIN OF TITLE.

In trespass to try title, where defendants claim title in themselves, they need not introduce deeds constituting links in their chain of title in the order of their execution, beginning with the original grant from the sovereignty, but may vary the order to suit their convenience,

subject to the direction of the court in its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 138, 139, 143.]

#### 2. DEEDS—EVIDENCE—TITLE UNDER LAST DEED—NONCLAIM BY GRANTOR.

In trespass to try title, where defendants seek to show by circumstances the execution of a lost deed in their chain of title, which deed, together with another in evidence, took out of the grantor all title to the land, and left none to descend to his heirs, through whom plaintiffs claim, evidence that the entire tract of land was being traded in, bought, and sold by persons claiming under the lost deed, was admissible to show assertion of title and ownership under it, and also in connection with evidence of nonclaim by the grantor in such lost deed and his heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 614-616.]

#### 3. SAME—RECITALS IN DEEDS OF CHAIN OF TITLE.

In trespass to try title, where defendants seek to establish title in themselves through two deeds from Y., a deed between third parties to part of the tract in question, which recited a chain of title from Y. through his two deeds, extending over a period of 50 years, was admissible as a link in defendant's chain of title, and as a circumstance showing a continuous claim of title and ownership.

#### 4. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—RECORDS—ABSTRACT OF TITLE.

An abstract of title made from public records before their destruction and recorded afterwards is not notice to a purchaser of land, of a deed to the land from his grantors' ancestor to a third person, set forth therein, unless he would have learned of the abstract and its contents by such investigation as a prudent man acting in good faith would have exercised, and unless a prudent man acting with reasonable diligence would have concluded that the deed recited therein as conveying his land had been executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 477-494.]

#### 5. SAME—POSSESSION OF THIRD PERSONS.

A purchaser of land must take notice of the character of title under which persons in possession of any portion of the land claim an interest therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 540-551.]

#### 6. EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS OF DEEDS—ABSTRACT OF TITLE.

An abstract of title made by a county clerk, and certified by him to have been taken from the record of deeds in his office, is admissible in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1317, 1318.]

#### 7. TRIAL—CONDUCT OF JURY—TAKING PAPERS TO JURY ROOM.

Where an abstract of title is introduced in evidence independently of an attached deposition of the county clerk, which is also introduced to show that the abstract was made from the records, the abstract becomes an independent piece of written evidence, and may be taken by the jury in their retirement, under Rev. St. 1895, art. 1303, providing that the jury may take with them any written evidence except depositions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 732-737.]

#### 8. APPEAL—ASSIGNMENTS OF ERROR—SCORE AND EFFECT.

Where assignments of error go to the admission of an entire deposition of a county clerk and an abstract of title attached thereto, they

\*Writ of error denied by Supreme Court.

do not raise the question of the admissibility of any particular portion of the abstract.

**9. EVIDENCE—BEST AND SECONDARY—LOST DEED—PROOF OF LOSS AND SEARCH.**

Evidence as to the loss of a deed and search therefor examined, and held to sustain the exercise of the court's discretion in holding it sufficient as a predicate for the introduction of secondary evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 612-637.]

**10. SAME—DOCUMENTARY EVIDENCE—ANCIENT DEEDS—EXECUTION BY AGENT—PRESUMPTION OF AGENT'S AUTHORITY.**

When a deed by an agent is shown by circumstances to have been executed, and is more than 30 years old, the agent's power will be presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1622.]

**11. SAME—DEEDS.**

A deed found in possession of the daughter of one of the grantees, and executed in 1835 before a primary judge or "judge of the first instance," signed by him with instrumental and assisting witnesses, and by the grantor, which recites in the body thereof that the grantor appeared before the judge and acknowledged that he executed it, is admissible in evidence, both as a duly authenticated instrument and as an ancient instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1613-1627.]

**12. SAME.**

The fact that such deed was found among the papers of one of the grantees, in possession of his daughter instead of among the public archives, does not throw suspicion on it.

**13. RECORDS—REREGISTRATION OF DEED.**

Where a deed was authenticated so as to entitle it to registration under the law in force at its execution, and was duly recorded in 1849, its reregistration in 1894, after the destruction of the public records, is sufficient for all purposes of notice after that date, under the express provisions of Rev. St. 1895, art. 4662.

**On Rehearing.**

**14. DEEDS—EVIDENCE—PRESUMPTIONS.**

In trespass to try title, where defendants claim under a lost deed over 30 years old, and they and those under whom they hold have during that time openly and with the acquiescence of plaintiffs claimed and exercised such acts of ownership as might reasonably be expected from the owners, and the alleged grantor in the lost deed did not claim ownership nor did his children during their lifetime, and did not pay taxes on the land, and recitals in instruments and records over 30 years old tend to support defendants' title, the jury may presume the existence of the deed.

**15. SAME—INSTRUCTIONS.**

In trespass to try title, where defendants claim under a lost deed, a charge that if the jury find that it is more reasonable to presume that the alleged grantor in the lost deed executed the deed than to presume to the contrary, they will answer "yes," but if they believe it more reasonable to presume that he did not execute the deed, they will answer "no," is not objectionable as placing on plaintiffs the burden of showing that the alleged grantor did not execute the deed.

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Trespass to try title by Rachel Frugia and others against H. M. Trueheart and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

V. A. Collins and Smith, Crawford & Sonfield, for appellants. Stevens & Pickett and W. P. Ellison, for appellees Trueheart et al. Ewing & Ring, for appellee Board of Church Extension of the M. E. Church.

REESE, J. Suit in trespass to try title by the heirs at law of Joseph Young and their assignees against H. M. Trueheart and others to recover the Joseph Young league of land in Liberty county. Verdict and judgment for defendants, and plaintiffs appeal.

The league was granted to Joseph Young by the state of Coahuila and Texas on June 20, 1835. Appellants, except J. L. Hooks and W. L. Cotton, claim title as heirs at law of Young. Hooks and Cotton claim under deeds of conveyance from other heirs. Appellees deraign their title under two certain deeds alleged to have been executed by Joseph Young. By one of these deeds, dated July 15, 1835, Young conveyed to John Swinney, James A. S. Turner, and Franklin Hardin an undivided half of the league. The original of this deed was introduced in evidence by appellees, and, as to the one half conveyed thereby, the jury was instructed to find for defendants. The other deed claimed to have been executed by Young conveyed to Franklin Hardin, in trust for James A. S. Turner and John Swinney, the other half of the league. This deed was lost, but evidence was introduced tending to show that it had been recorded, along with the first deed, in Liberty county, in 1849. The records of the county were destroyed by fire in December, 1874. Appellees relied upon this evidence of the record of the deed and other circumstances, such as claim of ownership under it by appellees and their vendors, payment of taxes, etc., and nonclaim by Young himself during his life, or his heirs after his death, for over 60 years while the entire league, in different parcels, was being bought and sold by various persons, all claiming title under the lost deed. Appellees Hooks and Cotton also pleaded that they were innocent purchasers for value from heirs of Young without notice of any conveyance by him. Along with other evidence of the execution by Joseph Young of the lost deed, to wit, the one to Franklin Hardin, in trust for James A. S. Turner and John Swinney, for an undivided half interest in the league, appellees introduced in evidence a certain abstract of title of the Young league, prepared by B. F. Cameron, then district and county clerk of Liberty county, in August, 1874, from the deed records of the county before they were destroyed by fire in December, 1874. This instrument, with its certificates, is as follows: "Abstract. Abstract of the Joseph Young league of land in Liberty county. Deed from Joseph Turner to John Swinney, J. A. S. Turner and Franklin Hardin, dated 15th July, 1835, for undivided one-half league, Book I, pages 228, 229. Deed from Joseph Young to Franklin Hardin, in trust for John Swinney and J. A. S. Turner, dated 15th July, 1835,

for undivided one-half league, Book I, pages 231, 232. Deed from J. A. S. Turner by R. N. Turner, agent, dated 10th February, 1849, to John Ayer, for 4,428 acres of land of the Joseph Young league, recorded in Book I, page 424." "State of Texas, Liberty County, I, B. F. Cameron, clerk of the district court of Liberty county, Texas, do hereby certify that the above abstract is correct and taken from the records of deeds of Liberty county. Witness my hand and seal of office, this August 28, 1874. [Seal.] B. F. Cameron, Clerk, District Court, Liberty County." "State of Texas, Liberty County. I, B. F. Cameron, clerk of the county court of Liberty county, Texas, do hereby certify that the within abstract of title was filed for record, March 7, 1891, at 5 o'clock a. m., and recorded June 26, 1891, at 9 o'clock a. m., in vol. J, of deeds of Liberty county, Texas, on pages 211 and 212. Witness my hand and seal of office, June 26, 1891. [Seal.] B. F. Cameron, Clerk District Court, Liberty County." "State of Texas, Liberty County. Before me, the undersigned authority, personally appeared B. F. Cameron, who, being duly sworn, deposes and says, that the within abstract of land was compiled by him from the records of the county of Liberty, state of Texas, prior to their destruction by fire, and that said abstract contains a true and correct statement of the matters and things to which the same relate. B. F. Cameron. Sworn to and subscribed before me, by above-named affiant, this 11th day of January, A. D. 1906. H. H. McConnel, Justice of the Peace and ex officio Notary Public in and for Liberty County, Texas." Cameron testified by deposition that the abstract was made and signed by him; that he has no independent recollection of what was shown by the deed records; that he would not have made it unless he had found the deeds on record as stated; and that the statements in the abstract are true to the best of his knowledge and belief. He further testified that the courthouse of Liberty county was destroyed by fire December 11, 1874, and that he had never seen Book I of the records since.

After instructing the jury to return a verdict for defendants as to the undivided one-half of the league conveyed to Hardin, Turner, and Swinney by the first deed, the court submitted to the jury in the form of special issues the issues as to the execution of the second deed to Hardin, in trust for Turner and Swinney, and as to the defense of innocent purchaser by Hooks and Cotton. In reply to question propounded the jury found that the deed was executed by Young, and that Hooks and Cotton were not innocent purchasers for value and without notice.

Appellants present first their fourteenth assignment of error, which is as follows: "The court erred in propounding the following question to the jury: 'Did Joseph Young execute a deed conveying to Franklin Hardin, in trust for James A. S. Turner and John

Swinney, the other undivided one-half interest in the Joseph Young league?'—based, as said question was, on the instructions included in section 2 of said charge, and requiring the answer to be given in accordance with said instructions." Under this assignment appellants present several propositions, all going to the general charge of the court, and in no way connected with that portion of it embraced in the assignment. Appellants cannot in this way bring under review errors, if any, in the general charge of the court, instructing the jury generally as to the law applicable to the fact, for their guidance in answering the question referred to in the assignment. The assignment is only as to error in propounding the question based as it was on the general instructions referred to, but alleges no error in those instructions. The propositions refer alone to alleged errors in those instructions. The assignment is not stated as a proposition in itself. For want of proper propositions it cannot be considered.

There was no error in the admission in evidence over the objections made to them, of the two deeds referred to in the fifteenth, seventeenth, and eighteenth assignments. The objection made was that the grantees were not shown to have any title to the land, that their title is not connected with the sovereignty of the soil or with the Joseph Young title or with any other person. The objection was not tenable. It was directly shown that Franklin Hardin, from whom emanated the title conveyed by the deeds, had a deed from Young, the original grantee.

The deeds referred to in assignments 35 to 38 were admissible in evidence on two grounds. Appellees were seeking to establish title in themselves, and every link in their chain of title was admissible for that purpose. They were not required to introduce such deeds in the order of their execution, beginning with the original grant from the sovereignty, but might vary this order to suit their convenience, subject to the direction of the court in the exercise of its discretion. Appellees were also seeking to show by circumstances the execution of the lost deed from Joseph Young, which, with the first deed, took out of him all title to the league, and left none to descend to his heirs. As circumstances tending to establish the execution of this deed by showing assertion of title and ownership under it, it was proper to show that the land was being traded in, bought, and sold by persons claiming title under the lost deed, and that this involved the entire league. This evidence was significant also in connection with the evidence of nonclaim by Young or his heirs. The sale of the land in various tracts, execution, and recording of deeds, all in hostility to their title, called upon them to assert their claim, and their failure to do so in presence of such public assertion of hostile claim of ownership was a cogent circumstance to show that they knew they had no title, and thus explains their failure to as-

sert any. The courts of this state have been liberal in the admission of testimony to establish the execution of deeds to land the originals of which have been lost and destroyed, and which have never been recorded, or where the records also have been destroyed. Without such liberality many titles unquestionably honest, the primary evidence of which has been destroyed, would be lost. Especially is this true when county records have been destroyed, and transactions sought to be thus proven are ancient.

We overrule assignments of error 19 to 34, and 40 to 50, all of which present the same objection to the admission of deeds in the chain of title of defendants or some of them, and all showing a general buying and selling, and claim of title and ownership of different parts of the league, extending over a long period of time.

The recitals in the deed from George Kessler to Henry Kessler dated 1875, referred to in the forty-second assignment of error, and in the deed from Henry Kessler to George Kessler October 22, 1888, were properly admitted in evidence. *Brewer v. Cochran*, 99 S. W. 1033, 17 Tex. Ct. Rep. 796; *Grant v. Searcy* (Tex. Civ. App.) 35 S. W. 862. It appears that in September, 1875, George Kessler of Philadelphia executed to Henry Kessler of the same city a deed to 1,000 acres of the Joseph Young league. The deed was recorded in Liberty county in October, 1875. It contained the following recitals: "Which said 1,000 acres is part of the league of land originally patented to Joseph Young, who by deed dated the 15th of July, 1835, recorded in records of said Liberty county, state of Texas, in Book I, pages 228 and 229, granted and conveyed one undivided half thereof to John Swinney, J. A. S. Turner, and Franklin Hardin, and by deed dated 15th of July, 1835, recorded in Book I, pages 231, 232, granted and conveyed the remaining undivided one-half part thereof to Franklin Hardin in trust for John Swinney and Joseph A. S. Turner, and the said Joseph A. S. Turner, by power of attorney executed August 30, 1848, recorded 9th December, 1848, in Book I, pages 323 and 324, duly empowered Richard M. Turner to sell and convey his interest in said league of land, and the said Joseph A. S. Turner by Richard M. Turner, his attorney, by deed 10th February, 1849, recorded 24th August, 1858, in Book N, page 619, granted and conveyed 1,000 acres thereof undivided to Alameda M. Smith and the said Alameda M. Smith and R. R. Smith, her husband, by deed dated April 2, 1864, recorded the 6th of April, 1864, granted and conveyed the said 1,000 acres to Allen & Fulton, and the said Allen & Fulton by deed dated the 18th October, 1865, recorded 16th October, 1865, in Book G, page 319-320, granted and conveyed the same to George Kessler in fee." The deed from Henry Kessler to George Kessler in 1888 contained the same recitals. It will be seen that the recitals in this deed of 1875 executed between two citi-

zens of Philadelphia correspond exactly with the statements in the Cameron abstract made in 1874, not only as to the dates and contents of the two deeds of Joseph Young, but as to the dates of their record and the book and page thereof. The other deeds recited in the chain of title were found in the deed records of Liberty county, and were all introduced in evidence by appellees. The objection made to each deed by appellants was that "the grantee is not shown to have had any title; that his title is not connected with the sovereignty of the soil, or with Joseph Young, or with any other person having a title to the land." The title of each of them was in fact traced back either by direct conveyances or by circumstances to the deeds from Joseph Young, and were links in appellees' chain of title, and served as circumstances to show continuous claim of title and ownership openly asserted by the execution and record of deeds of parts of the land, extending over a period of fifty years or more.

There was no error in charging the jury on the question of notice and with reference to the Cameron abstract, which had been recorded in 1894, that the same was not notice to Hooks of the deed mentioned therein unless he would have learned of such abstract and the contents thereof by such inquiry and investigation as a prudent man acting in good faith would have exercised, and that such inquiry prosecuted with reasonable diligence would have led a prudent man to conclude that the deed mentioned had been executed. There was testimony tending to show that Hooks had notice of such facts as would have put a prudent man acting in good faith upon inquiry, which, if prosecuted with reasonable diligence, would have led to a knowledge of the facts recited in the abstract. It is rather difficult to understand how Hooks escaped such knowledge.

Neither was there error in instructing the jury as to the necessity for one purchasing land to take notice of the character of title under which parties in possession of any portion of the land so purchased claimed an interest in the same. The various parties in possession of the league were shown to be connected with the title under Young, held by appellees, and not strangers to that title. Hooks, buying undivided interests in the entire league, made no inquiry whatever of these parties, nor indeed of any one else, about the title. The sixth assignment of error presenting the question is overruled.

The evidence referred to in the nineteenth assignment of error appears to us to be immaterial and irrelevant. Its purpose was to prove that W. R. Swinney executed a deed to Minter & Rayburn for the 1,485 acres of the league, which they afterwards conveyed to Williamson. We hardly think that it was relevant to that issue. In view, however, of the overwhelming character of the proof showing conveyance out of Young for the league

as presented by the entire record, we do not think that it presents reversible error.

In their 59th assignment of error appellants complain of the action of the court in allowing the jury to take with them in their retirement, over their objection, the Cameron abstract. This abstract was attached to Cameron's deposition which was introduced to prove that it had been made by him from the records of Liberty county. After the deposition was read, appellees introduced the abstract in evidence, independently, as a circumstance to show the execution of the lost deed from Young to Hardin, in trust for Swinney and Turner. No objection was made to its introduction except as a recorded instrument, which was fully met by the statement of appellees' counsel that it was not introduced as a recorded instrument. Under the authority of *Chamberlain v. Pybas*, 81 Tex. 511, 17 S. W. 50, and *Snow v. Starr*, 75 Tex. 411, 12 S. W. 674, appellants insist that it was not proper to allow the jury to take this instrument with them. Article 1303, Rev. St. 1895, provides that the jury may take with them in their retirement any written evidence except depositions. We are of opinion that when this abstract was introduced in evidence, independently of the deposition, it became like any other written evidence, like a deed, for instance, which has been attached to a deposition in order that the signature of the maker may be established, and which, being thus proven, is introduced in evidence. It was then not a part of the deposition but an independent piece of written evidence. The certificate of the clerk that these deeds were contained in the records was admissible, and this abstract, officially certified by Cameron at the time, must be considered as such. *Allen v. Read*, 66 Tex. 19, 17 S. W. 115. It had been introduced before the jury who had had ample opportunity to examine it, and they could not have failed to understand and appreciate the weight and importance of the evidence. We doubt very much whether they would or could have been more influenced by the circumstances of taking it with them to the jury room. If we are mistaken in our view that it was not error to allow them to do so, we think that the error is not ground for reversal.

By their fifty-seventh and fifty-eighth assignments of error appellants complain of the action of the court in admitting the deposition of B. F. Cameron regarding the abstract referred to, and, further, in admitting the abstract in evidence. The first proposition under the assignment presents the question as to the admissibility of the abstract to prove the execution of the third deed maintained therein, to wit, from R. M. Turner, agent, to John Ayer, on the ground that there was no evidence of the loss of the original, and search therefor. We have examined the testimony in the record upon this point very carefully. While it is not as full and specific as it should be, still, considering

the fact of the age of the deed—over 65 years—that it appears that the grantee Ayers was a roaming kind of man, a sea captain, long since dead, leaving heirs all residents of a distant state, and their names and exact places of residence difficult of ascertainment, and the further fact that from other facts and circumstances in evidence there seems no reasonable ground to doubt the execution of this deed, we do not think that the court abused its discretion in holding the evidence of search sufficient as a predicate for the introduction of secondary evidence of the execution of the deed. Further, it may be said in answer to this objection that the assignments of error go to the admission of the entire deposition and abstract, and do not raise the question of the admissibility of any particular portion of it. The objection as set out in the second proposition under this assignment of error, that it was error to admit in evidence the statement in the abstract that there was a deed on the records from Joseph Young to Franklin Hardin in trust for Swinney and Turner, is without merit, as is the fourth proposition. As to the third proposition, it is sufficient to say that the abstract was not introduced as a recorded instrument under the act of 1891. There was no claim that it was admissible as such. The sixth proposition is not sound. The recital in the ancient deed of George Kessler to Henry Kessler tended to establish the execution of a power of attorney from J. A. S. Turner to R. M. Turner. The deed to Ayers was from R. M. Turner, agent of J. A. S. Turner, to John Ayer, and purported to have been executed in 1849. When a deed by an agent is shown by circumstances to have been executed, and such deed is more than 30 years old, the power of the agent will be presumed.

There was no error in admitting in evidence the original deed from Joseph Young to Hardin, Turner, and Swinney, executed and recorded in 1835, and found in possession of the daughter of Franklin Hardin. The deed was admitted on two grounds, as stated by the court. First, as a duly authenticated instrument; and, second, as an ancient instrument. On both grounds we think it was admissible. The instrument was executed before a primary judge or "judge of the first instance," is signed by him, with instrumental and assisting witnesses, and by the grantor. In the body it is stated that the grantor appeared before the judge, and acknowledged that he executed the deed, in the phraseology then in common use. It is substantially identical with the instrument held to have been properly authenticated for record in *Beaumont Pasture Co. v. Preston & Smith*, 65 Tex. 457; *Brownson v. Scanlan*, 59 Tex. 222, and many other cases. The fact that the deed was found among the papers of Franklin Hardin, one of the grantees, instead of among the public archives, does not throw any suspicion upon it.

The deed of Young to Hardin, Swinney,

and Turner—the first deed—having been properly authenticated to entitle it to registration under the law in force at its execution, was duly recorded in 1849, and its reregistration in 1894 was regular and sufficient for all purposes of notice after that date. Art. 4662, Rev. St. 1895.

We have disposed of all the numerous assignments of error and find no reversible error. If there had been error committed ordinarily sufficient to require a reversal of the judgment, in our opinion no such result should follow in the present case. We are of the opinion that from the evidence in the record no other verdict could have been properly rendered than one for defendants. The evidence overwhelmingly establishes that Joseph Young did in fact execute the two deeds conveying the entire league in 1835. The evidence of the Cameron abstract, which was not impeached or contradicted, corroborated in the minutest particular by the recitals in the Kessler deed of 1875, and by the original deed found in the custody of Miss Helen Hardin, the long-continued claim of ownership and title by the appellees, and their vendees, the open, public, and notorious character of this claim as shown by the partition proceedings in 1896, and otherwise, and the utter failure of Joseph Young in his lifetime (and he lived for many years in the neighborhood of the land), and of his heirs after him, who also lived near the land, to assert their claim, the fact that some of these heirs bought some of the land from parties claiming title under the deeds referred to, all lead irresistibly to the conclusion that the deeds from Young were executed and recorded as claimed, and that the belated claim of his heirs was born of the destruction of the records of Liberty county, and with them, it was supposed, the evidence of the execution of those deeds. The Cameron abstract, uncontradicted and unimpeached as it was, established beyond dispute the execution of the deeds.

Nor do we think that there is any more doubt that the appellant Hooks is not entitled to be protected as an innocent purchaser without notice. He seems to have studiously avoided making any inquiry as to the title. Without recapitulating the evidence on this point, it is sufficient to say that it was not only ample to support the finding of the jury on this issue, but that no other conclusion could properly have been reached. *Berry v. House*, 1 Tex. Civ. App. 562, 21 S. W. 711.

The judgment is affirmed.  
Affirmed.

#### On Rehearing.

In our opinion in this case, in passing upon the fourteenth assignment of error, we declined to consider the various propositions presenting objections to the charge of the court, on the ground that they were not embraced in, and did not properly arise from,

the assignment. Upon this motion for a rehearing, upon a careful consideration of the question, we are not clear that we were correct, under the liberal rule announced by the Supreme Court in *Land Company v. McClellan Bros.*, 86 Tex. 187, 23 S. W. 576, 1100, 22 L. R. A. 105.

That portion of the court's charge intended to be brought under review in this court, and assailed as being upon the weight of the evidence, is as follows: "It is claimed by the defendants above mentioned, in view of the long lapse of time, nonclaim of ownership on the part of Joseph Young during his lifetime, and nonclaim of ownership by him or his children during their lifetimes, and nonpayment of taxes by him or them, and from recitals in instruments and records introduced in evidence more than 30 years of age, and the assertion and claim of ownership on the part of said defendants above named, and parties under whom they derived title, and acts of ownership by them and such parties, coupled with other facts and circumstances in the case, that it ought to be presumed and found that there was a deed to said other undivided one-half of the land in question from the said Joseph Young to the said Franklin Hardin, in trust for John Swinney and James A. S. Turner; and in this connection the law is that such claimed facts, i. e., that the said Joseph Young made such deed may be proven like any other fact, and that the jury may, in proper circumstances, such as are submitted below, presume such facts, the question being one for the jury, to be decided according to the weight of the evidence as they may find it. The law, further, is that where the facts, or deed, as the case may be, which is sought to have presumed, lies back 30 or more years, and the parties claiming the presumption, or those whose estate they have, or both combined, have, during such period, openly and notoriously, and with the acquiescence of their adversaries, claimed and exercised acts of ownership over the land in question, such as might reasonably be expected from the owners thereof, and the circumstances in evidence, taken in their entirety, are consistent with the presumption sought to be included, and it is more reasonably probable that the facts sought to be presumed existed than that they did not, then the jury are at liberty to presume them and find accordingly."

In the case of *Sydnor v. Investment Ass'n* (Tex. Civ. App.) 94 S. W. 451, decided by this court, in which writ of error was refused, referring to a charge complained of by appellant, it was held that the charge was free from objection, and was not upon the weight of the evidence. The charge was not set out in the opinion, but as shown by the briefs, is as follows: "The defendants, Texas Savings & Real Estate Investment Association and associates, further claim that, in view of the long lapse of time, coupled with the other cir-



cumstances in the case, it ought to be presumed and found that there was a deed for the land in question from Mosely Baker to William B. T. Batterson, of date, to wit, on or about May 12, 1845, and that the deed to John S. Sydnor was in trust for the benefit of Cyrus, and, in this connection, the law is that such claimed facts, i. e., that Mosely Baker made such deed to said Batterson and that the deed to John S. Sydnor was in trust for the benefit of Cyrus, may be proved by circumstances like any other fact, and the jury may in proper circumstances, such as are submitted below, presume such facts, the question being one for the jury, to be decided according to the weight of the evidence as they may find it. The law further is that where the fact or deed, as the case may be, which is sought to be presumed, lies back thirty or more years, and the parties claiming the presumption, or those whose estate they have, or both combined, have during such period openly and notoriously, and with the acquiescence of their adversaries, claimed and exercised acts of ownership over the land in question, such as might reasonably be expected from owners thereof, and the circumstances in evidence, taken in their entirety, are consistent with the presumption sought to be indulged, and it is more reasonably probable that the facts sought to be presumed existed than that they did not, then the jury are at liberty to presume them and find accordingly. The purported deed of record from Mosely Baker to William B. T. Batterson, dated May 12, 1845, is improperly acknowledged for record, and, being so improperly acknowledged, neither the record nor a copy of it is competent as proof of the deed, but the fact of the ancient record of such a purported deed is itself competent, and in this case has been admitted, as a circumstance to be considered by you, along with the other facts and circumstances in evidence, in deciding the issue as to whether or no you will presume or find that, in point of fact, the deed did exist, and such circumstance is to be given that weight on the issue to which you may deem it entitled." A charge of the same character was approved in *Herndon v. Burnett*, 21 Tex. Civ. App. 25, 50 S. W. 582, a writ of error being refused. *Taylor v. Watkins*, 28 Tex. 688-698.

By their second proposition under the fourteenth assignment of error appellants assail the following portion of the charge: "If you find, under the above instructions, that it is more reasonable to presume that Joseph Young in his lifetime executed said deed conveying to Franklin Hardin said other undivided one-half interest in the Joseph Young league (referring to one-half No. 2), than to presume to the contrary, you will answer the question propounded to you immediately following by writing the word 'Yes' after the word 'Answer,' but if you believe that it is more reasonable to presume that said Joseph

Young did not execute said deed, you will answer said question by writing the word 'No' immediately after said 'Answer.'" It is objected to this charge that it placed the burden of proof on appellants to show that Joseph Young did not execute the deed to Hardin. To the question the jury answered, "Yes." This they could not have done under the charge unless they believed that it was more reasonable to presume that Young executed the deed than to presume the contrary. To tell the jury that if they believed it more reasonable to presume that Young did not execute the deed to answer "No" was but to state the converse of the preceding proposition. It would have been probably better to have instructed them that if they did not believe that Young did execute the deed to answer "No." An acute and critical lawyer carefully analyzing the charge can see a shade of difference between the two ways of stating the proposition, but we cannot think that a jury would be so critical as to discern the difference. *Kerr v. Blair*, 105 S. W. 548, 20 Tex. Ct. Rep. 74.

The third, fourth, and fifth propositions under the fourteenth assignment present questions entirely too foreign to the assignment to be considered. The assignment is overruled.

We desire to withdraw the following statement in our opinion: "And that the belated claim of his heirs was born of the destruction of the records of Liberty county, and with them, it was supposed, the evidence of the execution of those deeds." The statement is of doubtful propriety, as we now think, and should not have been made.

The motion for rehearing is overruled.  
Overruled.

KIRBY et al. v. CARTWRIGHT et al.  
(Court of Civil Appeals of Texas. Nov. 29, 1907. Rehearing Denied Jan. 9, 1908.)

1. VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—INABILITY TO CONVEY—LAND IN "SOME OTHER PART" OF THE STATE.

A contract to convey a certain tract of land within 40 days, provided that, if the vendor should not be able to deliver a deed therefor within that time for any reason, he should be at liberty to convey to the purchaser a like quantity of land of equal value in some other part of the state. Held that only in the event that the vendor was not able to get title to the land in 40 days did he have the right to substitute other land, and, in no event, could he substitute land adjacent to the tract contracted for without a subsequent agreement of the purchaser.

2. DEEDS—DELIVERY—TIME OF DELIVERY—PRESUMPTIONS.

The date of a deed, and not of its acknowledgment, in the absence of other evidence, is presumptively the date of delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 578.]

3. SAME—EVIDENCE.

Evidence held sufficient to show that a deed was delivered on the date of its execution, and not on the date of its acknowledgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 625-634.]

\*Writ of error denied by Supreme Court.

**4. VENDOR AND PURCHASER—PERFORMANCE BY VENDOR—CONVEYANCE OF OTHER LAND—EVIDENCE.**

Evidence held not to show that a deed to land was made in satisfaction of a contract to convey a different tract.

**5. SAME—CONTRACT—CONSTRUCTION—AFTER-ACQUIRED PROPERTY.**

Where a vendor agreed for a stated consideration, the receipt of which was acknowledged, to convey a certain tract of land within 40 days, and if he should not be able to deliver the deed therefor within that time to convey a like quantity of other land of equal value, and he did get title to the land described within 40 days, the title acquired by him inured to the purchaser in the contract, and the vendor and his heirs were estopped to deny the title of those holding under his contract to convey.

**6. TRESPASS TO TRY TITLE—TITLE TO SUPPORT ACTION—CONTRACT TO CONVEY.**

The title, whether legal or equitable, of one holding under a contract to convey land which contains an acknowledgment of the receipt of the purchase money, will support or defend against an action of trespass to try title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, §§ 5, 13.]

**7. SAME—PLEAS OF LACHES AND STALE DEMAND.**

In trespass to try title, where defendants rely on a title sufficient to afford a good defense, the pleas of laches and stale demand are not available.

**8. SAME—PLEA OF TEN-YEAR STATUTE OF LIMITATION NOT AVAILABLE.**

In trespass to try title, where defendants rest upon their title, and do not seek affirmative relief, pleas of the 10-year statute of limitation, laches, and stale demand are not available.

**9. SAME—PLEA OF LACHES.**

Where a bond for title under which land was held had always been recognized by the vendor during his lifetime and by his heirs until a short time before their bringing trespass to try title to the land, no affirmative action on the part of defendants holding the land under the bond was necessary; and they were not guilty of laches because of their inaction.

**10. APPEAL—DETERMINATION OF CAUSE—RENDERING JUDGMENT.**

Where the evidence is so conclusive that the lower court should have directed a verdict for the unsuccessful parties, the judgment may be reversed and rendered for them on appeal.

Appeal from District Court, San Augustine County; A. T. Watts, Special Judge.

Trespass to try title by Leonidas Cartwright and others against John H. Kirby and others. Judgment for plaintiffs, and defendants appeal. Reversed and rendered.

Denman, Franklin & McGown, Lanier & Martin, Tallafarro & Nall, Joe H. Eagle, and Moye Wicks, for appellants. Davis & Davis, John H. Cunningham, Cobbs & Hildebrand, and Tom C. Davis, for appellees.

REESE, J. This is a suit in trespass to try title by Leonidas Cartwright and others, heirs of Matthew Cartwright, deceased, against John H. Kirby and others to recover the east half of the Henry Williams league, in San Augustine county. After the usual allegations in an action of trespass to try title, plaintiffs set out in their petition that the basis of defendants' title was a certain contract executed by Matthew Cartwright to John Gillespie as follows: "State of Texas,

San Augustine County. Know all men by these presents that for and in consideration of the sum of one thousand one hundred and eighty two dollars to me in hand paid, the receipt whereof I hereby acknowledge to have been paid by John Gillespie, I hereby bind myself, my heirs and assigns to make and deliver to him, the said Gillespie in the County of Grimes in the said State in the course of forty days from this date a warranty title to the east half of league of land granted to Henry Williams, which said land is situated in said county of San Augustine adjoining Jose Hobdy's headright. It is hereby agreed and understood that should I not be able from any cause to deliver to the said Gillespie a deed for said land within the said time above mentioned, then I am at liberty to convey to him within that time a warranty deed in fee simple for a like quantity of land of equal value in some other part of Texas, which said conveyance when so made by me is to be full satisfaction of this obligation. Witness my hand and seal, this 23rd of April, 1847. [Signed] M. Cartwright. [Seal.] Witness: J. Pinkney Henderson. John P. Love." As to this contract or bond for title, plaintiffs alleged that subsequently to its execution Matthew Cartwright executed to Gillespie a warranty deed to the east half of the Jose Hobdy league, in San Augustine county, which lay alongside of the Henry Williams and was of equal value, in full satisfaction of the aforesaid contract. It was further alleged that at the time of the execution of the said contract Cartwright did not have title to the east half of the Williams league; that he did not acquire such title until May 18, 1847; that the said contract was an executory contract, did not convey the title, and the claim thereunder by defendants was a stale demand, and barred by the statute of limitations of four and ten years. The plea of stale demand was set out with full and appropriate allegations of laches on the part of defendants. Defendants pleaded the general issue and not guilty, specially denied that the deed for the Hobdy league was in pursuance, or satisfaction, of the obligations of the contract to convey the Williams half league, set up execution by Cartwright, subsequently to the execution of the contract, of a deed to Mrs. Gillespie, administratrix of John Gillespie, for the Williams half league in pursuance of the obligations of the contract, which deed, they allege, has been lost, and which they will seek to establish by secondary and presumptive evidence. They also claim that if the contract did not convey the title, and if they failed to establish the execution of the subsequent deed, Cartwright acquired and held the title to the Williams half league in trust for Gillespie, his heirs, and assigns, and that they hold title under Gillespie. They also alleged fully and particularly claim and assertion of ownership on the part of Gillespie and those claiming

under him and recognition of their title by Cartwright and nonclaim by him and his heirs. Plaintiffs are the only heirs of Matthew Cartwright, and are entitled to his estate. Defendants have whatever title passed to Gillespie by the bond for title or by any deed executed in pursuance thereof. Upon the issues thus raised the court, upon motion of plaintiffs, submitted two special issues to the jury: First. Was the deed to the Hobdy half league made and executed in satisfaction of the contract to convey the Henry Williams half league? Second. Did Cartwright subsequently to the execution of the bond for title execute to John Gillespie or his administratrix a deed to the Henry Williams half league? The first question was answered in the affirmative and the second in the negative, whereupon the court rendered judgment for plaintiff, from which judgment defendants appeal.

It is assigned as error by the first assignment that the court erred in submitting the first special issue as to the execution of the Hobdy deed in satisfaction of the contract to convey the Williams half league in that there were no facts or circumstances in evidence showing or tending to show that the deed was given in satisfaction of the bond for title.

By their second assignment, appellants complain that there was no evidence to sustain the finding of the jury on this issue, and that their finding is against the great weight and preponderance of the evidence.

The third assignment complains of the refusal to give appellant's special charge instructing the jury to find for the defendants; there being no evidence that the deed to the Hobdy half league was given in satisfaction of the contract to convey the Williams half league.

In the view we take of the case, if Cartwright acquired the title to the Williams league, as claimed by plaintiffs in their petition and as established by the undisputed evidence, on the 18th May, 1847, 25 days after the execution of the contract or bond for title, and if said bond for title was not satisfied by the conveyance of the Hobdy half league, defendants, suing as plaintiffs, would have been entitled to recover the land as against the plaintiffs, heirs of Cartwright, and a fortiori could successfully defend their title under this instrument, and this whether any deed was subsequently executed by Cartwright to Gillespie or not. This view seems to have been taken by the trial court and also by appellees upon the trial in the district court, as shown by the submission, at their request, of the two issues alone upon which the case went to the jury.

The contention of the appellees that the Hobdy deed was given in substitution and satisfaction of the obligation to convey the Williams half league rests primarily upon an entire misconstruction of the terms of the contract. They assume, and it is largely, if

not solely, the basis of their contention, that, by the terms of the contract, Cartwright had the right at the time he executed the Hobdy deed to substitute the Hobdy half league for the Williams half league. The terms of the instrument are absolutely clear and unambiguous on this point. After the unconditional obligation, for the consideration acknowledged to have been received in cash, to make and deliver within 40 days a warranty title to the east half of the Williams half league, the stipulation is added "that, should I not be able from any cause to deliver to the said Gillespie a deed for said land within the time above mentioned, then I am at liberty to convey to him within that time a warranty deed in fee simple for a like quantity of land of equal value in some other part of Texas, which said conveyance when so made by me is to be in full satisfaction of this obligation." It was only in the event that Cartwright was not able to get the title to the land referred to within 40 days that he reserved that right to satisfy the obligation of the contract by the conveyance of other land. And, even in that event, he did not have the right, under the contract, to substitute the Hobdy half league which lay alongside the Williams, but only to substitute lands of equal value in some other part of Texas. Without some subsequent agreement on the part of Gillespie, express or implied, Cartwright could neither at any time substitute for the Williams the Hobdy half league, nor, except in the event he was unable to procure title to the Williams half league within the 40 days, to substitute any other lands whatever. Now, the undisputed evidence shows that Rowe who had title to the Williams half league conveyed it to Cartwright by deed dated May 18, 1847, 25 days after the execution of the contract, which deed was proven for record on June 15, 1847.

Appellees insist that this deed must be presumed to have been executed on June 15th, the day it was proven for record, and not on the day of its date, though it had been expressly set out in their petition that the title was acquired by Cartwright on May 18th. There being no pretense or claim that this bond for title has ever been satisfied, unless it was satisfied by the execution of the deed to the Hobdy half league, if it was not so satisfied, and therefore never satisfied at all, we do not think that it is material whether the deed from Rowe to Cartwright was delivered on the day of its date or the day it was proven for record. Appellees cite the case of *Kent v. Cecil* (Tex. Civ. App.) 25 S. W. 715, in support of their contention. We have carefully examined the opinion of the Court of Civil Appeals of the Fourth District in that case, and would not be prepared to assent to it, if upon the facts of that case it were not distinguishable from the present case. The authorities cited by the court (*Martind. Conv.* § 204; *Tied, Real Prop.* §

812) do not sustain the statement as to the weight of authority. To the contrary, in *Devlin on Deeds* (volume 1, § 265) it is stated that the general presumption is that a deed was delivered at the time it bears date, and that this rule is adhered to in most of the states where the date of the deed and the date of acknowledgment are different. The decided weight of authority seems to us to be in favor of the rule that the date of the deed, and not of its acknowledgment, in the absence of other evidence, is presumptively the date of delivery. 13 Cyc. 731; 9 Am. & Eng. Ency. of Law 152; note to *Railway Co. v. Whitham*, 46 Am. St. Rep. 367; 86 Am. Dec. 63. And especially should this be the rule with deeds of the class of the one from *Rowe to Cartwright*, executed in 1847. At that date the country was thinly settled, and officers authorized to take acknowledgments few and scattered, and it is a matter of common knowledge that instruments of this kind were sometimes carried a long time, in many cases for years, before being authenticated for record. This is forcibly exemplified by the deed from *Watson to Rowe* introduced in evidence by appellees, which was dated January 21, 1839, and proven for record September 29, 1847. However the general rule as to presumptions may be, all the authorities agree that such presumption is to be indulged only in the absence of evidence as to the date of delivery, and may be overcome by circumstances tending to show that the deed was delivered at its date, or not until its acknowledgment, as the case might be. We think the circumstances in the present case are sufficient to overcome the presumption that the deed was delivered on the date of its acknowledgment, if that rule be the correct one as laid down in *Kent v. Cecil*, supra. Cartwright was under obligation to make reasonable endeavor to acquire the title to the Williams half league within 40 days of the date of his contract with Gillespie. He had sold the land, and obligated himself to make title in that time, saving the privilege of substituting other land only in the event that he was not able to procure title to the Williams within the stipulated time. It is reasonable to presume that he was already in negotiation with Rowe for this land, and it is extremely probable that the trade had been made, lacking only the execution of the deed, in view of the fact that Rowe was a resident of Travis county, and that in 25 days thereafter he signed the deed, with the evident purpose of making immediate delivery. It was not acknowledged by him, but proven by one of the subscribing witnesses, so that the deed passed out of his possession before the date of the authentication, otherwise we have the condition of Rowe taking the deed to the officer and taking along with him the subscribing witness to prove it for record, instead of himself acknowledging it. Cartwright lost his right to substitute other lands after 40 days. It is not reasonable to

presume that he would have let the time slip by before getting the deed, which had been signed within 25 days. We think the circumstances sufficient to overcome whatever slight presumption there might be, under the rule laid down in *Kent vs. Cecil*, that the deed was not delivered until it was proven for record.

How stands the record, then, as to evidence that, by agreement between Cartwright and Gillespie subsequent to the execution of the contract to make title to the Williams tract, a deed should be made to the Hobdy tract in satisfaction of said contract? We think there is not a circumstance in the record that supports or tends to support appellees' contention on this point. They all, on the contrary, rebut such a conclusion, which is in itself very unreasonable. The two instruments were executed on the same day, were proven for record on the same day, before the same officer, by the same subscribing witness, and were filed for record and recorded on the same day. The Hobdy deed makes no reference to the contract. There is no significance in the fact that the contract was recorded on page 82 and the deed on page 83 of the same book. If the clerk had both instruments in his hands for record at the same time, executed the same day, it could not have been considered of any importance by him as to which he recorded first, and his recording the contract first does not indicate that he received it first, rather than that he received them at the same time. But, even if we agree that the contract for the Williams was executed and filed with the clerk first, that does not in the slightest degree tend to establish the main fact, which is that the Hobdy was conveyed in satisfaction of the contract to convey the Williams. If, after the contract had been executed to convey the Williams and on the same day it had been agreed to substitute the Hobdy half league then owned by Cartwright and make a deed for it in satisfaction of the obligation, the first thought of sensible men would have been to withdraw the contract for the Williams, which had been thus nullified, or, at least, to have set out in the Hobdy deed that it was executed in satisfaction of the contract to convey the Williams. The fact that the consideration of the two instruments was the same is of no force in view of the uncontroverted fact that the two tracts were of equal valuation. That the two tracts make a solid body of a league of land tends strongly to support the inference that Gillespie wanted them both. Cartwright paid in 1848 the taxes on the Williams half league for the years 1846, 1847, and 1848, amounting to \$4.50. He was liable for the taxes for 1846 and 1847. The taxes for 1848 we must presume amounted to \$1.50. In view of the fact that he never rendered or paid taxes on the land after this, although he lived in San Augustine county until 1870, and was careful about the pay-

ment of taxes, the force of this payment of taxes for 1848, for which he was not liable, at the same time that he paid them for 1846 and 1847 for which he was liable, is entirely destroyed as evidence to support the main fact. All of the evidence of claim of title on the part of Gillespie and those claiming under him, inventory and sale of the land by his administratrix in 1850, rendition for taxes for 1847 and 1849, sale by Mrs. Gillespie in 1882, and continuous, open, and notorious assertion of title under this sale to the present time, accompanied by payment of taxes for every year, including and since 1883, and, in the face of this, no assertion of ownership, rendition for, or payment of taxes by Cartwright or his heirs since the contract of sale, except payment of taxes for 1848 referred to, notwithstanding Cartwright lived in the same county in which the land was situated until 1870, and his two sons, plaintiffs in this suit, one of them until four years ago and the other until eleven years ago, the failure to inventory this land by Cartwright's administratrix, his wife, the partition of all his estate among his heirs, not including this land—all of these facts, established by the uncontroverted proof for the purpose of showing by presumption the execution of a subsequent deed to the administratrix of Gillespie, if not sufficient to require a peremptory instruction to the jury to find for the appellants on that issue, all tended very strongly to rebut appellees' contention that by subsequent agreement between Cartwright and Gillespie, made on the same day the bond for title for the Williams, had been nullified by the execution of the deed for the Hobdy half league. Gillespie lived in Grimes county, and died there in December, 1847, and his estate was administered there. His administratrix inventoried both the Hobdy half league and the Williams half league, and in 1850 both tracts were sold as the property of his estate under the orders of the probate court. The sale of the Williams was disapproved and it was again sold, but this sale appears not to have been consummated and the Williams passed to Mrs. Gillespie under a general deed from the heirs. Cartwright lived in San Augustine county, and died there in 1870, and his estate was administered there. His administratrix returned an inventory and appraisal of the property of his estate, upon which this land did not appear, and subsequently his heirs partitioned his property among themselves, but in such partition this land was not included.

Appellees attempt to explain the circumstances of the omission of the Williams tract from the inventory of the property of Cartwright's estate by his administratrix by the circumstance that a tract of land in Navarro county which had been inherited by Cartwright from his father was also omitted from this inventory, but this evidence discloses that this tract was in litigation, and

does not show that Cartwright's title was ever sustained or held to be good. In addition to this, there is much difference between omitting the Navarro county tract from the inventory and the omission of this half league lying in the county of Cartwright's residence and where his estate was administered, accompanied as it was with so many circumstances showing nonclaim by Cartwright and his heirs. We think that the evidence did not raise the issue suggested by the first special issue submitted to the jury, and that the jury should have been instructed, as requested by appellants, that there was no evidence that the deed for the Hobdy half league was made in satisfaction of the contract to convey the Williams. This left appellants holding title under the bond for title which had never been satisfied, or repudiated, by Cartwright or his heirs. The recitals in the contract of receipt of the purchase money was prima facie proof of that fact, and it was not disputed. *Short v. Price*, 17 Tex. 403; *Tumlinson v. York*, 20 Tex. 698; *Byars v. Thompson*, 80 Tex. 473, 15 S. W. 1087. Such a contract, under all the circumstances shown by the undisputed evidence, was sufficient to have entitled appellants to recover the land, if they had been plaintiffs. Certainly, when sued, they could defend their possession under it. Having obligated himself to convey the Williams half league, if he could get the title in 40 days, and having received the purchase money, when Cartwright acquired the land, and especially when he acquired it within the 40 days, the title thus acquired by him inured to the benefit of his grantee in the bond for title, and both he and his heirs are estopped to deny the title of those holding under his contract to convey. Whether such title be a legal or equitable one is of no importance. Either would equally well support an action of trespass to try title by appellant or afford a ground for defense. *Wright v. Dunn*, 73 Tex. 296, 11 S. W. 330; *Scarborough v. Arrant*, 25 Tex. 132; *Catlin v. Bennett*, 47 Tex. 170; *Miller v. Alexander*, 8 Tex. 45. That the plea of laches and stale demand set up by appellees to defeat appellant's title has no application, even if they had been plaintiffs, has been several times decided by this court, and those decisions we are content to follow. *Lyster v. Leighton*, 36 Tex. Civ. App. 62, 81 S. W. 1033, and cases cited.

Appellants rested upon their title, and did not seek specific performance or any other affirmative relief, and neither the plea of the 10-year statute of limitation nor the defense of laches and stale demand applied. *Hensel v. Kegans*, 8 Tex. Civ. App. 583, 28 S. W. 705. The bond for title had never been repudiated; on the contrary, the evidence is conclusive that the title under it had been always recognized by Cartwright in his lifetime and his heirs after him until a short time before bringing this suit. As long as their title was thus recognized, even

if only an equitable title, there was nothing to call for affirmative action by appellants and they have not been guilty of laches. Upon the undisputed evidence, the court should have instructed a verdict for appellants upon the issue as to their title under the bond for title irrespective of the evidence introduced to show by circumstances and presumption the execution subsequently of a deed from Cartwright to the administratrix of Gillespie.

Upon the second issue appellants do not contend that the evidence required a peremptory instruction to the jury to find that a subsequent deed to Gillespie or his administratrix or heirs had been executed. We think that it was error to refuse appellants' special instruction No. 5, as set out in their twelfth assignment. If the bond for title was not sufficient to enable Gillespie and those holding under him to take and hold possession of the land, but it was necessary, to enable them to do so, that a subsequent deed should have been executed by Cartwright, we would hold that the verdict of the jury upon the second issue was contrary to the law and the evidence, and unsupported by the evidence. In such case the only explanation of the acts of the parties, as shown by the undisputed evidence, would be found in the fact that such deed had been executed. The case seems to have been submitted to the jury upon the theory that a negative answer to the first question or an affirmative answer to the second would either have required a judgment for defendants.

We have not found it necessary to pass upon the other assignments of error. From our conclusion that, upon the undisputed evidence, the jury should have been instructed to return a verdict for appellants, as requested by them, it results that the judgment should be reversed and judgment here rendered for them; and it is so ordered. *Stevens v. Masterson*, 90 Tex. 417, 39 S. W. 292, 921; *Henne v. Moultrie*, 97 Tex. 216, 77 S. W. 607.

Reversed and rendered.

# McCORMICK v. NATIONAL BANK OF COMMERCE et al.

(Court of Civil Appeals of Texas. Nov. 23, 1907. Rehearing Denied Jan. 11, 1908.)

## 1. EXECUTORS AND ADMINISTRATORS—FUNDS OF ESTATE—APPLICATION TO DEBTS.

Where a widow as a creditor of her husband's estate claimed a bank deposit standing in plaintiff's name, representing the income of certain land deeded by her husband to his children, with a reservation of the rents and revenues for life, which were deposited in plaintiff's name to defraud the husband's creditors, plaintiff's right to such deposit did not depend on whether the conveyances of the property and the surrender of possession thereof to plaintiff were or were not made to defraud the husband's creditors, but on whether the husband reserved to himself, at the time he deeded the land to his

children, the rents and revenues from the land after the execution of the deeds.

## 2. BANKS AND BANKING—ACTION FOR DEPOSIT—LIMITATIONS.

Where, in a suit to recover a bank deposit, the bank filed a bill of interpleader without pleading limitations, alleging that it was a stakeholder, and offering to pay the money to plaintiff or C., who claimed the fund as assets of her deceased husband's estate, applicable to the payment of her claim against such estate, limitations were not available as a defense either to plaintiff or the bank.

## 3. DEEDS—RESERVATIONS—CONSIDERATION.

A conveyance of community property by a father to his children was sufficient consideration for the reservation to the father of the rents, subsequently arising from the land during his life.

## 4. ADMINISTRATORS—CLAIMS—ASSIGNMENT OF JUDGMENT.

Where a widow procured an assignment of a claim against her husband's estate, based on a judgment against her husband and another, she was entitled to collect the entire amount thereof from her husband's estate.

## 5. JUDGMENT—ENFORCEMENT—PARTIES.

Where a widow acquired a claim against her husband's estate, based on a judgment recovered against the husband and his son, the fact that the original judgment creditor might have proceeded against the son, did not make such creditor a necessary party to a suit by the widow to subject alleged assets of the husband's estate to the payment of the judgment under the rule that in actions on judgments or claims in which two persons are jointly interested, the parties in whom the right of action exists must be made parties.

## 6. SAME—ASSIGNMENT—PROOF.

Where, in an action to subject alleged assets of a judgment debtor's estate to the payment of the judgment, claimant specifically pleaded the assignment and her ownership of the claim on the judgment against the estate, and there was no plea of non est factum or denial of the assignment under oath, the court did not err in permitting the assignment to be introduced in evidence, without proof of the execution thereof.

## 7. ACKNOWLEDGMENT—INSTRUMENT—PROOF OF EXECUTION.

An assignment of a claim against an estate, based on a judgment not being an instrument authorized by statute to be acknowledged, an acknowledgment thereof before a notary constituted no proof of its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 269, 282, 283.]

## 8. APPEAL—HARMLESS ERROR—EVIDENCE.

Appellant was not prejudiced by the admission of testimony which was not materially different from the testimony of witnesses offered by appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4161.]

## 9. INTERPLEADER—ATTORNEYS' FEES—JUDGMENT.

Where, in an action for a bank deposit, the bank filed an interpleader offering to pay the deposit to the claimant entitled thereto, and praying an attorney's fee for the filing of such plea, the court should have rendered judgment against the bank in favor of the party found to be entitled to the deposit for the full amount thereof, less the amount allowed for an attorney's fee; a judgment that an attorney's fee of \$25 be paid by plaintiff as part of the costs, and that the claimant recover the full amount of the deposit being improper.

## 10. COSTS—APPEAL.

Where an error in the rendition of judgment was not called to the attention of the trial court in appellant's motion for a new trial, or otherwise, appellant would be required to pay the

costs of the appeal, though the judgment was reformed.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by J. D. McCormick against the National Bank of Commerce and others, in which Mrs. Elizabeth Crowley was made a party defendant on a bill of interpleader, and claimed the fund in controversy as the property of her deceased husband, B. F. Crowley. From a judgment in favor of the latter, plaintiff appeals. Reformed and affirmed.

Carden, Starling & Carden and Gilbert H. Irish, for appellant. U. F. Short, for appellees.

**TALBOT, J.** This is an action brought by the appellant against the defendant bank to recover \$814.96, alleged to have been deposited by him in said bank. The bank answered, admitting the deposit to the credit of the plaintiff of said sum, but averred that it had been notified and warned by Mrs. Elizabeth Crowley, surviving widow of B. F. Crowley, deceased, not to pay the said sum of money to the plaintiff, for the reason that the same was only deposited in the name of plaintiff, but was in fact and in truth the money of her deceased husband. The bank also pleaded a pending administration on the estate of B. F. Crowley, deceased, and asked that Mrs. Elizabeth Crowley and B. F. Crowley, Jr., executor of B. F. Crowley, deceased, be made parties defendant, and that it be allowed reasonable attorney's fees for filing its answer. On May 30, 1906, Mrs. Elizabeth Crowley appeared and filed an intervention, claiming that the money was the property of her husband; that it had been deposited in the said bank by her deceased husband, or by other persons at his direction, to the credit of the plaintiff, for the purpose of placing the same beyond the reach of his creditors; that during his lifetime, to wit, on May 11, 1899, A. J. Roe had recovered a judgment against her husband and his son, B. F. Crowley, Jr., in the sum of \$2,445.47; that her husband had died February 13, 1904; that the judgment had been presented to the executor and allowed; and that afterwards, on the 26th day of July, 1905, the said claim, based upon said judgment, was for a valuable consideration paid to A. J. Roe by Mrs. Elizabeth Crowley, assigned, transferred, and delivered to her, and that she was then the legal owner and holder thereof. She further pleaded that after the death of her husband she presented her application to the county court for an allowance as a surviving widow, and was by the said court allowed the sum of \$500, \$190 of which has been paid to her, the balance of which was unpaid. She pleaded the insolvency of her deceased husband's estate, and asked that she have judgment against the defendant bank for the amount of the deposit, to be credited by her on her allowance as the surviving widow, and the

remainder upon the A. J. Roe judgment. The executor, B. F. Crowley, Jr., filed a disclaimer of any interest in the funds in controversy. There was a jury trial, the case being submitted upon special issues. Plaintiff filed a motion for judgment upon the verdict, but the court rendered judgment in favor of Mrs. Elizabeth Crowley for the money on deposit, directing that said sum when paid her be applied as a credit upon the Roe judgment, and that no part of said sum be applied to the satisfaction of her widow's allowance. All costs, including a \$25 fee, were adjudged against plaintiff, and he has appealed.

B. F. Crowley was married to the intervenor, Mrs. Elizabeth Crowley, in 1891. At the time of his marriage he was a widower and the father of seven adult children, one of whom was and is the wife of the plaintiff in this suit. His first wife died in July, 1888. At the time of her death, and also at the time of his marriage, he owned several tracts of farm land in Dallas and Tarrant counties, Tex., and a piece of property on Caruth street, in the city of Dallas. Upon one of these farm tracts he resided, but upon his remarriage he moved to the city of Dallas, where he resided until the time of his death in February, 1904, he then being 78 years of age. In 1893 the said Crowley had become embarrassed financially, and made voluntary conveyances of all of his property to his children by his first wife, reciting a consideration of love and affection. These conveyances were duly acknowledged and filed for record on the respective dates of their execution, and were made with the agreement and understanding that the grantor, B. F. Crowley, was to remain in possession of the property during his lifetime, and that he reserved and was to receive all the rents arising therefrom for his own use and benefit. They were also made for the purpose of defrauding his creditors. From 1893 to 1899 B. F. Crowley, Sr., by the consent of and agreement with his children, remained in possession of said lands, and handled the property and collected the rents as he had done before the conveyances to his children were made. Whilst deceased was in possession of this property and receiving all the revenues therefrom, and during the year 1898, he became much embarrassed on account of security debts which he had incurred for his son, B. F. Crowley, Jr. A. J. Roe was one of the creditors of deceased, and the debt due to him was one that gave him considerable annoyance. Suit was brought on the debt due him, and judgment was rendered there on April 11, 1899, in the sum of \$2,445.47. This judgment was presented to the executor of B. F. Crowley, deceased, and allowed July 8, 1905, and for a valuable consideration was assigned to appellee July 26, 1905. To avoid the payment of this judgment B. F. Crowley, Sr., determined to put the rents of the property which he was receiving beyond the reach of his



creditors, and for this purpose obtained the consent of the appellant to deposit it in his name, which was done. He further determined to place the property, ostensibly, under the management of the appellant, for the same fraudulent purpose, and in 1899 possession thereof was turned over to him. At the time the property was turned over to appellant in 1899 he opened a bank account with the defendant bank in his own name, and gave the bank instructions to honor any checks that might be drawn thereon by B. F. Crowley, Sr. The fund in controversy was accumulated from the rents of the property of which deceased, B. F. Crowley, Sr., had remained in charge, and received by him and deposited in defendant bank, after the judgment of \$2,445.47 had been recovered by Roe in the name of appellant, but was at all times the property of the said Crowley.

The jury found that the conveyances of the real property by B. F. Crowley, Sr., to his several children in 1893, and the surrender by him of the possession of said property to the appellant in 1899, were made with the intent to defraud the creditors of the said Crowley. The submission of these issues to the jury is assigned as error, and numerous propositions are urged in support of appellant's contention, but, in the view we take of the case, it is unnecessary to discuss or pass upon them. Inasmuch as B. F. Crowley's ownership of the fund in controversy emanated from or grew out of the transaction resulting in the execution of said conveyances, it was probably not improper for the court to inquire into and understand the character of the same; but we are of the opinion that, in the ultimate determination of the controlling question in the case, the motive that actuated the grantor in making the conveyances and in surrendering his reserved right of possession to appellant in 1899 was unimportant. The right of appellee as a creditor of her deceased husband to set aside the conveyances made in 1893 is not involved in the case. The issue was, did B. F. Crowley own, at the date of his death, the fund in the possession of the defendant bank, which is sought by appellee to be subjected to the payment of her debt as an asset of the said Crowley's estate? This depended upon whether or not the deceased Crowley reserved to himself, at the time he deeded his lands to his children, the rents and revenues to be derived from said lands after the execution of said deeds, and not upon whether the conveyances of said property and the surrender of possession thereof to appellant were or were not made for the purpose of defrauding his creditors. This issue was properly submitted by the court in the third question propounded to the jury. Their finding is favorable to appellee, and appellant, in his brief, practically admits that there was evidence to support such finding. He says: "Appellant concedes that there is parol evidence in the rec-

ord tending to show that the father was to remain in possession of and have the proceeds of the land embraced in the voluntary conveyance, and that he did remain in possession for nearly six years thereafter, making such disposition of the proceeds as he saw proper." The statutes of limitation upon neither theory presented is available to appellant, and the bank has not pleaded it. On the contrary it appears as an impartial stakeholder, and offers to pay the money in its possession to whichever party the court decides is entitled to it. Nor do we think appellant's proposition to the effect that "a promise made without consideration by children owning land to give their father either the entire rents and revenues or a support therefrom is simply a gift, which, in the absence of either a statutory conveyance or the change of possession of such revenues or the crops deriving the same, is void, can be maintained under the facts of this case. The land conveyed was the community property of B. F. Crowley, deceased, and his children to whom he deeded it. The reservation by him of the rents subsequently arising from said lands was a part of the contract to convey, and the acquisition by the children, of his one-half of the land by such conveyance was a sufficient consideration to support the agreement that he should reserve such rents."

The court did not err in refusing to give appellant's special instruction to return a verdict against the defendant, Elizabeth Crowley, upon the issue as to whether the fund in controversy should be applied upon a claim based upon the A. J. Roe judgment. The assignment by Roe of his judgment against the deceased, B. F. Crowley, Sr., and B. F. Crowley, Jr., to Mrs. Elizabeth Crowley, was a transfer of the entire judgment, in so far as it was a claim against the estate of the said Crowley, deceased, and she had the right, by suit or otherwise, to collect the entire amount thereof out of said estate if she could. Roe, by the assignment to her, divested himself of any right whatever to proceed against Crowley's estate to collect any part of said judgment, and the fact that he might proceed against B. F. Crowley, Jr., in his own name and right to realize on said judgment did not make him a necessary party to the present suit. Mrs. Crowley is not seeking to recover anything of B. F. Crowley, Jr., but is simply pursuing the estate of B. F. Crowley, deceased, and attempting to subject assets of said estate to the payment, pro tanto, of said judgment, and the general rule invoked that, in actions upon judgments or claims in which two persons are jointly interested, all parties in whom the right of action exists must be made parties, does not apply.

But appellant contends that the trial court erred in permitting the assignment of the Roe judgment or claim to be introduced in evidence, without proof of the execution of such assignment. In this action of the court



we think there was no error. Appellee specifically pleaded the assignment of the claim to her and her ownership thereof, and there was no plea of non est factum or denial thereof by appellant under oath. This, we think, in view of such pleading and the statute, was necessary to put appellee upon proof of the execution of the assignment. The assignment was not such an instrument as is authorized by statute to be acknowledged, and we agree to the contention that the acknowledgment of Roe before a notary public of the assignment constituted no proof of its execution. We hold, however, that the assignment having been pleaded by appellee, and appellant not having denied its execution under oath, she was not required to make proof of its execution in order to establish its admissibility in evidence.

Nor did the court, in our opinion, commit reversible error in admitting in evidence the letter of B. F. Crowley, Sr., to appellant, dated June 30, 1899. The declaration of the said B. F. Crowley in this letter, and of which complaint is made, to the effect that, when he deeded the lands to his children, he reserved the right to control them and have a comfortable support, and to pay all his just liabilities out of the rents arising from said lands, and that he was going to have it, is not materially different from the testimony of witnesses offered by appellant, and otherwise appearing in the record. This being true, appellant is in no position to complain of the admission of the letter, and its admission is not reversible error.

Appellant's eighteenth assignment of error is as follows: "The court erred in adjudging that an attorney's fee of \$25 be paid by plaintiff as part of the costs and in rendering judgment in favor of intervenor for the full sum on deposit in bank, instead of rendering same for such amount, less \$25, the attorney's fees allowed the bank." This assignment is well taken, but does not require that the case be remanded. The judgment of the court below will be reformed in this court, directing that said sum of \$25 allowed the defendant bank as an attorney's fee in this case, be paid out of the fund in controversy. No reversible error is pointed out by any assignment not discussed. The executor of the estate of B. F. Crowley, deceased, disclaimed any interest in the fund sought to be subjected to the payment of appellee's debt. Said fund seems to be the only asset of said estate, and appellee's claim appears to be the only debt owing by said estate. No reason is perceived, therefore, why appellee could not properly maintain the intervention filed by her, and thereby recover said fund to be credited on her demand. The judgment of the court below, however, will be reformed, directing the payment of the attorney's fee of \$25 allowed the bank, out of the fund in its hands, and as reformed will be affirmed. Touching this matter the court propounded to the jury the

following question: "What amount should be paid out of the fund in controversy to said bank for filing its answer in the suit?" To which the jury replied, "\$25." The language, "What amount should be paid out of the fund in controversy?" indicates very clearly that the trial court was of the opinion that the fee allowed the bank should come out of the fund in controversy, but for some reason, by oversight most likely, the judgment entered recites "that said sum of \$25 be taxed as costs, and recovered by the bank against J. D. McCormick with other costs." This error was not called to the court's attention in appellant's motion for a new trial, or otherwise, so far as shown by the record before us, and the costs of this appeal will therefore be adjudged against the appellant.

Reformed and affirmed.

#### RYAN v. RALEY.\*

(Court of Civil Appeals of Texas. Dec. 11, 1907.  
Rehearing Denied Jan. 15, 1908.)

##### 1. EXECUTION—ISSUANCE—RECITAL IN JUDGMENT.

An execution may issue under the authority of a judgment not in terms providing therefor; the right to the process arising from the obligation to pay, and not from the language of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 7.]

##### 2. SAME—FORECLOSURE OF VENDOR'S LIEN—ENFORCEMENT.

Under Rev. St. 1895, art. 1340, providing that judgments for the foreclosure of liens shall be that plaintiff recover the debt, that an order of sale shall issue, and that if the property is insufficient other property shall be sold as in case of ordinary executions, an execution to satisfy a deficiency on the foreclosure of a vendor's lien is authorized, though the judgment contains no provision therefor.

##### 3. SAME.

Rev. St. 1895, art. 2324, requiring the clerk to issue execution in an action in which a judgment has been rendered for the enforcement of the judgment, etc., includes all final judgments, whether the issuance of an execution is provided for therein or not, and includes judgments of foreclosure of liens.

Error from District Court, Bexar County;  
J. L. Camp, Judge.

Action by Jennie Raley against Joseph Ryan. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Kelso & Lipscomb, for plaintiff in error.  
Jas. Raley, for defendant in error.

FLY, J. This is an action of trespass to try title to lots 6 and 7, in block 2, new city block 2,926, San Antonio, Texas, instituted by appellee against appellant. She recovered the land in a trial without a jury. The evidence shows an unbroken title to appellee in the land in controversy from Santiago Bargas, the common source. One of the links in the chain of title of appellee is a sheriff's deed, made under an execution levied under a judgment of foreclosure of a vendor's lien; the execution having been issued after the sale

of the property on which the lien was foreclosed for a balance remaining unpaid on the judgment of foreclosure. The execution was issued in a case styled "C. C. Abree v. Santiago Bargas." Appellant claimed through a deed from Santiago Bargas. There is but one assignment of error, and under it are advanced the propositions that "on a judgment merely foreclosing a lien, and not providing in terms for a deficiency judgment, the mortgagee is confined to a sale of the mortgaged premises, and is not entitled to resort to other property, or to the person of the mortgagor," and that "one claiming rights under an execution for a deficiency in a suit for foreclosure of a mortgage must show that such execution was authorized in the decree of foreclosure." The propositions amount to the assertion that no amount remaining due on a judgment of foreclosure on real estate, after the order of sale has been executed, can be collected under execution, unless it is specially recited in the judgment that such authority is given.

The propositions of appellant are based on article 1340, Rev. St. 1895, which prescribes the form of decree to be rendered in foreclosing mortgages; one of the requirements being that it provide that an order of sale issue to sell the property, and "if the property can not be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any property of the defendant, as in case of ordinary executions." Is a sale of other property, in case of the proceeds of the mortgaged property being insufficient to settle the debt, authorized under an order of sale which provides for such deficiency, but which is issued under authority of a judgment which does not provide for a deficiency? The judgment offered in evidence is not in compliance with the statute cited, because it does not in terms award an order of sale; the only words used that touch indirectly thereon being "that the vendor's lien be foreclosed on the above lot 23, and the same be sold to pay off this judgment and the costs of this suit," which would seem to exclude the probability of a deficiency. There is no language used in the judgment that has in contemplation a deficiency after the sale of the lot. The decree of foreclosure does fix, however, the indebtedness of Santiago Bargas and Gus Tyler to C. C. Abree, and orders the sale of the lot. The consequence of the decree was to establish an obligation, and conferred on the successful party the right to issue an execution or other process of the court for its enforcement. The right to use the process of the court to enforce the collection of the debt arose from the decree of obligation to pay, and not from any language of the judgment, and a valid execution can be issued under a judgment which does not in terms authorize the issuance of executions. *Black, Judg. § 4; Freeman, Judg. § 2; Roberts v. Connellee, 71 Tex. 11, 8 S. W. 626;*

*Hartz v. Hausser (Tex. Civ. App.) 90 S. W. 63; Taylor v. Doom (Tex. Civ. App.) 95 S. W. 4.*

The authorities establish the rule that executions can be legally issued under the authority of judgments not in terms providing for the same; but the question arises, does a different rule apply in cases of foreclosure of liens, in which class of cases it is provided by statute that provision shall be made in the judgment for the seizure and sale of the mortgaged property, and, if it cannot be found or the proceeds are insufficient to satisfy the judgment, then to make the money or any balance out of other property belonging to the defendant? We are of the opinion that the same rule would apply. The judgment in question is undoubtedly a final one, and under our blended system of law and equity the same rules would apply to decrees of foreclosure as to other judgments, and we do not think that article 1340, Rev. St. 1895, should be construed to provide that a judgment of foreclosure which fails to provide for execution against other property deprives the plaintiff in the foreclosure proceedings of his remedy against other property. It was the rule under the common law that an execution could not be issued by virtue of a decree in foreclosure proceedings against other property of the mortgagor for a balance remaining unpaid after the sale of the mortgaged property, and we are of the opinion that the prime object of article 1340, Rev. St. 1895, was to give statutory authority for the issuance of an execution in such cases, and that it was not intended that such execution could not issue unless it was provided for in terms in the judgment or decree. This construction is recognized in *Frankel v. Byers, 71 Tex. 308, 9 S. W. 160*, where it was held that the only requisites of a judgment of foreclosure, under the article in question, were subjecting the property to the judgment and providing for an order of sale. Those requisites were practically met in the judgment in question. In the case of *Hyder v. Butler, 103 Tenn. 289, 52 S. W. 876*, the Supreme Court of Tennessee had under consideration a sheriff's deed which had been executed under the authority of an execution sale made under a decree that did not provide for execution for the balance that might remain after the sale of property ordered to be sold to satisfy a vendor's lien, and the court said: "It is true that the recitals of the deed imply, and that the record upon which it is based distinctly shows, that the chancellor did not, in terms, order the issuance of execution. Such order, however, was not necessary to the validity of the writ. Both the deed and the supporting record show a formal decree for \$448.17, a specific sum; that it was adjudged to be a lien on the land involved in that cause; and that a part of that decree remained unsatisfied after the enforcement of that lien. More than this was not essential to authorize the master to issue an execution for the unpaid

balance of the decree. It is not required in a money recovery, whether a decree in chancery or a judgment at law, that the court shall in terms direct the issuance of an execution. Such a decree or judgment, without more, is in and of itself an award of execution."

It is made the duty of the district and county clerks to issue executions in every case in which a judgment has been rendered for the enforcement of the judgment and the collection of the costs, from and after the adjournment of their respective courts. Article 2324, Rev. St. 1895. We think that provision covers all final judgments, whether the issuance of executions is provided for therein or not, and there can be no reason why it should not include judgments of foreclosure of liens.

The judgment is affirmed.

#### SANGER et al. v. McCAN et al.

(Court of Civil Appeals of Texas. Dec. 14, 1907. Rehearing Denied Jan. 11, 1908.)

#### TRESPASS TO TRY TITLE — EVIDENCE—SUFFICIENCY.

In an action for possession of land, evidence held sufficient to show that the person under whom plaintiffs claimed was the person to whom a certain bounty warrant was issued by the Republic of Texas.

Appeal from District Court, Throckmorton County; H. R. Jones, Judge.

Action by E. D. McCAN and others against Sam Sanger and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

W. T. Andrews, A. C. Foster, and O. K. Bell, for appellants. T. J. Wright and Theodore Mack, for appellees.

CONNER, C. J. Appellees secured a verdict and judgment for the title and possession of 320 acres of land located in Haskell and Throckmorton counties, and patented by virtue of land bounty warrant No. 3,318, issued to James Ryan by the Secretary of War of the Republic of Texas on the 11th day of May, 1838. Appellee E. D. McCAN, who was joined in the suit by her husband, claimed as the sole surviving heir of a James Ryan, who died in Burleson county, Tex., about the year 1847. Appellants, who were defendants below, claimed as vendees of the heirs of a James Ryan, who died in Lavaca county, Tex. The crucial question on the trial, therefore, was whether the James Ryan, under whom appellees claim, was the James Ryan to whom the bounty warrant issued.

Appellants' main contention before us is that the evidence wholly fails to support the verdict and judgment in appellees' favor on this issue; but, after careful consideration, we feel unable to so say. Mrs. E. D. McCAN testified that she was 63 years of age; that her father, James Ryan, married Martha Fulcher in the state of Arkansas and came to

Texas "about the year 1831," where he continued to reside until his death; that he served in the Army of the Republic under Capt. Burleson; that she had heard her mother, now deceased, and two of her maternal uncles, speak of her father's service in the Army of the Republic. William Armstrong testified that he was 81 years of age, and had lived in Texas about 60 years; that he knew the Burleson county James Ryan about 1844; that he married "Patsy Fulcher," a sister of witness' wife and mother of appellee E. D. McCAN in Arkansas, and came to Texas "in the latter part of the 30's"; that, while witness was not with him, it was his understanding that James Ryan enlisted and served as a soldier with a company near San Antonio in the early days; that, "if he enlisted, it was in the early 40's." Thomas Ryan, a son of the James Ryan under whom appellants claim, testified that he came to Texas in 1856; that his father, James Ryan, immigrated to Texas in 1831 from Pennsylvania, and died in Lavaca county some time before 1856; that his father, James Ryan, was a widower at the time he came to Texas; that the name of his deceased wife (the mother of witness) before her marriage was Honar Durbin; that the marriage of his parents was in Pennsylvania at a date not remembered; that witness did not know whether the Republic of Texas or the state of Texas had ever granted or issued to the James Ryan he knew any land certificates; that "he (James Ryan, my father) did not serve as a soldier in the Army of the Republic of Texas; that is, if he ever served, I never heard of it." It was further shown that the certificate by virtue of which the land in controversy was located was issued by virtue of military service for the term of two months from the 3d day of October, 1835, to the 14th day of December, 1835; the certificate of military service being signed "Geo. Sutherland, Capt. Edward Burleson, Com'd in Chief." Appellants offered in evidence certified copy of petition of Martha Ryan, filed in the county court of Burleson county September 27, 1847, praying for her appointment as administratrix of the estate of James Ryan, and an order of said court on the 28th day of August, 1848, requiring her to give a new bond by reason of an application for release on the part of one of her sureties. Appellants further offered certified copy of conditional land certificate No. 7 for 640 acres of land, issued to James H. Ryan by the board of land commissioners of Burleson county on the 6th day of September, 1841. This certificate recited that James Ryan had "proved according to law that he arrived in the Republic in November, 1839," also certified copy of unconditional certificate No. 15 for 640 acres, issued by the same board, reciting that the administratrix of the estate of James H. Ryan (Mrs. Martha Ryan) on that day appeared before the board, "and proved, according to law, that the said James

H. Ryan arrived in the Republic of Texas in November, 1839, which is also shown by conditional certificate No. 7," etc.

It must be confessed that some of the evidence seems to be at first view incompatible with the verdict; that most strongly urged by appellants being the recitations hereinbefore set out, to the effect that the father of appellee came to Texas in 1839, supported as they are by some of the testimony of the witness Armstrong of like tendency. It must be remembered, however, that the large lapse of time may have obscured many circumstances that would explain the conflict in the testimony, and establish beyond controversy the truth of appellees' theory. Appellee E. D. McCan says her father came to Texas in 1831, and served in the Army of the Republic. These are facts well calculated to be firmly fixed in family tradition. If true, they support the inference that the bounty warrant issued to the James Ryan, who died in Burleson county, particularly in view of the evidence of the son of the only other James Ryan appearing in the testimony that he never heard of his father's having served in the Texas army. The son testified to a considerable family connection, and it seems improbable that his father in fact so served without at least family tradition of the fact. The witness Armstrong corroborates appellee E. D. McCan, save in his recollection of the date that her father immigrated to Texas, but he was a very old man, and not an immediate member of the family. The jury may have thought he was mistaken in his dates, and it is possible, too, that the Arkansas James Ryan served in the army two months in 1835, returned home (for which he was given ten days in the certificate of service), and again returned to Texas in 1839, as recited in certificates Nos. 7 and 15 for 640 acres. But, however this was, we cannot say that the jury were bound to accept said recitations as true. The recitations were not those of James Ryan nor of appellees, and it was for the jury to judge of the weight to be given to all of the testimony, and to reconcile conflicts if they could, and, having acted, we do not see our way clear, as stated before, to disturb their finding in appellees' favor.

We attach no importance to the assignments raising other questions. The court's ruling in excluding the deed from Mrs. Mary Ryan, one only of the heirs under whom appellants claim, and certain memoranda of the General Land Office tending to show, perhaps, that I. G. Searcy, of Austin, located the land for the Lavaca county James Ryan, is entirely immaterial in view of the jury's finding on the main issue, and the eighth and last assignment is entirely too general for consideration.

We conclude that the judgment should be affirmed; and it is so ordered.

## CITY OF SAN ANTONIO v. ROWLEY.

(Court of Civil Appeals of Texas. Nov. 27, 1907. On Rehearing, Jan. 8, 1908.)

## 1. TRESPASS TO TRY TITLE—TITLE TO SUPPORT ACTION—BURDEN OF PROOF.

In trespass to try title, where defendant city, at the time suit was brought, was in actual possession of the land as a street under an alleged dedication, and plaintiff claimed it under the 10-year statute of limitation, it was incumbent on plaintiff to show either that there had never been a dedication of the land as a street, or that the city had lost its rights thereunder, and that he had acquired title thereto under the 10-year statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, § 53.]

## 2. ADVERSE POSSESSION—LAND OCCUPIED BY STREETS.

Title by limitation to land over which a street had been established could not be acquired against a city after July 4, 1887.

## 3. SAME—EVIDENCE—QUESTION FOR JURY.

Whether plaintiff had acquired title to land by limitation *held*, under the evidence, for the jury.

## 4. DEDICATION—PLAT OF ADDITION TO CITY—MUNICIPAL CORPORATIONS—TITLE TO STREETS.

Where the owner of land lays out and establishes an addition to a city, files in the county clerk's office a plat of the land showing streets and alleys, and sells lots with reference to the plat, the purchasers of the lots acquire every easement and privilege which the plat represents as belonging to them, and title to the streets vests in the city.

## 5. TRESPASS TO TRY TITLE—NATURE OF POSSESSION OF DEFENDANT—RECOVERY BY ACTUAL POSSESSOR AGAINST TRESPASSER.

Where a city had title to land dedicated to it as a street, and had not lost it by limitation, in taking possession of the land it was not a trespasser against whom the actual possessor could recover by merely showing his possession.

## 6. DEDICATION—PLAT—EVIDENCE—CONVEYANCES OF LOTS.

On a question of dedication of a street in a city by filing a plat showing such street and selling lots with reference thereto, deeds and other instruments relating to a lot in the same part of the city, but which do not illustrate any issue in the case or affect the rights of either party, are not admissible in evidence.

## 7. SAME—REVOCATION BEFORE ACCEPTANCE.

In determining whether a dedication of property to a city, as a street was revoked before its acceptance, evidence that land has been sold by the dedicator and described by him in the deed by the plat upon which the blocks, lots, and streets were delineated is admissible.

## 8. TRESPASS TO TRY TITLE—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

In trespass to try title to land claimed by defendant city under an alleged dedication of it as a street, evidence of a petition of citizens to the city council asking for the removal of a fence on the land was irrelevant and improperly admitted against defendant's objection, though its admission was not reversible error.

## On Rehearing.

## 9. SAME—PLEADING TITLE—TITLE BY LIMITATION.

The general rule that in trespass to try title plaintiff, where he specifically pleads his title, must prove the title alleged in order to recover, does not apply where the title specifically pleaded is by limitation.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Trespass to try title by E. M. Rowley against the city of San Antonio. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This suit was brought by appellee against appellant, in the form of an action of trespass to try title, to recover a piece of land known as the "James H. French homestead," situated in the city of San Antonio, and alleged to be in the northeast corner of lot No. 5, in city block No. 822, and bounded on the east by Dallas street, on the south by property of John Pirtle, on the west by property of Mary Tunstall, and on the north by city block No. 837. In his petition the plaintiff grounds his right of recovery on the five and ten year statutes of limitation. The defendant by its answer disclaimed title to all the property, except such as is a part of one of its public streets known as "Brooklyn avenue," as to which part it pleaded not guilty. The answer also alleges that plaintiff and those under whom he claims have recognized and admitted that Brooklyn avenue, between Camden and Dallas streets, is a public street; that for more than 30 years past defendant has claimed the same as a public street, delineated the same upon the maps of the city, and that plaintiff and those under whom he claims have recognized it as a public street as claimed by defendant; that if the same was ever inclosed, or in possession of plaintiff and his vendors, as alleged by plaintiff, such possession was not adverse, but subject to the right of defendant to remove at any time the fence or any other obstruction thereon, the land in the street being held by plaintiff and his vendors in subordination to such right of the defendant. After hearing the evidence, the court peremptorily instructed the jury to return a verdict for plaintiff, and judgment was rendered on the verdict found in obedience thereto in favor of the plaintiff.

Joseph Ryan, for appellant. Webb & Goeth, for appellee.

NEILL, J. (after stating the facts as above). The first assignment of error complains that the court erred in not granting defendant's request, after plaintiff had offered his evidence and rested his case, to peremptorily instruct a verdict in its favor, and the fourth of the peremptory instruction of a verdict for the plaintiff. As these two assignments will require us to review the evidence, they will be considered together. If it should be determined that the first is well taken, the logical sequence will be that the fourth is also, though it will not follow from a failure to sustain either that the other should be upheld.

It will be seen from our statement of the case that plaintiff bases his right to recover on the five and ten year statutes of limita-

tion. No evidence was introduced which would tend to show title under the five year statute, but it was directed solely to the ten year statute. The questions, then, to be decided are: (1) Was there such a failure of plaintiff's evidence to show title in himself under this statute as would authorize the court to grant defendant's request to peremptorily instruct a verdict in its favor? (2) If the state of the evidence was not such as to require a peremptory instruction for the plaintiff, was it such as to authorize the peremptory instruction in favor of the defendant? After considering the evidence, we have concluded that, under the law applicable to it, both of these questions should receive a negative answer for these reasons: When this suit was brought, the city was in actual occupancy of the property in controversy as a street. The evidence tends to show that it had been dedicated and delineated on the maps of the city as part of one of its public streets prior to the time Crider inclosed it by his fence. In view of this, it was incumbent upon the plaintiff to show that either there had never been a dedication of the property as a street, or, if there had been such a dedication, that the city had lost its rights thereunder, and he had acquired title thereto by operation of the 10-year statute of limitation. There was no effort on his part to rebut the evidence of prior dedication, and the evidence was not such as would enable a court to say as a matter of law that the city had lost its title, and the plaintiff had acquired it through the statute of limitation. Though the city's title may have been extinguished by operation of such statute, unless the plaintiff acquired the title which destroyed that of the city, he cannot recover; for, if he did not, he being the plaintiff, even that title, though acquired by limitation, would be outstanding and sufficient to defeat him in this action. Title against the city could not be acquired by limitation after July 4, 1887. *Ostrom v. San Antonio*, 77 Tex. 347, 14 S. W. 66. If it was acquired, it must have been prior to that date either by M. Crider, James H. French, or the Grahams, or by the continuous consecutive possession of two or more of them for the requisite statutory period. The evidence does not show the length of time any one of these parties was in possession; nor is it such as to show as a matter of law that their possession was, or was not, successively connected and continuous for 10 years, or that the plaintiff has, or has not, such title or claim, if any, as may have been acquired by one or more of them. These were matters which, under the evidence, should have been left for the jury to determine. If the street was dedicated, it is a matter of no moment whether such part of it as is the subject of this litigation was used by the public or not; for the principle is well settled "that where an owner of land lays out and establishes an addition to a city, and makes exhibits and files in the coun-

ty clerk's office a plot of said land, including in the plot streets and alleys, and sells lots with reference to the plot, the purchasers of the lots acquire as appurtenant to their lots every easement, privilege, and advantage which the plot represents as belonging to them as part of the town, and title vests in the city in order that it may keep said streets in such condition as the traveling public may with safety pass over and along said streets." *City of Tyler v. Boyette* (Tex. Civ. App.) 96 S. W. 935. If the city had such title, unless it was lost by limitation, which was incumbent upon plaintiff to show, it could not be regarded a trespasser in taking possession of the property and in opening the street through it. Therefore the principle that actual possession of land is sufficient to warrant the plaintiff who has shown such possession to recover against a naked trespasser would, in that event, have no application. Besides, the principle cannot be invoked by plaintiff in this case, for he specifically pleaded that his title was under the 10-year statute of limitation, and the rule is that if a plaintiff pleads his title, he must prove the specific title alleged in order to recover.

We do not think the court erred in excluding the deeds and plat made by John Ireland to John Lleck to a lot in the same part of the city where the land in controversy is situated, and the release of D. Sullivan & Co. to Lleck of a deed of trust on the lot, offered in evidence by the plaintiff. Such documents do not tend to illustrate or make clear any issue in the case, nor can they affect the rights of either party. Where the question to be determined is whether a dedication of property to a city as a street was revoked before its acceptance, evidence that land has been sold by the dedicator and described by him in the deed by the plot upon which the blocks, lots, and streets were delineated, as in the cases of *Albert v. Ry.*, 2 Tex. Civ. App. 664, 21 S. W. 779, and *City of Houston v. Finnigan* (Tex. Civ. App.) 85 S. W. 471, is admissible against him to show that he is estopped from revoking such dedication. But we can conceive of no principle which would make the instruments offered in evidence by the defendant admissible against the plaintiff.

We are not able to see the relevancy of the petition of citizens to the city council asking for the removal of the fence at the corner of Brooklyn avenue and Dallas street, which was on the land in controversy, introduced in evidence over the objections of the defendant. We think the court erred in its admission; but the error is such as would not require a reversal of the judgment, had the evidence been such as to authorize the peremptory instruction given the jury to find for plaintiff.

Because the court erred in giving such instruction, the judgment is reversed, and the cause remanded.

### On Rehearing.

There are two of these motions, one filed by appellee, insisting that we erred in not affirming the judgment; the other by appellant, insisting that, after reversing the judgment of the district court, we should have rendered judgment in its favor.

In our original opinion we stated, as applicable to this case, the general rule that, where the plaintiff in an action of this character specifically pleads his title, he must prove the title alleged in order to recover. In doing so we did not have in mind the exception to the rule which obtains in cases like this where the title specifically pleaded is by limitation. *Mayers v. Paxton*, 78 Tex. 199, 14 S. W. 568; *McAdams v. Hooks* (Tex. Civ. App.) 104 S. W. 432. This inadvertency, however, did not affect our action in reversing the judgment, as is apparent from the original opinion. It rests upon the principle that as the evidence tended to show a dedication of the property to the city as a street prior to its occupancy by any one under whom appellee claims, and as the evidence was not sufficient to show as a matter of law continuous adverse possession of those under whom he claims for the statutory period, the defendant in taking possession could not be viewed in the light of a trespasser, so as to authorize a recovery by plaintiff upon mere proof of prior possession of his vendors.

After reviewing the testimony, we think the state of the evidence was such as required the submission of the case to the jury, and not such as to authorize a peremptory instruction in favor of either party.

We therefore overrule both motions.

### WILLIAMS v. JONES.\*

(Court of Civil Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 9, 1908.)

1. **HOMESTEAD—RIGHTS OF SURVIVING WIFE.**  
During the life of the surviving parent the homestead rights of a minor child can only be asserted through such parent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 278.]

2. **JUDGMENT—PERSONS CONCLUDED—PARTIES.**

A widow conveyed the deceased husband's homestead to the minor children, and thereafter one of such children, together with her husband, conveyed her interest in the land to plaintiff, and subsequently on application of the widow, as guardian of the other minor, the probate court set aside the property to the guardian as a homestead for the use and occupation of the minor. Held that, plaintiff not having been a party to such proceedings, the judgment of the probate court turning over the possession of the property to the guardian was not binding on her.

3. **PARTITION—PROPERTY SUBJECT.**

Where a survivor entitled to use or occupy a homestead has conveyed away her interest, and the guardian of minor children has not been permitted to use and occupy the same under the order of the proper court, the homestead may be partitioned.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

\*Writ of error denied by Supreme Court.

Action by Ira P. Jones against Etta Williams. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Brockman & Kahn, for appellant. Ira P. Jones, for appellee.

REESE, J. John Williams died intestate about June 1, 1898, in Harris county, leaving surviving his widow, Addie Williams, and two daughters, both minors, to wit, Willie Williams, a child of a former marriage, from whose mother John Williams had been divorced, and Etta Williams, defendant in the present suit, a child by deceased and his wife Addie. John Williams at the time of his death owned lot 2, block 152, in the city of Houston, on which was his residence and homestead at the time of his death. Willie, the eldest daughter, after the divorce, made her home with her mother. Addie, the wife, and Etta, the daughter of John and Addie, lived or made their home with him. The property in question was the separate property of the said John Williams. Etta is still a minor and unmarried. From the date of the death of John Williams in 1898 up to a short time before filing this suit in 1905, neither the said Addie Williams nor the said Etta had occupied or used the property in question. The house was dilapidated, and, particularly after the storm of 1900, was practically uninhabitable, having been badly wrecked by the storm. After the death of Williams, one Neal Allen, claiming to do so at the request of Williams, took possession of the property, renting it out occasionally, but collecting rents very irregularly, only a few dollars having been collected in all up to September, 1900. Immediately after the death of John Williams in July, 1898, Addie Williams by her deed duly executed conveyed "all her right, title, claim, and interest of every kind and description" in the property to Willie Williams and Etta Williams, the two daughters of the said John Williams. Shortly afterwards Addie married Tom Jennings, with whom she is now living as her husband. Her daughter Etta has been living with them. Willie married J. C. Clayton. August 17, 1901, the said Willie, joined by her husband, J. C. Clayton, sold and conveyed to Ira P. Jones, plaintiff herein, her interest in the property aforesaid. Jones took possession of the property, renovated it, put the house on blocks, put on a new roof, put in windows, and generally put it in a habitable condition. He occupied the house, through his tenants, from such time until about April, 1905. The house was not continuously rented. Some time in March or April, 1905, Addie Jennings took possession of the house, occupying it with her daughter, the said Etta. At the time of her taking such possession it was occupied by a tenant of Jones, who was put out. Neither appellant nor her mother, Addie Jennings, have any other homestead. On June 5, 1905, Jones filed this suit against the said Etta Williams for partition. The de-

fense set up to the petition is that the property is the homestead of the said Etta, occupied by her and her guardian under order of the probate court, and not subject to partition. The trial court held that it was subject to partition, and directed a verdict for plaintiff. From this verdict and the judgment, this appeal is prosecuted.

After the suit was filed on June 13, 1905, Addie Jennings made application to the probate court of Harris county to be appointed guardian of the person and estate of the said Etta, and on the 6th day of September following, by order of said court, she was regularly appointed such guardian. Her bond was approved, and she took the oath prescribed by law, and returned into court an inventory and appraisal of the property of her said ward. Upon the inventory is entered lot 2, block 152, of the city of Houston, valued at \$300. These documents were introduced in evidence by appellant. Appellant offered in evidence a certified copy of an application of Addie Jennings, guardian of Etta Williams, to the probate court, filed September 7, 1905, to have the property herein referred to set aside as a homestead to the said Etta Williams, and also a certified copy of the order of the probate court made and entered September 8, 1905, setting aside said property to the guardian as a homestead for the use and occupation of the said minor, Etta Williams. These facts were set out in defendant's answer. To the introduction of this evidence appellee objected on the grounds (1) "because it is shown from said application that the matters and things therein stated were not such matters that gave to the probate court jurisdiction to grant such order; and (2) because the probate court had no jurisdiction as it appears from said application, and as it appears from said order of court setting aside the homestead, and because the court could not grant said order prayed for for want of jurisdiction of the subject-matter in this case." The objection was sustained and appellant excepted. The ruling is made the basis of appellant's first assignment of error, and upon this question hinges this appeal.

There can be no question that at the death of John Williams his wife, Addie, with her minor child, had the right to occupy the property in controversy as a homestead, and that, had the widow chosen to so occupy it, it would not have been subject to partition so long as she did so. The right of occupancy of the widow, mother of appellant, she expressly renounced, together with her right by inheritance to a life estate in one-third of the property by her conveyance to appellant and Willie Williams, above referred to. After this conveyance the entire title to the property was vested in equal shares in the said grantees to whom prior thereto it belonged by inheritance from John Williams, subject to the widow's life estate in one-third thereof, and her homestead right of occupancy.

It was not at any time after the death of John Williams occupied or used as a homestead by any of the constituents of the family, being, in fact, not fit for occupancy. This was the status, when in 1901 Willie, joined by her husband, conveyed her interest to appellee. By this conveyance the title to one undivided half of the property became vested in appellee, and as such part owner, finding the property untenanted and practically uninhabitable, he took possession and proceeded to make it habitable. Such rents as he collected he has kept account of, and asks that out of the same he be reimbursed the amounts paid for taxes and the value of repairs, holding one-half of the balance for appellant. We are of the opinion that in the circumstances the probate court had no power to take charge and control of appellee's one-half of the property, and turn over the possession thereof to the guardian of appellant in a proceeding to which he was in no sense a party. The judgment of the probate court was not conclusive of appellee's right. It in no wise affected his rights. The fact that the guardian is the mother of appellant and the surviving widow of the deceased, Williams, does not affect the question. As the guardian of appellant, in which capacity she is acting, she has no rights superior to the rights of any other person who might have been appointed such guardian. If the right of appellant to the possession of the homestead can be recognized in this case against her mother's vendee, it could with equal propriety be asserted against her mother, if her mother, having abandoned her homestead right, were seeking a partition of her one-third interest in which she has a life estate. *Johnson v. Taylor*, 43 Tex. 122; *Shannon v. Gray*, 59 Tex. 252; *Ashe v. Yungst*, 65 Tex. 636. If the property had been the separate property of the widow, notwithstanding its homestead character, she could have sold it. If it had been community property, she could likewise have sold it for the purpose of paying community debts. Its character as homestead in no way interfered with this right of disposition. During the life of the surviving parent the homestead right of the child can only be asserted through such surviving parent. The order of the probate court could not affect the issue, and there was no error in excluding the evidence.

The order of the probate court setting aside the property to the guardian as a homestead for appellee being out of the case by the refusal of the court to admit it in evidence, appellant contends, by the fifth assignment of error, that the occupancy of the same by the said Addie Jennings and appellant was a bar to the partition. This contention cannot be sustained. Under the Constitution the homestead descends and vests as other property, but cannot be partitioned so long as the survivor elects to use or occupy it as a homestead, or so long as the guardian of the minor children of the deceased may be permitted,

under the order of the proper court having jurisdiction, to use and occupy the same. We have seen that there had been no such order authorizing the guardian to occupy the property as would be a bar to this partition. So far as her own rights are concerned, the mother, Addie Jennings, by her deed has conveyed away her homestead right with her other interest, and in this way has signified her election not to use or occupy the property as a homestead. This disposes of the appeal.

We find no error in the judgment, and it is affirmed.

Affirmed.

#### CRUSE et al. v. O'GWIN et al.\*

(Court of Civil Appeals of Texas. Dec. 4, 1907.  
Rehearing Denied Jan. 8, 1908.)

#### 1. ADMINISTRATORS—SALES—TERMS—VIOLATION—EFFECT.

That an administrator violated the terms of the law and the order of the court as to the terms of credit in making a sale of the intestate's land did not necessarily render the sale void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1495, 1496.]

#### 2. SAME—TEMPORARY ADMINISTRATOR—DUTIES—SALE OF LANDS.

Power to sell lands is not one of the powers conferred by law on a temporary administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 494.]

#### 3. SAME—ORDER—PERMANENT ADMINISTRATOR.

An order granting authority to a temporary administrator to sell land, made on the day of his appointment, did not authorize a sale by him after he had been appointed permanent administrator.

#### 4. SAME—PRESUMPTIONS—RECITALS IN DEED.

A recital in an administrator's deed that at the ——— term of court an order and decree to sell land had been made, followed by a recital that the grantor was appointed administrator of the estate of L. on December 19, 1840, which was the date of the issuance of letters of temporary administration, was insufficient to raise a presumption that an order had been granted to the grantor as permanent administrator authorizing him to sell land.

#### 5. SAME—CONFIRMATION—NECESSITY.

Though the statutes in force in 1841 regulating sales of realty by administrators did not require confirmation, the law of 1840 did require a return of the sale by executors and administrators within a month after sale. Held that, in the absence of confirmation, title would not pass from the estate, in the absence of proof that the requirements of the statute had been complied with; the administrator's deed being unsustainable by presumption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1530.]

#### 6. SAME—ORDER OF SALE.

Where an order directing an administrator to sell land was not shown by any probate record or recital, nor by anything tending to show a confirmation of the sale, its existence could not be presumed.

#### 7. APPEAL—ASSIGNMENT OF ERROR—PROPOSITIONS—APPLICABILITY.

A proposition that the recitals in an administrator's deed are conclusive on collateral attack was not germane to an assignment of error to a finding that L. made the sale as

\*Writ of error denied by Supreme Court.



temporary administrator under an order of sale issued to him in that capacity.

**8. ADMINISTRATORS—SALE OF LAND—VALIDITY.**

An administrator's sale of realty will be sustained against collateral attack, though there was no proof of an entry in the record books of the probate court of an order of sale, if there was some paper filed in such court indicating that the sale had been approved.

**9. SAME—WANT OF APPROVAL—EVIDENCE.**

The fact that on the day an administrator sold land belonging to the estate the purchaser reconveyed it to the administrator in his individual capacity, while insufficient to vacate the sale in a collateral proceeding, was competent to explain the absence of an order confirming the sale.

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by J. W. O'Gwin and others against Annie Cruse and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. A. Mooney and W. W. Cruse, for appellants. Robt. G. Johnson and T. C. Mann, for appellees.

**FLY, J.** This is an action of trespass to try title to the southwest one-fourth of the Robert Lucas league of land in Tyler county, prosecuted by J. W. O'Gwin and ten others against Annie Cruse and six others, one of them, W. W. Cruse, being sued as the administrator of the estate of E. Cruse, and Annie Cruse being sued in her individual capacity, and also as the guardian of the minors, Ruth and John Knight Cruse. The cause was tried by the court, without a jury, and judgment was rendered for the land in favor of appellees. The record contains the findings of fact of the court, as well as a transcript of the evidence prepared by the official stenographer. The land in controversy was granted to Robert Lucas, as a colonist, in 1835, and appellees claim the land as his heirs, while appellants claim it through a deed made by John Lucas, administrator of the estate of Robert Lucas, to David M. Evans, in 1841. That deed was held to be null and void by the trial judge and rejected, and the result of this appeal is dependent upon the propriety of that rejection. The findings of fact of the trial judge are adopted by this court. The following summary of the evidence is a correct version of the testimony in the case as to the administrator's deed: "On December 19, 1840, at a special term of the probate court of San Augustine county, John Lucas was appointed temporary administrator of the estate of Robert Lucas, deceased; no attempt being made in said order to define the powers and duties of such temporary administrator. On the same date said probate court ordered John Lucas, as temporary administrator, to sell an undivided one-half of the Robert Lucas league on a credit of — months. \* \* \* On December 28, 1840, said probate court ordered that letters of administration be granted to John Lucas upon the estate upon his giving bond and security.

On March 15, 1841, John Lucas filed in the probate court of San Augustine county a report of sale of one-half league of land located in Liberty county, to Daniel M. Evans for \$350, reciting the day of sale as the 2d and 3d day of March, 1841, but not stating otherwise the manner or place of sale. On August 30, 1841, John Lucas, as administrator of Robert Lucas, deceased, executed the deed to Daniel M. Evans before recited for a recited consideration of \$250 paid by the said Evans to the said Lucas. On the same day the said Evans conveyed the land covered by said purported administrator's deed to John Lucas."

The trial court held that the deed was void because no order of sale was made except to the temporary administrator, who was not qualified under the law to sell land, because the permanent administrator could not sell under authority of an order to the temporary administrator, because the sale was not made on credit as required by law and the order of the court, because the consideration was for less than was reported to have been bid, because there was no confirmation of sale, and because the sale was made of definite tracts, when the order directed the sale of an undivided interest. If there is sufficient evidence to indicate that there was no order of sale to the permanent administrator, or if the circumstances are of such a nature as to preclude a presumption of the existence of such, there is no necessity for any other reason for the invalidity of the deed to be given. We are of the opinion that if an order of sale can be presumed the deed should be sustained. The question of consideration recited in the deed is of no importance, and it has been held that the administrator may violate the terms of the law and the order of the court, as to credit sales, but that such violation would not render the sale void. *Sypert v. McCowen*, 28 Tex. 639; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804. As to the ground that the sale was invalid by reason of the administrator selling definite tracts of land, when directed to sell an undivided interest, it may be said that the question cannot arise unless the order to the temporary administrator is consulted, and if, as we believe, that order could not support a sale of land, the sale must be sustained, if at all, upon the presumption that an order of sale to the permanent administrator was made, and if we presume an order it will be one, of course, that upholds the deed. Will the order to the temporary administrator sustain the sale, and, if not, will the circumstances surrounding the case raise the presumption that there was an order of sale directed to the permanent administrator issued by the probate court? Those are the questions to be considered and to which we shall devote our attention.

The order to sell, given to the temporary administrator, was made on the day of his

appointment, at a time when neither he nor the court could probably have known the condition of the estate and the necessity for the sale of the real property belonging thereto. Temporary administration is permitted only because the exigency requires some one to take charge of and protect the estate in the interim that necessarily arises between the death and a permanent administration, and a strict construction is always given to statutes prescribing the powers and duties of a temporary administrator. The power to sell land has not been given to him by law. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364; *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 52 S. W. 626. If, however, the temporary administrator had the authority to make the sale, under the orders of the court, the sale could not have been made by him as temporary administrator, but was made by him at a time when he was the permanent administrator. It cannot be reasonably contended, as before stated, that the order to sell, issued to the temporary administrator, authorized sale by the permanent administrator, and therefore the validity of the deed must be made to rest on the presumption that an order of sale was granted by the probate court to the permanent administrator. The only circumstance tending to show that an order to sell was issued to the permanent administrator is the recital in his deed that "at the ——— term of said court" an order and decree to sell the land had been made. If that recital could be a circumstance tending to show the order, it is destroyed by the recital that John Lucas was appointed administrator of the estate of Robert Lucas on December 19, 1840, which was the date of the issuance of letters of temporary administration, and that recital, in connection with the statement that the order was made, would lead inevitably to the conclusion that the order referred to was the one issued to the temporary administrator on December 19, 1840. If John Lucas made the sale under the appointment made on that date, he must have acted under the order given him as temporary administrator, and must have referred to that order in the deed.

There is not a word in all the record of the probate court upon which to base a presumption that an order was issued to the permanent administrator. No confirmation of the sale was shown, and nothing in any of the proceedings indicates that the probate court approved the sale of the land. There was in proof an instrument as follows: "An account of the sale of Robert Lucas property, Dec'd, by the Adm'r John Lucas, on the 3d day of March, 1841. One league of land located in Liberty county, Purchaser, Daniel M. Evans. Price or amount for which is sold \$350.00." That paper is verified by the affidavit of John Lucas, who states that the property was sold on March 2, 1841. No action on that report was shown to have been taken by the court. The deed was executed on August 30, 1841, to

Daniel M. Evans, and it sought to convey a "half league of land composing the northeast and southwest quarters of said Robert Lucas headright." The statute in force at the time of the purported sale was silent on the subject of confirmation of sales of real property by the probate court, but the law of 1840 did require a return of sale by executors and administrators within a month after the sale, and it was held in the case of *Harris v. Brower*, 8 Tex. Civ. App. 649, 22 S. W. 758, that it was evidently intended that the probate court should have the power to approve or disapprove the amount for which the property was sold and the security offered for the same. In that case, as well as others, it is decided that a confirmation of the sale would have been conclusive, and that rule is founded in reason because such confirmation would be a judicial determination of the necessity and propriety of the sale, and of the sufficiency of the price paid for the land; but, in the absence of such confirmation, the title would not pass from the estate unless proof should be adduced to show that the requirements of the statute had been met. And in the absence of a decree of confirmation or approval of the sale evinced by some action of the court, the deed could not be sustained by presumptions. *Peters v. Caton*, 6 Tex. 554; *Alexander v. Maverick*, 18 Tex. 179, 67 Am. Dec. 693; *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607; *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313.

There was nothing shown by the evidence which indicated the existence of other orders of the probate court than those produced, as claimed by appellants, and an order of sale cannot be based upon a presumption founded thereon. The court did not find, as claimed by appellants in the second assignment of error, that John Lucas made the sale as temporary administrator, nor that the sale was made under an order of sale to the temporary administrator, and there is no foundation for the assignment. The proposition under that assignment is to the effect that in a collateral attack the recitals in an administrator's deed are binding. That proposition is not germane to, nor based on, the assignment of error.

Even though there was no entry in the record books of the probate court tending to show that an order of sale was issued to the permanent administrator, or tending to show an approval of the sale made by him, still if there was anything written on any paper filed in the case in the probate court that directly or indirectly indicated approval of the sale by the probate court, we would sustain its validity under the authority of decisions of the Supreme Court. *Neill v. Cody*, 28 Tex. 286; *Moody v. Butler*, 63 Tex. 210. But in this case there was no confirmation, nothing from which a confirmation can be inferred, and nothing done by the purchaser giving him the right to have the sale confirmed. On the other hand, it was shown that, on the same day that John Lucas made the deed to David M.

Evans, the latter conveyed the land back to Lucas, and it may be fairly inferred that the sale of the land was one by the administrator to himself. While a sale could not be set aside on that ground in a collateral proceeding, still it is a circumstance that may serve to indicate why there was no order of confirmation of the sale.

The judgment will be affirmed.

**TEXAS & P. RY. CO. et al. TOWNSEND.\***  
(Court of Civil Appeals of Texas. Nov. 9, 1907. Rehearing Denied Dec. 14, 1907.)

**1. CARRIERS—CARRIAGE OF GOODS—CONNECTING CARRIERS — SPECIAL CONTRACTS FOR THROUGH TRANSPORTATION.**

An initial carrier undertook to have goods transported in one of its cars at a given rate from origin to destination. The bill of lading of the initial carrier limited its liability to its own line, and provided that in case of loss or damage to the property before delivery at its destination, whereby any liability was incurred by any carrier, that carrier alone should be liable who had actual custody of the property at the time of such loss. *Held*, that the contract was within Rev. St. 1895, art. 331a, providing that in the through transportation of freight the connecting lines shall be held agents of each other, and under a contract with each other and the shipper for safe transportation, and that the bill of lading shall be prima facie evidence of such relations, notwithstanding any stipulation to the contrary.

**2. SAME—TRAFFIC ARRANGEMENTS BETWEEN CARRIERS.**

Where an initial carrier undertook to have goods transported in one of its cars at a given rate from origin to destination, and the car as loaded was forwarded to and over the connecting line at the rate fixed, the inference was warranted that the officers of the two companies must have had such an understanding as to such shipments as to bring the contract of transportation within Rev. St. 1895, art. 331a, making connecting lines parties with the initial line to contracts "for through carriage recognized, acquiesced in, or acted upon by such carriers," and each responsible with the others for safe and speedy transportation.

**3. EVIDENCE—EXPERT TESTIMONY—ACTION FOR LOSS OF GOODS.**

In an action against a carrier for the loss of a stock of merchandise, experts' evidence as to the value of the goods after they had testified that such value was fixed by the cost price plus the cost of carriage, and that, except as varied by the freight to different points, such property had a uniform value in the section of the state in which the business was carried on, was competent and sufficient to establish the extent of the loss, being unobjectionable on the ground that the experts called such value the market value.

**4. APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR.**

In an action against a carrier for the loss of goods, the evidence as to the loss being practically undisputed, a charge misleading and confusing as to the value of the goods cannot avail the defendant, being detrimental, if at all, only to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

**5. CARRIERS—CARRIAGE OF GOODS—ACTIONS FOR INJURY TO GOODS—DEFENSES.**

Where a carrier tendered a shipper a car in which to load a stock of goods and the shipper went to considerable trouble and expense in loading the car, and thereafter the carrier, be-

cause of the car's defective roof, offered to substitute another car, but finally, upon the shipper's objection to the substitution, undertook the transportation of the goods after ordering the roof repaired, the shipper, because of such objection, was not estopped from claiming damages for the destruction of his goods by water coming in through the roof of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 509-511.]

Appeal from District Court, Eastland County; J. H. Calhoun, Judge.

Action by R. H. Townsend against the Texas & Pacific Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Shropshire, for appellant Texas & P. Ry. Co. Earl Conner, for appellant Texas Cent. R. Co. Scott & Brelsford, for appellee.

**STEPHENS, J.** This suit was brought by appellee against the Texas Central Railroad Company to recover damages in the sum of \$3,000 resulting from a breach of a contract for through carriage of a car load of dry goods and groceries from Terrell, Tex., to Moran, Tex. The Texas Central Railroad Company, over whose line the car was carried from Cisco to Moran, interpleaded the Texas & Pacific Railway Company, the carrier between Terrell and Cisco, as provided in article 331b of the Revised Statutes of 1895. The trial resulted in a verdict and judgment for appellee against the Texas Central Railroad Company for the sum of \$2,250, and in favor of that company for a like sum against the Texas & Pacific Railway Company, from which judgment both companies have appealed, but in the brief for the Texas Central Railroad Company the judgment against it is complained of only in the event of a reversal of the judgment in its favor.

The ground of liability was the failure of the Texas & Pacific Railway Company to furnish appellee a suitable car for the transportation of his goods, in that the roof of the car furnished was defective and let in the rain, which was the cause of the damage. The defense was, first, that the goods had not been shipped "on a contract for through carriage recognized, acquiesced in, or acted upon by" said carriers; second, that appellee was estopped from claiming damages by accepting the car and refusing to allow the initial carrier, as it offered to do, to substitute a car with a good roof for the one in question, when it was about loaded and before the journey began. The only answer made by the appellee to the plea of estoppel was a general demurrer, which does not seem to have been ruled on, but the court seems to have ignored the plea on the trial by excluding evidence which was offered to sustain it, and by refusing to submit it in the charge. Evidence, however, was admitted, apparently in answer to the plea, to the effect that the appellee had not

\*Writ of error denied by Supreme Court.

absolutely refused to allow the substitution, but only had insisted that the roof of the car, which he had been at great expense and trouble in loading, in ignorance of its defective condition, be repaired, which course was finally adopted by the Texas & Pacific Railway Company, but the tinner by whom the repairs were made failed to stop the leaks.

#### Conclusions.

It is earnestly insisted by both appellants that the action, as brought against the delivering carrier only, was not maintainable under article 331a, first, because the contract made with the receiving carrier for the transportation of the goods was not one for through carriage; and, second, that it was not acquiesced in by the delivering carrier. Both of these issues were submitted to the jury, and we approve the verdict thereon in appellee's favor. It is our interpretation of the article of the statute referred to that the Legislature intended that it should apply to a case of this kind, in which the initial carrier undertook to have the goods transported at a given rate of freight from origin to destination in a car furnished by it for that purpose, and in which the bill of lading contained provisions for the benefit, not only of the initial carrier, but also of the connecting carrier. It is true the bill of lading in terms binds the initial carrier only to carry the goods to Cisco, and there deliver the car to the connecting line, and limits liability to its own line, but it goes further than this, and uses language and makes stipulations which would be meaningless if it had only contracted for a local shipment to Cisco with delivery to the next carrier. For instance, in the first paragraph of the terms and conditions of the bill of lading, this language is used, some of which we italicize, and similar provisions are found in three or four subsequent paragraphs, to wit: "The liability of the Texas & Pacific Railway Company in respect to said property and *under this contract* is limited to its own line of railway, and will cease and *its part of this contract* be fully performed upon delivery to its next connecting carrier, of the articles mentioned herein and receipted for hereby; and in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for before its arrival and delivery at its *final destination* whereby any legal liability is incurred by *any carrier, that carrier alone* shall be held liable therefor in whose actual custody the property shall be at the time of such damage, detriment or loss." Our interpretation of the bill of lading is, read in the light of the attendant circumstances, that it was a contract for through carriage which undertook to limit the liability of each carrier to damage occurring on its own line, and that it was just such contracts as this that the Legislature

had in mind in the adoption of article 331a. It had been repeatedly held by the court of final civil jurisdiction in this state that contracts for through carriage with limited liability might be made, and the Legislature undertook by the adoption of articles 331a and 331b to protect the shipper against the inconvenience of this rule, and at the same time to protect the interests of the carriers by providing a method of adjusting the liability between themselves in the same suit. That there were circumstances in this case tending to prove a contract for through carriage as the law stood prior to the adoption of this statute, see *Hutchinson on Carriers* (2d Ed.) § 152; *Railway v. Tisdale*, 74 Tex. 16, 11 S. W. 900, 4 L. R. A. 545. The circumstances also tended to prove acquiescence on the part of the connecting carrier in the contract made in its behalf by the initial carrier, as indicated above. No new contract was made at Cisco, but the car as loaded by the initial carrier was forwarded at the through freight rate as fixed by it. True, as urged by appellants, the local agent of the connecting carrier at Cisco seems to have been ignorant of the nature and terms of the shipping contract made at Terrell, but it would seem to be a fair inference that the managing officers of the two companies must have had an understanding with reference to such matters.

In the brief of the Texas & Pacific Railway Company numerous complaints are made of the rulings of the court affecting the measure of damages, too numerous, indeed, to admit of discussion in detail, but we have nevertheless considered them all, only to find no merit in any of them. The evidence admitted over objection was that of experts who were well acquainted with the goods in question and the markets in the several towns in that section of the state where Moran is situated, and was to the effect that the value of a stock of goods like the one shipped from Terrell to Moran was fixed by the original cost price plus the expense of carriage, and that, except as it might be varied by the difference in the freight rate to the different points, such property had a uniform value in that section of the state. The witnesses called it market value, and properly so, we think, since a stock of dry goods and groceries such as are sold in every town in Texas can hardly be said to be of that class of property that has no market value. But, whether you call it value or market value, we know of no better way of ascertaining the real loss than was adopted in this instance. Indeed, if there was any difference in the testimony offered between value and market value, it has not been suggested in the brief, and the examination we have made of the record falls to disclose it. We are of opinion that, not only was the evidence offered competent and sufficient to establish with adequate certainty the extent of the loss, but also that the objections to the charge submitting this issue to

the jury should not avail the appellants, since, if as claimed, the charge was confusing and misleading, this was to the detriment of appellee rather than to the appellants, who had all to gain and nothing to lose by the manner in which the issue was submitted to the jury; the evidence being practically undisputed and tending to but one conclusion.

It only remains to dispose of the issue of estoppel, which presents a question of some difficulty; but we have finally concluded that there was nothing in this defense. Appellee had gone to considerable trouble and expense in loading his goods into the car tendered him by the railway company, and therefore very naturally preferred to have the roof of the car repaired rather than to have the goods transferred to another car, and this course, admittedly, was finally adopted by the division superintendent of the railway company. After thus undertaking to carry the goods in a car repaired and treated by it as sufficient for that purpose, the railway company as a common carrier cannot escape its responsibility as an insurer of the goods because of the previous conduct of the appellee in objecting, however persistently, to the substitution of a new car as proposed by it. It may be that it should have insisted on its right to transfer the goods to a better car, and that appellee was altogether in the wrong in preventing that course, but the railway company had the right to undertake the transportation in a repaired car, and, when it did undertake it, it was in the capacity of a common carrier, and hence insurer of the goods. It matters not, therefore, that the person selected to repair the car failed to make its roof waterproof. As to the duty of the railway company to furnish suitable cars, see *Railway Co. v. Marshall*, 74 Ark. 597, 86 S. W. 803; *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827.

The judgment is therefore affirmed.

#### FERGUSON v. STRINGFELLOW & HUME et al.\*

(Court of Civil Appeals of Texas. Nov. 9, 1907. Rehearing Denied Dec. 14, 1907.)

##### 1. PARTITION — PARTIES DEFENDANT — PURCHASE OF INTEREST.

Generally a partition among co-tenants must embrace the entire estate, and, where it consists of several tracts, it is unnecessary that there be assigned to each co-tenant a share in each parcel, and a purchaser from one co-tenant of a specific part of the common property is a necessary party to a partition suit between the original co-tenants; and, where a co-tenant in four lots conveys one of them to a third person, such person is a proper defendant in a suit by the other co-tenant to specifically perform a contract between the original co-tenants for partition, and, in the alternative, for a partition.

##### 2. SAME.

A co-tenant in several lots who has not assented to a sale of one of them by the other co-tenant is not bound to seek a partition of that lot only with the purchaser, but may join him and the other co-tenant in a suit to partition all of the lots.

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by W. B. Ferguson against Stringfellow & Hume and J. J. Dillard. From a judgment dismissing the case as to defendant Dillard, plaintiff appeals. Reversed and rendered.

H. C. Ferguson, for appellant. H. H. Cooper and J. J. Dillard, for appellees.

SPEER, J. W. B. Ferguson, as owner of an undivided one-half interest in four certain lots in the town of Lubbock, sued R. L. Stringfellow and E. E. Hume for specific performance of a contract for partition, and also in the alternative for a partition, making J. J. Dillard a party defendant, and alleging that said Stringfellow & Hume had owned the other undivided one-half interest in said lots, and had previously conveyed, or attempted to convey, all of one of the lots to said Dillard, who had gone into possession and made valuable improvements. The plaintiff prayed that in the partition between himself and Stringfellow & Hume the Dillard lot be set over to the defendants, and charged to their interest in the common estate. The defendants Stringfellow & Hume answered by general and special demurrers, general denial, and by special plea. The defendant Dillard answered, setting up his purchase from Stringfellow & Hume, and adopting the prayer of plaintiff. The court sustained a special demurrer interposed by Stringfellow & Hume, and dismissed from the case the defendant Dillard, and refused to consider in the partition the Dillard lot. There was judgment for partition between plaintiff and defendants Stringfellow & Hume of the three remaining lots. The plaintiff has appealed.

It is the general rule, not without exception, however, that a partition amongst co-tenants must embrace the entire common estate, and not parcel by parcel, and, where the estate in common consists of several tracts, it is not necessary that there should be assigned to each co-tenant a share in each parcel. *Hagar v. Wiswall*, 10 Pick. (Mass.) 152. So that, if Stringfellow & Hume had not conveyed one of the lots out of the common estate to another, there could be no question but that the suit for partition of the entire common estate was properly brought. Now, it is equally well settled that a purchaser from one of the co-tenants of a specific part of the common property is not only a proper, but a necessary, party to a suit for partition between the original co-tenants. *Maverick v. Burney*, 88 Tex. 560, 32 S. W. 512. It would follow that appellant's suit was properly brought for the partition of the four lots, whether upon the agreement to partition or not, and that the defendant Dillard was properly joined. The effect of the court's judgment in dismissing from the partition the lot held by Dillard might work a great injustice, in that it would allow appellees Stringfellow & Hume the full bene-

\*Writ of error denied by Supreme Court Jan. 15, 1908.

fit of the value of that lot wrongfully sold by them out of the common estate, and perhaps deny to the purchaser the protection to which he might equitably be entitled on a partition by having the lot set over to his grantor, and thus perfecting his title by estoppel. Whether in a partition the Dillard lot would be set over to Stringfellow & Hume appellee Dillard could not, of course, know, but he was at least entitled to the chance that it would be done. Again, the plaintiff, never having assented to the Stringfellow & Hume sale, cannot be required to seek a partition of that lot only with the purchaser. *Barnes v. Lynch*, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470.

The agreement for partition relied upon by appellant appears to have been embraced in the written correspondence between himself and appellees Stringfellow & Hume, and provided that the Dillard lot should be charged to the interest of Stringfellow & Hume. These appellees pleaded in defense of the agreement that they were induced to enter into same by the false and fraudulent representations of appellant that such a partition would be a fair division of the property, but that in truth they afterward discovered that the division was unfair, and that the lots set over to them were of much less value than those set apart to appellant, and, further, that by such partition they were perfecting the title to the Dillard lot when they had "no right, title, or interest in and to" the same. The evidence, however, wholly fails to support such plea. In truth there is no evidence whatever tending to support it. Appellee Stringfellow testified that he learned the day after accepting appellant's proposition that the Dillard lot had been conveyed more than five years, and, that, having consulted his lawyer, he was told he would not have to account for this lot in the partition, and he therefore withdrew all propositions and agreements of settlement. The only evidence of values showed that the division was a fair one.

We therefore reverse the judgment of the district court, and here render judgment according to the terms of the agreement between appellant and appellees Stringfellow & Hume that the common estate be partitioned and divided as follows: That is, that lot 6, in block 104, and lot 9, in block 120, be set aside to appellees Stringfellow & Hume, and that lot 14, in block 119, and lot 12, in block 104, be set apart to appellant, and that appellee Dillard be quieted in his title and possession of lot 6, in block 104.

Reversed and rendered.

#### RUDOLPH v. SNYDER.

(Court of Civil Appeals of Texas. Nov. 9, 1907. Rehearing Denied Dec. 14, 1907.)

#### 1. SEQUESTRATION—COSTS—RECOVERY.

Under Rev. St. 1895, art. 4871, providing that an officer retaining sequestered property

shall receive compensation and reasonable charges therefor to be taxed and collected as other costs, if defendant was entitled to recover money paid a sheriff to regain possession of sequestered property, he should have the item taxed as costs, and could not have his right thereto determined by the jury.

#### 2. SAME.

Where plaintiff's right to the possession of cattle sequestered was not disputed, and no evidence was offered traversing the affidavit for the writ, he was entitled to the costs of the proceedings.

#### 3. SAME—COSTS—RIGHT TO.

Under Rev. St. 1895, art. 1425, providing that the successful party to a suit shall recover all costs, except where otherwise provided, where, in a suit to recover cattle, plaintiff sequestered them and some stock food, and defendant recovered \$48, the value of the food, and plaintiff recovered the cattle, defendant may not complain because all costs incurred to a certain time were adjudged against him.

#### 4. APPEAL—RECORD—SUFFICIENCY—COSTS.

On appeal from a judgment dividing the costs, the complaining party should show what items were taxed against him.

Appeal from District Court, Sherman County; Ira Webster, Judge.

Action by T. W. Snyder against C. F. Rudolph. From the judgment, defendant appeals. Affirmed.

S. G. Tankersley, R. E. Carswell, and Tra-bue Carswell, for appellant. Madden & True-love, for appellee.

CONNER, C. J. This suit was instituted by appellee on April 2, 1903, to recover from appellant certain cattle. On the same day appellee sued out a writ of sequestration, by virtue of which the sheriff seized the cattle and some oil cake claimed by appellant. Some 10 days thereafter appellant replevied both cattle and oil cake, being required, however, to pay to the sheriff \$297, cost of keeping the cattle while in the sheriff's possession. The trial resulted in a judgment for appellant for \$48, the value of 32 sacks of cotton seed cake, and for appellee quieting "his claim and right of possession" to the cattle sued for. It appears that subsequent to appellant's replevy the cattle were again sequestered at the suit of one Sneed, a vendee of appellee under whom appellee had claimed at the institution of this suit, and that in a suit between appellant and Sneed the latter retained the cattle, but was adjudged to pay appellant certain damages for wrongfully dispossessing him of said cattle. The court below hence seems to have assumed on the trial of this case that the right of possession was no longer in issue, or if so, that it conclusively appeared from the evidence that appellee had rightfully brought suit for the cattle. At all events, the only issue submitted to the jury is to be found in the following charge: "Gentlemen of the jury, first I charge you with the law of this case as follows, to wit: If you find and believe from the evidence in the case that the defendant was the owner and had possession of certain cotton seed oil cake, and that the same was taken from him without his consent by

plaintiff, T. W. Snyder, or by the sheriff as his deputy, by virtue of a writ of sequestration sued out by the plaintiff, T. W. Snyder, then you will find for the defendant, C. F. Rudolph, and assess his damages at such sum as you believe from the evidence was the value of such cotton seed oil cake at the time it was so taken, if it was taken, not to exceed \$1.50 per sack." The court also refused the following special instruction requested by appellant, viz.: "You are instructed that if you find from the evidence that defendant was holding the cattle in controversy by virtue of the contract read to you in evidence, and that, while he was so holding them, they were taken from him without his consent by the sheriff of Sherman county by virtue of the writ read to you, and while said sheriff was so holding them the defendant was compelled to pay to said sheriff the sum of \$297 in order to regain the possession of the same, and that he did so pay said sheriff such sum, then you will find for defendant such amount as damages."

Appellant complains of the refusal of the special charge, and also of the court's charge on the ground that it failed to submit the issue of whether the writ of sequestration had been wrongfully issued; the contention being "that the evidence shows conclusively that appellant was wrongfully deprived of the possession of the cattle by the levy of the writ, and that, having to pay the \$297 to recover his possession, he was entitled to recover that amount in this suit as damages." Complaint is not made of any other injurious result of the court's action, and it seems clear to us that the item of \$297 paid to the sheriff had no place among the issues proper to be submitted to the jury. Rev. St. 1895, art. 4871, expressly provides that "the officer retaining custody of property by virtue of a writ of sequestration shall be entitled to receive a just compensation and all reasonable charges therefor, to be determined by the judge or justice from whose court the writ issued, to be taxed in the bill of costs against the party cast in the suit, and collected in the same manner as the other costs in the case." If, therefore, appellant was entitled to the item of \$297 at all, it was merely as part of the costs of the suit, and he should have asked the court to so tax it, which he does not appear to have done. Besides, as stated, appellant has not otherwise complained of the judgment, to the effect that appellee was the owner and entitled to the possession of the cattle at the time of the institution of the suit, nor did he offer any evidence traversing the allegations of the affidavit for the writ of sequestration in other particulars, so that it seems necessarily to follow that appellee on the motion to retax the costs would be entitled to the costs of the sequestration.

What we have said in part applies to the only remaining assignment, which is that "the court erred in rendering judgment against defendant for any costs incurred in this suit."

The statute provides that "the successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law." See Rev. St. 1895, art. 1425. Appellee having recovered in part, as we have seen, we cannot say that the court erred in adjudging, as he did, that appellant "pay all costs incurred in this suit up to and including the October term of this court, 1905, and that said T. W. Snyder pay all costs incurred herein since the said October term, 1905." Appellant, indeed, in his statement under this assignment has failed to point out what items of cost, if any, were taxed against him by virtue of the judgment quoted, and we hardly see how, in the absence of some such showing, we could, in any event, say that material injury in this respect has been done appellant.

We conclude that the judgment should be affirmed; and it is so ordered.

**TEXAS & P. RY. CO. et al. v. TUCKER.\***  
(Court of Civil Appeals of Texas. Nov. 2, 1907. On Rehearing, Jan. 11, 1908.)

**1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—MISLEADING INSTRUCTION.**

Though in a personal injury action the burden is upon defendant to establish a plea of contributory negligence, an instruction that unless defendants "have shown by preponderance of the testimony" that plaintiff was guilty of contributory negligence, etc., is objectionable as leading the jury to consider only defendant's testimony.

On Rehearing.

**2. RAILROADS—CROSSING ACCIDENT—QUESTION FOR JURY.**

In an action against a railway company for the death of one struck by a train at a public crossing, *held*, under the evidence, a question for the jury whether the engineer was negligent in failing to blow the whistle, and thus warn decedent of his danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1161-1164.]

**3. DEATH—PERSONS LIABLE.**

Under Sayles' Ann. Civ. St. 1897, art. 3017, giving a right of action against those causing injuries resulting in death, a locomotive engineer may be sued for negligently causing the death of one crossing the track in front of his train.

**4. REMOVAL OF CAUSE—JOINDER OF RESIDENT IN APPLICATION—EFFECT.**

Where a cause of action is stated against two defendants, that one who is not entitled to removal joins the nonresident defendant's application does not require a removal.

**5. RAILROAD CROSSING—ACCIDENT—QUESTION FOR JURY.**

In an action against a railway company for the death of one struck by a train while crossing a track, *held*, under the evidence, a question for the jury whether the company's failure to erect a signboard at the crossing caused the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1156, 1190.]

**6. APPEAL—SUBMISSION OF ISSUES—ESTOPPEL TO ALLEGE ERROR.**

A party may not complain because the court submits a certain issue where he has re-

\*Writ of error denied by Supreme Court.

quested the submission of such issue in a charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3604.]

7. RAILROADS—CROSSING ACCIDENT—SPEED — LIABILITY.

While ordinarily the operatives of railway trains need not reduce their speed in approaching public crossings, yet the circumstances may be such that they should; and where, in an action for a collision at a crossing, it appeared no bell was rung, no signboard was erected, and the engine was equipped with an insufficient headlight, it was proper to authorize recovery for plaintiff, if the jury found that the train approached the crossing at a negligently high rate of speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1006-1012.]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by W. H. Tucker, guardian, against the Texas & Pacific Railway Company and another for negligent death. From a judgment for plaintiff, defendants appeal. Affirmed.

Wagstaff & Davidson, for appellants. A. S. Hawkins, Hardwicke & Hardwicke, and Theodore Mack, for appellee.

SPEER, J. J. E. Tucker, father of the minors Roxie Annie Tucker and Fred Dickson Tucker, was run over and killed by a passenger train of the Texas & Pacific Railway Company at Elmdale Crossing in Taylor county, and W. H. Tucker, as guardian of such minor children, instituted this suit against the railway company and Jim Ellis, the engineer operating the train which killed deceased, and recovered damages for his wards in the sum of \$10,150, against both defendants, from which they have appealed.

We rule against appellants on all their assignments save the thirteenth, which is to the effect that the court erred in submitting to the jury the issue of discovered peril, in that there was no evidence on which to base such an instruction, and this we sustain. J. E. Tucker, together with a son 11 years of age, was driving in a wagon along the public highway from Baird to Abilene, and both were killed while crossing appellant Texas & Pacific Railway Company's track at the public crossing at a little station known as "Elmdale." The wagon in which the deceased was driving was drawn by two horses, on either side of which he was leading another horse, and trailing a buggy behind the wagon. The accident occurred at 6:40 p. m. on a cold January evening, when the wind was blowing from the north, and the direction traveled by deceased across appellant's railroad was from the north to the south. The train was running at least 25 or 30 miles an hour and perhaps faster, going downgrade, and no one witnessed the accident save the engineer, the appellant Jim Ellis, upon whose testimony alone the issue of discovered peril was submitted to the jury. The substance of Ellis' testimony is that, as his train approached the Elmdale crossing at about the speed mentioned, he

was occupied on the south side of the cab looking out for persons who might be on that side to flag the train, the station being a flag station only, until, as he says, he "straightened up," and looked ahead on the north side, when he discovered the wagon of deceased just coming on to the crossing only 130 feet ahead of his engine. The deceased appeared to be sitting in the front of the wagon wholly unconscious of the approaching train, while the little boy appeared to be trying to extricate himself from some bed clothing which he had about him. The deceased also had his head covered up with a blanket or other covering of some kind, and made no effort to stop or hasten his team, indicating that he never discovered the approach of the train. Upon discovering the wagon so near upon the crossing, the engineer immediately seized the sand lever, and applied the emergency brakes, stopping the train as quickly as it could be done, which proved to be some 800 or 900 feet. He testified that there was nothing he could have done towards stopping the train, after discovering deceased, that he did not do. On looking up the second time after applying the emergency brakes, deceased had already passed beyond his line of vision on to the track ahead of the train, and was almost instantly killed. Witness did not blow the whistle after he discovered deceased approaching the crossing, and his failure in this respect is made the predicate for appellee's insistence that the issue of discovered peril was properly raised by the evidence, but we have concluded otherwise. A simple calculation will show that if appellant Ellis' testimony is correct, and it is upon this appellee relies, it was only about three seconds, perhaps less, after he discovered deceased's peril until the collision resulting in his death. In the very nature of things the engineer could not under such circumstances in so short a time experiment as to the best means to adopt to avert an accident, and we think it would be an unreasonable and an unwarranted conclusion to say that he ought to have done more than he did do; that is, employ all the means at his hand to stop his train or slacken its speed. His first duty was to his passengers, and, if his judgment was that their safety lay in checking his train, as he testified, it was his duty to do this, and the evidence indicates that to do this would occupy and did occupy all of the time intervening between the discovery of deceased and the fatal accident. We think from the evidence no other reasonable conclusion could be drawn than that everything was done that could be done to avoid killing deceased after discovering his perilous position, and that the court erred in submitting the issue of discovered peril as a ground of liability against appellants.

While under the evidence there was no error in placing the burden of proof upon appellants to establish their plea of contributory negligence, yet the language, "and, unless they have shown by a preponderance of



the testimony that J. E. Tucker was guilty of contributory negligence," to find for plaintiff upon that issue, might possibly tend to mislead the jury into looking alone to the evidence adduced by the defendants in determining such issue, and the same should be reworded or entirely eliminated on another trial.

Reversed and remanded.

#### On Rehearing.

A reconsideration of the case convinces us that we were in error in holding, as we originally did, that the evidence did not justify the submission to the jury of the issue of discovered peril. We are now of opinion that it was for the jury to say whether or not the failure of appellant Ellis to blow the whistle, and thus warn the deceased of the impending peril, was not such act of negligence as would authorize a recovery upon this issue. *Sanches v. Railway*, 88 Tex. 117, 30 S. W. 431. Having concluded to affirm the judgment, it is perhaps proper for us to express more fully our conclusions on appellants' various assignments of error.

The first assignment complains that the trial court erred in not sustaining appellants' petition for removal of the cause to the Circuit Court of the United States for the Northern District of Texas. The insistence is that since the cause of action is inseparable, and since the appellant the Texas & Pacific Railway Company on account of being incorporated under the laws of the United States has a right to the removal, and since appellant Ellis joined in the application for removal, the court should have granted such application. It is also insisted that appellee's petition shows no cause of action against appellant Ellis under the holding of our Supreme Court in *Eastin & Knox v. Tex. & Pac. Ry. Co.*, 92 S. W. 838, 102 S. W. 105, in that the acts for which he is sought to be held are those of omission merely, and not affirmative or overt acts. We are of opinion, however, that the authority cited has no application to the present case, since the action against appellant Ellis may be properly maintained under article 3017, *Sayles' Ann. Civ. St.* 1897, giving a right of action for injuries resulting in death. This being true, and appellant Ellis not being entitled himself to remove the cause, the fact that he joined in appellant Texas & Pacific Railway Company's application would not require the court to make such an order. *T. & P. Ry. Co. v. Huber* (Tex. Sup.) 92 S. W. 832.

That portion of the general charge which submitted the issue of negligence of appellant Texas & Pacific Railway Company in failing to erect a sign at the crossing where deceased was killed was authorized under the facts, since it cannot be said that the absence of such signboard did not cause the accident. While the evidence tended to show that the night was dark and would have au-

thorized a finding that deceased could not have seen the signboard if there had been one, yet the evidence in this respect is not conclusive, and it was a question for the jury to determine whether or not the failure to erect a signboard under all the circumstances caused the deplorable accident.

Appellants cannot complain that the court submitted to the jury to find whether or not the whistle was blown at least 80 rods from the crossing, since they requested the submission of such issue in a special charge which was given.

The tenth assignment is overruled because the charge therein complained of does not make the failure to have a "sufficient headlight" as appellant's train approached the crossing negligence per se, but specifically submits to the jury the question of whether or not such failure would be negligence.

Neither was there error in authorizing a finding for appellee if the train approached the crossing at a negligent rate of speed. While ordinarily the operatives of a railway train are not required to slacken its speed in approaching public crossings, yet the circumstances may be such as that they ought to do so. In the present case, considering the allegations and proof tending to support them—that no bell was being rung, no signboard was erected, and the engine equipped with an insufficient headlight—the jury might properly have concluded that the train was being operated at a dangerous and negligent rate of speed. We find as a fact that the evidence authorized all the charges given, that the defense of contributory negligence was properly submitted, and that the verdict finds support in the testimony.

What we have said disposes of all assignments of error.

The rehearing is therefore granted, and the judgment affirmed.

#### SOUTHERN PAC. CO. v. DUSABLON.

(Court of Civil Appeals of Texas. Dec. 11, 1907. Rehearing Denied Jan. 15, 1908.)

#### COURTS—JURISDICTION—ACTIONS UNDER LAWS OF OTHER STATE.

Where, at the time a person received injuries in the territory of New Mexico, he was a resident citizen thereof, as well as at the time when he brought an action therefor in Texas, the courts of Texas had no jurisdiction under the New Mexico statute (Laws 1903, p. 51, c. 33), requiring that all actions for injuries occurring in that territory shall be maintained in the courts thereof alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 18.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Arthur C. Dusablon against the Southern Pacific Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and dismissed.

Beall & Kemp, for appellant. Patterson & Wallace, for appellee.

NEILL, J. This suit was brought by the appellee against appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of the company on the 26th of April, 1906, at Lordsburg, N. M. In our view of the case it is unnecessary to state the grounds of negligence averred, nor the specific injuries sustained. The appellant answered by a plea of privilege, claiming the right to be sued in Harris county, Tex. Also by special demurrer, raising the question of jurisdiction, which being overruled, it filed a special plea to the jurisdiction of the court, predicated such plea upon the statute set out in our conclusions of law, and upon the fact that appellee was a resident citizen of New Mexico at the time of his alleged injuries and when this suit was brought. This plea being overruled, appellant pleaded certain defenses in bar, which, in view of the disposition we shall make of the case, are not necessary to further mention. The trial of the case resulted in a verdict and judgment for the appellee.

#### Conclusions of Fact.

As we shall reverse the judgment and dismiss the suit upon the ground that the court erred in not sustaining appellant's plea and demurrer to the jurisdiction, these conclusions will be confined to such facts as pertain to that plea. It was averred and proved that, when plaintiff received the personal injuries upon which he bases his action, he was a resident citizen of the territory of New Mexico; that his injuries were sustained in that territory; that at the time he was injured, and when the suit was brought, defendant was a foreign corporation, having been incorporated under the laws of the state of Kentucky, operating a railroad in the territory of New Mexico, where it maintained an office and had agents through whom service could be had on the company under the laws of said territory; that the statute set out in our conclusions of law was passed by the Legislature of New Mexico, and was in full force and effect at and from the time the injuries complained of were inflicted and the suit instituted until it was tried.

#### Conclusions of Law.

Appellant's first and second assignments of error, which involve substantially the same question, and will be considered together, are as follows:

"The trial court erred in not sustaining defendant's special demurrer questioning the court's jurisdiction, which special demurrer is, in substance, as follows: The defendant, excepting to and protesting against the action and order of the court in overruling its plea of privilege, appears for the single and special purpose of objecting to the jurisdiction of this court, and for that purpose specially excepts to the plaintiff's petition and says: That it appears therefrom that the plaintiff's cause of action, if any he has,

did not arise in the state of Texas, but arose and accrued at Lordsburg, in the territory of New Mexico, at which time, and the time of the filing of his petition, it appears therefrom that the plaintiff was a resident citizen of said town of Lordsburg and territory of New Mexico, and the defendant a foreign corporation, nonresident of Texas, and an inhabitant of another state. Wherefore this court ought not to take jurisdiction of this cause, and of this the defendant prays the judgment of the court.

"The trial court erred in overruling the defendant's plea to the jurisdiction based on the laws and act of New Mexico set up in said plea, for the reason that plaintiff had not filed his suit in New Mexico, as required by said laws and act as a condition precedent to his right to a recovery, and because said laws and act expressly repudiated the right of the courts of Texas to take jurisdiction of plaintiff's cause of action, which arose in New Mexico, and on no principle of comity should this court have entertained jurisdiction. On the contrary, inasmuch as the said act of New Mexico, set up in defendant's plea, expressly repudiated the right of Texas courts to take jurisdiction of actions of this sort arising in said territory, this court ought not to take jurisdiction of this suit."

It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it whenever the wrongdoer may be found. To this there are a few exceptions, in which actions are said to be local, and must therefore be brought within the country where they arose. As applied to torts, these exceptions may be said to consist of: (1) Those where the *lex loci delicti* is in direct contravention of the law or policy of the forum; (2) where the remedy prescribed for the tort by the *lex loci delicti* is penal in its character; and (3) statutory torts, where the statute, in creating the liability, at the same time, creates a mode of redress peculiar to that state, by which alone the wrong is to be remedied. To these exceptions, however, there are certain limitations and qualifications not necessary to mention here. It is obvious that the second exception has no application to this case. But it was earnestly contended by counsel for appellant in brief and oral argument that the first has; and among other cases they cite *Mex. N. Ry. Co. v. Jackson*, 89 Tex. 113, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28, in support of the contention. Before showing the distinction between that case and the one at bar, we deem it not improper to observe that the policy of a state or nation must be determined by its Constitution, laws, and judicial decisions, not by the varying opinions of lawyers or judges as to the demands or interest of the public. As has been well said: "Anything more indistinct and incapable of certainty or uniformity than the requirement of 'public policy' can hardly be imagined.

This principle is now invoked with increasing frequency, and sometimes, at least, seems to be made use of as authority for deciding in whatever way the court thinks would, on the whole, be most useful. It need not be said that such use of such principle must diminish greatly the certainty and uniformity of the law." 2 Parsons on Contracts (9th Ed.) 265. It is because things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are, in his or their view, contrary to public policy. *Janson v. Driefontein Con. Mines* (1902) A. C. 484, 491. In that case, the Earl of Halsbury said: "I do not think that the phrase 'public policy' is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. \* \* \* I deny that any court can invent a new head of public policy."

Ever since the adoption by this state of the common law as the rule of decision a wrongful injury to the person of another has been actionable in its courts, and redress given the injured party, regardless of where the injury was inflicted, if such personal injury (not resulting in death) was actionable in the country where such wrong was done. It may be safely said, in view of our laws and judicial decisions, that it has never been the policy of the state of Texas to furnish a city of refuge or make itself an Alsatia for those who have wrongfully inflicted injuries upon others. But its policy has always been, without counting the costs, if the wrongdoer could be found within its borders to open the doors of its courts to the injured party, though an alien, and mete out the same even-handed justice to parties to the suit that she would had they both been its own citizens and the injury inflicted within its borders. Nor has Texas ever said to any of its citizens: "You shall not go into courts of any other jurisdiction, where your aggressor may be found, than my own to redress your grievance." Throughout its history, this state has strictly adhered to the principle of the common law which declares that: "If an injury be done to the person of another, the liability therefor is deemed personal to the perpetrator of the wrong, following him wheresoever he may go, so that compensation may be exacted from him in any proper tribunal which may obtain jurisdiction of the defendant's person, if the right to sue is not confined to the place where the cause of action arises." The case of *Mex. Nat. Ry. Co. v. Jackson*, though contrary to the weight of authority (*Wharton, Conflict of Laws* [3d Ed.] § 480b, p. 1123), is not in antagonism with this principle, but is only a misapplication arising from a misconception of it, producing the anomaly of closing the courts of this state to actions for personal injuries inflicted in the Republic of Mexico, while the federal courts within its boundaries stand open to redress such wrongs. Every v.

*Mex. Ct. R. Co.*, 52 U. S. App. 118, 81 Fed. 294, 28 C. C. A. 407. The *Jackson Case* was decided upon the ground that the remedy given by the law of Mexico for such an injury is so essentially different from that given by our law that it cannot be enforced by the courts of Texas. Something is said, arguendo, in the opinion as to public policy of Mexico, a matter about which the courts of this state are not concerned, and is never considered in determining the public policy of the forum. It is the public policy of its own country that a court must look to and be governed by in deciding whether it will entertain jurisdiction of a cause of action arising elsewhere, and not to the policy of a foreign country, about which they know and care nothing. In view of what has always been the pronouncement of our courts on cases of this character, we do not think it was the intention of the Supreme Court to hold that jurisdiction should be denied because they would be "charge upon our people" in making settlement of rights originating outside the state, under the laws of a different government. See *Mexican Cent. Ry. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282. But, however this may be, the territory of New Mexico does not occupy the attitude towards Texas of strictly a foreign country. Among the privileges guaranteed by article 4, § 3, of the Constitution of the United States to the citizens of each state, is the right to institute and maintain actions of every kind that is accorded its own citizens. *Corfield v. Corryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3230. Under the third section of article 4 of the Constitution it has been held that a "citizen of a sister state may sue a defendant resident of his home state in any state where he can get service on him, even though the cause of action arose in his home state, provided it be transitory." *Eingartner v. Ill. Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859; *Cofrode v. Gartner*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. While it may be that this privilege is not extended to citizens of territories, and may be claimed only by citizens of sister states, yet a territory like New Mexico, waiting to be panoplied with statehood, is a child of the federal government to whom comity, at least, should, in its infancy, be extended by one of the United States. We therefore conclude that this case does not fall within the first exception stated to the general rule that, for the purpose of redress, it is immaterial where the wrong is committed.

Does it fall within the third exception? This question depends upon (1) whether plaintiff's action is founded upon a statutory tort, and (2), if it is, whether the statute, in creating the liability, at the same time create a mode of redress peculiar to the territory of New Mexico. The act of the Legislature (Laws 1903, p. 51, c. 33) upon which the appellant bases its contention that

this action is for purely a statutory tort is as follows:

"Whereas it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory, and in derogation of the dignity of the courts thereof; therefore be it enacted by the Legislative Assembly of the territory of New Mexico:

"Section 1. Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted, or death caused by such person or corporation in this territory, unless the person claiming damages therefor, shall, within ninety days after such injury shall have been inflicted, make and serve upon the person or corporation against whom the same is claimed and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this territory who is authorized to administer oaths, in which the affiant shall state his name and address, the name of the person receiving such injuries, in so far as the same may be known to affiant, the way or manner in which said injuries were caused in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such times be known to affiant, and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur in the district court of this territory in and for the county in which such injuries occur, or in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of defendant filed in the case or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries except as herein otherwise provided."

"Sec. 3. It shall be unlawful for any person to institute, carry on or maintain any suit for the recovery of any such damages in any other state or territory."

It clearly appears from this act that the Legislature intended to make any right of action against any person or corporation for personal injuries or death inflicted in New Mexico depend upon the person claiming dam-

ages bringing and prosecuting his suit therefor in a district court of the territory, after performing certain acts made conditions precedent to his cause of action. In other words, its obvious purpose was to relieve the perpetrator of the wrong from any civil liability therefor, unless the party damaged, after complying with certain conditions prescribed, instituted his suit within one year after the injuries occurred in the district court of the territory where they were inflicted, or in the county where both parties reside, or, if against a corporation, in the county of the territory where such corporation has its principal place of business. It will, however, be observed that the statute does not create or originate the cause of action, but seems to recognize the fact that civil liability theretofore existed at common law, as well as by statute, for personal injuries inflicted or death caused by persons or corporations in New Mexico. This differentiates this case from *Ross v. Kansas City Ry. Co.*, 34 Tex. Civ. App. 588, 79 S. W. 626, and others which hold that, where a cause of action is created by and has its origin in a statute which imposes conditions or limitations upon the right as prerequisites to its exercise, this is a right of action existing at common law, which has not, as in the case of *Coyne v. Southern Pacific Co.* (O. C.) 155 Fed. 683, been wholly superseded by the statute, upon which conditions are sought to be imposed by statute limiting its enforcement. As was said by this court in *Atchison, T. & S. F. Ry. Co. v. Sowers*, 99 S. W. 190, a case where the same statute was considered, and precisely like this one, except the plaintiff was a citizen of the territory of Arizona: "The section of the law under consideration \* \* \* attempts not only to prohibit its citizens, but all parties, who are so unfortunate as to be injured within its territorial limits, from exercising the right, accorded in England, the states of the American Union, and other civilized countries, of instituting such actions, wherever the guilty party may have his or its domicile." The judgment in favor of plaintiff in that case was affirmed, and an application by the defendant for a writ of error was denied by the Supreme Court. This is, in so far as it can be decided by the courts of state, a judicial determination that this action is not a statutory one, in the sense that it can only be prosecuted and maintained in the state where the injury was inflicted, unless the injured party be a citizen of that state. But, inasmuch as the plaintiff in this case was at the time his cause of action accrued, and when this suit was brought, a resident citizen of the territory of New Mexico, the further question is presented: Can this action, in view of the statute under consideration, be maintained by him in any jurisdiction except that territory? It cannot be said that a citizen is not to be governed and bound by the laws of his own country; nor can he, in disregard of

such laws, go into the courts of another country and ask them as a matter of comity to redress wrongs which the laws of his domicile require him to seek redress in the courts of his own country. The very principle upon which comity between foreign or sister states is based repels the idea that he has even the shadow of a claim to any such right. As we said in the Sowers Case: "The right of injured parties to recover damages from the negligent inflictor of the injuries is recognized in New Mexico, although the recognition carries with it burdensome and vexatious conditions, of which, however, if its citizenship is willing to endure them, no one is in a position to complain." The honor one enjoys in being a resident of a territory whose Legislature has such an exalted idea of the "dignity" of its courts, and tender consideration for its "business interests," manifested by the statute in question, must be taken cum onere. We therefore conclude that the district court was without jurisdiction of this case, and that it erred in not sustaining defendant's exception and plea to its jurisdiction.

If we are correct in this conclusion, the other assignments of error should not be considered. If, however, the Supreme Court should differ from us upon the jurisdictional question, we will then cheerfully perform the duty of considering all other questions raised by the assignments.

For reason of the errors indicated, the judgment of the district court is reversed, and the suit dismissed, without prejudice of plaintiff's right, if any he has, to institute and prosecute his action in any jurisdiction outside the state of Texas.

Reversed and dismissed.

#### CAIN et al. v. STATE ex rel. COUNTY ATTORNEY OF DALLAM COUNTY.

(Court of Civil Appeals of Texas. Nov. 16, 1907. Rehearing Denied Dec. 14, 1907.)

#### 1. INJUNCTION — GAMING — PETITION — COMPLAINT — SUFFICIENCY.

In a proceeding by the state under Act 29th Leg., April 19, 1905 (Laws 1905, p. 372, c. 153), authorizing an injunction to restrain the habitual use, actual, threatened, or contemplated of any premises, etc., for the purpose of gaming, a petition charging that defendants were habitually using, etc., certain premises, and setting forth the conviction of certain persons for gaming at the premises described on a day prior to the injunction suit, was not defective because, in alleging the convictions, the petition did not show the nature of the game, the allegations as to the conviction being merely in the nature of evidence.

#### 2. SAME.

Act 29th Leg., April 19, 1905 (Laws 1905, p. 372, c. 153), authorizes an injunction to restrain the use of any premises, place, building, or part thereof for gaming, or keeping or exhibiting games prohibited by law. Pen. Code 1895, art. 379, prohibits any game with cards in any public house, etc. Article 380 declares that all gaming houses are places at which it is unlawful to play the game of cards. In referring to games, gaming tables, etc., prohibited by

article 382, article 383 declares that it being intended by the foregoing article to include every species of gaming device known by the name of table or bank of every kind whatever, this provision shall include any and all games which in common language are said to be played, dealt, kept, or exhibited. Held that, in a proceeding by the state under the act of 1905, it was not necessary to describe the game sought to be inhibited, and to negative exceptions to the gaming statute relating to private residences.

#### 3. APPEAL — ASSIGNMENTS OF ERROR — SUFFICIENCY.

Where, on appeal, appellant assigned as error the act of the court in rendering judgment for plaintiff as contrary to the law and evidence, but neither the assignment nor the propositions thereunder specified the fact or facts in issue which the evidence was insufficient to prove, as required by the statute and rules, they could not be considered.

Appeal from District Court, Dallam County; Ira Webster, Judge.

Proceeding by the state, on the relation of the county attorney of Dallam county, against J. F. and William Cain. From a judgment for the state, defendants appeal. Affirmed.

R. Tatum, for appellants. C. D. Stepp, for appellee.

CONNER, C. J. This is an injunction proceeding, instituted in the name of the state on February 26, 1906, by the county attorney of Dallam county, under an act of the Twenty-Ninth Legislature approved April 19, 1905 (Laws 1905, p. 372, c. 153), authorizing the issuance of injunctions to restrain "the habitual use, actual, threatened or contemplated use of any premises, place, building, or part thereof, for the purpose of gaming or of keeping or exhibiting games prohibited by the laws of this state." The petition for injunction charged "that said defendants and each of them above mentioned are using, concerned in using, and are actually and habitually using, and are threatening and contemplating the use of, places, premises, and buildings in block No. 48, lots Nos. 9, 10, and 11, in the city of Dalhart, Dallam county, Tex., and a part thereof for the purposes of gaming and the keeping and exhibiting games prohibited by the laws of the state of Texas." The petition further sets forth the conviction of certain persons named for gaming at the premises described on July 19, 1905, and on September 4, 1905, and averred "that the said defendants, and each of them, are aiding and abetting the use of some other person, and are aiding and abetting each other in the use of the above-mentioned and described premises, places, and buildings, and a part thereof, for the purposes of gaming and of keeping and exhibiting of games prohibited by the laws of the state of Texas." Appellants answered by general and special exceptions and a verified denial of the charges so made against them. The court overruled the demurrers, and on final hearing rendered judgment perpetually enjoining appellants as prayed for by the state.

Appellants' principal complaint is at the action of the court in overruling their demurrers. It is insisted that the petition is insufficient, in that it alleges convictions for gaming long prior to the institution of the suit without showing the nature of the game. We do not regard the allegations referred to as essential to the sufficiency of the petition. The material allegations are those quoted by us above, and those now under consideration seem to be in the nature merely of evidence tending to support the material complaint. The antecedent convictions were but circumstances illustrative of the use appellants had been making of the premises, which, together with other evidence that was offered, was relevant to the issue of the threatened use charged; and while it may not be good pleading for the pleader to set forth his evidence, no such objection is here made, and we fail to see why we should hold the petition bad in its entirety because of such fault.

Again, it is urged that the petition should have described the games sought to be inhibited, and negatived exceptions to the gaming statute relating to private residences, the contention being that under article 379 of the Penal Code of Texas for 1895 it is no offense to play at a game of cards at a private residence occupied by a family. It is to be observed, however, that the evident purpose of the act of the Legislature as well as of the suit was to prevent the progress and continued commission of a specified class of crimes, and not to convict and punish for a single offense already committed, and, in the very nature of the case, we apprehend the same strictness of pleading and proof is not required in the first instance as in the last. An act already committed is susceptible of precise proof, and hence of averment. But it does not seem so easy to specify or describe an act merely threatened or in contemplation. It may be committed in any one or more of the many ways in which our gaming laws can be violated, and therefore the material fact charged in the petition under consideration—the "factum probandum"—is that the defendants are actually contemplating (threatening) to use the specified premises for the purpose of gaming and of keeping and exhibiting games prohibited by the laws of Texas. If so, it is not material that the premises may be a private residence. In article 380 of the Penal Code for 1895 it is declared that "all gaming houses" are included within the meaning of places at which it is unlawful to play at a game of cards. And in referring to games, gaming tables, or banks, prohibited by article 382, article 383 of the same Code declares that it was "intended by the foregoing article (article 382) to include every species of gaming device known by the name of table or bank, of every kind whatever. This provision shall be construed to include any and all games which in common language are said

to be played, dealt, kept or exhibited." Why, then, should the cause of the plaintiff in the action be unnecessarily incumbered and imperiled by requiring technical descriptions of the premises in question or of the games threatened? All places and all games prohibited by law, and of which all persons are presumed to know, are included within the beneficial purposes of the act of the Legislature under consideration, and a petition in the form of the present one, charging substantially in the language of the act, is, in our judgment, sufficient. All assignments which call in question the sufficiency of appellee's petition are accordingly overruled.

But one other assignment is presented, and that is that "the court erred in rendering judgment for the plaintiff perpetuating the injunction, for the reason the same is contrary to the law and the evidence in the case." Neither the assignment nor the propositions thereunder specify the fact or facts in issue which the evidence is insufficient to prove, as required by the statute and rules, and hence are too general to require consideration.

We conclude that the judgment must be affirmed, and it is so ordered.

#### WOOD v. LIMBAUGH et al.

(Court of Civil Appeals of Texas. Dec. 14, 1907.)

#### 1. PLEADING—UNNECESSARY MATTER—AMENDMENT.

Where, in an action on a note, defendant claimed a credit not indorsed thereon for paper delivered to the payee of the note in renewal of which the note in suit was given, and plaintiffs pleaded that the payee had credited the balance on the note, it was proper to refuse to require plaintiffs to state what other debt defendant owed the payee, since plaintiffs were not required to plead the matter pleaded; it being a matter of evidence.

#### 2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error in submitting an issue whether defendant was indebted to the payee of the note, in renewal of which the one sued on was given, beyond such note, there being no evidence thereof, was harmless where the verdict showed the jury were not misled.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by D. C. Limbaugh and others against B. F. Wood. From a judgment for plaintiffs, defendant appeals. Affirmed.

Preston Martin and T. F. Temple, for appellant. McCall & McCall, for appellees.

#### Statement.

STEPHENS, J. The appellees declared on a written instrument in the form of a promissory note, dated October 13, 1903, and signed by appellant, by the terms of which 60 days after date he promised "to pay to the order of Isom Cranfill estate five hundred and eighty and <sup>00</sup>/<sub>100</sub> dollars at Weatherford, Texas, with interest thereon from date at the rate of 9 per cent. per annum and 9

per cent. as attorney's fees if collected by suit or attorney." In the body of the instrument is this recital: "This note is given by me in lieu of a certain promissory (land) note on the sum of \$721.90 given by me to Isom Cranfill on the 12th day of March, 1899, and made due on October 15, 1899, and further it is given in payment of a certain lot or parcel of land situated in Parker county and being southeast  $\frac{1}{4}$  of section 300, certificate No. 2/539 T. & P. Ry. Company, containing 160 acres, deeded by Isom Cranfill to B. F. Wood. And it is hereby agreed and understood that the payee herein shall be and is hereby subrogated to all the rights, both legal and equitable, of the holders of said note." The instrument bears the following indorsement: "We hereby transfer our interest in this note to D. C. Limbaugh. [Signed] V. L. Grabel. Jane Grabel. J. B. Cranfill. Mrs. S. T. Cranfill." The recitals above quoted from the body of the instrument are alleged as facts in the petition, and the further allegation is made that, after the execution of the original note, and before the execution of the renewal, the said Isom Cranfill died intestate, leaving a widow, S. T. Cranfill, a son, J. B. Cranfill, and two daughters, Mrs. Mary Limbaugh, wife of D. C. Limbaugh, and Mrs. Jane Grabel, wife of V. L. Grabel; that there had never been any administration on his estate nor any necessity therefor; that the wife of D. C. Limbaugh was one of the heirs; and that the other heirs had transferred their interest in the alleged note to D. C. Limbaugh. The answer pleaded a payment and satisfaction of the original note prior to the execution of the instrument declared on, alleging, in addition to the following credits indorsed thereon, "Dec. 7—99 paid \$44.00; Dec. 30—99 paid \$253.51; November 23, 1900, paid \$36; Nov. 18, 1901, paid check, \$36.00": That appellant was entitled to a credit of \$400, the amount of two promissory notes dated December 30, 1899, one for \$100, due one year after date, and another for \$300, due two years from date, both drawing interest at the rate of 10 per cent. per annum, executed by W. C. Walters to appellant and by him delivered to Isom Cranfill with the understanding that, when they were paid, appellant was to have a credit in the sum of \$400 as of date December 30, 1899, on the note for \$721.90. It is further alleged that these notes had both been paid either in the lifetime of Isom Cranfill or since his death, but by mistake or oversight credit had not been entered on the note; that when appellant signed the instrument declared on he claimed that he was entitled to this credit; and that therefore the note had been paid, and only signed it at the urgent instance of D. C. Limbaugh and J. B. Cranfill to prevent the statute of limitation from running against the original note, on the promise on their part that they would investigate the matter and allow him the

credit as of date December 30, 1899, if he was entitled to it, which had not been done. On this ground a failure of consideration was pleaded. In a supplemental petition it is alleged that on December 30, 1899, appellant owed Isom Cranfill other money besides the amount of the note for \$721.90, and that on that date said Cranfill, after deducting from the amount of the Walters notes what was due him outside of the note for \$721.90, entered a credit thereon for the balance of \$253.51, and in this way denied that appellant was entitled to any further credit. The issues were submitted to a jury, and judgment was entered in favor of the appellees on the following verdict: "We, the jury, find for the plaintiff in the sum of \$205.90 principal, \$55.59 interest, and \$18.53 atty. fees, total \$280.02." There was a further finding that same was secured by a vendor's lien on the land described in the petition, on which the judgment of foreclosure was entered.

#### Conclusions.

The first assignment presented in the brief seems subject to the objection urged to it that it complains both of a ruling of the court on the pleadings and a finding of the jury on the facts; but, discarding this objection, and treating the complaints separately, we find no merit in either of them. The first is that "the court erred in not requiring plaintiffs to state in their first supplemental petition what other moneys than the original vendor's lien note defendant was at the time owing the plaintiffs." It is a sufficient answer to this assignment that the plaintiffs were not required to plead the matters set up in their first supplemental petition at all, since they were merely matters of evidence. The second is that, "no evidence being adduced to show any other indebtedness than the land note sued upon, defendant should have been allowed all the credits and payments shown, and the \$400 additional, as contended for by defendant, and the \$400 could not be allowed for any other purpose, and for the jury to find and apply any portion of the \$400 payment to other debts due by defendant was contrary to both the law and the evidence adduced upon the trial." The amounts specified in the verdict of the jury indicate that appellant was allowed the credit claimed of \$400, but that the credit of \$253.51 indorsed on the note was only a part of the larger credit, and, while the evidence had a diverse tendency on this point, we think the jury were warranted in so treating it. True, appellant testified that the \$253.51 represented a cash payment made the day before he turned over the Walters notes to be credited on the original note, but there were circumstances tending to discredit his testimony on this point. Treated as rejecting his interpretation of this credit, the verdict must have allowed the \$400 credit without applying any part of it to any other debt or debts, as will be seen by a simple calculation. That is to

say, the sum of \$205.90 named in the verdict as principal is the difference between \$721.90 and the aggregate of the credits indorsed on the original note for that sum, plus the difference between \$233.51 and \$400; from which it is to be inferred that the jury not only allowed all of the credits indorsed on the original note, but also increased the credit of \$253.51 to \$400, thus adopting the version of the appellees, which finds support in the testimony, that the credit of \$253.51 was probably a part of the \$400 credit claimed, but rejecting their further contention that the rest of the \$400 had been properly applied to some other indebtedness. The evidence did not warrant any such application, and the jury must have adopted the view, as the court in effect charged, that appellant, and not Cranfill, had a right to direct the application of this credit. The first assignment is therefore overruled, and also, for substantially the same reasons, the fourth and fifth.

The remaining assignments, the second and third, we have found it more difficult to dispose of. These assignments complain of the following charge for submitting an issue not raised by the evidence: "If the defendant was, at the time the Walters notes were delivered to Isom Cranfill, indebted to the said Cranfill in any sum except the \$721.90 note, and if the Walters notes were to be applied to such other indebtedness, and if the amount of such Walters notes, or any part of same, were applied to such other indebtedness, then for so much of said \$400, if any, as was applied to such indebtedness other than the \$721.90 note, the defendant would not be entitled to credit on said \$721.90 note." It is insisted, under these assignments, that there was no evidence of any other indebtedness between Isom Cranfill and appellant after the execution of the note for \$721.90, and it is difficult to controvert this proposition. True, as stated by the appellees, George W. Taylor, who had been a collecting agent for Isom Cranfill, testified that at one time appellant owed Cranfill two notes, one for borrowed money, and the other for land; but he also testified that Cranfill had told him that both sums had been merged in one note against appellant's land, and no other note seems to have been found among the papers left by Cranfill at his death. Possibly, also, it may be said that the testimony of D. C. Limbaugh, wherein he reproduced a conversation between him and appellant in a controversy over the credit for \$253.51, tended to show an implied admission on the part of appellant that possibly he might have been indebted to Cranfill outside of the note for \$721.90 when the credit for \$253.51 was entered thereon. Certain it is that there was neither pleading nor proof that "the Walters notes were to be applied to such other indebtedness," as submitted in the charge; but no notice is taken of this feature of the record in the propositions under these assignments. It

seems also true that the charge might be subject to the objection that it gave undue prominence to the circumstance of other indebtedness by thus singling it out, even if there had clearly been evidence tending to prove such indebtedness, which at best was but a circumstance bearing on the issue of credits claimed on the one hand and denied on the other, and did not itself constitute a substantive issue in the case, even though it was pleaded; but no such objection is made to the charge.

If, then, the charge be treated as submitting an issue not raised by the evidence—and we are inclined to so treat it—we have yet to determine whether it should require the judgment to be reversed and have finally concluded, though not without considerable hesitation, that it should not, since the verdict excludes the suggestion that the jury might have been misled by it into denying appellant credit for the full amount of the Walters notes. The existence of other indebtedness was submitted only as a ground for finding that appellant would not be entitled to a credit for so much of the Walters notes as might have been applied by Cranfill to such other indebtedness, and inasmuch as the jury, as already seen, have allowed appellant credit for the full amount of the Walters notes, notwithstanding the supposed application by Cranfill of a part thereof to other indebtedness, we are inclined to the opinion that the misleading tendency of the charge was cured by the verdict; that is, that we are probably warranted by the verdict in holding that the charge did not mislead the jury, even though it should be held that it submitted an issue not raised by the evidence.

The judgment is therefore affirmed.

#### TEXAS & P. RY. CO. v. JOHNSON et al.

(Court of Civil Appeals of Texas. Dec. 10, 1907. Rehearing Denied Jan. 9, 1908.)

#### 1. NEGLIGENCE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an action for the negligent death of an employe, an instruction that by contributory negligence is meant some act of negligence of decedent, concurring with the negligence of the employer, contributing to cause death, is not misleading as limiting contributory negligence to some act of negligence and excluding a failure to perform a duty incumbent on decedent in the exercise of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 382-385.]

#### 2. MASTER AND SERVANT—DEATH OF SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for the negligent death of a railway engineer crushed between the supporting columns of a roundhouse and the cab of an engine, the evidence showed that decedent was caught almost instantly after placing himself in the position he was in at the time of the accident, a charge that by contributory negligence was meant some act of negligence of decedent, concurring with the negligence of the employer, contributing to the injuries, was proper as against the objection that it excluded a

\*Writ of error denied by Supreme Court.



failure to perform an obligation incumbent on decedent in the exercise of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1183.]

### 3. TRIAL—INSTRUCTIONS—FORM OF INSTRUCTIONS.

An instruction, in an action for the negligent death of an employé, that if decedent at the time of the injuries was in the actual "exercise of ordinary for his safety," etc., is not misleading for omitting the word "care" in the quoted phrase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 560-576.]

### 4. DEATH — ACTIONS — DAMAGES — INSTRUCTIONS.

An instruction, in an action for negligent death, which authorizes the jury to award as damages "such a sum of money now" as they believe will compensate for the pecuniary loss, is not erroneous, though it would have been more accurate to have stated in lieu thereof "such a sum of money as paid now," and a party desiring a fuller statement should have requested a special charge.

### 5. TRIAL—INSTRUCTIONS—FORM OF INSTRUCTIONS.

Where the ordinary intelligence of the jury will suggest from the context of a paragraph in a charge that a word should have been supplied, the omission of the word is immaterial error.

### 6. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK—INSTRUCTIONS—"ORDINARILY PRUDENT PERSON"—"ORDINARY CARE."

A charge submitting the issue of assumed risk, which uses the term "ordinarily prudent person," is sufficient, under the statute providing that the defense shall not be available where a "person of ordinary care" would have continued in the service with a knowledge of the defect, the quoted words in the charge and statute being synonymous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1168-1179.]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739-7740.]

### 7. SAME.

Where an instruction stated that there could be no recovery for the death of an employé unless he was at the time in the exercise of ordinary care, a charge submitting the issue of assumed risk in language synonymous with the statute, providing that the defense shall not be available where a person of ordinary care would have continued in the service with the knowledge of the defect, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1168-1179.]

### 8. TRIAL—INSTRUCTIONS—ISSUES.

It is not error to refuse a charge not applicable to any issue raised by the evidence, and not necessary to explain instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

### 9. SAME—REQUESTED INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse a requested instruction embodied in the charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

### 10. NEGLIGENCE—ORDINARY CARE—DEGREE OF CARE.

The degree of care one is required to use to protect himself is the same whether the danger is known or unknown, and, in either case, the care that an ordinarily careful person would use under similar circumstances is the measure of duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 83.]

### 11. SAME.

In determining what is ordinary care in a particular case, all of the surrounding circumstances must be considered, and what will be ordinary care under some circumstances will not be under others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 6.]

### 12. DEATH—ACTIONS FOR NEGLIGENT DEATH—DAMAGES.

In an action for negligent death by decedent's widow and his mother, it appeared that decedent at the time of his death was 81 years old, with a life expectancy of 34 years; that his widow was 28 years old, and his mother 72 years. He was in good health, sober, capable, and industrious, and expended all his earnings for the support of his wife, mother, and self. The widow and mother were dependent upon him, and he maintained them both. He earned \$90 per month, and he would have continued to receive that amount and greater wages. *Held*, that a verdict for \$14,000 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 125-130.]

### 13. APPEAL—REVIEW—APPORTIONMENT OF VERDICT—RIGHT TO COMPLAIN.

A defendant, in an action for negligent death by the widow and the mother of decedent, cannot complain of the apportionment of the verdict between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3563, 3564.]

### 14. SAME—RIGHT OF ACTION.

In an action for negligent death by the widow and mother of decedent, proof of the earnings of decedent, and that a large portion of them was expended for the maintenance of plaintiffs, was sufficient to enable plaintiffs to maintain the suit, and to authorize the jury to fix the damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 96.]

### 15. MASTER AND SERVANT—INJURIES TO SERVANT—PERFORMANCE OF DUTY.

Where, in an action for the negligent death of a railway engineer caught between the supporting columns of a roundhouse and the cab of an engine, the evidence showed that it was the duty of decedent to operate all engines in the roundhouse, that the engine on which the accident occurred was being operated at the time by the foreman, who took charge because decedent was otherwise engaged, and that decedent, on completing the other work, stepped onto the engine with a view of taking charge thereof, the evidence showed that decedent was in the performance of a duty of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 952.]

### 16. SAME.

Where an employé, at the time injuries were sustained by him, was at his place of duty, ready to begin work when called on, the employer owed him the duty of using ordinary care to keep the place reasonably safe, and he was guilty of negligence for failing to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

### 17. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for the negligent death of an employé, the question of decedent's contributory negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from District Court, Gregg County; R. B. Levy, Judge.

Action by Mrs. Kate Johnson and another against the Texas & Pacific Railway Compa-

ny. From a judgment for plaintiffs, defendant appeals. Affirmed.

John M. Duncan and H. B. Lasseter, for appellant. McCord & Bulloch and Johnson & Edwards, for appellees.

PLEASANTS, C. J. This is a suit against the appellant, brought by Mrs. Kate Johnson and Mrs. Mary R. Johnson, wife and mother of A. H. Johnson, to recover damages for the death of the latter, which, it is alleged, was caused by the negligence of the defendant. At the time he was killed A. H. Johnson was in the service of appellant as hostler in the railroad yard maintained by appellant at Longview Junction. Appellant maintained a roundhouse and repair shop in this yard, and there were a number of tracks running into said roundhouse upon which engines were placed and operated, while undergoing repairs or being prepared to go out on the road. It was Johnson's duty to bring these engines into the roundhouse or take them out as occasion required, and to operate them when any movement thereof was necessary in effecting repairs. The roof of the roundhouse was supported by columns, placed on either side of the several tracks which entered said roundhouse. These columns were placed so near the tracks that only about five inches of space was left between them and the frame of the cabs on the engines used on appellant's road. At the time the roundhouse was built the engines used by appellant were much smaller than those in use at the present time and at the time Johnson was killed, and under then existing conditions the columns supporting the roof were far enough from the track to leave ample space for the operatives of the engines to perform their duties while on the engine or on getting on and off without coming in contact with said columns. No change was made in the position of these columns after the change in the size of the engines, and for that reason the roundhouse was not thereafter a reasonably safe place for the operatives of the engines moving therein to perform their work. This condition had existed several years prior to the accident which caused the death of the deceased, and he knew of such condition, and had warned other employees of the danger incident thereto. On the day of the accident one of appellant's engines was being repaired in said roundhouse, and in the completion of said repairs it became necessary to move the engine back and forth over the track in order that the machinist working thereon might observe and mark any defective operation of its valves. At the time it became necessary to commence this movement of the engine Johnson was engaged in taking another engine out of the roundhouse and placing it on the track for use in taking out a train on appellant's road. In the absence of Johnson the fore-

man of the yard took charge of the engine which was being repaired, and in the capacity of engineer was operating it back and forth in the roundhouse so that the machinist who was making the repairs could observe the working of its valves. These movements were made slowly, and while they were going on Johnson, having taken the engine he was operating out of the yard, returned to the roundhouse, and immediately got upon the engine which was being operated by the foreman as aforesaid. At the time he got upon it the engine was backing slowly. The foreman was at the throttle on the right-hand side, facing the front, and operating the engine, and the machinist was on the ground on the left side of the engine, and out of sight of the foreman marking the working of the valves. Johnson got upon the engine on what is called the "gangway," which is between the cab and the tender. He got up on the right side, and walked across to the other side, and was seen leaning out a short distance looking towards the front at the machinist. While in this position, and before he could be made to hear warnings attempted to be given him by other employees in the yard, his head was caught and crushed between the frame of the cab and one of the columns supporting the roundhouse, and the injuries thus received caused his death in a few minutes. It was customary in moving engines in the roundhouse for the purpose of ascertaining the condition of their valves for the machinist who was making the observations and marking the effect of the valve motion to signal the engineer when to stop the engine and reverse its movement. This signal was given by motion of the hand or by vocal instruction. It was not necessary, however, for the proper performance of this work, that the engine should be stopped at any precise point; all that was required being that sufficient revolutions of the wheels should be made each way, for the machinist to determine whether the valves worked properly in both the forward and backward movement of the engine. At the time the accident occurred, and when the deceased got upon the engine, another engine was blowing off steam in the roundhouse a short distance from the engine upon which the accident occurred, and the foreman who was operating said engine could not have heard anything said to him by the machinist, and the latter, as before stated, was out of the foreman's view, and therefore could not have signaled him when to stop or reverse the engine. The movement of the engine by which deceased was caught was the last movement necessary in testing the valves, but there is nothing to indicate that deceased knew this fact. The defendant answered by general demurrer, general denial and pleas of contributory negligence and assumed risk. The trial in the court below by a jury resulted in a verdict and judgment in

favor of plaintiffs in the sum of \$14,000, of which \$10,500 was in favor of the widow, Mrs. Kate Johnson, and \$3,500, in favor of Mrs. Mary Johnson, the mother of deceased.

From the foregoing statement of the facts we conclude that appellant was guilty of negligence in failing to use ordinary care to provide the deceased with a reasonably safe place in which to perform his work, and that the findings of the jury that the deceased was not guilty of contributory negligence and did not assume the risk caused by defendant's negligence, and that said negligence of defendant was the proximate cause of deceased's death, must be sustained.

The first assignment of error is as follows: "The court erred in that paragraph of its general charge to the jury as follows: 'By the term "contributory negligence" is meant some act of negligence on the part of A. H. Johnson, which, concurring with some negligence on the part of defendant company, caused or contributed to cause his injury and death,' in that it limits the definition of contributory negligence to some act of negligence on the part of Johnson, and does not include any omission or negligence of Johnson which may have consisted in an omission or failure to perform an act, duty, or obligation incumbent upon him in the exercise of ordinary care." We do not think the term "act of negligence," as used in this paragraph of the charge, could have been understood by the jury as only including some physical movement or action on the part of the deceased, but must have been understood to mean any failure, passive or active, on his part, to exercise ordinary care for his safety. If, however, the term should be given the literal restrictive meaning contended for by appellant, it was not inapplicable to the facts of this case, because the negligence charged against the deceased was his act in placing himself in such position as to cause his head to be caught between the supporting columns of the roundhouse and the cab of the engine. The evidence shows that he was caught in a few seconds, or almost instantly after placing himself in this position, and, speaking in a literal sense, if he was guilty of negligence, such negligence consisted in the act of placing himself in such position.

The second assignment is as follows: "The court erred in the following part of its main charge to the jury: 'And you further find from the evidence that at the time of his injuries A. H. Johnson was himself in the actual exercise of ordinary care for his safety and protection and without any fault on his part,' in that the word 'care' was omitted from this part of the charge, and it was thus calculated to mislead and confuse the jury." There is no merit in this assignment. The omission of the word "care" from this sentence of the charge was clearly a clerical error, and the word would necessarily have been supplied by the jury from reading the charge as a whole, and its omission in this

place could not possibly have misled or confused them.

The third and fourth assignments complain of the charge on the ground that it failed to submit the proper measure of damage. The paragraph of the charge complained of under these assignments is as follows: "If the jury shall find for the plaintiffs, and further find that the injury of A. H. Johnson proximately caused his death, and that both plaintiffs were damaged thereby, then you are charged that you should award the plaintiffs such a sum of money now as you shall believe from the evidence would compensate them for the pecuniary loss, if any, which you will find from the evidence they have sustained." We do not think this charge is subject to the criticism made under the assignments. Probably it would have been more accurate to have said "such a sum of money as paid now," but the language used means the same thing. While it is true that only such sum could be awarded as would reasonably compensate plaintiffs for their pecuniary loss, the instruction that they were entitled to damages for "such pecuniary loss as resulted to them by reason of the death of A. H. Johnson" was not a misstatement of the law, and, if the defendant desired that the jury be more fully informed as to the rule by which such loss should be ascertained, it should have requested a special instruction giving such information.

The omission of the word "person" in the paragraph of the charge complained of under the fifth assignment was an immaterial error, as ordinary intelligence on the part of the jury would suggest from the context of the paragraph that such word should be supplied, and we cannot assume that the jury were lacking in such degree of intelligence. The second objection to this charge is also untenable. The statute limiting the defense of assumed risk provides that such defense shall not be available, "where a person of ordinary care would have continued in the service with knowledge of the defect and danger," from which the injury complained of resulted. In submitting this issue the court used the term "ordinarily prudent person." This is synonymous with the term "person of ordinary care" used in the statute. We think it was unnecessary in this connection to have further told the jury that the ordinarily prudent person mentioned in the charge must have been in the exercise of ordinary care in remaining in the service. Other portions of the charge instructed the jury that plaintiffs could not recover unless deceased was in the exercise of ordinary care at the time he received the injuries which resulted in his death, and, in submitting the issue of assumed risk, it was only necessary that the statute limiting this defense should be substantially followed, and this, we think, was done by the charge given.

The sixth assignment complains of the refusal of the court to give the following in-

struction requested by the defendant: "You are further charged as part of the law of this case that, where an employé knows of the nature and character of a place in which he is called to work in the service of his master and the damages incident thereto, if any, he could not in such case assume that the master had used ordinary care to furnish him a safe place in which to work." This charge was not applicable to any issue raised by the evidence, and was not necessary in explaining or modifying any instruction given by the court, and was therefore properly refused.

There was no error in refusing the special instruction requested by defendant upon the issue of contributory negligence, the refusal of which is complained of under the seventh assignment. That issue was sufficiently presented in the charge given by the court, and the requested instruction was therefore unnecessary, and to have given it would probably have unduly emphasized the defense of contributory negligence.

It would not have been proper to instruct the jury that "the degree of care which an ordinarily prudent person should exercise should be commensurate with the dangers known or obvious to him." The proposition is not technically correct. The degree of care one is required to use to protect himself is the same whether the danger be known or unknown. In either case ordinary care, or the care that an ordinarily careful person would use under the same or similar circumstances, is the measure of duty. Of course, in determining what is ordinary care in a particular case, all of the surrounding circumstances must be considered, and what would be ordinary care under some circumstances would not be under others. All that it was necessary to inform the jury on this subject was contained in the charge given by the court, and the eighth assignment complaining of the refusal to give this instruction cannot be sustained.

The requested charge, the refusal of which is complained of in the ninth assignment, was in effect a charge to find for the defendant on the issue of assumed risk, and was therefore properly refused.

The tenth, eleventh, twelfth, and fifteenth assignments of error assail the verdict on the ground that the amount of damages assessed by the jury is so excessive that it shows that they were influenced by passion, prejudice, or some other improper motive, and also on the ground that there was no proof as to any specific sum which the deceased had contributed to either of the plaintiffs, nor any evidence from which the jury could approximate the sum which it could reasonably be expected he would have contributed in the future, had his life been spared. The evidence shows that deceased was 31 years old at the time he was killed, and was earning \$80 per month. He was in perfect health,

and was sober, capable, and industrious, and expended all of his earnings for the support of his wife, mother, and self. His wife was 28 years old at the time of his death, with a life expectancy of 37.7 years. His mother was 72 years old, and her life expectancy was 7.5 years. The life expectancy of deceased was 34.6 years. He entered the service of appellant as a boy, and had been promoted from the position of caller and messenger boy through regular grades of the service to that of hostler. He had always been careful and attentive to his duties. The only damages claimed in the petition is the loss of the contributions which deceased would have made to plaintiffs had he lived, and there is no evidence of any specific amount of such contribution made by deceased in his lifetime. The evidence does show, however, that plaintiffs were entirely dependent upon him, and that he supported and maintained them both. He had no children, and no one else dependent upon him other than plaintiffs. He owned his home, and, as before stated, all of his wages were appropriated to the support of himself and plaintiffs. The petition alleges that plaintiffs, prior to the death of deceased, were receiving large contributions from his wages, and would have continued to receive such contributions had he lived, and "that he was regularly earning \$80 per month, and if he had continued to live would have continued to receive that amount and greater wages." Upon the evidence above set out, we cannot hold that a verdict for \$14,000 in favor of plaintiffs is so excessive as to authorize this court to say that it was not the honest judgment of the jury as to the value of the pecuniary aid which plaintiffs might reasonably have expected to receive from the deceased had he lived, and we cannot substitute our judgment upon this issue for that of the jury. If we take the earnings of the deceased at the time of his death as a basis, at the present rates of interest, it can, by a mathematical computation, be demonstrated that the amount of the verdict paid now and placed at interest would produce a larger sum than it could be reasonably expected deceased would have contributed to plaintiffs during his life expectancy, had he lived out the full time of such expectancy. But a calculation of this kind leaves out of consideration the element of an increase of earning capacity, an issue raised by the pleadings and evidence, and is also based on the assumption that the present rates of interest will continue the same, and therefore it is manifest that such calculation cannot be held to be conclusive. The law has not fixed any definite rule by which damages of this kind should be computed, but has left it to the unbiased, unimpassioned judgment of a jury to say what the amount should be, and in the absence of anything in the record of a case to indicate that the jury were improperly influenced an appellate court cannot

substitute its judgment as to the proper amount of the verdict for that of the jury, unless the amount found by the jury is so unreasonably excessive as in itself to justify the conclusion that they acted from improper motives in fixing said amount, and we cannot so hold under the evidence in this case. *Railway Co. v. Smith*, 65 Tex. 167; *Railway Co. v. Ormond*, 64 Tex. 485; *Railway Co. v. Kime*, 21 Tex. Civ. App. 271, 51 S. W. 559.

Appellant cannot be heard to complain of the apportionment made by the jury of the amount of the verdict between the respective plaintiffs. The amount of the verdict as a whole not being excessive, it is no concern of appellant as to how it was apportioned between the plaintiffs. *Railway Co. v. Munn* (Tex. Civ. App.) 102 S. W. 442; *Railway Co. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 259. There is no rule which requires that a plaintiff suing for damages for the pecuniary loss occasioned by the death of another must show any specific or definite amount of contributions received from the deceased in his lifetime, in order to recover for the loss of such contributions. It is sufficient, as in this case, to show what the earnings of the deceased were, and that a large portion of these earnings were expended for plaintiff's support and maintenance. These facts, taken in connection with the evidence showing the relation of the parties to each other, and that it could be reasonably expected that the contributions made by deceased to plaintiffs would have continued, were sufficiently definite to authorize the jury to fix the amount of damages occasioned plaintiffs by the loss of such contributions.

The thirteenth and fourteenth assignments assail the verdict on the ground that it is without evidence to support it, in that the undisputed evidence shows that the deceased at the time he was killed was not in the performance of any duty of his employment and not in the proper place for the discharge of such duty, and further shows that deceased was guilty of contributory negligence, which was the proximate cause of his injury. Neither of these assignments can be sustained. The undisputed evidence shows that it was the duty of the deceased to operate all the engines operated in appellant's roundhouse. The engine upon which the accident occurred was being operated at the time of such accident by the foreman of the yard, but the foreman only took charge of the engine because of the fact that at the time it became necessary to move it the deceased was otherwise engaged. There is no suggestion in the evidence that it was not the duty of the deceased to place himself in position to immediately take charge of the engine when called upon by the foreman, and it is evident that the most convenient and appropriate position for him to take in order to be ready to promptly enter upon the discharge of the duties of his employment when occasion re-

quired was upon his engine. It is not material that he was not in the active performance of any duty at the time he was killed. He was at the place of duty ready to begin work when called upon, and appellant owed him the duty of using ordinary care to keep such place reasonably safe, and if it failed in such duty was guilty of negligence. *Railway Co. v. Scott*, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; *Railway Co. v. Welch*, 72 Tex. 302, 10 S. W. 529, 2 L. R. A. 839; *Railway Co. v. McHale* (Tex. Civ. App.) 105 S. W. 1149. It cannot be held as a matter of law that deceased was guilty of negligence in taking the position he did upon the engine. The evidence shows that the place at which he was standing on the engine was not the safest place he could have taken, but aside from the danger of being struck by the columns, of the proximity of which deceased was obviously unmindful, there is nothing in the evidence to justify the conclusion as a matter of law that his position was so unsafe that no one in the exercise of ordinary care would have taken such position on the engine. All of the evidence shows that just after getting to the left side of the gangway deceased leaned over and looked to the front to observe what the machinist was doing, and immediately after putting himself in this position he was caught between the column of the roundhouse and the cab of the moving engine. It may be, as contended by appellees' counsel, that his purpose in leaning out of the gangway was to receive and transmit to the foreman any signal which the machinist might give, or it may be he only wanted to see what the machinist was doing, and thus ascertain when the foreman would probably cease the operation of the engine and turn it over to him. In neither event can it be said that his act in leaning out of the gangway was so wanting in ordinary care that it should be held negligent as a matter of law. It would be unreasonable and unjust to hold a servant guilty of contributory negligence as a matter of law merely because while engrossed in the duties of his employment he became temporarily unmindful of the known dangerous condition of the place in which he had to perform his work, which condition had been negligently maintained by the master.

This disposes of all of the assignments presented in appellant's brief. We think the case was properly tried, and the judgment of the court below should be affirmed.

Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SCRUGGS.\*

(Court of Civil Appeals of Texas. Nov. 9, 1907. On Rehearing, Dec. 14, 1907.)

RAILROADS—OPERATION—ACCIDENTS AT CROSSINGS—PROXIMATE CAUSE OF INJURY—INSTRUCTIONS.

Plaintiff, upon the invitation of defendant's yard foreman, boarded a switch engine to go

\*Application for writ of error pending in Supreme Court.

to the freight depot, and he stepped from the engine when near a street not far from the depot, caught his foot in a switch, and was run over by a car from which the engine had just been cut loose in making a drop switch. *Held*, that the court improperly submitted as a ground of recovery the negligence of defendant in maintaining the switch in the street, where, though the switch was located in the street, it was at a point not used by the public in crossing the railroad, and where plaintiff was not expected to alight until after the switch was made or he had reached the depot, since the injury was not the natural and probable consequence of the maintenance of the switch in the street.

Speer, J., dissenting.

Appeal from District Court, Denton County; D. E. Barrett, Judge.

Action by J. L. Scruggs against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee recovered a verdict and judgment in the sum of \$18,600 for the loss of a leg and the suffering incident thereto, from which this appeal is prosecuted. The accident occurred November 19, 1904, at Denton, Tex., in or near McKinney street. In stepping from the footboard of the engine, on which he was riding from the coal chute north of McKinney street toward the freight depot south of McKinney street, appellee got his right foot caught between the main rail of the track and the switch rail, and was run over by a stock car from which the engine had just been cut loose by one Bushey, yard foreman of appellant, in making a drop switch. This stock car had been loaded with turkeys for appellee on appellant's railway south of McKinney street and west of the freight depot, and he had been invited to ride on the engine to the freight depot to get his bill of lading. In order to make this journey the car had to go north, or rather a little west of north, along appellant's track to a point north of where the accident occurred, and then move south, or a little west of south, along the Texas & Pacific track, which was in common use by both companies, to the freight depot. The car of turkeys was to be carried by the Texas & Pacific Railway Company to Bonham, but the switching was being done by the employees of appellant. The details of the accident were thus given in the testimony of appellee: "After we got to the coal chute, the engine and car stopped, and I got off there, and saw Mr. Bushey, who was the yard foreman of the defendant. \* \* \* When we got up there I got off on the west side, next to the coal chute. Mr. Bushey asked me what I got off there for, and I told him I would go up to the depot and get my contract signed—the bill of lading for the turkeys. He then told me to get back on the engine, and I got back on there. He said they were going to make a switch, and I could get off up there. I got back on the west side of the rear of the tank or tender, as it is called. I didn't stay on the west end. Mr. Bushey told me to get over on the east end; that he wanted to ride on

the west end, and for me to get over on the east end. The head of the engine was pointed south at that time. I mean that I got on the footboard of the engine when it started there. The engine then started south, and when they got up as far as McKinney street, Mr. Bushey got off the west side and I got off the east side. Before I got off Mr. Bushey had cut the engine loose from the car of turkeys. I never noticed him when he cut the car loose. \* \* \* When I got off the footboard at McKinney street, my car of turkeys was something like 45 or 50 feet from me. The engine was going something like three miles an hour when I got off at McKinney street, and I think the car was running something like a mile and a half or maybe two miles an hour—something like that—I can't tell exactly. When I got off I got my foot caught in the track when I stepped off. It was caught between the rails just back of the switch point. It was caught between the east rail of the track and the switch point—the rail that made the point of the switch—these two rails just as I stepped off. It was the right foot. After it got fastened, I tried to pull my foot out and could not. When I found that I couldn't pull my foot out, I hollered for help. No help came until after the car ran over me. \* \* \* Bushey and I alighted from the locomotive just about the same time, as well as I remember. \* \* \* When I was on the engine I was looking for a place to get off. I thought I would get off in the street at the street crossing. If I had have looked at the rails as I was passing over them, I would not have known exactly what I was passing, except that I was passing a switch." The testimony offered by appellant tended to prove that appellee was not expected to leave the engine till it reached the freight depot, and that Bushey was surprised at his stepping off when he did. It also tended to prove that the car of turkeys was so close to the engine that the accident could not have been averted by the application of brakes; the proof showing that the car had been cut loose without any brakeman to control its movements, contrary to the rules of the company.

Two grounds of recovery were submitted in the charge of the court: First. Whether it was negligence on the part of appellant to maintain the switch in McKinney street at a point used by the traveling public in crossing said street. Second. Whether it was negligence in appellant to propel a car detached from the engine across said street without having a man on the car to control the same, and keep a lookout for persons who might be on the street. Quite a volume of testimony was introduced as to the situation of the switch with reference to the street, and of the use made of the street at this point. From this testimony but one conclusion can be drawn, and that is, while the switch was located in the north part of McKinney street, as shown by an extension on the map of its

northern boundary east from Bell avenue, it was at a point in said street not at all used by the traveling public in crossing the railroad; the route of travel across the railroad being entirely south of the switch. That portion of the street lying immediately west of the switch was so broken and rough by reason of its proximity to Pecan creek as not to admit of travel thereon at all, and no effort had ever been made to open up and use it. The only use made of the street at this point was by persons going up and down the railway track along a route through the railway yards not indicated by any street. There is nothing in the evidence to indicate that the situation and structure of the switch would have had a tendency to injure persons crossing the railway track if the street had been used for this purpose at this point. The court instructed the jury, in the second paragraph of the charge, that if McKinney street had been laid out and extended east across the railroad at the place where the switch was located, that would not render appellant liable if "on account of the lay of the ground, or natural obstructions," the switch "was at a point not used by the public in crossing said railroad."

Garnett & Eldridge, for appellant. Owsley & Sullivan, O. B. Randell, and J. H. Wood, for appellee.

STEPHENS, J. (after stating the facts as above). We are of opinion that the court erred in submitting to the jury as a substantive ground of recovery the alleged negligence of appellant in maintaining a switch in McKinney street, as set forth in the first, sixth, and eighth paragraphs of the charge; also, in sustaining the verdict on this ground, which was at least contrary to the second paragraph of the charge, as shown in the statement above. However, as two grounds of recovery were submitted, we have no means of determining whether the verdict was sustained on this ground alone or not, and will therefore confine the discussion to the charges submitting the issue affirmatively. We find nothing in the record to suggest that appellant was guilty of negligence in the location and maintenance of the switch in question. While it was theoretically in McKinney street, it did not in the least interfere with, and could not reasonably have been expected to interfere with, much less endanger, travel on said street as it was then used. A person traveling the street, which ran east and west, would have to leave his course and go out of his way to pass over the switch. All the travel at this point was up and down the railway track, at right angles with the street, along pathways leading through the railway yards. Appellant, of course, in operating its trains, had to take notice of the use thus made of its premises and adjacent territory, but this had nothing to do with the original location

and maintenance of its switch at this point. It is not claimed that any ordinance of the town of Denton was violated, nor is there any proof of negligence in the manner of constructing or maintaining the switch. What is there, then, to suggest to a person of ordinary prudence or even of the highest care that any more danger was to be apprehended from the location of the switch where it was than at some other place along the track? Nothing that we can see. It is claimed that appellant should have contemplated that appellee, or a person similarly situated, would or might want to use the street as a suitable place to alight from the engine. If so, it could hardly have been contemplated that he would want to alight before he reached the known and used part of the street. Suppose there had been an impassable embankment on either side of the switch, would it be contended that, because the boundary of the street when correctly located would include the switch, appellant should have contemplated that a person in the situation of appellee would want to alight there? Certainly not. According to appellant's version of the testimony, appellee was not expected to leave the engine until it reached the freight depot, and even according to his own version he could only have been expected to step off when the contemplated switch was made. In no view of the case was it contemplated that he would leave the engine at McKinney street unless the drop switch was made there. The injury in this instance, deplorable as it was, if in any measure due to the maintenance of the switch in McKinney street, was not the natural and probable consequence of that fact. That was not the test of liability in the case. At best, it was only a circumstance to be considered by the jury in passing on the other ground of liability. See *Ry. Co. v. Rogers* (Tex. Civ. App.) 40 S. W. 849; *Id.*, 91 Tex. 52, 40 S. W. 956. Appellant having undertaken to carry appellee to the freight depot, with the understanding, according to the latter's contention, that he might get off when the switch was made, it was liable for any failure to properly discharge the duty thus assumed, and if he had a cause of action, it arose out of this relation, and not from the maintenance of a switch in the street.

The judgment is therefore reversed, and the cause remanded for a new trial.

SPEER, J. (dissenting). The evidence showing, as it did, that appellant's switch was in McKinney street, even though it was at a point not used by the traveling public in crossing said street, an issue was thus raised whether or not it was negligence on appellant's part to maintain such switch at that place. If a switch or other dangerous obstruction is placed in a public street, or even near to it, in such way as to endanger the life or limb of one rightfully using such street, the one placing such obstruction is

responsible to the injured person, if that person himself is free from contributory negligence in the premises. And it can make no difference that the injured person at the time is crossing the street rather than traveling along its route. *Judson v. Ry.*, 29 Conn. 434. The test is, was the injured person rightfully using the street, and was he in the exercise of due care at the time? This being resolved in his favor, the question then arises, was the person responsible for the obstruction guilty of negligence, and was such negligence the proximate cause of the injury? The issue of contributory negligence having been submitted to the jury, and having been found in appellee's favor, the court correctly submitted the latter question, or dual question—that is, the negligence of appellant in maintaining its switch in McKinney street—as a ground of liability against appellant. If for any reason appellee might reasonably have been expected to alight from the engine at the point where he did alight, and the appellant negligently maintained a switch at that point, there is no reason why, barring the question of contributory negligence, it should not respond in damages for appellee's injuries. Indeed, it was most reasonable for appellee, knowing that he must leave the engine at or near the depot, to alight in a street. As a part of the public, to say nothing of his superadded rights growing out of his relation to appellant as a passenger for the time being, he had the right to use McKinney street and every part of it, and it can make no difference that his use of it was only then begun, and in the manner shown, since the moment he rightfully and carefully attempted to use the street the company owed him the duty not to obstruct it so as to endanger him. The known physical fact that the structure of a switch is such as to endanger pedestrians passing over it is sufficient to require the submission to the jury of the question whether it was negligence to maintain the same in or near a traveled street. Unlike the ordinary tracks, which must of necessity be in the streets, this switch may just as well have been somewhere else. Again, if the maintenance of the switch in McKinney street was negligence, it was the proximate cause, or at least a concurring proximate cause, of appellee's injuries, since appellant was required to anticipate every reasonable and proper use of that street by appellee, and might reasonably have foreseen that in such use he would get his foot fast in the switch and be run over. So that, in my opinion the evidence not only raised the issue submitted, but amply supports it.

#### On Motion to Correct Findings of Fact.

STEPHENS, J. In this motion we are referred to Exhibit A, attached to the motion for rehearing, in which testimony is quoted to prove, as therein claimed, the following

with reference to the situation and use of McKinney street at and near the place of the accident: "There is a passway for pedestrians some eight or ten feet wide on each side of the railway, running parallel with the railway track, extending from a point north of the coal chutes south to McKinney street. There is a considerable number of residences north of the coal chutes, and persons go down on either side of the railway track till they reach McKinney street, and go east and west on said street, and some of them use it south of McKinney street going to the passenger station. On the east side of the railway track the street is open from the track toward the east and graded up. The northern boundary line of said street is marked by a trespasser's sign, some telephone poles, and the toe of the grade. The street is entirely open and clear of obstructions from said trespasser's sign to the south side of the same, a distance of about 40 feet. On the west side of the railway track the street is not open as far north as it is on the east side, by some 15 or 20 feet, by reason of Pecan creek bearing south. By reason of the conformation of the ground, wagons crossing said railway track coming from the east turn in a south-westerly direction, so as to strike the street on the west side of the track south of the creek, and wagons coming from the west would turn in a northeasterly direction, in order to reach the middle of said street going east from said track. Appellee was hurt on the east side of said track, some 8 or 10 feet north of the wagon tracks, where wagons usually crossed said track, and some 8 or 10 feet south of the northern portion of said street as the same was actually laid out upon the ground, graded and bounded by said telephone poles, and as bounded by appellant's trespasser's sign. The evidence further shows that a pedestrian's walk had been maintained on the north side of McKinney street east of the railway track and north of the telephone poles, which led to appellant's railway track some 8 or 10 feet north of where appellee was hurt. A fence had been moved south on the east side of said track and the north side of McKinney street to within about two feet of the telephone poles prior to the date of the trial. As to whether the fence had been moved prior or since appellee was hurt, the witness did not know. Wagons could have driven from the east going toward the west up to and on the railway track at the point, and north of the point, where appellee was injured, but would have had to have turned south at said point to avoid the creek on the west to continue its way up McKinney street. In order to avoid this abrupt turn, the evidence showed that the wagons coming from the east turned diagonally southwest, so as to cross the track and avoid Pecan creek on the west. So while there was nothing to prevent vehicles from using McKinney street on the east side of the track at the point where appellee was hurt, yet they did not



ordinarily use it, because they could shorten the distance across the street by turning southwest some feet before reaching the track. Leaving the vehicles out of the question, because pedestrians used said street also, what we find the truth to be is a man coming from the east toward the railway track could use the middle of the street, and follow the wagon tracks across the railway track. He could follow the northern boundary of the street at the place where the walk had been maintained, and it would carry him to the track north of where appellee was hurt. He could then turn south along the track, and cross the same lower down, and avoid the creek on the west, or he could go straight on across the track at a point north of where appellee was hurt, and would then have a beaten pathway 8 or 10 feet wide to go south on the west side of the said railway track, and avoid the creek, if he desired to pursue his journey to the west toward town. Persons coming from the coal chutes and the settlements north of that, south along the east side of the railway track, desiring to go east on McKinney street to that part of Denton lying east of said railway track, could leave the railway track and go east, north of where appellee was hurt, along the northern boundary of the street where the walk was maintained north of the telephone poles, or could leave the beaten path east of said railway track anywhere from said point to the southern boundary line of said street in order to go east. Persons coming from the coal chutes and the settlements north of there desiring to go to the town of Denton on the west would come down a beaten path 8 or 10 feet wide on the west side of said track, pass opposite where appellee was hurt on the east side of the track, and turn west up McKinney street some 8 or 10 feet south of where appellee was hurt."

We find that the testimony at least tended to prove what is thus stated as established by the evidence, and the statement and findings heretofore filed as the basis for our judgment of reversal will be modified accordingly, if this should be considered a material modification thereof.

#### FIDELITY & DEPOSIT CO. OF MARYLAND v. NATIONAL BANK OF COMMERCE OF DALLAS et al.\*

(Court of Civil Appeals of Texas. Dec. 21, 1907. Rehearing Denied Jan. 11, 1908.)

##### 1. APPEAL—CONCLUSIONS OF LAW—REFUSAL TO FILE—PREJUDICE.

Where an agreed statement of facts was adopted by the trial court as its conclusions of fact, and the same was sent to the Court of Civil Appeals as a full statement of facts to be considered on the appeal, appellant was not injured by the trial judge's refusal to file specific conclusions of law.

##### 2. BILLS AND NOTES—CERTIFIED CHECK—NON-COMMERCIAL INSTRUMENT.

An instrument certified by a national bank, reciting that on the failure of the drawers to

comply with a building contract the drawers agreed to pay plaintiff surety company, which had become surety on the drawers' construction bond, any amount such surety should become legally liable to pay on the bond, not exceeding \$10,159, otherwise the check to be void and held for naught, was not a certified check, drawn in the ordinary course of business, which is properly defined as a draft or order on a bank, purporting to be drawn on a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to his order or to bearer, instantly on demand.

##### 3. BANKS AND BANKING—NONCOMMERCIAL CHECKS—CERTIFICATION—ULTRA VIRES ACTS—AUTHORITY OF BANK'S OFFICERS.

Under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455], empowering national banks to perform all acts incident to the carrying on of banking business by discounting or negotiating notes, bills of exchange, or other evidence of debt, and by loaning money on personal security, etc., a bank had no power to certify an instrument by which the drawers agreed to pay their surety any amount the surety might be legally required to pay by virtue of such suretyship, not exceeding \$10,159, the check to be void in the absence of such liability; such instrument not being a commercial check, drawn in the ordinary course of banking business.

##### 4. SAME—ULTRA VIRES—RIGHT TO PLEAD.

Where the president and cashier of a bank had no authority to certify a noncommercial instrument, by which the drawers sought to indemnify their surety on a building contractor's bond for any liability the surety might sustain by virtue of such bond, the bank was not estopped to plead that the certification of such instrument was ultra vires and void.

##### 5. SAME—GUARANTY.

Under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455], specifying the powers of national banks, such a bank cannot bind itself by contracts of suretyship or guaranty made for the sole benefit of others.

##### 6. SAME—CERTIFICATION OF INSTRUMENT—REPRESENTATION—DEPOSITS.

Certification of a noncommercial instrument by the president of a bank for the benefit of the drawers, for the purpose of indemnifying the drawers' surety on a building contractor's bond, did not constitute a representation that the drawers had on deposit in the bank the amount specified in such instrument as the limit of the indemnity.

##### 7. SAME—OFFICER'S LIABILITY.

Where the president of a bank certified a noncommercial instrument for the accommodation of the drawers solely in his official capacity and ultra vires the bank's powers, he was not individually liable on such certification.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by the Fidelity & Deposit Company of Maryland against the National Bank of Commerce of Dallas and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The Fidelity & Deposit Company of Maryland brought this suit against the National Bank of Commerce of Dallas, J. B. Adoue, and W. Illingworth. The bank is sought to be made liable upon the following instrument in writing, which is made the basis of the suit: "The National Bank of Commerce, Dallas, Texas, June 10, 1901. \$10,159.00. The National Bank of Commerce of Dallas, Texas. On failure on our part to comply with a certain contract existing between the First National Bank Building Company, Lim-

\*Writ of error denied by Supreme Court.

ited, of Shreveport, La., and ourselves, in which we agree to erect a certain building for them in Shreveport, La., and the further condition that the Fidelity & Deposit Company of Baltimore City, Maryland, who have become our surety in said bond, have become legally liable on said bond, then and in that event pay to said Fidelity & Deposit Company any amount they may legally have to pay under their said bond, not exceeding the sum of \$10,159.00 (ten thousand one hundred and fifty-nine dollars). Otherwise this cheque to be void and held for naught. [Signed] Sonnefeld & Emmins. No. 450. Certified as per terms and conditions herein expressed. [Signed] J. B. Adoue, Prest. J. D. Estes, Cashier." J. B. Adoue is sought to be made liable upon the ground that in certifying the instrument sued on, "as per terms and conditions therein expressed," he made false representations, which led appellant to believe that the sum of money mentioned in the instrument was on deposit in the bank to the credit of Sonnefeld & Emmins, and would be held by the bank to protect appellant in the event of legal liability. W. Illingworth is sought to be made liable upon the ground that he executed to the bank a note, and delivered the same to J. B. Adoue, to be held by him for the purpose of indemnifying the bank against loss by reason of the action of J. B. Adoue in certifying the instrument sued on in the terms hereinafter shown. The bank defended upon the grounds, first, that it was without power to enter into the obligation sued upon, and that the acts of its officers (president and cashier) were ultra vires and void, and therefore of no binding force upon the bank; second, that the obligation of the bank, if any, imposed by the terms of certification of the instrument sued on, was secondary; and in the nature of a surety obligation, based upon the contract then existing between Sonnefeld & Emmins and the First National Bank Building Company, Limited, of Shreveport, La., and that there were subsequent alterations and changes made in the contract by said original parties thereto and the Fidelity & Deposit Company of Maryland, without notice or consent of the bank, and that this operated as a release and discharge of the bank from liability under such certification of the instrument sued on. J. B. Adoue answered, first, by general denial; second, that in certifying and signing the instrument sued on he acted in his official capacity as president of the bank; that he made no misrepresentations or concealments, and in nowise deceived or misled the plaintiff, etc., but acted in entire good faith in the premises, etc. W. Illingworth answered, first, by general denial; second, that the note executed by him to the bank was delivered to J. B. Adoue in trust, with the understanding that same should be by him held as indemnity against loss to the bank by reason of the certification of the note sued on, etc. The case was

tried by the court without the intervention of a jury upon an agreed statement of facts, which had been reduced to writing and signed by the parties, and resulted in a judgment for the defendants. Upon motion of the plaintiff to file conclusions of fact and law the trial court adopted the agreed statement of facts as his findings of fact in the case, and for his conclusions of law simply stated: "Upon said facts, judgment should be rendered for the defendants, which will accordingly be now done." The agreed statement of facts is also adopted by this court as its conclusions of fact.

P. M. Milner, McLaurin & Wozencraft, and A. H. Graham, for appellant. Finley, Knight & Harris, for appellees.

TALBOT, J. (after stating the facts as above). 1. Appellant was dissatisfied with the court's general conclusions of law that judgment should be rendered for the defendants, and filed a motion requesting specific findings of law upon several designated issues. This motion was refused, and the court's action upon it is assigned as error. There was and is no dispute about the facts. They were agreed upon, reduced to writing, and submitted to the court on the trial of the case. This agreed statement of the facts was adopted by the trial court as its conclusions of fact, and the same is found in the record sent to this court as a full statement of the facts to be considered on this appeal. In this attitude of the record the judge's refusal to file specific conclusions of law, expressive of his views of the legal questions involved, resulted in no injury to appellant, and hence furnishes no sufficient ground for a reversal of the case. *Bank v. Stout*, 61 Tex. 567; *Umscheid v. Scholz et al.*, 84 Tex. 265, 16 S. W. 1065.

2. Appellant contends, in effect, that the instrument declared on is a check certified by the bank in the usual course of banking business, and fixed the liability of the bank thereon upon the happening of the contingency expressed upon its face. This proposition is controverted by appellees, and the position taken that the contract sued on, so far as the bank is concerned, is a surety or indemnity obligation, indemnifying appellant to the extent of \$10,159 against liability and loss arising from default of Sonnefeld & Emmins in the performance of the contract with the first National Bank Building Company, Limited, for the erection of a building in Shreveport, La., and is ultra vires, and not binding upon the bank. We think it clear that the instrument in question is not a commercial check, certified in the usual course of business, and that the principles applicable to such checks cannot be invoked to fix liability on the bank. Indeed, we think it is plain from the face of the instrument that it is a check or order drawn and certified entirely outside of the usual course of banking business. Mr. Daniel, in his work on Negotiable Instruments,

vol. 2, § 1566, defines a check as follows: "A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order or to bearer, and payable instantly on demand." Tested by this definition, the instrument sued on is lacking in more than one of the essential characteristics of this species of commercial paper. It is not for the payment of a certain specified sum of money, nor is it payable instantly on demand. Neither is any amount by the terms of the instrument payable at all events. On the contrary, the amount agreed to be paid is uncertain, and dependent on condition that the drawers shall fail to comply with the terms of a certain building contract existing between them and a third party, namely, the First National Bank Building Company, Limited, of Shreveport, La., and on the further condition that the drawee (appellant) as surety on the drawer's bond for the faithful performance of said contract shall have become legally liable on said bond. The text-writers differ in their definitions of a check, some falling short, it is said, "of giving all its distinguishing qualities, and some ascribing to it qualities which it is not absolutely necessary that it should possess;" but the definition quoted is sustained by many authorities, among which are the following: Blair & Hoge v. Wilson, 28 Grat. (Va.) 170; Ridgely Bank v. Patton, 109 Ill. 484; Harrison v. Nicollet Nat. Bank, 41 Minn. 489, 43 N. W. 336, 5 L. R. A. 746, 16 Am. St. Rep. 718; Oyster & Fish Co. v. Bank, 51 Ohio St. 106, 36 N. E. 833; Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Kavanaugh v. Bank, 59 Mo. App. 540. That it shall be payable instantly on demand and unconditionally for a sum certain are certainly essential elements, and inasmuch as the check or order we are considering shows on its face that the time of its payment was uncertain, and the amount which the bank might become liable for not definitely fixed by its terms, and that its liability for any amount whatever was conditioned and dependent upon the happening of certain contingencies, we are quite sure it was not a check certified in the usual course of business, and therefore no officer of the bank had implied authority to certify it. That the president or cashier of a bank ex officio has implied power to certify a check drawn in the usual course of banking business when presented for payment seems to be well settled. Such a check is supposed to be drawn upon a previous deposit of funds, and when certified is an appropriation of such funds to the holder of the check. In such case the money no longer belongs to the drawer. Morse on Banking, 382. But, "without special authority conferred upon him, the officer of a bank has no implied authority to certify any but commercial checks—that is, those

drawn in commercial form in the usual course of business"—and the certification of other than such checks will not bind the bank, unless express authority for so doing is shown; so that, "if the check bears upon it a memorandum that it is to be held as collateral, etc., the cashier's certification is not in due course, and will not bind the bank unless expressly authorized." *Dorsey v. Abrams*, 85 Pa. 299, 27 Am. Rep. 657; 2 *Daniel on Negotiable Instruments*, § 1607. The proposition that appellant was a bona fide holder of the order for value is unavailing. It was not shown that either the president or the cashier of the bank was expressly authorized or empowered to certify said order, and the face of the instrument affected appellant with notice that it was not a commercial check. This was sufficient to put appellant upon inquiry as to the authority of said officers.

3. Treating the contract sued on as a surety or indemnity obligation, indemnifying appellant to the extent of \$10,159 against liability and loss arising from default of Sonnefeld & Emmins in the performance of their contract with the First National Bank Building Company, Limited, as we think it should be, then the acts of the officers of the bank in entering into such an obligation must be held to be ultra vires and void. Section 5136 of the Revised Statutes of the United States provides that national banks shall have power "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the banking business; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title." In construing this statute the courts of the United States, to whose interpretation of such laws the state courts must yield, have repeatedly held, in effect, that it is not within the corporate power of a national bank to become surety or guarantor for another, or to bind itself to answer for the debt or default of another. In *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059, the authorities upon the subject are cited in extenso, and the rule declared to be "that a national bank has no power, with or without a sufficient consideration, to agree or bind itself that a draft of A. upon B. will be paid; that such agreement is a mere guaranty, and is not within the powers conferred upon such banks; and that, when sued upon such a contract, the bank can successfully interpose a defense of ultra vires." In *Bank v. Pirie*, 82 Fed. 799, 27 C. C. A. 171, the rule is stated thus: "The act of Congress under which the bank was organized confers no authority upon national banks to guaranty the payment of debts contracted by third parties, and acts of that

nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily ultra vires. A national bank may indorse or guaranty the payment of commercial paper which it holds, when it rediscounts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incident to the express authority conferred on such banks by the national banking act to discount and negotiate promissory notes, drafts, bills of exchange, and other evidence of debt (*People's National Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907; *U. S. Nat. Bank v. First Nat. Bank*, 49 U. S. App. 67, 79 Fed. 296, 24 C. C. A. 597); but it has never been supposed that the board of directors of a national bank can bind it by contracts of suretyship or guaranty which are made for the sole benefit and advantage of others. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power by such corporations would be detrimental to the interest of depositors, stockholders, and the public generally—citing *Norton v. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *State Nat. Bank of St. Joseph v. Newton Nat. Bank*, 32 U. S. App. 52, 58, 66 Fed. 691, 14 C. C. A. 61; *Bank v. Smith*, 40 U. S. App. 690, 23 C. C. A. 80, 77 Fed. 129." It follows that the effort on the part of the president and cashier of the appellee bank in this case by the acts disclosed to create upon it an obligation to indemnify appellant, to the extent of the amount specified in the instrument declared on, against liability and loss arising from default of *Sonnefield & Emmins* in the performance of their contract with the *First National Bank Building Company, Limited*, or to in any manner answer to that extent for such default, was ultra vires, and not binding upon the bank. *Commercial Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879; *Groos et al. v. Brewster* (Tex. Civ. App.) 55 S. W. 590; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1069; *Bowen v. Nat. Bank* (C. C.) 87 Fed. 430, and cases cited. The foregoing authorities also sustain the view that under the circumstances of this case the bank was and is not estopped to plead ultra vires, but the remarks quoted from cases mentioned below are especially applicable. In *California Bank v. Kennedy*, 167 U. S., loc. cit. 367, 17 Sup. Ct. 833, 42 L. Ed. 198, Mr. Justice White says: "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act." In *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S., at pages 59 and 60, 11 Sup. Ct. 488, 35 L. Ed. 55, it is said: "A contract of a corporation, which is ultra vires in the

proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation for any right of action upon it." It must be borne in mind that we are speaking of acts that are ultra vires absolute—that is, such as are "beyond the powers of the bank for any purpose and under all circumstances—and not acts that are ultra vires by circumstance, or such as are beyond its authority for some purposes or under some circumstances, but are within its power under other circumstances or for other purposes." We regard the acts involved in this controversy to be of the character first named. Many of the authorities cited and discussed by appellant have reference to acts ultra vires by circumstances unknown, and hence not applicable to the facts of this case.

4. There is no assignment of error complaining of the judgment in favor of *Illingworth*, and the only remaining question requiring notice is whether or not *J. B. Adoue* became and was individually liable upon the obligation sued on. Such liability is claimed by appellant upon the ground that *Sonnefield & Emmins* did not, at the date of the giving of the order, have money on deposit in the bank sufficient to pay the same, and that *Adoue* by certifying the said order, "as per terms and conditions therein expressed," falsely led the appellant to believe that the sum named in said obligation was on deposit to the credit of said *Sonnefield & Emmins*, and would be held by the bank to protect appellant in the event it should become legally liable on its bond to the *First National Bank Building Company, Limited*. This proposition cannot be maintained. It clearly appears that *J. B. Adoue*, in certifying and signing the instrument, acted as an officer of the bank, and with a view of binding only the bank. He made no misrepresentations whatever, so far as the evidence shows, and, having acted simply as an officer of the bank, and no liability being fixed upon the bank, *Adoue* is not individually liable. *Bank v. Bank*, 87 S. W. 1032, 13 Tex. Ct. Rep. 181; *Holt v. Bank* (C. C.) 25 Fed. 812. Again, as the check sued on was not a certified check, issued in the usual course of business, the presumption would not obtain, or could not be indulged, as it would or could be in the case where such a check was given, that funds had been deposited with the bank to meet it. The face of the instrument was notice to appellant of that fact, and that it did not have the effect to appropriate any

deposit of Sonnefeld & Emmins to its payment. Adoue did not represent that there were such funds on deposit for that purpose, and he cannot be charged with having deceived or misled appellant into the belief that there were by the mere certification of the order. If appellant was ignorant of the fact that no funds of Sonnefeld & Emmins were in the bank to meet the order, it must be attributed to its neglect and want of investigation. There were in fact no such funds, and inquiry would have disclosed to appellant that fact. The action of the court in rendering judgment for appellees embraces a finding that, under the facts and circumstances disclosed by the evidence, there was no such misrepresentation or concealment on the part of Adoue as to render him individually responsible for the amount of the order, and we think such finding warranted by the evidence, and it will not be disturbed. Certainly, the court was not authorized, under the circumstances, to declare, as a matter of law, that the mere unauthorized act of certifying and signing the order constituted such a legal fraud upon appellant as rendered Adoue personally liable.

Believing no reversible error is apparent of record, the judgment of the court below is affirmed.

#### PULASKI STAVE CO. v. SALE.

(Court of Appeals of Kentucky. Jan. 14, 1908.)

##### 1. FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CREDIT GIVEN TO PROMISOR.

In an action for the price of goods furnished to defendant's employes subsequent to a promise by defendant to pay for same, the statute of frauds is no defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 35-46.]

##### 2. APPEAL—DETERMINATION—REVERSAL.

In an action for the price of goods sold, where the evidence was conflicting, but showed that defendant was charged with an order that had never been paid, which was admitted by plaintiff, the judgment will be reversed, with directions to enter a judgment less the amount of the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4590.]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by C. W. Sale against the Pulaski Stave Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, with directions.

Gourley, Redwine & Gourley, for appellant. B. Blakey, for appellee.

NUNN, J. This action was instituted by appellee to recover of appellant an alleged balance of indebtedness of \$380.98, created in the year 1906. The account filed with appellee's petition is made up of an account of \$103.81 for goods delivered to one Wade Blankenship and 97 orders of different dates

drawn by Wade Blankenship and others upon appellee for goods and supplies, amounting, as alleged, to \$404.95, and for \$12.22 furnished directly to appellant, which sum is admitted by it to be correct, making the whole amount \$580.98. This amount is credited by a check given by appellant, dated July 6, 1906, for \$200, leaving a balance of \$380.98, as claimed by appellee. Appellee alleged in substance in his petition that, before the goods and supplies were sold and delivered by him, appellant, by its president, J. C. Parker, requested him to furnish same to its employes and promised to pay for same; that for several months it paid such accounts without objection. Appellant answered, controverting all the allegations of the petition, and pleaded the statute of frauds. On motion of appellant the action was transferred to the equity docket and referred to the master commissioner to take proof and report the state of accounts existing between the parties. The proof was taken and report made, showing that appellee was entitled to recover the amount sued for. Exceptions were filed by appellant to the report, the case tried, and the court sustained the commissioner's report, rendering a judgment for the whole amount.

The proof is very conflicting, and we would not feel authorized to disturb the judgment of the court if it had found in behalf of appellant; but some weight should be given to the judgment of the chancellor. The statute of frauds does not apply to the facts of this case. Appellant did not promise to pay the debts of its employes which had already been created. In such a case a promise in writing would have been necessary to bind it. But the promise was made before the goods were obtained, and appellee parted with his goods upon the faith of the promise by appellant to pay for same. But upon an examination of the record we find that the commissioner and court erred in ascertaining the total amount of the 97 orders to be \$464.95, for the correct total is \$462.55, leaving a difference of \$2.40. This is a small sum, and we would not reverse for this error alone; but the court also erred in charging appellant with an order of \$46.31, drawn by Blankenship, to be entered, when paid, as a credit on his account. It was never paid, is one of the orders sued on, and aids in making up the sum total of the orders. This is admitted by appellee in his deposition. This would be correct, if the account against Blankenship had been credited with that sum and appellee had sued for the balance of the account; but he sued for the whole account. The judgment of the lower court had the effect to charge appellant with the \$46.31 twice. It appears that the judgment of the lower court should have been \$332.23, instead of \$380.98.

For these reasons the judgment of the lower court is reversed, with directions to enter a judgment for that amount.

**DODD et al. v. PITTSBURG, C., C. & ST. L. R. CO. et al.**

(Court of Appeals of Kentucky. Jan. 14, 1908.)

**1. CORPORATIONS—MISAPPROPRIATION OF CORPORATE EARNINGS—RECOVERY AT SUIT OF MINORITY STOCKHOLDERS—ATTORNEY'S FEES PAID BY CORPORATION.**

In a suit by minority stockholders of a corporation against a railroad company for its wrongful appropriation of the assets and earnings of the corporation, resulting in another railroad company recovering judgment against the corporation, attorney's fees paid by the corporation in defense of the action resulting in the judgment are not recoverable as a part of the costs.

**2. SAME—NATURE OF LIABILITY FOR LOSS.**

A bridge company contracted with several Northern railroads and one Southern road for the use by them of its bridge on payment of equal charges sufficient to provide for annual dividends and a sinking fund. One of the Northern roads, by virtue of its control of the bridge company, required the latter to pay rebates to the Northern roads, to the exclusion of the Southern road, which afterwards recovered judgment against the bridge company for its proportion of the rebates. *Held*, that the loss suffered by the bridge company was a tort committed against it by the railroad company controlling it, rendering the railroad company liable for the entire loss at the suit of the minority stockholders of the bridge company.

**3. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—NATURE OF CAUSE OF ACTION.**

A decision in an action by minority stockholders of a corporation to compel defendant to satisfy a judgment against the corporation in an action on a contract, which denies relief, is not conclusive on the right of the minority stockholders to compel defendant to satisfy a judgment against the corporation for a tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1092-1099.]

**4. APPEAL AND ERROR—FAILURE TO PRESENT QUESTION BELOW—DEPARTURE IN PLEADING.**

Where, in a suit by minority stockholders of a corporation to compel defendant to pay a judgment rendered against the corporation, the reply, on which issue was joined, advanced the theory of a right of recovery for fraud committed by defendant, and the matter was litigated on that issue, defendant could not on appeal defeat a recovery on the ground that the theory of fraud was a departure and could not, under the circumstances, be made the foundation of the action.

**5. PLEADING—REPLY—DEFENSIVE MATTER.**

Where, in a suit by minority stockholders of a corporation to compel defendant to satisfy a judgment against the corporation, defendant relied on a decision of the court denying relief to the stockholders, demanding that defendant should satisfy another judgment against the corporation in an action on contract, a reply advancing the theory that the ground of recovery was based on a tort committed by defendant, was available under Civ. Code Prac. § 101, authorizing a pleading of equitable matter of avoidance or estoppel, etc.

**6. CORPORATIONS—MISAPPROPRIATION OF CORPORATE FUNDS—ACTIONS BY MINORITY STOCKHOLDERS.**

A railroad company owned a majority of the stock of a bridge company and of defendant, another railroad company. The bridge company contracted with defendant and other railroads for the use by them of its bridge. The principal officers of defendant were the officers of the bridge company, and by reason of such control the earnings of the bridge company were wrongfully divided for the benefit of defendant. *Held*,

that defendant, in a suit by minority stockholders of the bridge company, must pay the loss sustained, and the railroad company controlling defendant, having received no benefit from the wrongful division of the earnings, was not liable.

**7. SAME.**

A bridge company contracted with railroads for the use by them of its bridge on payment of equal charges sufficient to provide for annual dividends and a sinking fund. One of the contracting railroads, by virtue of its control of the bridge company, wrongfully divided the surplus earnings of the bridge company to the exclusion of another contracting railroad, which afterwards recovered judgment against the bridge company for its share of the earnings so appropriated. *Held*, that the railroad company misappropriating the funds could not defeat a recovery of the loss sustained, at the suit of the minority stockholders of the bridge company, on the theory that the division of earnings was *intra vires* and made to carry out a bona fide scheme to conserve the interest of the bridge company from competition.

**8. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.**

The right of minority stockholders of a corporation to compel defendant, controlling it, to satisfy a judgment obtained against it, based on the fraudulent division by defendant of the surplus earnings of the corporation, accrues when the corporation is compelled to pay the judgment, and not when the wrongful division of the earnings was made; a juncture of wrong and damage giving rise to a cause of action.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by John L. Dodd and others against the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Kohn, Baird, Sloss & Kohn, W. O. Harris, and J. C. Dodd, for appellants. Helm & Helm, Helm, Bruce & Helm, and Lawrence Maxwell, Jr., for appellees.

LASSING, J. Appellants were the plaintiffs in the circuit court, and the present appeal is from a judgment of the Jefferson circuit court, rendered January 7, 1905, dismissing the ninth paragraph of the amended petition, filed October 15, 1903, and supplemented and extended by amendments of February 25, 1904, and October 29, 1904. Many of the questions involved have been settled by this court in a previous appeal in this same case, reported in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, under the title "Pittsburg, C., C. & St. L. Ry. Co. et al. v. Dodd et al.," and we shall not in this opinion go over what was there decided.

After the case was returned to the trial court the plaintiffs amended the ninth paragraph of their previous pleading, filed October 15, 1903, and the present appeal deals exclusively with the ninth paragraph and its amendments and the proceedings thereon. In that paragraph it was alleged in substance that on March 11, 1902, a judgment was rendered against the Louisville Bridge Company, in favor of the Louisville & Nashville Railroad Company, for certain rebates of tolls, ac-

cruing during the years, 1888, 1889, 1890, and 1891, amounting, with interest computed down to March 11, 1902, to the sum of \$259,280.61 and costs; that, shorn of interest, the principal covered in the judgment was \$150,775.88. The paragraph then proceeds with other allegations in general to the effect that the judgment so recovered had not yet been paid, but that the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company was endeavoring to cast the burden of the judgment upon the bridge company, with a prayer that the bridge company and defendant be required to make immediate demand upon the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to pay, and that that company be required to pay into the treasury of the bridge company a sufficient amount to satisfy the said judgment. On December 12, 1903, the parties to this litigation entered into a written agreement, settling all of their differences, but expressly reserving to the plaintiffs and for further litigation any loss to which the bridge company might be subjected by virtue of the matters set forth in the ninth paragraph above referred to, growing out of the judgment which the Louisville & Nashville Railroad Company had recovered against the bridge company for the rebate of tolls in the years aforesaid. The manner of the rebating of these tolls is fully set forth and explained in the opinion of this court in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096.

By an amended pleading filed by the plaintiffs on February 25, 1904, this agreement of December 12, 1903, is in general terms set out, and it is further there alleged that the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company paid only a part of the judgment recovered against the bridge company, leaving unpaid and casting as a loss upon the bridge company a certain portion which the bridge company was required to pay, and which amounted on the date of payment, to wit, January 11, 1904, to the sum of \$144,329.28. In general terms it is alleged that this amount, which the bridge company was required to pay, was the result of a wrongful appropriation of the assets and earnings of the bridge company by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that during the time these rebates were being made, for which the judgment of the Louisville & Nashville Railroad Company was recovered, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company had derived a profit of \$304,412.95. By stipulation of the parties it is agreed that these amounts are correct. The pleading of February 25, 1904, prays judgment against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company for the sum of \$144,329.28, with interest thereon at the rate of 6 per cent. per annum from January 11, 1904, and costs. The amended pleading of date October 29, 1904, refers to a matter of attorney's fees paid by the bridge company in defense of the

suit of the Louisville & Nashville Railroad Company, which resulted in the judgment above referred to; and as the court is of the opinion that the attorney's fees cannot be recovered as a part of the costs, it will not be necessary here to consider that pleading. See *Gaar v. Louisville Banking Co.*, 74 Ky. (11 Bush) 180, 21 Am. Rep. 209.

The Louisville & Nashville Railroad Company recovered another judgment against the Louisville Bridge Company for its proportion of the rebates of tolls for the years 1892, 1893, 1894, and 1895, which was before this court in 106 Ky. 674, 51 S. W. 185. On the previous appeal in this case (115 Ky. 176, 72 S. W. 822, 74 S. W. 1096) the plaintiffs sought to recover against the appellee for the loss sustained in the payment of this judgment; but that contention was denied in the judgment of this court in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096. It is contended by appellees that the principle of that judgment enforces a decision against the contention of the appellants made here, even if it be not a foreclosure of the contention under the principles of *res judicata*. The contention of the appellants is that the loss which they desire in this proceeding to restore to the bridge company grows out of a tort of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, while there was no feature of tort so far as the bridge company was concerned in the judgment recovered by the Louisville & Nashville Railroad Company in the case decided in 106 Ky. 674, 51 S. W. 185, and for which a recoupment was denied in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, and that, therefore, they are not estopped, either by the principles of *res judicata* or precedent of the former case. Both parties seriously contend for and against the claim on the ground of tort as an original proposition, and this requires a short statement of the main features of the case.

While a vast quantity of evidence has been introduced and the record is exceptionally large, the facts which control the question at bar are few and not disputed. The dispute attaches mainly to the deductions drawn from the admitted facts. It appears that the Louisville Bridge Company was organized with a capital of \$1,500,000, all of which was paid in, and that this, together with \$800,000 borrowed on an issue of bonds secured by mortgage, constructed and equipped the bridge, which was open for traffic on February 12, 1870. Of its total capital, consisting of 15,000 shares, the Pennsylvania Railroad owns and has owned, at least since 1880, as agreed by the parties, 9,006 shares, giving it a control in stockholders' meeting; and it further appears from the stipulation that the Pennsylvania Railroad owns all of the stock of the Pennsylvania Company, and it is not disputed that the Pennsylvania Company manages all of the railroad interests of the Pennsylvania Railroad west of Pittsburg, and that in turn the Pennsylvania Company owned and controlled the Jeffersonville, Madison



& Indianapolis Railway, which, with other railroads, in the year 1890 was consolidated into the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that by this consolidation the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company assumed all of the obligations of the Jeffersonville, Madison & Indianapolis Railroad Company, and it is stipulated that the Pennsylvania Railroad Company owns, and has always owned since the consolidation, 57 per cent. of the stock of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. It appears that on June 5, 1872, the Louisville Bridge Company, together with the Louisville & Nashville Railroad Company, which was the only railroad approaching the bridge, which spans the Ohio river at Louisville, from the south, and the Jeffersonville, Madison & Indianapolis Railroad, and the Ohio & Mississippi Railroad, then the only railroads approaching it from the north, entered into a written contract which is set forth in full on the former appeal of the case in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1006. It is not necessary again to set forth the contract here. The general plan of that contract was to keep up merely the corporate organization of the bridge company, and to pay its operating expenses and taxes, and to provide a sinking fund to retire its indebtedness of \$800,000 at its maturity in 1888, and to pay a semiannual dividend to its stockholders. The railroads assumed the management and control of its property and while the contract provided that the tolls should be fixed at a sum sufficient in the aggregate to raise a sum sufficient to meet the fixed charges, this provision was very soon breached. From the beginning the railroads in effect fixed the tolls.

During the first years of operation under the contract all of the surplus earnings were paid over to the sinking fund to retire the bonded indebtedness. In 1875 the Ohio & Mississippi Railroad Company, through its president, complained that the tolls were excessively high, and that, unless reduced, it would retire from the contract, under a clause which permitted this upon two years' notice. It seems, however, that nothing was done under this threat, but that in the latter part of 1880, or the first part of 1881, a meeting was held at which the bridge company, the Ohio & Mississippi Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company were represented. At this meeting it was agreed that the tolls should not be reduced, but that the contribution to the sinking fund of the bridge company should be reduced, and, instead of paying over all of the surplus earnings, they should pay over only an amount of \$36,500 per annum, which was calculated to be a sufficient contribution to retire the bonds at their maturity in 1888, and this sum did subsequently retire the bonds and leave a small surplus. At that meeting it was further agreed that all of the earnings of the bridge company, and it ap-

pears that it had certain terminal properties which it rented and probably other sources of income, should be turned over to a common fund, and that after the payment of the fixed charges the balance should be divided among the Northern roads in the proportion of the traffic furnished by them respectively. It appears that the Louisville & Nashville Railroad Company was not invited to this conference, and had no part in it, and was never apprised of it, but, on the contrary, that this arrangement was concealed from the Louisville & Nashville Railroad Company until about the year 1888.

At the time of this agreement, in 1880 or 1881, it appears from the agreed stipulation that the Pennsylvania Railroad Company, then acting in its stockholding interest in the bridge company, elected three out of five of the members of the board of directors of the Louisville Bridge Company, and at that time and thereafter actually elected as its representatives on that board the first, second, and third vice presidents of the Pennsylvania lines west of Pittsburg, and that during the whole time of the present controversy these officers were elected without reference to their individual personality, but wholly by virtue of the fact that they occupied these respective positions in the Pennsylvania interest. It further appears that at none of the times in controversy did any of these officers thus elected in the Pennsylvania interest have any stock in the bridge company, and none of them was paid any salary by the bridge company, but all received their entire compensation from the other Pennsylvania interests. It further appears from the evidence that the meetings of the stockholders of the bridge company were merely perfunctory, and that in fact its whole directory was elected by the stock of the Pennsylvania Railroad, and that the meetings of the board of directors were few and far between. Under these circumstances the agreement to keep the tolls of the bridge company at a rate in excess of the contract and to divide the surplus between the two railroads which came to it from the north, was made, and a letter of instructions was written by an officer of the Pennsylvania Company to the accounting officer of the bridge company, giving him a form for keeping the accounts and for the division of this surplus, and expressly excluding from participation the Louisville & Nashville Railroad Company. Under this arrangement the tolls were maintained far in excess of raising an amount equal to pay the fixed charges provided for in the contract of June 5, 1872, and the surplus was divided among the Northern railroads from the year 1880 down to and including the year 1891.

Shortly after the agreement was made the Louisville, Evansville & St. Louis Railroad Company, called the "St. Louis Air Line," and the Louisville, New Albany & Chicago



Railway Company, called the "Monon," were incorporated, and were permitted to participate in the surplus earnings of the bridge company. Both of these latter railroads, the "Air Line" and the "Monon," as well as the Ohio & Mississippi Railway Company, failed and went into the hands of a receiver before the initiation of any of the litigation here concerned. It is stipulated that during the years 1881 to 1891, both inclusive, there was rebated out of the surplus earnings of the bridge company to the appellee and its predecessor, whose obligations it assumed, the sum of \$900,787.02, and that for the years 1888 to 1891, both inclusive, there was rebated to the appellee and its predecessor, out of these surplus earnings, the sum of \$304,412.95. These amounts, by stipulation, are agreed to be so much profit to the appellee and its predecessor out of the surplus earnings of the bridge company, which were accumulated in breach of the contract between the railroads and the bridge company. In this division of the surplus earnings among the Northern railroads the Louisville & Nashville Railroad Company was entirely ignored and the distribution was concealed from it, and in this way that proportion of the surplus earnings which were exacted from the traffic furnished by it in violation of the contract of June 5, 1872, was divided among the Northern railroads; and it was to recover this wrongful exaction that the Louisville & Nashville Railroad Company instituted two actions against the Louisville Bridge Company in the year 1892. It (the Louisville & Nashville Railroad Company) discovered somewhere in the year 1888 that it was being discriminated against under the contract of June 5, 1872, and that the discriminatory tolls exacted upon its traffic crossing the bridge were being divided wholly among the Northern railroads. An inquiry was set afoot which resulted in a meeting of the railroads patronizing the bridge at Cincinnati, by virtue of which it was agreed that, beginning with January 1, 1902, the railroads on the north would pay to the bridge company the proportion of the surplus tolls which belonged to the Louisville & Nashville Company, if it was finally adjudged to be entitled under the contract of June 5, 1872, to participate in the surplus. The "Monon" alone disagreed to this arrangement and defaulted in the payment of any tolls, which brought about a loss which was adjudged on the former appeal in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096. Likewise the "Air Line," while entering into the agreement, defaulted in the payment of a small amount of tolls, which was adjudged on the previous appeal; but none of these defaults has any bearing upon the question now before the court.

The manner in which these rebates were conducted, in short, was this: The Louisville & Nashville Railroad Company, from the making of the contract and during the en-

tire period covered by this litigation, received its interchange of traffic from, and delivered its interchange of traffic to, the Northern railroads, and permitted the Northern railroads to keep the accounts. The bridge company never for itself kept an account of the traffic that passed over its bridge, but received its account from the railroads, and in this way the accounts of its entire traffic were furnished to it by the Northern railroads in one account, which did not, prior to 1892, separate the Louisville & Nashville traffic delivered to the Northern roads from the traffic of the Northern roads delivered to the Louisville & Nashville, and thus the entire traffic down to 1892, in the information furnished the bridge company, appeared to be the traffic exclusively of the Northern railroads. Quarterly the bridge company, from its own data of expenses and the traffic furnished it by the Northern railroads, would deliver to the railroads a statement showing the gross traffic and the fixed charges to be paid under the operating contract, and upon these statements so furnished the railroads would at intervals furnish to the bridge company the funds necessary to meet its fixed charges, withholding the balance, and the amounts thus retained are what in this opinion and in the record are denoted "rebates." In this way, the wrongful exactions by surplus tolls from the traffic furnished by the Louisville & Nashville were divided among the Northern railroads, and this continued down to and including the year 1891; but thereafter, and beginning with the year 1892, under the agreement made at Cincinnati by the appellee and its associates, the Northern railroads, in their quarterly statements to the bridge company, stated the amount of traffic that was furnished by the Louisville & Nashville, and in their remittances remitted to the bridge company the proportion of the surplus earnings which belonged to it, save and except the "Air Line" and "Monon," which defaulted in the payment of all tolls. In this way, and from 1892 to 1895, both inclusive, the appellee regularly in periodical installments paid to the bridge company under this new agreement the proportion of the rebates which belonged to the Louisville & Nashville. These rebates were used by the bridge company in meeting the deficit, in dividends and other fixed charges, caused by the failure of the "Air Line" and "Monon" to pay any tolls, as set forth in the former appeal in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096. In 1896, instead of a surplus, there was a deficit in the earnings of the bridge company, and this deficit brought about a default in the dividends, which in turn aroused the stockholders and thus brought about the present litigation, which was instituted in September, 1897.

The Louisville & Nashville Railroad Company had accurate knowledge of its proportion of the rebates from the years 1892 to 1895, inclusive, which were furnished to it

under the agreement above referred to; but for the years prior to 1892 it had no such information, though it knew it had been excluded from participation. To obtain this information for the years prior to 1892 would require a great deal of work in the examination of waybills and original documents in its archives, and, as stated by its counsel, it was fearful whether or not a compilation of sufficient proof could be thus made. To circumvent these difficulties, in the year 1892 it filed two suits against the bridge company to recover the proportion of the surplus earnings of which it had been deprived. In one suit it sought to recover its proportion of these earnings from the year 1880 down to and including the year 1891; and in the other suit it sought to recover its proportion of these earnings from the years 1892 to 1895, both inclusive. Both suits were based upon an alleged breach by the bridge company of the contract of June 5, 1872, in that the tolls had been maintained at a rate in excess of that which would merely meet the obligations of the contract, and in this way a surplus had been accumulated and divided, to its exclusion. It pressed to a speedy judgment the suit brought to recover for the years 1892 to 1895, inclusive, and withheld a prosecution of the suit for anterior years until it had recovered judgment for the latter years. The result of the prosecution for the latter years—that is, for the years 1892 to 1895, both inclusive—was a judgment in its favor on the 27th day of June, 1896, against the Louisville Bridge Company. At the time of the filing of the original petition in the present suit this judgment had been recovered; but at the instance of the railroads, as set forth in the previous appeal (115 Ky. 176, 72 S. W. 822, 74 S. W. 1096), was still in process of litigation; but the suit to recover for the years anterior to 1892 had not, at the filing of the petition in the present litigation, been prosecuted to a final judgment.

The original petition in the case at bar sought to recover by way of indemnity on behalf of the bridge company whatever amount might be ultimately adjudged against it in favor of the Louisville & Nashville Railroad Company by virtue of the suit involving the years 1892 to 1895, both inclusive, and referred to the suit for the anterior years as a merely pending matter. It was then a question whether there would be any recovery against the bridge company for these years prior to 1892. The allegations in the pleadings in a general way referred to the accumulation and division of all of these surplus earnings as a wrong committed by the appellee and its predecessor upon the bridge company, and the issues joined on the original pleadings are sufficient for a recovery in tort. At the time of the previous appeal in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, the judgment of the Louisville & Nashville for the years from 1892 to 1895, both inclusive, had been affirmed by this court in 106 Ky.

674, 51 S. W. 185, and had been paid off. It appeared, from the evidence, the agreed facts, and the presentation of the case on that appeal, that the stockholders in the right of the bridge company were seeking to recover from the appellee the full amount of the loss suffered in contractual dividends by the payment of the judgment as an operating expense under the contract of June 5, 1872. The contention then was that under the contract the contracting railroads were liable for the operating expenses and the dividend jointly and severally, and that this loss was an operating loss, and therefore to be recovered against one or all of the contracting railroads. This court did not take this view, and in the opinion in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, it was held that as the deficit in dividends had come from an application to operating expenses and other obligations under the contract of June 5, 1872, of the amounts paid to it in the office of a stakeholder, for the purpose of the then pending suit of the Louisville & Nashville Railroad Company, the loss was not an operating charge, but was an independent loss of the bridge company, to fall upon its dividends or capital. The matter could not have been otherwise adjudged, as the appellee in regard to the matter then before the court had committed no wrong either in the accumulation or division of surplus earnings. It had agreed to and had actually paid periodically its whole contribution as called for by the contract, and the only misfortune of the bridge company was that it had used these contributions to meet other losses occasioned by the entire default of two other contracting parties to pay anything whatever. What the opinion of this court on that appeal, therefore, has to say with regard to the first judgment of the Louisville & Nashville recovered against the bridge company for the years 1892 to 1895, both inclusive, has no bearing upon the loss suffered under the subsequent judgment in the case now before the court, unless the facts are the same.

The claim of the Louisville & Nashville for its proportion of the surplus earnings of the bridge company for the years anterior to 1892 also resulted in a judgment in its behalf against the bridge company for the years 1888 to 1891, both inclusive. Its proof failed as to years antedating 1888. This judgment was for \$150,775.88, and was affirmed by this court in 116 Ky. 258, 75 S. W. 285, under the style of "Louisville Bridge Company v. L. & N. R. R. Company." At the conclusion of the opinion in that case this court expressly withheld intimating any opinion upon the merits of any controversy that might arise between the bridge company and the present appellee. This judgment was paid off by the bridge company on the 11th day of January, 1904, and it amounted then to \$314,534.35. Of this sum the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company furnished the amount of

\$170,204.97, on the contention that it had received of the surplus tolls owing to the Louisville & Nashville thus wrongfully accumulated and distributed only this amount, and that the balance of the amount had been distributed to other Northern railroads, and, as they were insolvent, the bridge company must suffer that loss. The present litigation is to determine this question; that is, whether or not this loss must fall upon the bridge company or fall upon the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. By appropriate pleadings these facts are set forth, and it is sought on behalf of the bridge company to recover this amount of \$144,329.28, which it was compelled to take out of the dividend fund, under the contract, from the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, on the theory that it was under its management of the bridge company through its first, second, and third vice presidents that the tolls were kept at a rate that would accumulate a surplus, and that it was by its tort through these officers, who controlled the bridge company, that this surplus thus wrongfully accumulated was again wrongfully distributed to the advantage of the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and its predecessor, and that thus, the appellee having wrongfully accumulated the surplus and having wrongfully divided it between itself and its associates, it cannot now relieve itself of liability by returning only that proportion which it received of the share of the Louisville & Nashville; that the wrong is a joint and several tort, for which it or all of the wrongdoers must account.

It appears to the court from the facts which are not disputed that the agreement of the year 1880 or 1881, by which the surplus in question was accumulated, was wrongful and a fraud upon the Louisville & Nashville, and that the division of that surplus for the years in question was wrongful and was a fraud upon the Louisville & Nashville, and that this result was accomplished wholly by virtue of the control which the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and its predecessor had over the bridge company through the stockholding interest of the Pennsylvania Railroad Company, in and by virtue of which the first, second, and third vice presidents of the appellee and its predecessor were elected to the board of directors of the bridge company and controlled its action. This control alone, by virtue of the officers which the two corporations had in common, would not be sufficient to mulct the appellee for the entire loss brought about by their wrongdoing, as was well said in the opinion of the trial judge. It appears, however, beyond question, that the first, second, and third vice presidents of the appellee and its predecessor, who controlled the bridge company, did not manage or operate the bridge company to their individual profit; nor does it

appear that any official action was taken by any of these officers for their individual aggrandizement. Their whole effort and intent was to manage the bridge company as a part and parcel of the Pennsylvania System. The Pennsylvania interest was their interest, and it was to further that interest that the contract was violated by keeping the tolls higher than the contract permitted and that the surplus thus accumulated was distributed among the Pennsylvania interests and the other railroads taken into the agreement. In short, there was no damage suffered by the bridge company by the accumulation of surplus. The damage was in the division, and this division was not among corporate officers, but among contracting railroads, one of which was the appellee and its predecessor, which had complete control of the bridge company through their common officers; and it is this feature that makes the appellee responsible jointly and severally for the entire loss brought about by this wrongdoing. While the officers of the appellee were elected to the directory of the bridge company by the Pennsylvania Railroad, their management and control of the bridge company was wrongful to the bridge company and to the profit of the appellee, and it was the appellee as an entity that received and enjoyed this profit from this wrongful act, and therefore, under the principles of law controlling such cases, it cannot enjoy the profit without suffering the correlative duty of liability for the loss.

It is not necessary in this opinion again to refer to the duties and obligations of a corporation to its stockholders, nor to the rights of the stockholders when the corporate organization of one corporation is controlled by outside or community interests. This matter has been fully considered on the previous appeal in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, and it was because of this situation that the right of the minority stockholders to maintain this action in equity was there maintained. As an original proposition, therefore, the court concludes that the loss suffered by the bridge company on account of the accumulation and division of its surplus earnings adjudged to the Louisville & Nashville Railroad Company for the years 1888 to 1891, both inclusive, was a wrong and a tort committed upon the bridge company on behalf of and to the interest of the appellee, and that appellee is liable for the entire loss, and will not be permitted to repay only that proportion of the wrongful distribution which it received, leaving the bridge company to suffer the remainder, but that it must pay the entire loss; and as it has paid only a part, and the bridge company by virtue of the judgment has been compelled to pay the balance, it must now return to the bridge company what was thus paid by it, with interest and costs.

It is contended, however, on behalf of the appellee, that, though this be correct as an

original proposition, it is foreclosed as a recovery to the bridge company by virtue of the previous judgment in this case on the principle of *res judicata*. It is conceded that the claims arising under the two judgments are not the same, even though they be the result of a splitting of one entire cause of action into two, as animadverted upon in the appeal of *Bridge Company v. L. & N. R. R. Co.*, 116 Ky. 258, 75 S. W. 285. While the cause or causes of action on behalf of the Louisville & Nashville Railroad Company against the bridge company for both losses proceeded upon the same ground, and judgments in both were recovered on the theory of a breach of the contract of June 5, 1872, between it and the bridge company, it by no means follows that the relation of the bridge company to these causes of action is identical. On the contrary, it appears from the agreed stipulation of facts that the source and cause of the losses to the bridge company were separate and distinct, or, in other words, that it was caused to break its contract with the Louisville & Nashville by virtue of separate and distinct forces. It appears that its failure to pay the Louisville & Nashville its proportion of the surplus for the years 1892 to 1895, both inclusive, was caused by its failure to collect any tolls from the "Air Line" and "Monon," and therefore, instead of paying the Louisville & Nashville what it had received in its behalf, it wrongfully applied the fund to other sources of expense. On the other hand, it appears that it was never in possession of any part of the surplus rightfully belonging to the Louisville & Nashville for the years anterior to 1892, and that its failure to pay the Louisville & Nashville its proportion of the surplus earnings for these years anterior to 1892 was caused solely by virtue of the agreement of the Northern railroads, formed in 1890 or 1881, by virtue of which the Louisville & Nashville was collusively excluded from participating, and its proportion of the surplus was distributed among the Northern railroads; and all of this was accomplished by virtue of the control which the appellee had over the bridge company through their officers in common, and this control was exercised solely and exclusively for the profit of the appellee. It thus results that, not only is the relation of the bridge company to the two losses separate and distinct causes of action, arising upon separate and distinct judgments, but that they are also founded in separate and distinct causes—one in its own breach of contract, and the other in a wrong or tort, originally intended against the Louisville & Nashville alone, but which resulted in a loss for the bridge company alone. Therefore no fact nor conclusion adjudged on the former appeal has any controlling effect upon, or is it a precedent, for any question involved here.

The cause of action of the bridge company here does not move upon the contract of

June 5, 1872, but moves entirely in tort. The cause of action in the previous appeal moved entirely upon the contract, and it was there sought to recover the loss there suffered as an operating expense or loss. Neither the causes of action, nor the facts supporting them, nor the theory upon which the claims are litigated, are the same, or even similar. The cases cited by counsel for the appellee, (*Tlago R. R. v. Blossburg, etc.*, R. R., 20 Wall. [U. S.] 137, 22 L. Ed. 331; *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Davis v. McCorkle*, 14 Bush, 746) have no bearing on the case at bar. Those cases apply to an interpretation placed upon a contract when the same contract is again in litigation between the parties, or to a second appeal of the same case, which was the instance in *Davis v. McCorkle*. The principles of law distinguishing the present appeal from the previous appeal were stated by the Supreme Court of the United States in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204, and *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214, and have since been universally followed by the courts, state and federal, and accepted as sound by all text-writers on the subject of *res judicata*. See *Black on Judgments* (2d Ed.) vol. 2, §§ 506, 509, 614, 617, 618, 630, 726, 730, 733, 750; *Schmidt v. Railroad*, 119 Ky. 287, 84 S. W. 314; *Schuster v. White*, 106 Ky. 317, 50 S. W. 242; *City of Newport v. Commonwealth*, 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; *Yates v. Utica Bank*, 206 U. S. 181, 27 Sup. Ct. 646, 51 L. Ed. 1015; *Southern Pacific v. U. S.*, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307; *Third National Bank v. Stone*, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035. We do not understand counsel for appellees to dispute the principles of law decided by these cases. Their dispute touches the application of these principles, and as this in turn must be controlled by the pleadings and facts, and as we find both the pleadings and facts regarding the loss suffered by the bridge company under the judgment of the Louisville & Nashville now in question are separate and distinct from those applicable to the other loss suffered under the judgment before this court on the previous appeal in 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096, there is no estoppel. The present case moves in pleadings and fact upon wrongdoing and tort. The previous case in pleadings and fact moved upon a contract liability of the railroads to indemnify the bridge company against all losses on the theory of their being operating expenses, or in all events to be indemnified against loss under the provisions of the contract.

It is contended, however, by appellee, that the theory of tort as a foundation for the present recovery cannot be maintained, for the reason that this theory was not directly and distinctly advanced until the reply came

to be filed by the plaintiffs on May 7, 1904. We think, however, this is sufficient, as the appellee joined issue and the matter was litigated upon that theory. A similar condition was before the court in the case of Louisville Bridge Company v. L. & N., 116 Ky. 258, 75 S. W. 285, where the principle of estoppel was enforced against the bridge company, claiming a splitting of a cause of action after the splitting had been suffered and issues had been joined. Aside, however, from this principle of estoppel against the appellee to make this claim, we do not agree with the appellee that the reply is a departure. It appears to the court that it was in the nature of a pleading of a matter in estoppel of the appellee's plea of *res judicata*, and thus permitted by section 101 of the Civil Code of Practice.

The contention of appellee that if any recovery is adjudged it can only be against the Pennsylvania Railroad, because the proof of wrongdoing points to it alone, if to any one, is not maintainable, for the reason that as far as the Pennsylvania Railroad is connected with the matter it is only by virtue of its election to the directory of the bridge company through its stockholding interest of the first, second, and third vice presidents of its subsidiary companies. It does not appear, however, that any wrong was done to the advantage of the Pennsylvania Railroad, further than that advantage which results from its ownership of 57 per cent. of the stock of the appellee company. The wrong that was done in the accumulation of the surplus earnings was the direct wrong of the first, second, and third vice presidents of the appellee company, who also controlled and directed the affairs of the bridge company; and the wrong done in the division of these earnings was not in the payment of any profits to the Pennsylvania Railroad Company; but in the payment of profits directly to the appellee. It was the appellee who received the benefit of the wrongdoing, and this by virtue of its control through common officers of the bridge company. It is the appellee, therefore, who must pay the loss which the bridge company has suffered.

The theory which is advanced that the accumulation and division of this surplus was an act *intra vires* the Louisville Bridge Company and to postpone competition in the erection of rival bridges is not maintainable. Among others is the sufficient reason that any bona fide scheme to postpone rivalry and thus conserve the interest of the bridge company as a direct entity would necessarily have counted upon the Louisville & Nashville Railroad Company as a participant; for without it no such scheme could have been feasible. At the time in controversy it was the only road at Louisville having an outlet to the south. A fair scheme between the railroads would have contemplated an interchange of traffic, and this would have been impossible without the Louisville & Nashville. The scheme in controversy, in which surplus earn-

ings were accumulated and divided, not only ignored the Louisville & Nashville, but from the agreed facts it must be concluded that it was concealed from the Louisville & Nashville. An accumulation and division of surplus earnings fair to all of the railroads must necessarily have taken in the Louisville & Nashville as a factor, and thus only the public would have been the sufferer. But the agreement here in question not only made the public the sufferer, but at the same time divided that which should, under fair agreement, have gone to the Louisville & Nashville among the other roads; and it is this unfair agreement solely as to the Louisville & Nashville that brought the loss now litigated upon the bridge company.

The fourth paragraph of the answer of appellee, filed May 7, 1904, pleads that the cause of action of the plaintiff occurred at each quarter of the year when the rebates were distributed, and that, as the last distribution occurred on December 31, 1891, more than 10 years have elapsed, and the cause of action is therefore barred by the statute of limitations. This plea is not maintainable, for the reason that by the distribution of the surplus earnings alone, as hereinbefore set out, the bridge company was not damaged. It had no cause of action until the wrong of the appellee in the accumulation and distribution brought upon it a loss. It is a juncture of wrong and damage that gives rise to a cause of action, and this did not occur, as far as the bridge company is concerned, until it was compelled to pay the judgment recovered by the Louisville & Nashville, and therefore the statute of limitations has no application to the case at bar. The claim and contention of appellants appeal most strongly to our sense of justice. Through no fault of theirs, or any one having the interests of the bridge company at heart, was any act done or wrong committed which occasioned a loss to the bridge company; but appellees and their predecessors, through their officers, who dominated and controlled the directory of the bridge company, have brought upon the bridge company the loss which it has sustained by conspiring together for the fraudulent purpose of defrauding the Louisville & Nashville Railroad Company, and later carrying out this conspiracy through this same instrumentality by illegally collecting from the Louisville & Nashville Railroad Company, between the years 1880 and 1891, more than \$900,000, and during the period covered by this litigation, to wit, 1888 to 1891, inclusive, more than \$300,000, and, having thus wrongfully, unlawfully, and fraudulently collected these large sums, they caused the officers of the bridge company, who were in fact the officers of appellee and its predecessor, to distribute same among the Northern railroads, and, while this distribution or apportionment of rebates thus fished from the coffers of the Louisville & Nashville Railroad Company was apparently or formally made by the bridge

company, yet it was in fact and in truth not the act of the bridge company, but the work of appellee and its predecessor. Appellee and its associates conceived the plan by which this wrong could be done, and they chose as the instrument for carrying out their unlawful purpose the bridge company. In order that there might be no miscarriage of their plan and arrangement to enrich themselves at the expense of the Louisville & Nashville Railroad Company, it was necessary that they should have absolute control of the directory of the bridge company; and therefore they chose as directors of the bridge company the first, second, and third vice presidents of appellee company, men who had no interest, pecuniary or otherwise, in the welfare of the bridge company, but whose sole aim and purpose was to serve and subvert the interests of appellee company and its predecessor.

Upon discovering that it had been discriminated against and unfairly dealt with, the Louisville & Nashville proceeded to recover the moneys unlawfully and wrongfully collected from it. Every court of justice in which its cause was heard promptly decided that it was entitled to recover back so much of the money illegally taken from it as it was able to show had been so done. Can it be successfully maintained, under any principles of equity, justice, or right, that the bridge company, and especially the minority stockholders, should be made to bear the burden of this wrong, while appellee and its predecessor, who were directly responsible for it, escape liability? Clearly we think not. As between the bridge company, which was in fact innocent of any wrongdoing, and appellee and its predecessor and associates, who were responsible for all of the wrongs and mismanagement complained of, the burden should fall upon appellee. And this conclusion is strengthened by the further fact that, when restitution is demanded of them, appellees, while practically admitting the charges against them, seek to avoid responsibility upon technical and other grounds which, for the reasons above given, we have deemed insufficient.

It is therefore adjudged that the judgment of the lower court be reversed, and this case is now remanded to the court below, with instructions that a judgment be entered in favor of the plaintiffs, for the use and benefit of the bridge company, for the sum of \$144,329.28, with 6 per cent. per annum interest thereon from the 11th day of January, 1904, and costs.

#### LOUISVILLE & N. R. CO. v. BROWN.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. MASTER AND SERVANT—RAILWAY TRAINMEN—GROSS NEGLIGENCE.

It was grossly negligent towards those on an approaching train for the engineer and conductor of a work train to permit it to stand on a main track on the other train's time, though the engineer directed the brakeman to flag such

other train; the brakeman's failure to do so being also gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 224-227.]

##### 2. SAME—FELLOW SERVANTS.

The engineer, conductor, and brakeman of a train, which they negligently permitted to stand on a main track on another train's time, were not fellow servants of a brakeman on the other train, in the sense that he could not recover from the company for injuries received in the collision resulting from such negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 500-509.]

##### 3. SAME—SUPERIOR OFFICERS.

The rule that no recovery may be had from a master for injury to a servant, not causing death, resulting from the servant's superior officer's ordinary negligence, is limited to cases in which the superior officer has immediate control of or supervision over the servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 427-449.]

##### 4. SAME—FELLOW SERVANTS.

A servant may not recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross such negligence may be; but recovery may be had for the negligence of other of the master's servants, whether it be ordinary or gross.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 352, 353.]

##### 5. DAMAGES—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

In an action against a railway company for injury to plaintiff in a wreck, he could show mental anguish and pain suffered while pinioned in the wreck and in momentary danger of being burned to death.

##### 6. EVIDENCE—PHOTOGRAPHS.

Photographs of a railway wreck, their accuracy being shown by the photographers, are admissible in evidence in an action against the company for injuries received in the wreck.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1509-1512.]

##### 7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.

\$10,000 is an excessive recovery for injury to a foot and other parts of plaintiff's body, where the injuries do not appear to be permanent, though punitive damages are allowable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357, 358.]

##### 8. APPEAL—REVIEW—DAMAGES.

The Court of Appeals has the same power to set aside a verdict involving punitive damages as it has where only compensation is recovered, and in every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Personal injury action by Harry Brown against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions for a new trial.

Benjamin D. Warfield and Clifton J. Waddill, for appellant. Sybert & Phillips, for appellee.

CARROLL, J. Appellee, who was a head brakeman on one of appellant's freight trains, while riding in the engine, was seriously in-

jured in a head-on collision between the engine in which he was riding and one of appellant's work trains. The work train was on the main track on the time of the freight train, and although the engineer of the work train testified that he directed a brakeman to flag the freight, and supposed he had done so, it developed that he had not, and the freight, running at a high rate of speed, had no notice that the work train was on the track until the engine was within a few feet of it, and when it was too late to stop or reduce the speed or avoid a collision. As a result of the collision, appellee was thrown under a large mass of wood and iron, and so fastened that he could not immediately be extricated. While in this position, where he remained for about an hour, the wreck caught fire, and appellee believed, and, indeed, had good reason to believe, that he would be burned to death before he could be rescued; but fortunately, before the fire reached him, he was removed from his perilous position, and escaped with severe injuries to one of his feet and some other parts of his body. He alleged in his petition to recover damages that "the agents and servants of defendant, in charge of the trains and superior in authority to plaintiff, managed and operated the trains and their crews with such gross negligence and carelessness that they came together in a head-on collision, whereby he sustained permanent injury and suffered great mental and physical pain." In its answer, after traversing the material averments of the petition and charging that appellee was guilty of contributory negligence, it set up in a separate paragraph that "the collision was due solely to the ordinary negligence of the flagman of the work train, who was then and there in the same field of labor and the same grade of employment as plaintiff in the employ of a common master, and was not superior in authority, but was his fellow servant." On motion of appellee this defense was stricken from the answer. Upon the trial appellee recovered a judgment for \$10,000, which we are asked to reverse (1) because the trial court erred in permitting testimony to go to the jury showing the negligence of the brakeman on the work train; (2) in striking from the answer the words before mentioned; (3) in failing to instruct the jury that there could not be a recovery unless the persons in charge of the work train were guilty of gross negligence; (4) in admitting testimony of appellee and other witnesses that while under the wreck of the colliding engines he was in danger of being burned to death; (5) in allowing photographs of the scene of the collision to be introduced in evidence; (6) that the damages are grossly excessive.

We will consider the first, second, and third assignments of error together. It was the duty of the engineer and conductor in charge of the work train to know that proper measures had been taken to flag the freight

or notify it that the work train was on the track. They knew the freight was due, and that they were on the main track on its time. Although the engineer testifies that he directed a brakeman to flag the freight, and supposed he had done so, his attempted performance of duty will not relieve the company from liability for the accident. The conductor and engineer were in control of the work train, and were charged with the duty of taking every possible precaution to see to it that timely warning was given to the approaching freight. They, as well as the brakeman, were guilty of gross negligence, although the company would be liable to appellee if they, or the brakeman alone, had only been guilty of ordinary neglect. Neither the conductor nor engineer on the work train, or the brakeman who participated in their negligence and equally with them was guilty of a failure to discharge his duty, were fellow servants of appellee in the sense that appellee could not recover for their negligence. It has been frequently ruled by this court that a servant for injuries not resulting in death cannot recover from the master for the ordinary negligence of his superior officers. *Kentucky Distilleries & Warehouse Co. v. Schrieber*, 73 S. W. 769, 24 Ky. Law Rep. 2236; *C. & N. O. & T. P. Ry. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199; *Greer v. L. & N. R. R. Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; *Linck's Adm'r v. L. & N. R. R. Co.*, 107 Ky. 370, 54 S. W. 184. But this doctrine is limited in its application to cases in which the servant is injured by the negligence of the superior officer who has immediate control of or supervision over him. To illustrate: If appellee had been injured by the negligence of the engineer or conductor on his train, he could not recover damages against the company unless they were guilty of gross neglect. The reason of this rule is that the servant, when he engaged to work, undertakes that he will assume the ordinary risks incident to the employment, and will not hold the master liable for the ordinary negligence of those employes with whom he is engaged, whose actions and conduct he can observe and, if necessary, guard against.

This doctrine of assumed risk by the servant has been further extended by this court until now it is well established that a servant cannot recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross the negligence of the fellow servant may be. Hence, if appellee had been injured by the negligence of a fellow brakeman on the train he was working on, without any fault on the part of the conductor, or engineer, or other superior, or breach of duty on the part of the company, he could not recover in this action. In *L. & C. & L. R. Co. v. Cavens' Adm'r*, 9 Bush, 559, the proposition before us was under consideration by



the court, and it was said: "It is well settled that where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against. And it is equally as well established that, where a number of persons contract to perform service for another, the employes not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of his duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. Public policy requires that, where the laborers are coequals and engaged in laboring in the same field, or on the same railroad train, or in any other employment, each should exercise proper care in the conduct of the business, and look to it that his collaborer does the same thing; and, when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution." And this principle was fully recognized and applied in *L. & N. R. Co. v. Sanders' Adm'r*, 44 S. W. 644, 19 Ky. Law Rep. 1941; *Volz v. C. & O. Ry. Co.*, 95 Ky. 188, 24 S. W. 119; *Dana v. Blackburn*, 90 S. W. 237, 28 Ky. Law Rep. 695; *Martin v. Mason & Hoge Co.*, 91 S. W. 1146, 28 Ky. Law Rep. 1333; *Pitts, Hankins & Trundell v. Centers*, 98 S. W. 300, 30 Ky. Law Rep. 311.

But when the servant is injured by employes of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds. And so appellee, whose injuries were directly caused by the negligence of the employes on the work train, may recover from the company, without regard to which one of them was guilty of the neglect that resulted in his injuries. The distinction between the liability of the master for injuries to the servant, when the injury is caused by the neglect of those engaged directly with the servant, and when it is due to the carelessness of employes not immediately associated with him, was first recognized by this court in *L. & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486, in a case against the company to recover damages for personal injuries inflicted by the negligence of the engineer, where it was said: "The company is respon-

sible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars; and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient. As to subordinate employes associated with the engineer in conducting the cars, the negligence must be gross. As to employes in a different department of service unconnected with the running operations, ordinary negligence may be sufficient."

And subsequently this distinction was more clearly expressed and applied thus: In *Kentucky Central Ry. Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480, the action was brought for personal injuries received by Ackley, who was an engineer upon a passenger train, resulting from a collision with a freight train of the company. It was contended by the company that, as the injuries were caused by the negligence of employes in the same grade of employment as the person injured, there could be no recovery. But the court, in rejecting this contention, quoted with approval the principle announced in *L. & N. R. Co. v. Cavens' Adm'r*, supra, saying: "It is argued in that case that the rule should be applied that when a number of persons contract to perform a service for another, the employes not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service with reference to his collaborer as precludes him having any control over his actions or the right to advise even as to the manner in which the service is to be performed." In *Illinois Central Ry. Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75, Hilliard, who was a conductor, was injured by the giving way of a ladder on one of the cars in his train. The company requested the court to say to the jury that the car inspector, whose duty it was to keep the ladders in repair, and the conductor, were fellow servants engaged in the same line of service, and that Hilliard could not recover unless the jury believed the inspector guilty of gross negligence. This court, in commenting on this request, said that the instruction was properly refused, the conductor and inspector "acted in different spheres, and neither could or was required to know whether the other was properly doing his duty," and held that the company was liable for the ordinary negligence of the inspector.

In *L. & N. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 65 L. R. A. 122, C., N. O. & T. P. Ry. Co. v. Hill's Adm'r, 89 S. W. 523, 28 Ky. Law Rep. 530, and *L. & N. R. Co. v. Hiltner*, 56 S. W. 654, 21 Ky. Law Rep.



1826, the rule announced in the Collins, Cavens, and Ackley Cases was followed. In the cases of *L. & N. R. R. Co. v. Robinson*, 4 Bush, 507, *L. & N. R. R. Co. v. Rains*, 23 S. W. 505, 15 Ky. Law Rep. 423, and *Robinson v. L. & N. R. R. Co.*, 24 S. W. 625, 15 Ky. Law Rep. 626, it was apparently held that an employé on one train could not recover from the company for the negligence of the employés on another train unless their negligence was gross; but these cases may now be regarded as having been overruled by the later ones above referred to, and it must be considered as no longer an open question in this state that there may be a recovery in a case like the one before us, although the negligence of the person causing it was ordinary. Hence the court correctly instructed the jury that, if they believed from the evidence that the injury to plaintiff's foot was the direct result of negligence on the part of the agents or servants of the defendant in charge of the work train, they should find for the plaintiff.

Nor did the court err in striking from the answer the defense that the brakeman on the work train was a fellow servant of appellee, and therefore the company was not responsible to appellee for his neglect.

Appellee was permitted to testify that, while he was plunions in the débris of the wreck, he knew it was on fire and was fearful that he would be burned to death before he could be extricated; and other witnesses were allowed to say that they saw the fire burning close to him. In our opinion it was competent to permit appellee to testify as to the mental anguish and pain that he suffered while he was fastened in the wreck. If he had not sustained any physical injury, he could not recover at all for the mental suffering he endured, as was said in *Morse v. C. & O. Ry. Co.*, 117 Ky. 11, 77 S. W. 361: "Damages cannot be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some direct contemporaneous injury to the person." But where there is a physical injury there may be a recovery for it, as well as the mental pain and suffering occasioned by and accompanying it. Mental as well as physical suffering directly caused by an injury is a part of the compensation to which the injured person is entitled; and in the cases, without exception, that have come under our notice, the jury have always been instructed that they might compensate for mental as well as physical pain. *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453. As it was competent for appellee to describe fully and accurately his pain and suffering after he was extricated from the wreck and during the time the cure was being effected, and in fact up to the time of the trial, we are unable to understand upon what theory it can be maintained that it was not competent for him to relate the torture he endured when under the wreck and in momentary danger of being burned to death. In our opinion it is not at

all material or important whether the mental suffering is contemporaneous with the reception of the injury or subsequent to it, if it is the direct result of it. In the able and exhaustive opinion in *Denver & Rio Grande R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, this question was fully covered, and the conclusion reached that evidence of this character is competent.

It was also admissible for appellee, as well as those who saw him under the wreck, to describe the surroundings and conditions that existed, so that the jury might know all the facts and circumstances of appellee's situation when injured. The accuracy of the photographs was testified to by the person who took them, and they furnished to the jury a more complete and realistic picture of the wreck of the colliding engines than could be obtained from any other source. The wreck could not be seen by the jury, nor could it be accurately described by the witnesses; but from an inspection of the photographs the jury could obtain a more correct impression and a better understanding of the situation than in any other way. *Denver & Rio Grande R. Co. v. Roller*, supra; 11 Am. & Eng. Ency. of Law, p. 539; 17 Cyc. 414.

Although there was no error in the admission of evidence or the instructions given by the court, we feel constrained to reverse the judgment upon the ground that the verdict is excessive. If there was sufficient evidence to show appellee's injuries were permanent, we would not interfere with the finding of the jury upon this point; but there is not. That he sustained severe injury, not only to his foot but other parts of his body, there is no doubt; but, whether they are permanent or not is another question. Appellee, in answer to the question, "Is your foot permanently injured or not?" answered, "I believe it is." Dr. Sorry, the only physician who testified for appellee, said that he had made only one examination of appellee's foot, and that a few days before the trial. The material parts of his evidence are as follows: "Q. Tell the character of his injuries from your examination, and whether or not you think it is permanent. A. Yes, sir; I think it is. Q. Did you make an examination with the X-rays to ascertain whether or not the bones were sound? A. No, sir. Q. You predicate your opinion about the permanency of the injury upon the fact that it should turn out that the bone is diseased? A. I take it the bones were diseased from the fact of the time it has been healing. If there was no disease of the bone, it seems like it would heal. Q. You predicate your answer solely upon that? A. From the length of time and the appearance of the wound. Q. You don't know whether or not the bone is injured? A. No, sir; the symptoms indicate that by having a running sore for several months. Q. If there has been no injury to the bone, and no diseased condition of the bone, do you think it will not heal? A. If there is no

disease of the bone, that flesh wound will heal; yes, sir."

For appellant the two physicians who treated appellee were introduced, and testified that they made an examination of appellee's foot with the X-rays, and in answer to questions said: "Q. I will ask you whether any of the bones of his foot or ankle or leg are broken or affected. A. No, sir; they are not. Q. Tell the jury how you know it? A. Well, simply by examination; from the examination at the time of the accident, and while the wound was fresh. Q. Have you ever examined it with the X-rays? A. Yes, sir; examined it with the X-rays, and I also asked Dr. Nisbitt to examine it with them. Q. Did both of you examine it with the X-rays? A. Yes, sir. Q. Is there any injury at all to the bone? A. No, sir; there is not. Q. What was the nature of the wound, that causes it to be so long healing? A. It was a flesh wound, and considerable bruise; the muscles torn, and the skin considerable bruised, and a tear and laceration also." These doctors also testified in substance and effect that his injuries were temporary. It will be observed that the physician who testified for appellee made only one examination, and that without using the X-rays, and his conclusion that the foot was permanently injured was based on the fact that in his opinion the bones of the foot were diseased; while the physicians who treated him for the injury, and who examined his foot frequently and with the X-rays, say that the bones are not injured, and that in time the foot will be restored to its normal condition.

We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent. The fact that the negligence was gross, and that punitive damages were allowed, and that appellee was entitled to more than mere compensation for his mental and physical suffering, does not imply that a jury are at liberty, unrestrained, to award by way of punitive damages any amount, however large it may be. This court has the same power and discretion to set aside a verdict, when excessive, in cases involving punitive damages as it has where only compensation is recovered. In every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted. *L. & N. R. R. Co. v. Long*, 94 Ky. 410, 22 S. W. 747; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595. As was said by this court in *Louisville Railway Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378: "It is impossible to measure with anything like absolute certainty the amount of punitive damages proper in a case, or the extent of some of the elements of those which are compensatory. The opinion of a jury has been, and properly, no doubt, regarded as the best means of even a fair approximation, and every verdict should be treated *prima facie*

as the result of honest judgment upon their part. They are the constitutional triors of the facts of the case, and courts should exercise great caution in interfering with their verdicts. Litigants must not be left, however, to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy or unreasonable prejudice."

It will readily be conceded that it is peculiarly within the province of the jury to fix the amount of damage that a person is entitled to for mental and physical suffering, and will also be agreed that there is no rule by which the amount that should be awarded can be measured. For these reasons this court has always been reluctant to interfere with the finding of a jury upon the question of damages, and especially is this true when the injury is permanent, or of such a character as to disable the injured person from pursuing his usual occupation or employment, or one that will cause him to suffer serious pain probably through life. But, if appellee's foot should be fully restored, and there is a complete recovery, and he is placed in the same physical condition as he was before the injury, it appears to us at first blush that the verdict is too large. The future effect of the injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury.

For the error in the amount of damages, the judgment must be reversed, with directions for a new trial.

#### COMMONWEALTH v. NATIONAL BISCUIT CO.

(Court of Appeals of Kentucky. Jan. 10, 1908.)  
CORPORATIONS—ADVERTISING MATTER—USE OF WORD "INCORPORATED."

Letter heads and bill heads are not advertising matter, within Ky. St. 1903, § 576, requiring every corporation, except a railroad and others named, to have printed the word "incorporated" on advertising matter.

Appeal from Circuit Court, Grayson County.  
"Not to be officially reported."

The National Biscuit Company was indicted for failure to comply with Ky. St. 1903, § 576, requiring a corporation to place under its name on all advertising matter the word "incorporated." From the judgment, the commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., T. B. McGregor, and C. H. Morris, for the Commonwealth

O'REAR, C. J. Appellee was indicted for failing to comply with section 576, Ky. St. 1903, which requires every corporation, except banks, railroads, and insurance and trust companies, to have printed plainly the word "incorporated" upon its advertising matter. The specific offense in this case was that appellee, a foreign corporation doing business

in this state, wrote a letter and sent a bill on its bill head to a customer in Grayson county, this state, on which it failed to have printed the word "Incorporated." It developed that appellee's principal place of business in this state is Louisville; but where the letter was written and the bill sent from is not disclosed. Certain it is that it is admitted by the pleadings that they were not written or sent in Grayson county. The circuit court held that it had not jurisdiction of the case, which is in accord with the opinion of this court in the very recent case of *Commonwealth v. Remington Typewriter Co.*, 105 S. W. 399. Furthermore, letter heads and bill heads are not "advertising matter," contemplated by section 576, Ky. St. 1903. *T. J. Moss Tie Co. v. Commonwealth (Ky.)* 105 S. W. 163.

Judgment affirmed.

#### MORGAN et al. v. JOE MORGAN & CO.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. APPEAL—PRESUMPTIONS.

Where an order of attachment complained of was not in the record on appeal, it would be presumed that it complied with the law.

##### 2. SAME—FINDINGS—CONFLICTING EVIDENCE.

Where the evidence is conflicting, and on the whole case the mind is left in doubt as to the truth, the chancellor's judgment will not be disturbed.

Appeal from Circuit Court, Leslie County.

"Not to be officially reported."

Action by Joe Morgan & Co. against Jasper Morgan and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

J. M. Muncy, for appellants. J. M. Bicknell, for appellees.

CARROLL, J. Appellees, who were plaintiffs below, were partners doing a mercantile business, and in July, 1903, entered into a contract with appellants, defendants below, by the terms of which the appellants agreed to saw, pit, haul, and deliver to the appellees on the bank of Middle Fork of Kentucky river, on or before March 1, 1904, all the poplar saw logs owned by appellees, supposed to be 400 or 500. As compensation they were to be paid \$1.05 a log. Appellants further agreed to deliver to appellees at the same time from 30,000 to 60,000 feet of merchantable white oak saw logs, for which they were to receive \$1 per 100 feet. As a part of the contract appellees sold to appellants one pair of mules for \$250, and a yoke of oxen, for which appellees were to be paid by appellants out of the proceeds due them for logs. Appellees agreed to furnish appellants merchandise and supplies for the purpose of enabling appellants to carry out their contract. The parties were to make a full settlement of their accounts under the contract on March 1, 1904,

and if upon final settlement appellants should be indebted to appellees, then appellees were to have a superior lien on the mules and oxen to secure the payment of the indebtedness. In March, 1905, appellees brought this suit to recover a balance of \$190.72, alleged to be due them by appellants on the mules and oxen, and for merchandise and supplies furnished. In this action, they obtained an attachment which was levied upon the mules. Appellants in an answer and amended answer questioned the justness of a number of items charged against them in the account filed with the petition, and also disputed the correctness of credits allowed them on account of the lumber contract, and in a counterclaim they sought judgment over against appellees. A reply, controverting the affirmative matter in the answers, completed the pleadings, and after the evidence was taken the case was referred to the master commissioner. The commissioner reported that there was due appellees \$151.72. The chancellor, on hearing the case, rejected the counterclaim of appellants and adjudged that appellees recover of them \$178.22, with interest from March 11, 1905, and awarded a lien on the mules to secure the payment of the judgment.

Counsel for appellants question the sufficiency of the order of attachment; but, as the papers relating to the attachment are not in the record, we cannot express an opinion upon this point; the presumption being that the order of attachment was properly issued and that in other respects it sufficiently complied with the Code.

Appellants complain that the chancellor failed to give them credit by \$25, to which they claim to be entitled as the hire of one of the mules that was used by appellees. They also challenge the correctness of charges against them in the account of appellees to Will Lewis, Jasper Lewis, Clarke, Cornett, and Howard, and insist that the chancellor erroneously failed to give them credit for various amounts due for delivering logs. The evidence in the case is conflicting, each of the parties supporting their respective contentions by some testimony; but after a careful examination of the record we are unable to say that the judgment of the lower court, supported as it is by the report of the master commissioner, is against the weight of the testimony. The rule adopted by this court and long adhered to is that in equity cases the judgment will be given according to the truth of the matter as it shall appear to the court from the whole record; but where the evidence is conflicting, and on the whole case the mind is left in doubt as to the truth, the chancellor's judgment will not be disturbed. *Campbell v. Trosper*, 57 S. W. 245, 22 Ky. Law Rep. 277.

Following this practice, the judgment of the lower court must be affirmed.

## COUCH et al. v. SIZEMORE et al.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

## 1. TRUSTS—RESULTING TRUSTS—EVIDENCE.

Where plaintiffs in good faith, for a valuable consideration, purchased land of the heirs of a person to whom it had been conveyed by a deed which did not show that his wife had any interest in the land, and it did not satisfactorily appear that he had it in trust for her, or that the title to the whole of it was made to him by fraud or mistake, or that his wife did not know that her name was not mentioned in the deed, plaintiffs' deed is good as against a deed from the wife of an alleged interest, in excess of her dower right, which she claimed in the land by reason of having paid part of the purchase price.

## 2. MORTGAGES—CONSTRUCTION—DOWER INTEREST—LIEN.

After the death of the owner of land, his wife, who owned merely her dower interest therein, mortgaged the land. Defendants, to whom the wife had conveyed an alleged one-fourth interest in the land, paid the mortgage. Held, that the mortgage lien, which attached only to the wife's dower interest, was extinguished by her death, and could not be extended to an undivided fee interest in the land purchased by plaintiffs from the heirs of the original owner.

Appeal from Circuit Court, Leslie County.

"Not to be officially reported."

Action by William Sizemore and others against William Couch and others for the division of land. From a judgment for plaintiffs, there was an appeal by defendants, and a cross-appeal by plaintiffs. Affirmed on the original appeal, and reversed on the cross-appeal with directions.

Lewis & Calvert, for appellants. James H. Jeffries, for appellees.

CARROLL, J. In 1849 there was conveyed to Wilkerson Sizemore a small tract of land, the consideration being \$300. His wife, Mahala Sizemore, had received from her father's estate in 1848 \$75, and this sum it is claimed was a part of the \$300 paid for the land. Wilkerson Sizemore and his wife lived on the land until his death, about 1880. After his death his widow resided on the land until her death in 1902. The appellees purchased six-ninths of the land from the heirs of Wilkerson Sizemore, and brought this suit for the purpose of having the land divided and their interests allotted to them. The appellants resisted the division of the land as sought by appellees, and asserted that they owned one-fourth of the land; their title to this one-fourth arising, according to their contention, in this way: After the death of her husband Mahala Sizemore conveyed to them one-fourth of the land, which they assert she was entitled to because with money received by her from her father's estate one-fourth of the land was purchased.

The title to the land was in Wilkerson Sizemore until his death. The evidence is very indefinite as to whether any money received by Mrs. Sizemore from her father's estate was invested in the land; but, assuming that it was, and that she paid \$75 of the purchase money, it is nevertheless a fact that the deed

to Wilkerson Sizemore did not show that his wife had any interest in the land, and the evidence that he held it in trust for her, or that the title to the whole of it was made to him by fraud or mistake, or that his wife did not know that her name was not mentioned in the deed, is entirely too vague and unsatisfactory to authorize the court to adjudge that she was entitled to an interest in the land growing out of the payment by her of a part of the purchase money. When Wilkerson Sizemore died the title to the land descended to his heirs, subject to his widow's right of dower. Although she sold and conveyed to appellants one-fourth of the land of which her husband died the owner, her deed could not pass any greater interest in the land than she owned. All that she could convey was her life estate or dower, and that is the only interest that appellants took under the deed made by her. Appellees were purchasers in good faith, and for a valuable consideration obtained—and when this suit was instituted were the owners of—six-ninths of the land, and the lower court correctly so adjudged.

There is some evidence that after the death of Wilkerson Sizemore his widow executed a mortgage on the land to John Y. Begley for about \$187. Begley assigned this mortgage to one Josiah Combs, and appellants testified that they paid off this mortgage, and the lower court gave appellants a lien on the interest allotted to appellees to secure the payment of this sum. The mortgage is not mentioned in the pleadings in the case, nor did appellants in their pleadings assert any claim against or lien on the land growing out of the fact that the mortgage debt, or a part of it, was paid by them. If Mrs. Sizemore executed a mortgage on the land, the only interest that she could convey by mortgage was her dower interest or life estate; and if the appellants paid the whole or any part of the mortgage they could not occupy any better position than did the mortgagee, who only had a lien on the interest owned by Mrs. Sizemore. It follows that the mortgage lien was extinguished when Mrs. Sizemore died, and in no state of case that we can conceive of were appellants entitled to be reimbursed out of the interest in the land purchased by appellees.

It results that the judgment must be affirmed on the original appeal, and reversed on the cross-appeal, with directions to set aside so much of the judgment as awards to appellants a lien on the land for \$50, with interest from June 12, 1896.

## WILSON et al. v. NANTZ.

(Court of Appeals of Kentucky. Jan. 16, 1908.)

## 1. BOUNDARIES—SURVEY—EVIDENCE.

Evidence held to warrant a finding that the description of land contained in a patent covered the land in controversy, and that there was no vacant land between such survey and an adjoining survey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184-194.]

## 2. APPEAL—REVIEW—FINDINGS.

Where on all the evidence the mind is left in doubt as to the truth, the Court of Appeals will not disturb the conclusions of the chancellor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

Appeal from Circuit Court, Leslie County.  
"Not to be officially reported."

Action between S. W. Wilson and others and George Nantz. From a judgment for the latter, the former appeals. Affirmed.

J. M. Blacknell and B. L. Blakeman, for appellants. Cleon K. Calvert, for appellee.

HOBSON, J. On March 18, 1870, a survey of 200 acres of land in Clay county, now Leslie, was made in the name of William North; and on the same day a survey of 100 acres of land was made in the name of Aaron Brock. Patents were duly issued upon both surveys. Appellee, George Nantz, claims under Aaron Brock. Appellants do not connect themselves with the William North patent, but claim in substance that the two patents did not adjoin and that there was vacant land between them. The court below adjudged in favor of Nantz, and from that judgment the appeal before us is prosecuted.

The only question we deem it necessary to consider is whether the Aaron Brock patent covers the land in dispute. The calls of this patent are as follows: "Beginning on two pines near the top of a ridge about 30 yards from the same, near the head of the Joseph Hobbs hollow, the N. E. corner, to a 100-acre survey made for Simon B. Wilson; thence with a line of said 100 acres, S. 65° W. 100 poles, to two chestnut oaks and a black walnut on the top of the divide between the Joseph Hobbs hollow and the War Branch waters of the Beech and Middle Forks; thence N. 12° E. 60 poles, to two chestnuts and a dogwood on the aforesaid divide; thence N. 46° W. 26 poles, to two chestnut oaks on the top of said divide; thence N. 65° W. 34 poles, to a pine and chestnut oak on said divide; thence N. 10° W. 20 poles, to a black oak and chestnut on said divide; thence N. 41° E. 500 poles, to a stake in a line of William North survey; thence, with lines of said survey, south 480 poles, to a stake in said line; thence S. 65° W. 80 poles, to a stake in the gap of the Good Branch divide between the Hendrickson Branch and Trace Branch, waters of the Beech Fork; thence west 160 poles, to two chestnut oaks on the top of the divide between the Joseph Hobbs hollow and the Hendrickson afd.; thence S. 65° W. 12 poles, to the beginning."

There is no dispute as to the beginning corner at the two pines. If we begin there, and run the calls of the patent with slight variation, we reach the two chestnut oaks and black walnut, then the two chestnut oaks and dogwood, then the two chestnut oaks on the top of the divide, then the pine and chest-

nut oak on the divide, and then the black oak and chestnut on the divide. These corners are all established, and as to them there seems to be no dispute; but if we run the next call of the survey "N. 41° E. 500 poles" it will not reach the William North survey. If the line is run on the course N. 41° E. it will not touch the North survey, and will run to the west of it. If we disregard the course, and run the line 500 poles long to the North survey, the next call must be disregarded, and it will give a very narrow body of land. But if we go back to the beginning and reverse the calls of the patent we strike the next corner two chestnut oaks on the top of the divide, and thence reversing the calls of the patent we strike the gap of the Good Branch divide between the Hendrickson Branch and Trace Branch, as called for in the patent. If we run from this point on the call of the patent, reversed to the line of the North survey, the line must be prolonged something over 50 poles to reach it. If we then measure along the lines of this patent 480 poles, and connect the point so located with the black oak and chestnut, we have located the patent as well as may be done on the evidence before us. The surveys were made on the same day. The Brock survey calls for the North survey and to run with it. We cannot believe that there was any vacant land between them. It is manifest that the surveyor who surveyed the Brock tract did not run the line between that and the North tract, but contented himself by writing his survey in these words, "thence with the lines of the said survey some 480 poles." It is true that one of the surveyors in this case located the North survey somewhat differently from the other. But he does not appear to have run enough of the lines to make his survey valuable. The rule is that where, upon all the evidence, the mind is left in doubt as to the truth, this court will not disturb the conclusion of the chancellor. On all the facts here we think the weight of the evidence sustains the chancellor's conclusion.

Judgment affirmed.

## JONES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 10, 1908.)

### 1. HOMICIDE — EVIDENCE — SUFFICIENCY — DECREE.

In a prosecution for murder, evidence held sufficient to sustain a conviction for voluntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 539-541.]

### 2. SAME—ILL FEELING.

In a prosecution for murder, admission of evidence of statements about a difficulty between defendant's brother and the father of deceased, to establish a motive by showing ill feeling by defendant toward the family of deceased, is not prejudicial, where a verdict for voluntary manslaughter was returned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 321-323.]

### 3. SAME—ADMISSIBILITY—PREVIOUS DIFFICULTIES.

In a prosecution for murder, evidence of a previous difficulty between defendant's brother and the father of deceased is incompetent, where there is nothing shown to connect defendant with such difficulty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 343.]

### 4. SAME—INDICTMENT AND INFORMATION—PROOF.

Where the first count in an indictment charges murder, and the second count charges a conspiracy to commit the murder, proof of the conspiracy is not essential, in order to convict defendant of voluntary manslaughter.

### 5. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for murder, error in admitting incompetent evidence will not authorize granting a new trial or the reversal of a judgment, unless the evidence was prejudicial to the party complaining.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

### 6. SAME—NECESSITY OF OBJECTION—INSTRUCTIONS.

In a criminal prosecution, error in instructions, not presented in the motion and grounds for a new trial in the lower court, cannot be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2683.]

Appeal from Circuit Court, Leslie County.  
"Not to be officially reported."

George Jones was convicted of voluntary manslaughter, and appeals. Affirmed.

John L. Dixon, R. B. Roberts, and J. G. Forrester, for appellant. James Breathitt, Atty. Gen., O. H. Morris, and T. B. McGregor, for the Commonwealth.

SETTLE, J. The appellant, George Jones, and Curt Jones, Russ Sizemore, and Bill Sizemore were jointly indicted by the grand jury of Leslie county for the murder of Frank Napier. The indictment contains two counts; the first in due form charging that the four defendants named did kill and murder Frank Napier by shooting him with guns and pistols, and the second in apt language charging a conspiracy and agreement between the same defendants to murder Napier, and that pursuant to such conspiracy the murder was committed by the appellant by shooting Napier, in which he was aided and abetted by the other defendants, who were then present. Appellant was given a separate trial, which resulted in a verdict convicting him of voluntary manslaughter and fixing his punishment at confinement in the penitentiary five years.

Quite a number of witnesses testified in the case; those introduced by appellant being, perhaps, in the majority. The testimony of the commonwealth was to the effect that the homicide occurred on Sunday night at the residence of Wm. Napier, the father of Frank Napier; that appellant went home with Frank Napier from Osborne's store, where they had taken several drinks of whisky; that at the home of the Napliers there was a jug of whisky belonging to Wm. Napier, from which

appellant, Frank and Wm. Napier, and other members of the family drank, and that both Frank Napier and appellant were intoxicated, when, or soon after, they arrived at Wm. Napier's; that Frank Napier and appellant each had and exhibited a pistol at the Napier's home; that appellant had his in hand at the supper table, and with it knocked a lamp from the table, but, being requested by the wife of Wm. Napier to put it up, he ceased to flourish it, and laid it on the table by his plate until through with his meal, when he picked it up and with Frank Napier left the house; that the latter soon returned to the house, but had been there but a short time when appellant called him out into the yard, and with him walked to the yard gate, at which his codefendants, Curt Jones, Russ Sizemore, and Bill Sizemore were standing; that, when appellant and Frank Napier got to the gate, Curt Jones pointed a gun at Napier's head and fired it, whereupon the latter fell to the ground, but immediately attempted to get on his feet, and while doing so appellant shot at him twice, and perhaps the third time, causing him again to fall to the ground; that both Russ and Bill Sizemore then shot at Napier as he lay on the ground, and they (appellant and Curt Jones) were fired upon from the Napier residence or yard by Wm. and Mack Napier, which caused them to leave. Notwithstanding the many shots fired, there seemed to have been but one wound inflicted upon Frank Napier, which proved fatal, as he died on the second day after receiving it.

The evidence introduced in appellant's behalf greatly differed from that of the commonwealth. Appellant himself testified that he took supper at Wm. Napier's, after going there upon the invitation of Frank Napier. He admitted that he had a pistol, which he borrowed that day of one Osborne, and that he had it in his hand while at supper, but laid it by his plate when asked by Mrs. Napier to put it away. He denied, however, that he knocked the lamp from the table, and claimed that it was knocked off by Frank Napier, who also had a pistol, which remained by his plate during the meal. Appellant also admitted that he and Frank Napier had taken several drinks of whisky, and that each of them boasted at the table of his gameness, but denied that there was or had been any bad feeling between them, or between him and any of the Napier family. Appellant's version of the facts immediately surrounding the homicide was that he was called out of the house by Lucian Jones, who informed him that Curt Jones, Russ Sizemore, and Bill Sizemore were at the yard gate, and that they wanted him to go with them to his home; that Frank Napier left the Napier house as he did, and walked with him to the gate, where they joined Curt Jones and the two Sizemores, and that upon reaching them a gun held by Curt Jones was accidentally discharged, the load entering the ground;

that upon the discharge of the gun Frank Napier elevated his pistol until it was by the side of appellant's head and discharged it which caused appellant to fall, but, immediately regaining his feet, he saw Frank Napier pointing the pistol at him as if about to shoot him; that he then believed the latter was about to shoot him, and to protect himself and save his life he raised his own pistol, pointed it at Napier, and fired, and Napier fell to the ground. He further testified that he shot at Frank Napier but once, and that no shooting, besides the accidental shot from the gun in Curt Jones' hands, the one shot from Frank Napier's pistol, and that from appellant's pistol was done at the gate, but that shots were fired at him or his codefendants from near the Napier house by Wm. and Mack Napier, which caused them all to flee. Appellant's testimony as to the manner of the homicide was corroborated in many of its essential features by that of Curt Jones and Russ and Bill Sizemore. Curt Jones is a nephew of the appellant, Russ Sizemore his half-brother, and Bill Sizemore his brother-in-law.

It is apparent that the jury refused to believe the testimony of appellant and his witnesses. Had they done so, their verdict would have been not guilty, on the ground that the killing of Frank Napier by appellant was in self-defense. It is equally apparent, from the verdict returned, that they did accept the account of the homicide given by the witnesses for the commonwealth, though the crime of which appellant was found guilty was of lesser degree than that charged in the indictment. Our examination of the bill of evidence gives us no reason for finding fault with the verdict of the jury. There was sufficient evidence to authorize it, and in fixing appellant's punishment at five years' confinement in the penitentiary the jury were as merciful as he had a right to expect.

The only error assigned in the grounds filed in support of appellant's motion for a new trial was as to the admission by the lower court of so much of the testimony of Alfred Napier and George Osborne as related to certain statements in respect to a previous difficulty between Wm. Napier, father of deceased, and Russ Sizemore, appellant's half-brother, made in their hearing by Russ Sizemore. The purpose of this testimony was to show that ill feeling was entertained by appellant and his kinsmen, jointly indicted with him, against the Napier family, and thereby established a motive for the killing of Frank Napier, and it is argued for the commonwealth that the testimony in question, together with the action of Curt Jones and Russ and Bill Sizemore, in going to Wm. Napier's, calling for appellant, and having him bring Frank Napier out to the gate, coupled with the immediate shooting of the latter, conduced to prove the existence and execution of the conspiracy charged in the indictment. The facts referred to were not, in our opinion, sufficient to es-

tablish the conspiracy charged. We are also of opinion that the testimony in question was not competent for any purpose. It did not connect Frank Napier, the appellant, Curt Jones, or Bill Sizemore, as participants or otherwise, with the difficulty between Wm. Napier and Russ Sizemore; nor was there any other evidence in the case that tended to involve Frank in any trouble his father may have had with Sizemore. But the admission of the testimony complained of was not prejudicial. In view of the verdict returned, it manifestly had no weight with the jury. If they had found appellant guilty of murder, the inference might have arisen that the verdict was in some measure influenced by this testimony; for it could have had no other effect than to aid in establishing the alleged conspiracy, or supply a motive for the homicide, either of which would have justified a verdict of murder and its consequent punishment. As it was, the verdict finding appellant guilty of voluntary manslaughter makes it clear that the jury rejected the commonwealth's theory of a conspiracy, or that there was a motive other than a hastily created determination on the part of appellant to kill the deceased, superinduced by sudden heat and passion resulting from some sort of provocation unexpectedly given by the deceased.

It was not necessary to prove a conspiracy in order to convict appellant of voluntary manslaughter, nor was proof of a conspiracy necessary even to a conviction of murder. Such conviction might have resulted under the first count in the indictment, which did not charge a conspiracy, if the testimony had been sufficient to show beyond a reasonable doubt that appellant unlawfully, maliciously, feloniously, and with malice aforethought shot and killed deceased, not in his necessary, or as it reasonably appeared to him necessary, self-defense. Error in the admission of evidence, however incompetent, will not authorize the granting of a new trial, or the reversal of a judgment of conviction, unless the evidence was prejudicial to the party complaining, and, as before stated, the evidence complained of in this case could not have influenced the jury, or otherwise prejudiced any substantial right of the appellant.

It is insisted for appellant that the jury were not properly instructed by the trial court. Objection is made by counsel for appellant to the first two instructions given by the lower court. The errors they are alleged to contain were not material or prejudicial; but, if they were, we are not permitted to review them, as no complaint was made of them in the motion and grounds for a new trial. It is well settled that error in instructions, which was not presented in the motion and grounds for a new trial in the lower court, cannot be reviewed by this court on appeal. *Thompson v. Commonwealth*, 91 S. W. 701, 28 Ky. Law Rep. 1187.

Judgment affirmed.

**HILL v. CLARK.**

(Court of Appeals of Kentucky. Jan. 10, 1908.)

**1. REFORMATION OF INSTRUMENTS—RIGHT OF ACTION—MISTAKE IN DESCRIPTION.**

Where a purchaser bought a lot by title bond, and after erecting a house received a deed for it, the description in the bond being correct, but that in the deed being wrong, a subsequent owner of the property may have the deed reformed to correct the description on the ground of mistake; it appearing that the bond had been lost previous to drawing the deed, in which the description was drawn from memory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 94.]

**2. LIMITATION OF ACTIONS—CORRECTION OF DEED.**

The statute of limitations is not a bar to the correction of a deed, where the vendee has been in possession of the land, under Ky. St. 1903, § 2543, providing that limitation shall not apply to an action by a vendee in possession for a conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 175.]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by Joanna Hill against D. R. Clark. From a judgment for defendant, plaintiff appeals. Affirmed.

J. J. C. Bach and Hazelrigg, Chenault & Hazelrigg, for appellant. Greene & Van Winkle and A. H. Patton, for appellee.

**HOBSON, J.** In the year 1892 Joanna Hill sold to John Goff by title bond a lot in Jackson, Ky. Goff took possession of the lot and built a house upon it, in which he resided. After the house was built and the purchase money paid, she made him a deed in which the lot was described as No. 132 on a certain plot, and as being the second lot on the upper side of the road leading from Jackson to the mouth of Miller's Branch. Some time after Goff got his deed he sold the house and lot to S. E. Patton. Patton lived there a year or more, and sold the lot to Floyd Hagin, who sold it to D. R. Clark. Clark moved into it after his purchase and has since lived there. The lot upon which the house was built, in which all of these people lived, was in fact lot No. 130 on the plot, and the third lot on the upper side of the road above referred to. After all the above sales had been made, Mrs. Hill sold to James Hargis the lots she still owned. Hargis and Clark were on a trade by which Clark was to buy a part of the lots on each side of him, when it was discovered that Clark's house was not on the lot which his deed called for. Hargis then set up a claim to the lot. He reconveyed the lot to Joanna Hill, and this suit was brought by her against Clark to recover it. Clark by his answer aptly pleaded the facts above stated, and alleged that the deed was drawn by mistake; that the lot purchased and intended to be described in the deed was lot No. 130. He prayed that the deed be reformed. On final hearing the court adjudged him the relief sought, and the plaintiff appeals.

The weight of the evidence sustains the conclusion of the chancellor. Goff had built his house and was living in it when the deed was made. The deed was evidently intended to cover the property on which Goff was living. The proof shows that it was drawn at Beattyville, when the parties did not have the plot before them; and it is manifest that Goff would not have accepted the deed, but for his supposing that it covered the lot on which he had built his house, and on which he was then living. He testifies that the bond correctly described the lot, but it was lost at the time the deed was made. They undertook to give a description of the lot from memory. That this was the lot which was sold to him we think was conclusively shown by the conduct of the parties; for no objection was made until after the sale to Hargis, and the objection was first made by him after he had made an agreement to sell Clark a part of the two adjoining lots. This suit was not filed until the year 1902, or something like 10 years after Goff bought the lot and had taken possession of it. When a deed by mistake does not properly describe the thing granted, it may be reformed, so as to correctly describe the property. *Neal v. Louisville*, 3 Ky. Law Rep. 614; *Savage, v. Yellman*, 4 Ky. Law Rep. 991; *Cotton v. Ward*, 19 Ky. 304; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947.

Limitation is not a bar to the correction of the deed, as the vendee has been in possession of the land. *Sewell v. Nelson*, 113 Ky. 171, 67 S. W. 985; *Potter v. Bengel*, 67 S. W. 1005, 24 Ky. Law Rep. 24; section 2543, Ky. St. 1903.

Judgment affirmed.

**HEGAN v. CITY OF LOUISVILLE.**

(Court of Appeals of Kentucky. Jan. 17, 1908.)

**MUNICIPAL CORPORATIONS—TAXATION—RETROSPECTIVE ASSESSMENT.**

A city has the right, under the statutes, to retrospectively tax personal property.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by James E. Hegan against the city of Louisville. From a judgment for defendant, plaintiff appeals. Affirmed.

C. B. Seymour, Thum & Clark, and Lane & Harrison, for appellant. A. E. Richards and Arthur B. Bensinger, for appellee.

**LASSING, J.** Appellant filed suit in the Jefferson circuit court seeking to enjoin the city of Louisville in its effort to collect certain back taxes, retrospectively assessed upon personal property. The city demurred to his petition, and, the demurrer being sustained, he declined to amend, and his petition was dismissed. Because of this ruling he prosecutes this appeal.

The right of the city to retrospectively as-



ness personal property was fully discussed in the case of *Botto's Ex'r v. City of Louisville*, 117 Ky. 802, 79 S. W. 241. Appellant practically admits in argument that if the rule laid down in the *Botto Case* is to be adhered to he has no standing in court. As stated in the *Botto Case*, while the statute was silent upon the question as to whether or not personal property could be retrospectively assessed by the city, there was nothing in it which negated the right of the assessor to so assess omitted property, and that the fact that the provisions of the statute governing cities of the first class expressly authorized the assessor to retrospectively assess real property did not justify the conclusion that its right to retrospectively assess personal property did not exist, and in that case this court expressly held that the city had this right. Appellant advances no good reason, nor do we know of any, why the principle announced in the *Botto Case* should be departed from.

The Legislature in 1906 amended that section of the statute which gave a city the right to retrospectively assess real estate by adding the word "personalty" thereto, so that it now reads that the city has a right to assess retrospectively real estate and personal property. This enactment was passed in conformity to the construction of the statute by this court in the *Botto* and other cases therein cited. The city had the right to retrospectively assess this property, and, as appellant based his application for an injunction upon the idea that it did not have this right, the trial court properly sustained the demurrer thereto.

Judgment affirmed.

#### YEAGER et al. v. BANK OF KENTUCKY et al.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. WILLS—FAILURE TO DISPOSE OF REMAINDER.

Where a testator by will leaves the income from his estate to his widow during life, but no disposition is made of the remainder after her death, it passes to and vests in his heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2193.]

##### 2. REMAINDERS—ACTIONS BY REMAINDERMEN—ACCRUAL OF RIGHT OF ACTION—LIMITATIONS.

Where defendant bank assisted one entitled to a life estate in some of its stock to sell the stock outright, the owners of a vested remainder therein had a right of action at once, without waiting for the termination of the life estate; and where they did not sue within the period of limitations, after knowledge of the facts, their rights will be barred by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Remainders, § 16.]

##### 3. LIMITATION OF ACTIONS—CONTINUING TRUST—RENUNCIATION—SALE FOR OWN BENEFIT.

A sale by a trustee for his own interest is a repudiation of the trust, and limitations begin to run against the cestui que trust from the

date of the sale; hence, even if the bank was a trustee holding title for the benefit of remaindermen when the stock was sold, there was a renunciation of the trust, in which the bank joined, and a cause of action arose at once in favor of the remaindermen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 506-510.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by F. J. Yeager, administrator de bonis non of the estate of W. H. Yeager, deceased, and others, against the Bank of Kentucky and its successor, the National Bank of Kentucky. From a judgment for defendants on demurrer, plaintiffs appeal. Affirmed.

Barnett & Barnett, for appellants. Alex. G. Barrett, for appellees.

LASSING, J. W. H. Yeager, a resident of Jefferson county, Ky., died in 1891. His will was probated in the county court of that county. By the term of his will his wife, Nannie R. Yeager, was entitled to receive all of the income from the estate during her life. No disposition was made of the remainder of his estate after the death of his wife, and it therefore passed to and vested in his collateral heirs. A portion of his estate consisted of 10 shares of the capital stock of the Bank of Kentucky, and the appellee the National Bank of Kentucky is the successor of the Bank of Kentucky. Some six years after the death of her husband, Nannie R. Yeager, his wife, made known to the bank that she desired to sell these shares of stock, and the bank procured a purchaser for her for said stock. In 1904 Nannie R. Yeager died. This action was instituted against the Bank of Kentucky and the National Bank of Kentucky, seeking to recover of them for the conversion of these shares of stock. General and special demurrers were filed by the defendant banks to this petition, and, the court having sustained both, the plaintiffs appealed, and this court reversed the judgment; the opinion being found in 100 S. W. 848, 30 Ky. Law Rep. 1287. In that opinion two questions are decided: First, that the administrator de bonis non did not have the right to maintain the suit, but that it must be brought in the name of the heirs and remaindermen; and, second, that the statute of limitations, to be available, must be pleaded affirmatively. Upon the return of the case the pleadings were amended, so that the heirs and remaindermen were made parties plaintiff to the action. To the petition as thus amended an answer was filed pleading the statute of limitations. To this answer a reply was filed, denying that the plea of limitation was available, and also stating that the cause of action was on a continuing and subsisting trust. To this reply a demurrer was interposed and sustained. The plaintiffs declining to plead further, their petition was dismissed, and they again appeal.

The question in issue in this case is sharp-

ly drawn, the facts all being admitted. For appellee it is contended that the statute of limitations begins to run against remaindermen before the termination of the particular estate. This proposition is denied by appellants. The pleadings show that the sale and transfer of these shares of bank stock was made on February 6, 1897, and that the plaintiffs, appellants, learned of this sale in 1899. The suit was instituted May 13, 1905; hence it is admitted, not only that the sale had been consummated and the title passed to the purchaser by Nannie R. Yeager more than eight years before the institution of this suit, but that appellants had actual notice, more than five years before the institution of their suit, that she had so sold and divested herself of the title to said stock. The petition charges that the bank assisted Mrs. Yeager in selling and transferring this stock, and thereby enabled her to convert it to her own use; that it was charged with notice of the provision of the will of her husband, and knew that she had no power to sell the stock; that such a sale was a constructive, if not actual, fraud upon the rights of the remaindermen in said estate. The action being based upon fraud, it is insisted for appellees that section 2515 of the Kentucky Statutes of 1903 applies. For appellants it is contended that limitation does not begin to run from the time of the sale and transfer of the stock, or from the time that notice of such sale and transfer was brought home to them, but that it can only begin to run from the death of the life tenant, as she was entitled to the free use and enjoyment of the proceeds of such sale during her lifetime.

In the case of Coffey v. Wilkerson, 1 Metc. 101, plaintiffs were the owners of some slaves, subject to the life estate of their father in said slaves. They alleged that the defendant, Coffey, had purchased their father's life estate and afterwards sold the absolute title to the slaves to Southern traders, and they sought to recover of Coffey the value of the slaves with interest. The sale to Coffey by their father had been made more than five years before the action had been brought, but the action was brought less than two years after the death of their father. In passing upon the right of plaintiffs to maintain that suit, this court said: "The tenant for life of slaves, or any purchaser under him, will be restrained by a court of equity, on the application of the owners of the estate in remainder, from doing any act that will jeopardize their interest, upon the representation of such a state of case as shows the existence of good grounds to apprehend that the person holding the life estate has the commission of such an act in contemplation; and where, as in this case, the person holding the life estate converts not merely the life estate, but the absolute and entire estate, in the property to his own use, and that with the effect of defeating the enjoyment of the estate in remainder, he

becomes immediately responsible for the act to the persons entitled in remainder, who have a right to recover against him the full value of their estate. The cause of action accrues so soon as the wrong has been committed. It consists in the injury which has been done to the estate in remainder. It exists independent of the life estate, and is not affected in any manner by its termination. An action for the injury can be maintained during the existence of the life estate, or after it has ended; but, as the cause of action accrues at the time of the conversion, the statute of limitations runs from that time, and consequently forms a bar to the present action." The case at bar is very similar to the case from which we have just quoted. The subject-matter under consideration in the two cases is the sale of personal trust property. In each a life estate was created—in the one in favor of the father of plaintiffs, and in the present case in favor of the wife of the decedent. In each case the property was sold and transferred to the purchaser more than five years before the institution of the action seeking its recovery, although in each case the life tenant had died less than five years before the institution of the action. We are unable to draw any distinction or see any difference between the facts in these two cases. They are as nearly identical as could well be found.

We are aware that a contrary rule has been adopted and followed by courts of last resort in some of our sister states, wherein it is held that the statute of limitations does not begin to run against remaindermen until the death of the life tenant; but such is not the rule in this state. Our courts have for a period of more than 50 years followed the rule laid down in Coffey v. Wilkerson, and the principles therein announced have been followed with approval in some of the state courts and in the United States courts; hence the opinion of the lower court must be affirmed, unless, as insisted upon by appellants, this is a continuing and subsisting trust, and therefore not subject to the limitations which would otherwise apply. Practically the same question raised in this case was before this court in the case of Wilson v. Louisville Trust Company, in which case land had been conveyed to one Schrader in trust for Mrs. Phillips for life, with remainder to her children, but no power of sale was conferred upon the trustee. Thereafter the trustee, in 1863, sold 33 acres of this property to one Roth, and conveyed it to him in fee. In 1898 an action was brought to foreclose a mortgage executed by Roth, the purchaser, on this 33-acre tract. The land was sold, and the purchaser filed exceptions to the report of sale on the ground that Roth had not only constructive, but actual, notice of the trust, and of the trustee's want of power to sell, and that therefore the equitable remaindermen could recover this land at

any time within 15 years after the life tenant's death, which occurred only 3 years prior to the institution of this suit. In that case, as in this, the purchaser charged in his exceptions to the report of sale that Roth, who purchased from the trustee, knew of the existence of the trust, and therefore became a party with the trustee to the wrong done the remaindermen, and pleaded, further, that because the trustee, in his conveyance to Roth, united with Roth in the breach of trust, he was estopped from suing for the property, and that therefore the remaindermen were not affected by the statute of limitations, but could sue at any time within 15 years after the death of the life tenant. In passing upon the exceptions, upon appeal to this court, it was said: "It has been expressly held by this court that, when a trustee holds the legal title to real estate which is barred by the statute of limitation, the equitable interests dependent upon it will also be defeated, notwithstanding the cestui que trust is an infant; \* \* \* and this seems to be the general rule of construction. The question in this case is: Does this rule apply where the trustee has joined in the conveyance under which the vendee claims, and does the fact of his having united in such a conveyance estop him from any proceedings to recover, notwithstanding such action on his part?" The court then quotes, with approval, from the case of *Meeks v. Olpherts*, 100 U. S. 566, 25 L. Ed. 735, wherein it is said that, "wherever the right of action in the trustee is barred by the statute of limitation, the right of the cestui que trust, which is represented, is also barred." And, continuing: "In this case the right of action accrued to the trustee, who held the legal title for the benefit of all those beneficially interested, as soon as Roth took possession. The vendee has admittedly been in possession of the land for more than 32 years, holding adversely both to the trustee and the cestui que trust, and has obtained by the statute of limitation a complete title which cannot be disturbed. Any other construction would destroy the purpose and intention of the statutes, which are statutes of repose, and the rule 'that, if one purchases property of a trustee with notice of the trust, he shall be charged with the same trust in reference to the property as the trustee from whom he purchased, even if he pays a valuable consideration, with notice of equitable rights of third persons, and shall hold the same subject to the equitable interests of such persons' (which is so strongly invoked by the appellant herein), does not apply to a purely constructive trust, and such a person may apply the statute, though in other respects equity will treat him as if he were the trustee." By the sale of the bank stock in 1897 Mrs. Yeager repudiated the trust, and there was not, nor could there have been, a continuing and subsisting trust, after the sale of the stock by her as trustee, for the

reason that the trust relation no longer existed.

Our courts have uniformly held that a sale by the trustee for his own benefit is a repudiation of the trust, and from the date of the sale limitation begins to run in favor of the trustee and against the cestui que trust. The case of *Wickliffe v. Lexington*, 11 B. Mon. 155, is an interesting case directly in point. In 1782 the Virginia Legislature conveyed the land whereon the city of Lexington now stands to trustees, who were required to make conveyances to the settlers on the lots. By contract among themselves each settler was entitled to one inlot and one outlot. In 1832 Mrs. Wickliffe brought suit against the city of Lexington, as successor to the original trustees, in which she sought, as sole heir of her father, to recover an inlot and an outlot to which he was entitled as one of the original settlers. The city claimed in its answer that an inlot and an outlot had been allotted to plaintiff's father, and sold by his executrix, and conveyed to the purchaser by the trustees. Plaintiff denied the right of the executrix of her father to sell the lots, and denied the right and authority of the trustees to convey the title to the purchaser. In reviewing this case upon appeal this court said: "If the trustees of the town conveyed the lots to those who had no right to them, although the act was wrongful, and amounted to a breach of trust, yet it conferred no right on the heir at law to demand other lots, although it may have rendered the trustees liable for the value of the lots so improperly conveyed by them. But, if such liability was incurred by the trustees, it cannot be enforced at this late period; more than 40 years having elapsed after the execution of the deeds by them before this suit was instituted. It is argued, however, that in cases of trust there is no limitation, and that the lapse of time does not bar this claim against the city. This doctrine, however, applies alone to cases where there is a direct, express, and subsisting trust of a purely equitable nature, and not in cases where the trust which once existed has been violated, and a suit is brought to obtain redress for the injury resulting from the breach of trust. Had the title to the property still remained with the trustees or their successors in office, they would have held it in trust for those entitled to it, and the doctrine contended for would then have had a direct application in a proceeding against the trustees in a court of chancery to compel them to convey the legal title. But, when they had conveyed away the legal title wrongfully, what trust existed between them and the rightful owner of the lots? The trust had ceased by the execution of the conveyance. The act by which it was terminated had imposed a new liability upon the trustees; but that liability was not in the nature of a trust, either expressed or implied. The trust had been openly renounced, and it no longer subsisted; but in its stead a liability had arisen of a

different character, and one that had to be enforced, if at all, within the time allowed by law for redressing similar injuries by a resort to a proper tribunal for that purpose." It will thus be observed that in this case the court held that a sale of the trust property by the trustee, though wrongful, nevertheless operated as a breach of the trust, and that therefore the trust relation between the trustee and the cestui que trust no longer existed. This principle was also recognized in the cases of *Williams v. Williams' Ex'r*, 25 Ky. Law Rep. 838, 78 S. W. 413, *Roberts v. Roberts*, 7 Bush, 104, *Hall v. Ditto*, 11 Ky. Law Rep. 667, 12 S. W. 941, and *Blades v. Grant County Bank*, 101 Ky. 163, 40 S. W. 246, 41 S. W. 305.

It is insisted for appellants that, inasmuch as the bank procured a purchaser for this stock and enabled and assisted the life tenant, Mrs. Yeager, to make disposition thereof, it is liable, for the reason that it was a trustee holding the title to this property for the benefit of appellants. The same reasoning that would support the plea of the statute of limitations as to Mrs. Yeager would apply with equal force to the bank. The fact that the bank and Mrs. Yeager acted together in the disposition of this stock does not enlarge appellants' rights, and it is immaterial whether one or both was acting in the capacity of trustee for appellants in its management of this stock. When it was sold, and the trustee had parted with her title thereto, and the stock had been transferred and delivered to the purchaser, there had been a breach of the trust, a renunciation thereof by the trustee, in which the bank joined, and a cause of action at once arose in favor of the remaindermen. With a full knowledge of all of these facts, appellants permitted more than five years to run before they instituted their suit seeking to recover for its wrongful sale and conversion, and they have thereby lost their right to recover.

Being of opinion that the defendant presented a valid defense in the plea of the statute of limitations, set up in its answer, and the reply being insufficient for the reasons given, the trial court properly sustained the demurrer to the reply.

The judgment is affirmed.

## BECKWITH ORGAN CO. v. MALONE.

(Court of Appeals of Kentucky. Jan. 10, 1908.)

### 1. MASTER AND SERVANT—INJURY TO SERVANT—INFANTS—ASSUMPTION OF RISK.

Where an infant is employed at a hazardous business, the master must see that he comprehends the dangers, and it is not enough that he is merely informed of them; and where the master fails in this duty the infant will be treated as if he did not know of the dangers, and the duty to furnish a reasonably safe place and reasonably safe tools is not affected by the obviousness of dangers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 603, 604.]

### 2. CONTINUANCE—ABSENCE OF WITNESSES—DILIGENCE.

Where a party made no effort to procure the deposition of a witness before he went away on account of ill health, but relied on his promise to return for the trial, there was an absence of diligence essential to a continuance on the ground of the absence of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 74-93.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Frank Malone, by, etc., against the Beckwith Organ Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bennett H. Young and Marion W. Ripy, for appellant. Hickman & Watkins, for appellee.

O'REAR, C. J. Frank Malone, a small boy 14 years old, was hired by appellant in its organ factory and put to work as off-bearer at a double tenoning machine. His station was at the rear of the machine, between the belts, which barely admitted his person. His duty was to catch the pieces of plank as they came from the machine and to bear them away. The floor upon which he stood was by long use and flying oil from the machine made very slippery. He had been at work for about a week. In attempting to turn around in his place his foot slipped, and he involuntarily threw out his hand to save himself from falling, when his hand came in contact with the rapidly moving knives of the machine and was so mutilated as to be practically destroyed. He sued the master to recover for his injury, basing his action upon the master's failure to furnish him a reasonably safe place to work, as well as the failure to properly instruct him in his duties and its dangers. There was a recovery by the plaintiff. Appellant seeks to avoid it on the ground that the danger was an open and obvious one, and was consequently assumed by the servant.

There is a very marked, as well as a very proper, distinction between assumptions of risks by adults and assumptions by children of immature years. Every reason for the support of the former may be lacking in the latter. The reason an adult is held to have assumed the risks of obvious and known defects in the premises is that, knowing them, his judgment, ripened by experience and observation, will acquaint him with the probabilities of his employment. He can elect to do or not to do the work under the conditions. A child may lack, and usually does lack, experience, and has not had opportunity to learn the probable effect of the conditions. His unseasoned judgment is not equal to the task of reasoning correctly as to the likelihood of his avoiding injury under the unusual circumstances. While he may see, he may not comprehend, the danger in the defects; nor may he appreciate that they

are defects. To say that he assumes the risk is to say that his mind has comprehended a situation that it has not, and would impose arbitrarily a rule which was founded upon just the opposite state of facts. A minor may in fact as fully comprehend the dangers of a situation as if he were an adult. But the general experience of mankind is to the contrary. There is no certain age at which intelligence may be said to be matured. For ordinary purposes the age of manhood, 21 years, is found the nearest approach to it in all practical affairs. If the employé, notwithstanding his minority, has sufficient intelligence and experience to appreciate the dangers of his situation, the rule applicable to adults may be applied in this case. But, when an infant of tender years is put to work at a hazardous business, the master must at his peril see that he is made to comprehend its dangers. It is not enough that he is merely informed of them. Children are thoughtless and heedless by nature. They should be made to understand the danger to themselves of such employment, as well as understand the means provided for protection. If they are not made to do so, then they will be treated as if they did not know it, and the master's duty to furnish them reasonably safe places to work and reasonably safe tools with which to work will not be affected by the mere obviousness of the dangers or defects. No one has a right to put children in such perilous places and fasten upon them the consequences of the employer's inattention upon the ground that his neglect was to be seen by experienced and thoughtful persons. The instructions given to the jury fairly embodied the foregoing principles, and, in so far as the plaintiff's contributory negligence was concerned, fairly told the jury that he was only required to exercise that degree of care for his own safety as children of his age, experience, and judgment usually exercised under similar circumstances.

There was a motion by appellant for continuance because of the absence of an important witness. This witness was in the employ of the appellant, but had gone away on account of his health. No effort had been made to procure his testimony in form of a deposition before he left, and appellant knew of his intention to go. It relied on his promise to return in time for the trial. There was not legal diligence by appellant in the effort to produce the witness or his testimony.

We see no error. Judgment affirmed.

#### COMMONWEALTH v. PERKINS.

(Court of Appeals of Kentucky. Jan. 10, 1908.)

##### 1. GIFTS—EVIDENCE—SUFFICIENCY.

Evidence in a proceeding to tax notes as omitted property held not to show a change of ownership from the one proceeded against to his then minor son by gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 95-100.]

##### 2. SAME—NECESSITY FOR EXECUTION.

A gift is not complete unless executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 29-33.]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Divisions.

"Not to be officially reported."

Proceeding by the commonwealth against George R. Perkins to tax certain notes as omitted property. Judgment for Perkins, and the commonwealth appeals. Reversed and remanded.

R. G. Williams, for the Commonwealth. S. D. Rouse, for appellee.

O'REAR, C. J. Appellee owned \$88,000 of promissory notes secured by pledge of certain shares of stock as collateral, executed in 1898 and falling due some time later. In this proceeding to tax the notes as omitted property appellee claims that he did not own them, but had given them to his then infant son. Upon this issue of fact the circuit court, as well as the county court in the first instance, decided that appellee was not the owner of the notes for the years for which they were sought to be taxed.

The notes were executed to evidence a deferred payment upon a race track which appellee had sold (or, rather, the shares of stock in the corporation owning the track). There was some controversy between appellee and his vendee, Applegate, concerning certain features of the trade, which resulted in a lawsuit between them. It was then contended by appellee that the hypothecated shares had been sold under a power of attorney executed by the debtor, and that appellee had bought them in and presented them as a gift to his young son. They did not bring the whole of the debt, and the balance appellee was claiming as a liability still owing him. The litigation was protracted and spirited. Still nowhere was it mentioned in the record that appellee did not own the notes. On the contrary, he was asserting ownership to them. He employed counsel, and it is said paid them considerable sums as fees for defending the suit. Nothing appearing on the notes indicated a change of ownership. When they were paid off, appellee received the proceeds as his own apparently, and applied \$8,000 to his personal use. He took a draft on New York bankers for \$80,000 in his own name, which he delivered to his son. With its proceeds the son paid \$17,000 of debt which appellee's wife owed, and gave some \$25,000 or \$30,000 to his sister, appellee's daughter. Appellee controlled the notes and funds in every way as he would his own, including the public and written evidences of their title. He testified that he gave the notes to his son, and signed a paper to that effect. At that time appellee was in ill health, and was going abroad under an apprehension of a probably fatal malady. He was also largely involved. Later his health was restored, or at least considerably

improved, as was his fortune, it seems. Thereafter he continued to exercise as complete title and authority over the notes as if the previous purpose to give them to his son had not existed, and the son appears to have fully acquiesced in the manner of their use and appropriation. It is altogether likely that appellee's purpose as to the tentative gift was repented of, with the assent of the proposed donee. Such dubious evidence of change of ownership is too fragile to rest a claim upon to defeat the tax assessor. Else there would be but little chance of reaching that class of property at all, as any man could mentally give his cash and bonds to his infant child, retaining the custody and full authority over them, even to collecting and disposing of the proceeds to his own or his family's use, until after the assessing period had gone by. Such a practice would not be tolerated as to creditors.

But, asks appellee, how can the state complain because a man gives his property to his own child. The difficulty we find with the question is to say that there was in fact or law a gift in this case. As neither authority nor possession changed, and nearly every step indicated a retention of both by the appellee, subject to his own future will as to what he would do with the money, it is most difficult to find that there was a change of title. There was most too much authority retained by appellee, and too little vested in or exercised by his son, over the notes, to say that there was a complete gift. A gift is not complete unless executed, and until executed completely, so as to divest the giver of title, he is liable for the taxes that may accrue upon the asset.

We feel constrained to reverse the judgment. Cause remanded for proceedings consistent herewith.

#### HOLT v. HOLT (two cases).

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. DEEDS—CONSIDERATION—SUPPORT—PLACE OF SUPPORT.

Where an aged widower divides his property between two sons by separate deeds, each of which recites that the grantor, in consideration of the grantee helping to see after and take care and furnish such as he (the grantor) needs as long as he lives, sells, etc., he is not required to stay with the sons, if they make it unpleasant for him to do so, but may reside where he can be welcome and comfortable; and it is their duty, if they desire to keep the land, to support him wherever he chooses to reside.

##### 2. DEEDS—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

In an action to set aside certain deeds for undue influence, etc., evidence held sufficient to show that plaintiff was not mentally capable of contracting with his sons on a purely business basis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 633.]

Appeals from Circuit Court, Casey County.  
"Not to be officially reported."

Actions by Jackson Holt against Virgil Holt and against G. W. Holt to set aside certain deeds. From judgments for the respec-

tive defendants, plaintiff appeals. Reversed, with directions.

N. H. W. Aaron, for appellant. C. F. Montgomery, for appellees.

**BARKER, J.** These two cases were tried together; the transactions and the evidence concerning them being practically identical. The appellant, Jackson Holt, lives in Casey county, Ky. On the 8d day of January, 1905, he was about 74 years old. He had just lost his wife, and was very ill physically and much depressed in spirits. He was the father of 11 children; but at the time mentioned he was living alone. In this condition he was induced to convey to his sons Virgil and G. W. Holt each 50 acres of land, which was all that he owned. The consideration in each of the deeds is the same: "That the party of the first part, for and in consideration of the party of the second part helping to see after and take care and furnish such as he needs as long as the said party of the first part lives, the party of the first part, under this consideration, bargains, sells, and conveys to the party of the second part a certain parcel of land lying and being in Casey county, Kentucky." After these deeds were executed and delivered to the appellees, Virgil Holt came to live with the old man in his house; it being agreed between him and his brother G. W. Holt that they would together assume to support and maintain their aged father. About the 10th day of May, 1905, the old man left his home and went to the house of his son Ambrose Holt, where he has since resided. In July, 1905, he instituted these actions against his sons, the appellees, for a rescission of the deeds by which he conveyed to them his land, charging that the conveyances were procured from him by fraud, duress, undue influence, and overreaching on the part of his sons. The defendants, in their answers, deny all of the material allegations of the petitions, and then affirmatively plead that they were ready, able, and willing to perform their part of the contract to support their father; he having left them and refused to allow them to do so thereafter. The case being submitted to the chancellor for final adjudication, the petitions were dismissed, and from these judgments the plaintiff appeals.

It must be conceded that there is a great deal of contrariety in the evidence adduced for and against the respective sides of this litigation. The father charges that his sons, after they got his property, studiously mistreated him, refused to attend to his wants, abused and cursed him, and at one time Virgil made so hostile a demonstration toward him as to induce him to believe that he was about to be violently assaulted. He testified that they refused to speak to him for long periods of time, and otherwise mistreated and neglected him. In justice to the defendants it must be said that they denied all of these statements on the part of their father,

and for the sake of humanity we hope that the mistreatment charged is not well-founded. But there are some things about this case that are not disputed, and which we think should have controlled the chancellor in reaching a conclusion whether or not the rescission should be granted. The appellant, as said before, was quite old at the time he made the deed, and the fact that he signed his deposition by making his mark shows him to be a very illiterate man. He had just lost his wife, and was very much depressed by her death. He was living alone, and was quite sick. It was under these circumstances that he conveyed to his sons all of his property. After the conveyances were made, it is evident that he did not get along well with his sons, and that he was very much dissatisfied with the treatment he received at their hands; and in five months the situation apparently became so painful to him that he practically stole away from his own home and took refuge in the home of another son. At the time the depositions of the appellees were taken in this case, which was long after the father had left his home, neither of them had ever sought him out or tried in any way to induce him to return to them. Neither of them spoke to him when they met him. Perhaps the exact situation can be better shown by a short quotation from the testimony of Virgil Holt: "Q. When did you have your last conversation with your father? A. I don't recollect. It was some time before he left home. Q. Are you and your father on friendly terms at this time? A. The most of the time, when I met up with him, he began to turn his head off, and I hate to speak to a fellow when he won't look at me. Q. When did you speak to him last? A. I don't remember. It must have been before he left home." This deposition was given nearly a year after the old man left home. The above excerpt from the testimony of the son fully shows the situation of affairs between him and his father. He seems to have had no conception of the duty of love and reverence which he owed his parent. He treated his father just as he would an ordinary acquaintance with whom he was at odds; in other words, he dealt with him at arms' length, when it was his duty to seek his parent and to leave nothing undone to smooth away any asperity there might have been in the old man's mind or demeanor.

The terms of the deed did not require that the vendor should be supported and maintained at any particular place or in any particular house. It was the duty of the vendees to support and maintain him wherever he chose to reside within the bounds of reason. It was not unreasonable for the old man to go to the home of his son Ambrose to live; it being but a short distance from the homes of the vendees. It was their duty to support him there if he chose to live there; and this they have failed to do. The terms of the deed required something more than mere

bread and apparel. The vendees obligated themselves "to see after and take care of" and to furnish their parent all that he needed as long as he lived; and this consideration could not be fulfilled in the spirit of throwing a bone to a dog, as seems to have been the opinion of the appellees. The aged father was not required to stay with his sons, the appellees, if they made it unpleasant for him so to do. He had the right, as said before, to reside where he could be welcome and made comfortable; and it was the duty of the vendees, if they desired to keep the land, to support him wherever he chose to reside. Now, what will be the result of the judgment in this case? Either this aged parent must go back to the sons who will not speak to him, or recognize him, and where he claims to have been mistreated and abused, or else live upon the charity of some one. He is beyond the age of labor, his health is gone, and his spirit broken. If these appellees hold the land, as the judgment authorizes, then there is submitted to this broken old man the hard alternative of living with people who, he thinks, dislike him, or of being dependent upon the voluntary charity of others. It is always distasteful to this court to disagree with the chancellor on his conclusions as to the facts of the case; but we are deeply impressed that justice requires that the contracts between the parties litigant should be rescinded and the conveyances canceled. We do not believe, taking the appellant's age, his broken health, and the great sorrow that had come upon him, into consideration, that he was mentally in any condition to contract at arms' length with those upon whose love and fidelity he had a right to rely.

For these reasons the judgments are reversed, with directions to enter judgments in accordance with the prayers of the petitions.

#### COMMONWEALTH v. MONTENEGRO-REIHM MUSIC CO.

(Court of Appeals of Kentucky. Jan. 9, 1908.)  
CORPORATIONS — CRIMINAL PROSECUTIONS — VENUE.

A prosecution of a corporation for a violation of Ky. St. 1903, § 576, punishing any corporation failing to use under its name in advertising matter the word "incorporated," must be brought in the county in which it has its principal place of business.

Appeal from Circuit Court, Grayson County.  
"Not to be officially reported."

The Montenegro-Rheim Music Company was indicted for crime, and from a judgment of dismissal the commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., T. B. McGregor, and Ohas. H. Morris, for the Commonwealth. J. S. Wortham, for appellee.

BARKER, J. The Montenegro-Rheim Music Company, a corporation, was indicted by

the grand jury of Grayson county, charged with a failure to place the word "incorporated" under its corporate name upon its letter head, contrary to the provision of section 576, Ky. St. 1903. The defendant filed the following plea in bar to the indictment against it: "Defendant comes and says that this court has no jurisdiction of the offense charged in the indictment, because the said alleged offense was not committed in Grayson county. It says that its place of business is in the city of Louisville, in Jefferson county, Kentucky, and all its letter heads and advertising matter were printed and distributed from said city, and not in Grayson county. Wherefore it prays that this prosecution be dismissed. J. S. Wortham says he is the sole attorney of the defendant in Grayson county, and that all of the officers and agents of the defendant are now absent from Grayson county, and that he believes the statements made in this plea to be true." The commonwealth demurred to this plea, and, its demurrer being overruled, it refused to plead further, and the indictment was thereupon dismissed, from which judgment this appeal is prosecuted.

It will be observed that the special plea to the jurisdiction of the court sets forth that the place of business of the defendant corporation is in Louisville, Jefferson county, Ky.; and, this being admitted, the question arises whether or not the Grayson circuit court had jurisdiction of the offense charged against the defendant. The identical question we have here arose in the case of *Commonwealth v. Remington Typewriter Co.*, 105 S. W. 899, and it was there held that the jurisdiction to try violations of the statute under consideration was in the circuit court of the county where the corporation had its principal place of business. In ruling upon the validity of the plea in bar, the circuit judge followed the opinion in the case cited, and the judgment is therefore affirmed.

#### PURITAN MFG. CO. v. RENAKER.

(Court of Appeals of Kentucky. Jan. 10, 1906.)

##### 1. SALES—ACTIONS FOR PRICE—INSTRUCTIONS.

Where, in an action for goods sold, the vendee answered that he was induced to sign the order by reason of the description given by vendor's salesman, and that he did not see the goods, and that they did not come up to the description of the goods ordered, and for that reason he returned them to vendor, on which answer issue was joined, an instruction to find for vendor unless the goods delivered were not gold plate, gold filled, gold front, sterling silver, and oxidized finished articles in assorted styles, as described, in which event to find for vendee, fairly submitted the only issue made by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1066.]

##### 2. SAME—RESCISSION BY BUYER—DEFECT IN QUALITY.

A contract guaranteeing the articles sold for periods therein specified, and binding vendor to repurchase or replace any article returned to it on account of defective workmanship or qual-

ity, or which had not given satisfaction as to wear, provided the same was returned by the individual purchaser from vendee, and wherein vendor agreed that if vendee, after having the articles on sale for 60 days, found any style not selling readily, he could return the same and exchange them for any new style, such privilege to extend over a period of 14 months, does not obligate vendee to accept articles and endeavor to sell them in accordance with the terms specified, where vendor did not deliver to vendee the kind of articles purchased.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by the Puritan Manufacturing Company against J. W. Renaker for goods sold and delivered. Judgment for defendant, and plaintiff appeals. Affirmed.

Hanson Peterson, for appellant. M. C. Swinford and Wade H. Lall, for appellee.

MUNN, J. Appellee is a druggist, and has been engaged in that business for many years at Cynthiana, Harrison county, Ky. Appellant is a foreign corporation, with its place of business in Iowa City, Iowa, and is engaged in selling jewelry to retail dealers. On the 14th day of April, 1905, appellee ordered from appellant, through its traveling salesman, a lot of jewelry described as rolled gold plate, gold front, gold filled, sterling silver, and oxidized finished articles in assorted styles and patterns; the cost of the articles to amount to \$380. A short time after this order was made appellant shipped and delivered to appellee a box containing jewelry at his place of business in Cynthiana. He refused to accept it, and returned same by express to appellant, which it refused to receive. Shortly thereafter appellant instituted this action to recover of appellee the contract price, \$380. Appellee answered that he was induced to sign the order by reason of the description of the jewelry given him by appellant's agent, and also the description as given in the order; that he did not see, and had no opportunity to see, any of the goods before they were ordered; that the goods at that time were in the possession of appellant at its place of business in Iowa City; that he relied in good faith upon the representation made to him by appellant's agent and the description given in the order; that the goods were ordered by him for the purpose of resale to his customers, but they did not come up to the description of the goods he purchased, and for that reason he immediately returned them to appellant. On this answer issue was joined and a trial had, which resulted in a verdict in favor of appellee.

The testimony of appellee conduces to show that the jewelry delivered to him was not of the kind described in the order and by the agent of appellant; that it did not consist of rolled gold plate, gold front, gold filling, sterling silver, and oxidized finished articles; that the articles delivered to him were of inferior quality, and were not worth as much as the articles ordered by 30 to 50 per cent.;



that he could not afford to sell the goods delivered at a price above that charged to him sufficient to allow him a reasonable profit without committing a wrong upon his customers and injuring his reputation as a merchant. Appellant's testimony controverted the testimony of appellee, and tended to show that the goods delivered to appellee were in all respects the same as ordered by him. The court submitted the issue to the jury in the following instruction: "The court instructs the jury to find for plaintiff the sum of \$380, with interest from the 15th day of May, 1905, unless they shall believe from all the evidence that the goods delivered to the defendant and described in the proof were not rolled gold plate, gold front, gold filled, sterling silver, and oxidized finished articles in assorted styles; and if they so believe they should find for the defendant." This instruction fairly and pointedly submitted the only issue made by the pleadings.

Appellant contends that the court erred in not sustaining its demurrer to appellee's answer, for the reason that appellee did not have the right to plead that the goods were not of the kind ordered; that he should have accepted them and complied with the provisions of the order executed by him for the goods. By the provisions of the order or contract appellant agreed to guarantee the goods for periods ranging from 5 to 20 years, and to make that guaranty good agreed to buy back for cash or replace any article returned to them on account of defective workmanship or quality, or which had not given satisfaction as to wear, provided the same was returned to them by registered mail by the individual purchaser thereof, giving his name, address, date when article was purchased, and the price paid therefor. Appellant further agreed that if appellee, after having their goods on sale for 60 days, found any style or pattern was not selling readily, he could return same and exchange them for any new style or pattern they might have in stock. This privilege extended over a period of 14 months. It is the contention of appellant's counsel that appellee, under this contract, was compelled to accept the goods and undertake to dispose of them, and that he had no right to resist the payment of the purchase price until he had endeavored to sell the goods under the terms specified in the contract; and, as he admitted in his answer that he refused to receive the jewelry and had never made any attempt to dispose of same, he failed to state a defense to the action. This contention would be correct, provided appellant had delivered to appellee the articles which he purchased. Then it would have been his duty to have complied with all the terms of the contract; but the jury determined by its verdict that appellant did not deliver to appellee the articles which he purchased. Appellee purchased jewelry represented in the order as rolled gold plate,

gold filled, etc. He should not have been compelled to receive jewelry which was not of that kind, and especially when not worth more than one-half the price that he agreed to pay for the jewelry described in the order.

In the case of *Munford & Co. v. Kevil & Sons*, 58 S. W. 703, 22 Ky. Law Rep. 730, in speaking of sales of goods where the purchaser has had no opportunity for inspection, this court said: "The stipulation that goods of a certain description or quality are to be delivered is made an essential part of the contract, which must be complied with by the vendor as a condition preceding the obligation of the vendee to receive the goods and pay for them; and if the goods are not of the description or quality described the vendee has the right to reject them." In the case of *Baird & Co. v. Matthews*, 6 Dana, 133, where a similar question was involved, the court said: "In other words, there must, in such cases, be a substantial conformity between the article delivered and the description by which it is sold, or the vendor will have broken, not merely his word, but his contract." According to these authorities appellee had the right to refuse to accept the jewelry delivered to him by appellant, as it was not the kind of jewelry he purchased from it.

For these reasons, the judgment of the lower court is affirmed.

#### TURNER v. DIXON.

(Court of Appeals of Kentucky. Jan. 14, 1908.)

##### 1. BOUNDARIES—ESTABLISHMENT—EVIDENCE.

Evidence held to sustain a finding that the division line between the parties' lands ran along the center of a lane dividing them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 191.]

##### 2. SAME—RECOGNITION AND ACQUIESCENCE.

Where a division of land was made by persons of legal age and competent to contract, and fences were erected by them in conformity thereto, and the division has been acquiesced in for over 40 years by all the parties in interest, it will not be disturbed simply because the forms of law were not invoked in establishing it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Deeds, §§ 232-242.]

Appeal from Circuit Court, Trigg County.

"Not to be officially reported."

Action by Blunt Turner against Thomas Dixon for the division of land. Judgment for defendant, and plaintiff appeals. Affirmed.

Jno. D. Shaw and R. A. Burnett, for appellant. Max Hanberry, for appellee.

NUNN, J. This action was instituted by appellant to have a certain tract of land containing 50 acres divided between himself and appellee. There is no controversy as to the title of either. Appellant owns eight-elevenths and appellee three-elevenths of the tract. Appellee denied the right of appellant to have the land divided, and pleaded that

the same had been divided. It appears from the evidence without contradiction that this piece of land was set apart to Catharine Sumner as her dower in her deceased husband's land; that her son, Samuel Sumner, became the legal owner of eight-elevenths and appellee three-elevenths thereof, subject to the widow's life estate; that the widow died prior to September, 1866, and in that month Samuel Sumner, the remote vendor of appellant, and appellee, agreed that one B. B. Mart, a surveyor, should divide the land between them in the proportion named. Mart divided the land and allotted to appellee  $14\frac{3}{4}$  acres, and gave him a plat and certificate giving the metes and bounds of same; but it does not appear that he gave Sumner a like paper showing the boundaries of his portion. The evidence also shows without contradiction that in the year 1867 Sumner and appellee erected fences along the division line, leaving a space of 15 feet between them for a passway for the benefit of the public. Dixon testified that the true line between them was the center of the passway. Sumner does not deny this, but says that he does not remember whether he gave one-half of the passway or not. It was also shown, without any contradiction, that appellee has kept his fence up and been in the possession of and cultivated his part of the land from that time to the institution of this action without interference or complaint from any one, until within a few months before the bringing of this suit. It appears that after this suit was instituted the court directed a survey of the land to be made. Two surveyors met and acted together in the performance of the order of the court. They both ran Dixon's land from the calls given in the plat and certificate made by Mart. One of them found appellee's part to be  $13\frac{10}{11}$  acres, and the other found it to be 14 acres and 7 poles; both finding an amount less than that found by Mart. All the witnesses who testified on the point stated that according to the surveys made by the two surveyors under order of court the division line was found to be along this lane and near to the fence of appellee, Dixon, and that most of the lane was on the side owned by appellant. The lower court adjudged the true line between the parties to be along the center of the lane, and dismissed appellant's petition.

Appellant complains of this, and says that the court erred in fixing the center of the lane as the line; for it should have been fixed where the surveyors ran it, near the fence of Dixon. After a careful examination of the facts and circumstances shown in this case, we do not feel authorized to say that the court erred in this respect. Appellee testified, without contradiction, that the center of the lane was the line as fixed by Mart in the division. Both the surveyors who made the surveys under order of court testified that they started their surveys at a point where there was no corner standing,

but at a place where they were told the corner stood, and ran a line to the lane and a few links outside of appellee's fence, and then ran the course along the lane; sometimes running on the fence, and at times three or four feet from the fence in the lane. It is not certain that the surveyors started at the exact point where the corner stood. It is almost impossible for a person who has seen a corner standing, if it is gone, to locate the exact spot where it stood; and different persons carrying a chain in the measurement of land do not usually reach the same result. Some will carry it taut and some slack, and it is evident that something of this kind occurred, for the reason that these last surveyors did not find as much land as Mart did. One of them gave Dixon  $13\frac{10}{11}$  acres, and the other 14 acres and 7 poles, when Mart in the division gave him  $14\frac{3}{4}$  acres. These facts, taken in connection with the proof that the fences were erected in 1867 with the view of making the center of the lane the line, convinces us that the court did not err in its judgment. It is true this division was not made by virtue of an order of court; but the parties were all of lawful age and competent to contract, and the division was made more than 40 years ago, and has been acquiesced in from that time to the institution of this action by all the parties in interest, and appellee has been in the actual adverse possession of his part of the land from that date, and we are unwilling to disturb that division simply because the forms of law were not invoked in the division.

For these reasons, the judgment of the lower court is affirmed.

## COMBS et al. v. VIRGINIA IRON, COAL & COKE CO.

(Court of Appeals of Kentucky. Jan. 10, 1908.)

### 1. BOUNDARIES—DESCRIPTION—COURSES AND DISTANCES.

Where, if a line is run on the call of the patent "south 18° west 220 poles to a stake," and the other lines of the patent are then run, the patent will not close, but the last corner will be 6,000 feet from the beginning, and if, commencing at the beginning corner of the patent and reversing the calls from that corner until the call "south 18° west 220 poles" is reached, it is found that the call "south 81° west 220 poles" will close the patent and give the quantity of land called for, lying in a shape corresponding with the figure drawn in the plot, and if the call is run south 18° west 220 poles it will make the patent include 1,637 acres, instead of 500 acres, as called for therein, the call "south 18° west 220 poles" will be held to be a clerical error for "south 81° west 220 poles."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 52.]

### 2. SAME.

Where a survey fails to close by 6,000 feet and will include three times as much land as the patent calls for if run by the calls of the patent, running then from the beginning corner in the order in which they are given, it is prop-

er to reverse the calls of the patent to discover in that way where the mistake occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 52.]

### 3. SAME.

The original survey and accompanying plot may always be considered to correct a mistake in the calls of a patent.

### 4. APPEAL—DECISIONS REVIEWABLE—MATTERS NOT PRESENTED OR CONSIDERED.

The objection that there was no evidence of plaintiff's incorporation cannot be raised for the first time on appeal.

### 5. MINES AND MINERALS—QUIETING TITLE—NECESSITY OF POSSESSION.

An action to quiet title to the minerals under the surface may be maintained, though plaintiff is not in actual possession of the land.

### 6. CHAMPERTY AND MAINTENANCE — POSSESSION—STATUTORY PROVISIONS.

Where, after the conveyance of mineral rights by the one then in possession of the land, possession of the surface was taken by another by putting a tenant on it, such possession was not an actual possession of the mineral rights within the meaning of the champerty statute.

### 7. DEEDS—DESCRIPTION—SUFFICIENCY.

A description of land in a deed as lying "on the waters of Lot's creek and Carr Fork adjoining the lands" of persons named, "212 acres being patented in my own name," sufficiently identifies the land, when read in connection with the patent to grantor.

### 8. JUDGMENT — CONCLUSIVENESS — PERSONS CONCLUDED.

A judgment in a prior action by defendants against the one under whom plaintiff claims, quieting title in defendants, does not affect plaintiff's right to quiet title to the minerals under the surface, where before such prior action the one under whom plaintiff claims had conveyed to plaintiff's vendor the mineral rights, and plaintiff was not a party to that action, and it went off on grounds other than that raised in the subsequent action by plaintiff.

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Action by the Virginia Iron, Coal & Coke Company against G. P. Combs and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Hall and Greene & Van Winkle, for appellants. Bailey P. Wooton and Jesse Morgan, for appellee.

**HOBSON, J.** The Virginia Iron, Coal & Coke Company brought this suit against G. P. Combs and Cora Combs to quiet its title to the coal, oils, gases, and mineral products upon and under a tract of 212 acres of land patented to F. Elden Combs March 3, 1881, under whom it claims. They claim the land under a patent issued to Samuel Napier on August 9, 1846. The circuit court adjudged the plaintiff the relief sought, and the defendants appeal.

The first and most material question in the case is whether the Napier patent covers the land, as that patent is superior to the patent issued to F. Elden Combs. The plot of the survey upon which the patent was issued shows the shape of the survey and that it extended on either side of a branch so as to take in the land lying on the waters of this branch. There is no dispute about the

beginning corner of the patent. If we begin at this corner and follow the calls of the patent, the survey is run as shown in the plot until we reach the sixth call, which is, as given in the patent, "south 18° west 220 poles to a stake." If this line is run upon the call of the patent and the other lines of the patent are then run, the patent will not close; but the last corner will be 6,000 feet from the beginning. If we then go back to the beginning corner of the patent and reverse the calls from that corner until we get to the sixth call of the patent, it is found that the call "south 81° west 220 poles" will close the patent, and will give the quantity of land called for in the survey, lying in a shape corresponding with the figure drawn in the plot. If the sixth call of the patent is run south 18° west 220 poles, it will make the patent include 1,637 acres, instead of 500 acres, as called for in the patent. If the lines of the patent are reversed from the beginning corner, they do not include the land in controversy. From these facts we think it is evident that the call in the patent "south 18° west 220 poles" is a clerical error for "south 81° west 220 poles"; the figures "8" and "1" having been by a mistake transposed in copying. One line of a patent is entitled to as much dignity as another, and where the survey fails to close by so great an amount, and will include three times as much land as the patent calls for, if run by the calls of the patent, running them from the beginning corner in the order in which they are given, it is always proper to reverse the calls of the patent and see if it cannot be discovered in this way where the mistake occurred. When that is done in the case before us, the mistake in the sixth call is evident. It is well settled that the original survey and accompanying plot may always be considered to correct a mistake in the calls of the patent. *Hogg v. Lusk*, 120 Ky. 419, 86 S. W. 1128; *Witt v. Middleton*, 86 S. W. 968, 27 Ky. Law Rep. 831; *Kerr v. Delaney*, 91 S. W. 286, 28 Ky. Law Rep. 1140; *Morgan v. Lewis*, 92 S. W. 970, 29 Ky. Law Rep. 197. We therefore conclude that the circuit court properly held that the Napier patent did not include the land.

The plaintiff alleged in its petition that it is a corporation duly organized and existing under the laws of the state of Virginia, and as such has the power to contract and be contracted with, to sue and be sued. The defendants by their answer denied knowledge or information sufficient to know or form a belief as to whether the plaintiff is a corporation duly organized or existing under the laws of the state of Virginia, or as to whether or not it has the power to sue, contract, or be contracted with, or be sued. No proof was given on the trial as to the plaintiff's incorporation, and it is insisted that for this the judgment should be reversed. Waiving the question whether the traverse contained a negative pregnant, and

by implication admitted that the plaintiff was otherwise incorporated, though not incorporated under the laws of Virginia (see *McCormick Harvesting Machine Co. v. Hovey*, 36 Or. 259, 59 Pac. 189), we think that this question cannot be raised for the first time in this court, but should have been presented in the circuit court by a motion to dismiss the action. The objection only went to the plaintiff's capacity to sue. If it was sustained, the action should have been dismissed without prejudice. It is what is known as a "dilatatory plea," and is waived where the party without objection tries the case on the merits.

The defendants made their answer a counterclaim, alleging that the female defendant was the owner of the land. It was incumbent on the court on the counterclaim to determine the question of title, and the legal effect of the judgment would not be different if it had been rendered on the counterclaim alone, without reference to what was alleged in the petition. A case may be tried on a counterclaim, although the plaintiff's petition is dismissed, and as the defendants insisted on their counterclaim, and went to trial on the whole case, no substantial rights of theirs were prejudiced by the judgment of the court on the merits.

The objection that the petition does not show that the plaintiffs are in actual possession of the land cannot be maintained, as the action only relates to the minerals under the surface. *Eversole v. Virginia Iron, Coal & Coke Company*, 92 S. W. 593, 29 Ky. Law Rep. 151. The champerty statute does not apply, although some of the deeds under which plaintiffs claim were made while the defendants had a tenant on the land. Fielden Combs, when he had possession of the land and before the defendant took possession, conveyed the mineral rights to T. P. Trigg as trustee. The possession of the surface of the land, afterward taken by the defendant by putting a tenant on it, was not an actual possession of the mineral rights within the meaning of the champerty statute. *White on Mines and Mining*, § 436; *Armstrong v. Caldwell*, 53 Pa. 284.

The description of the land in the deed by Fielden Combs to Trigg and in the subsequent deeds is sufficient. It is there described by Combs as lying "on the waters of Lot's creek and Carr Fork adjoining the lands of Samuel Napier, Clinton Combs, 212 acres being patented in my own name." This sufficiently identifies the land, when read in connection with the patent to Fielden Combs.

In 1897, G. B. Combs and wife brought a suit against Fielden Combs to have their title quieted to this tract of land. In that suit they obtained a judgment as prayed, and the judgment was affirmed by this court. See *Combs v. Combs*, 72 S. W. 8, 24 Ky. Law Rep. 1691. But that judgment does not affect the plaintiff, because Fielden Combs

had conveyed to its vendor the mineral rights on July 19, 1887, or 10 years before the suit was brought. It was not a party to the suit. In that case Combs did not make the question that the Napier patent did not include the land, nor did he introduce proof showing the facts. The case went off on other grounds. This being true, and the plaintiff not being a party to that action, the judgment there does not affect its rights. The form of the judgment is not prejudicial to the defendants. It merely determines that the former judgment does not conclude the Virginia Iron, Coal & Coke Company, and sets it aside as to it. Its effect is only to quiet the plaintiff's title. It affects nothing else.

On the whole case we see no error to the substantial prejudice of the appellees. The judgment of the circuit court is in accord with the rights of the parties.

Judgment affirmed.

### LOUISVILLE & N. R. CO. v. GUEST'S ADM'R.

(Court of Appeals of Kentucky. Jan. 14, 1908.)

#### 1. NEGLIGENCE—ACTIONS—EVIDENCE—PROXIMATE CAUSE OF INJURY.

Where the evidence shows that plaintiff's injury may have resulted either from the defective condition of defendant's hand car, from which he fell, or by his negligently losing his hold on the lever, and the inference that the injury resulted from one cause is no stronger than that it resulted from the other, plaintiff cannot recover.

#### 2. MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—EVIDENCE.

Evidence held insufficient to sustain a recovery against a railroad by a section hand injured by falling from a hand car.

Appeal from the Circuit Court, Lincoln County.

"Not to be officially reported."

Action by William Guest's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Alcorn and Benjamin D. Warfield, for appellant. M. C. Sauffley, for appellee.

HOBSON, J. William Guest was a section hand in the service of the Louisville & Nashville Railroad Company, and while working at the front end of a hand car he fell from it and was run over by the car. From the injuries that he received he died the next day and this suit was brought against the railroad company by his administrator to recover for his death on the ground that it was caused by the negligence of the company. He proved on the trial by Elijah Sutton, who was also a section hand on the same car, that about quitting time in the afternoon they took the hand car to go to the boarding car; that it was a drizzling and rainy afternoon; that there were three men working at the lever in the front and four at the lever behind. Guest being the middle man in front,

and Sutton being one of the men by the side of him; that they pulled up to the top of the grade, and as they were rolling down the grade Guest fell off. To quote the words of the witness, he said: "I do not know how he happened to fall off. I was on one side and Curtis Stewart on the other. We were pulling on the outside, and when we saw that he was going to fall we aimed to catch him; but we had our hands on the lever." The witness also stated that the condition of the car was not very good. It was shackling and not very stout; seemed like there was a broken place in the wheel that would make it jump. Sometimes it would jump as it was moving along. The witness was scared all the time when riding on the car. The hands had said to the foreman that the car was dangerous, and then he said that he was looking for a new one. The brakes on the car were not good. It would go a good way before they could stop it. The car was running at a pretty good rate of speed when Guest fell off. The railroad track along at that place was tolerably rough. It was an old track. They were laying new track below and above along there. There were some low joints where the ends of the rails came together, so that when the car moved along and would reach one of these low places it would make a little dip. They could tell by the car rising up and down when it hit those joints. When Guest fell, he fell right in front of the car, and the car ran right over him. This was all the proof introduced for the plaintiff. The defendant's proof by several witnesses was to the effect that there was no lurch or jump of the car, but that Guest lost his hold on the lever as the car was running, and, losing his balance, fell backward in front of the car. Several of these witnesses sustained Sutton's statements as to the condition of the car and the condition of the track, and as to what had been said to the foreman and by the foreman about it. But there was no evidence by any witness that the car gave any lurch or jump, or that there was anything at the time he fell in its motion to cause one to fall off.

On these facts we are unable to see how a recovery against the defendant can be sustained. It is true that there was proof that there were some low places in the track, and that the car would sink as it passed over one of these places and rise after passing it. There was also proof that the car was shackling and would sometimes jump as it was going along. If the car had run off the track, this proof might have been sufficient to justify the inference that the shackling condition of the car caused it to leave the track. The fact that the car would sometimes jump, instead of running smoothly, is not material here, unless it is shown that the car made a lurch or jump at the time Guest fell from it. Sutton does not testify that there was any lurch or jump in the car at the time that Guest fell off. He testifies to nothing that could rea-

sonably cause a man to fall off. Although the car sometimes jumped, if it did not jump at the time he fell off, and this did not cause him to fall off, the plaintiff cannot for this reason recover. In order for him to recover he must show that the injury was due to the defective condition of the car or to the defective condition of the track. The rule is that if the evidence shows that the injury may have resulted from either of two or more causes, only one of which was due to the defendant's negligence, and the inference that the injury resulted from one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case. *Louisville Gas Co. v. Kaufman, Straus & Co.*, 105 Ky. 153, 48 S. W. 434, and cases cited. There is an entire failure of evidence here to show that there was anything in the motion of the car to cause the intestate to fall off.

On another trial, if there is evidence sufficient to take the case to the jury, in lieu of instruction 3 the court will tell the jury that if Guest fell from the hand car by reason of his loosening his hold on the lever, and not by reason of the unsafe condition of the car or the unsafe condition of the track, they should find for the defendant.

Judgment reversed, and cause remanded for a new trial.

#### BELCHER et al. v. POLLY et al.

(Court of Appeals of Kentucky. Jan. 14, 1908.)

#### 1. REMAINDERS—LIMITATION OF ACTIONS—RECOVERY OF REAL PROPERTY.

Remaindermen are not barred by the statute of limitations in a suit to quiet title to land, where 15 years have not elapsed since the death of the life tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Remainders, § 16.]

#### 2. ACKNOWLEDGMENT—AUTHORITY TO TAKE—JUSTICE OF THE PEACE OF ANOTHER STATE.

A justice of the peace in another state has no power to take an acknowledgment to a conveyance of land in Kentucky, and a conveyance so acknowledged is not entitled to record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 83.]

#### 3. EVIDENCE—RECORD OF CONVEYANCES—INTRODUCTION OF COPY.

Where an instrument has not been so acknowledged as to entitle it to record, it is error to allow a copy thereof made by the county court clerk to be read in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1325.]

#### 4. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, an instrument having been lost, there was proof of its execution and contents, it was immaterial that a copy thereof made by the county court clerk was read in evidence, though such instrument was not so acknowledged as to entitle it to record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

#### 5. HUSBAND AND WIFE—COVERTURE AS A DEFENSE—NECESSITY OF PLEADING.

Under the statute authorizing a married woman to sue and to be sued as a single woman, coverture at the time of the execution of an in-

strument in effect a title bond, to be available as a defense, must be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Husband and Wife, § 835.]

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

Action by L. D. Polly and others, under Ky. St. 1903, § 11, against James Belcher and others, to quiet title. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bowling & Stratton, for appellants. York & Johnson, for appellees.

NUNN, J. Prior to the year 1872 one Ramey devised to his daughter Nancy Belcher, a tract of land containing 1,600 acres, situated in Pike county, Ky., for and during her natural life, with remainder to her children. On August 22, 1872, she and her husband, with six of their children, who were adults, signed a paper purporting to be a deed in the usual form and purporting to convey a fee-simple title, and acknowledged it before a justice of the peace in Kanawha county, W. Va. This attempted conveyance was made to Joseph D. Belcher and Levi Clevenger, and was recorded in the clerk's office of the Pike county court. Appellees are the remote vendees of Belcher and Clevenger. It is proven, and not contradicted, that appellees and their remote vendors have been in the actual, adverse possession of this land and claiming to the exterior boundaries thereof since 1872. Nancy Belcher had nine, and only nine, children. Six of them signed the paper referred to. The other three were under age at that time. Two of them conveyed to Belcher and Clevenger in 1882. The other one in 1902 conveyed to appellees. About this time several of the parties who signed the paper referred to commenced to claim that they owned interests in the land, that the deed referred to was void, and that their names were forged thereto. Then it was that appellees instituted this action, under section 11 of the Kentucky Statutes of 1903, to quiet their title to the land. Three of the children and the descendants of two others, who are appellants herein, answered the petition, and alleged that they were the owners of five-ninths of the land, and alleged that they never signed or acknowledged the deed referred to, and that their names were forged thereto. George Belcher, one of the children, agreed that he signed and acknowledged the deed, and stated that all the others also signed and acknowledged it. Appellants also say that they were joint tenants with appellees and their vendors, and appellees' possession was not adverse to them, and also that the life tenant, their mother, who did sell her interest, did not die until September, 1889, and that 15 years had not elapsed from that date until this action was instituted.

We agree with appellants in this last statement, and they are not barred by the statutes of limitation from asserting their claim to their interests in this land, for the reason

that appellees and their vendors were legally in the possession of this land under their purchase from the life tenant, which ended in September, 1889. The deed or paper referred to was not a legal conveyance of the five children's interests. A justice of the peace in West Virginia had no power to take their acknowledgments to a conveyance of land in Kentucky, and therefore it was not a recordable instrument under the laws of Kentucky, and it could only have operated as a title bond, and is binding only as such upon those who signed it. We deem it unnecessary to refer in detail to the evidence upon the question as to whether they executed the paper and received the consideration therefor. The preponderance of the evidence is to the effect that they did sign it and receive the consideration named in the paper. The price appears small for so large a body of land; but it appears that the price of land in that section at that time was very low.

Appellants contend that the lower court erred in allowing a copy of the deed or paper made by the county court clerk of Pike county to be read as evidence. This was error, as it had not been executed in such a manner as to make it a recordable instrument. The original paper had been lost, or misplaced, so that it could not be found. The testimony showed this fact, and appellees had the right to prove the execution and the contents of it, and, as stated, there was an abundance of proof to show these facts. It was immaterial whether the copy was read or not, for the reading of it could not have affected the result. It also appears from the testimony that Annie Peters was a married woman at the time she signed the paper, which is in effect a bond for title; but she does not plead her coverture. Her only defense is that her name was forged to the instrument. Under the statute as it now exists she is authorized to sue and to be sued as a single woman, and she failed to plead her coverture at the time she executed the instrument. See the case of *Turner v. Gill*, 49 S. W. 311, 20 Ky. Law Rep. 1253.

For these reasons, the judgment of the lower court is affirmed.

#### SIMPSON v. ADAMS et al.

(Court of Appeals of Kentucky. Jan. 14, 1908.)

##### 1. WILLS—CONSTRUCTION—"DYING WITHOUT ISSUE."

Where an estate is devised to one for life, with remainder to another, with gift over on the remainderman dying without issue, the words "dying without issue" are restricted to death before the termination of the particular estate; but where there is no intervening estate, or where there is a period fixed for distribution, the words, in the absence of a contrary intent, create a defeasible fee, defeated by death at any time without issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1810-1818.

For other definitions, see Words and Phrases, vol. 3, pp. 2059-2061; vol. 8, p. 7636.]

**2. SAME—ESTATES ACQUIRED.**

Testator devised his real estate to his grandsons, directed that each of them should pay to a third person an annual sum for life, and provided that, if either of the grandsons should die without children, the property devised should descend to the survivor and his descendants. *Held* not to create an estate tail, converted into a fee simple under Ky. St. 1903, § 2343; the word "body," or some other words of procreation, being necessary to make an estate tail.

**3. SAME.**

Testator gave his household goods, etc., to his daughter for life, and at her death to her two sons, or the survivor of them, or their descendants. *Held*, that the property passed at the daughter's death to the sons then living absolutely.

**4. SAME.**

Testator devised real estate to his grandsons, subject to a certain charge, and directed that, if either of the grandsons should die without children, the property should descend to the survivor and his descendants. *Held* to vest the fee simple in the grandsons, subject to be defeated as to either by his dying without issue at any time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1354.]

**5. SAME—TITLE OF PURCHASER FROM DEVISEES.**

Testator devised real estate to his grandsons, vesting in them the fee simple, subject to be defeated as to either dying without issue at any time. The grandsons and their mother mortgaged the premises, and a third person purchased the same at a foreclosure sale. He thereafter conveyed the premises to the mother, who failed to pay the purchase-money notes, and the land was ordered sold to pay them. The third person became the purchaser. *Held*, that the third person acquired complete title to the land, except the contingent remainder vested by the will in the descendants of either of the grandsons, if either should die without issue after the death of the other with issue living.

**6. PLEADING—ALLEGATION OF FACTS.**

An amended pleading, which alleges that the proof shows a certain thing to be true and that the proof is uncontradicted, is properly disallowed, for pleadings should positively allege the existence of facts.

**7. JUDGMENT — FORECLOSURE OF VENDOR'S LIEN—CONCLUSIVENESS.**

A judgment enforcing a vendor's lien to the amount of purchase-money notes is conclusive on the question whether the notes were in part without consideration, and such a defense is not available in a suit to quiet title by the purchaser at the foreclosure sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1254-1258.]

Appeal from Circuit Court, Owen County.

"To be officially reported."

Action by W. G. Simpson against A. M. Adams and others. From a judgment of dismissal, plaintiff appeals, and defendants bring cross-appeal. Judgment on cross-appeal affirmed, and reversed in part and affirmed in part on original appeal.

Hazelrigg, Chenault & Hazelrigg and H. G. Botts, for appellant. H. K. Bourne, Strother & Gaunt, W. S. Pryor, Jno. C. Strother, and Chas. Strother, for appellees.

HOBSON, J. Thomas A. Berryman died testate, a resident of Owen county, in the year 1875, the owner of a considerable estate.

He left surviving him an only child, Mrs. Ann M. Adams. She had three children—two boys, the oldest of whom was then about 16, and a daughter, who was married. Among other things the decedent owned a valuable farm of 568 acres in Owen county, which is the subject of this controversy. After his death Mrs. Adams and her two sons mortgaged the farm about the year 1886 to the Mutual Life Insurance Company of Kentucky to secure a debt of \$4,000. They failed to pay the debt. The insurance company foreclosed the mortgage. The debt then amounted to \$5,961.79. At the sale H. G. Simpson became the purchaser. The sale was confirmed, and the land was conveyed to him. He afterward conveyed it to Mrs. Adams for \$7,188, of which she paid \$1,500 in cash and gave four notes for \$1,422 each. These notes were assigned by Simpson to the insurance company. She failed to pay the notes, and the insurance company brought a suit for the sale of the land. It was ordered sold, and the sale was made on November 14, 1902. Simpson then again became the purchaser, the sale was confirmed, the land was conveyed to him, and he was put in possession. After this he brought this suit to quiet his title to the land against the descendants of Mrs. Adams. The circuit court dismissed his petition, and he appeals.

The case turns on the proper construction of the will of Thomas A. Berryman, which is as follows:

"This is my last will and testament.

"First. I direct that all my just debts be paid.

"Second. My executor is given power and is directed to sell, at either public or private sale, all or any part of my real estate in Owen county and its vicinity upon such terms as he or she may deem best and, on failure to sell, rent the same to good and careful tenants.

"Third. I give to my daughter, Mrs. Ann M. Adams, all the household and kitchen furniture which I may own at the time of my death for her lifetime and at her death the same to pass to and descend to her two sons Daniel Avery Adams and Stanley G. Adams, or the survivor of them or their descendants.

"Fourth. I desire that said two boys Daniel A. and Stanley G. Adams, who are my grandsons, shall be well educated, the course of same to be directed by their parents and that their board, tuition, and clothing be paid for out of my estate.

"Fifth. I give to my two grandsons Daniel A. and Stanley G. Adams all the rest and residue of my property of every kind and character which I may own in law or equity at the time of my (Thomas A. Berryman's) death, each one of them paying to their mother Mrs. Ann M. Adams the sum of \$125.00 annually as long as she may live, and this annuity is directed to become and be a lien upon the estate devised to them, and I further direct that either of said boys shall die without child or children that the property devised

shall descend to the survivor and his descendants.

"Sixth. I make my daughter, the said Ann M. Adams, executor of this will and she is requested to see to its execution to its full extent and is directed to make any and all deeds for real property which I sold when the purchase money is paid.

"Seventh. It may be noted that I have omitted in this paper all reference to the name of my granddaughter, Lucy G. who has recently married one Andrew Loudon. This I have purposely done, not intending her to have any part of my estate.

"August 15th, 1874.

"Thomas A. Berryman."

Mrs. Adams is dead. Daniel A. Adams is unmarried and about 50 years of age. Stanley G. Adams is married and has four children. The question presented is what estate Daniel A. Adams and Stanley G. Adams take under the will. In the case of *Harvey v. Bell*, 118 Ky. 512, 81 S. W. 671, we summed up the decisions of the court as follows: (1) "Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the rule is that the words 'dying without children or issue' are restricted to the death of the remainderman before the termination of the particular estate." (2) "On the same principle, where property is devised to one or more infants, and is to be held by their trustees or guardians until they are 21 years old, and then be turned over to them or divided between them, with the proviso that, if they die without issue, it shall go to the survivors, or, if all die, to a third person, it has been held that the limitation as to dying without issue is to be limited to a death in infancy before the period of distribution." (3) "And where by the will the devise is to a class, and the period of division is postponed, even where the devisees are not infants, it has been held that the limitation as to dying without issue must be confined to a death without issue before the period of division fixed by the will." (4) "On the other hand, where there is no intervening estate and no other period to which the words 'dying without issue' can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee, which is defeated by the death of the devisee at any time without issue then living." In that case we further said: "All the cases recognize the rule that, where there is any period to which words of survivorship can be reasonably referred, they will be so construed. All the cases also recognize the rule that in the end all rules of construction are but means of ascertaining the testator's intention, and that, when this is apparent from the whole will, it must be enforced. No Procrustean rule can, therefore, be laid down as to the construction of words of survivorship; for, while the words in one clause

may have a well-defined legal meaning, there may be other things in the will making it manifest that the testator actually used the words in a different sense, and when this is the case the rights of the parties must be determined by the meaning of the will taken as a whole." The last clause of section 5 of the will is not grammatically expressed, and it seems that the word "that" was a clerical error for "if" and that the word "and" is used in the sense of "or." If this is true the clause would read thus: "I further direct, if either of said boys shall die without child or children, that the property devised shall descend to the survivor or (if dead) his descendants." Neither of the boys were grown when the will was made. The testator did not contemplate, if one died childless, the survivor and his descendants should jointly take the property. His intention was that, if either of the boys died without issue, his share should go to the other if living, or, if he was dead leaving descendants, to them.

We see nothing in the will creating an estate tail. None of the technical words necessary to create such an estate are used. By section 2343, Ky. St. 1903, all estates which at common law would have been deemed estates entailed are made estates in fee simple. The rule as to what words were necessary to create an estate tail at common law is thus stated in 2 Blackstone, 114: "As the word 'heirs' is necessary to create a fee, so in farther limitation of the strictness of the feudal donation the word 'body,' or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children or offspring, all these are only estates for life; there wanting the words of inheritance, his heirs." By section 2342, Ky. St. 1903, words of inheritance in a deed or will are not necessary to create a fee; and though the devise to the survivor and his descendants did not at common law create an estate tail, under our statutes it creates more than a life estate in the survivor. The meaning is that, upon the death of one of the boys without child or children, the other brother, if living, takes the property, and, if he is dead, it passes to his descendants. The word "descendants" was used because this court has held that "children" did not include grandchildren. *Churchill v. Churchill*, 2 Metc. 466.

Under rule 1 above quoted the household and kitchen furniture, which was devised to Mrs. Ann M. Adams for life and at her death to her two sons, Daniel A. Adams and Stanley G. Adams, or the survivors of them or their descendants, passed at her death to the sons then living, absolutely. The devise as to the land owned, however, is different. Mrs. Adams is not given a life estate in the land.



The land is divided to the two boys, who are charged with an annuity of \$125 annually to her. The land was renting for \$1,200 a year, and the testator evidently contemplated that the annuity would be paid out of the rent; but to secure it a lien was given on the property. We do not see how this clause of the will can be construed to refer to the death of one of the boys in the lifetime of the testator; for not only is the annuity charged to the estate devised to each of them, but it is provided that in case of the death of either without child or children the property devised shall descend to the survivor and his descendants. It could not descend before the testator's death. The word "descend" shows that the testator had in mind that in case either of the boys died without child or children the property was to descend from him to the survivor and his descendants; and, as the will would not take effect until the testator's death, he must have contemplated in this provision the death of one of the boys after his death.

The will does not provide for a division of the estate when the boys became of age. The devise was immediate, and their rights were in no manner affected by their becoming of age. There is nothing in the will to show that the testator contemplated in the provision under consideration the death of the devisees before they were of age. The case is one where there is no intervening estate and no other period to which the words "die without child or children" can be reasonably referred, and falls under rule 4 above quoted. Each of the boys took a fee in a moiety of the land, subject to the annuity charged, and subject to be defeated by his dying without issue. If either dies leaving children, his estate will not be defeated, but, the defeasance not having occurred, becomes absolute. It cannot be known whether, if one shall die without issue, the other will be living, or, if dead, what descendants of his will be then living. On one of them dying without issue after the death of the other leaving issue, the estate will vest in the descendants living at the time when the defeasance occurs; and, as it cannot be told who will take the estate in such an event, until the event occurs, it is what is called a "contingent remainder." There is no devise over beyond the boys. It is not provided, if they die leaving issue, the estate shall go to such issue. There is no devise over in case both die without issue. The testator plainly did not intend his granddaughter to have any part of his estate, and he gave his daughter what he intended her to have. If Daniel A. Adams shall die childless, leaving his brother surviving him, the latter will take the whole estate, and on his death leaving children his title will not be defeated, and Simpson's title will be absolute; but, if Daniel A. Adams shall survive his brother and then die childless, his title will be defeated, and his half of the land, his brother being dead leaving issue, will pass to his brother's children or descendants.

The farm was the testator's home. He intended to confine it to the two grandsons and their descendants. He did not intend, if one of the grandsons died at any time without issue, that his part of the estate should go to strangers; and from his point of view it was not material when the death of the grandson occurred without issue. He vested the fee simple in the grandsons, subject to be defeated as to either of them by his dying without issue at any time. Simpson took by his purchase all the title possessed in the land by Ann M. Adams, Daniel A. Adams, and Stanley G. Adams; but he did not acquire by his purchase the contingent remainder vested by the will in the descendants of either of them, should one die without issue after the death of his brother with issue living. Mrs. Louden and her children have no interest in the land. The circuit court properly dismissed the petition of Simpson as to the children of Stanley G. Adams; but he should have quieted Simpson's title as to all of the other defendants.

During the progress of the case it appeared that when Simpson conveyed the property to Ann M. Adams, a part of the consideration was certain tax receipts which he held against the land, amounting to something like \$800 or \$1,000. Daniel A. Adams after this testified that these taxes had been paid before that deed was made, and the defendants afterwards offered an amended answer, in which they pleaded that the proof of Daniel A. Adams showed that all of these taxes had been paid before the date of that deed, and that this proof was uncontradicted. The court refused to allow the amended answer to be filed, and of this the defendants complain on the cross-appeal. The court properly refused to allow the amended answer to be filed, for the reason that it does not state the facts, but only pleads the evidence of the facts. The allegation that the proof shows such and such a thing to be true and that this proof is uncontradicted is not an allegation that the fact exists. Facts must be stated in a pleading positively, and not the evidence of the facts. Not only so, but, if these taxes had been paid prior to the making of that deed, then the notes which were given for the land by Mrs. Adams were to this extent without consideration, and this defense should have been pleaded when the suit was brought on the notes to enforce the lien on the land. The parties are now concluded by the judgment enforcing the lien and selling the land for the debt; for that judgment is necessarily a determination that Mrs. Adams then owed the amount of the notes.

The judgment on the cross-appeal is affirmed. On the original appeal it is affirmed as to the children of Stanley G. Adams; but it is reversed as to the other defendants, with directions to the circuit court to enter a judgment as above indicated.

## CLARK et al. v. BURTON et al.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

## LANDLORD AND TENANT — ATTACHMENT FOR RENT—EVIDENCE—SUFFICIENCY.

Evidence in attachment *held* sufficient to show that plaintiffs had reasonable grounds for belief that they would lose their rent unless an attachment issued, within Ky. St. 1903, § 2302, authorizing attachment for rent in such cases.

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Lizzie W. Clark and others against Richard Burton and others. From a judgment discharging an attachment, plaintiffs appeal. Reversed and remanded, with directions.

J. C. & D. M. Chenault, for appellant. J. Tevis Cobb, for appellee.

CLAY, C. On February 24, 1906, appellant Lizzie W. Clark leased to appellee Richard Burton for the year 1906 her farm, situated on Poosey Ridge, in Madison county, Ky., about 10 miles from Richmond. By the terms of the lease the rent was fixed at \$500, and was made payable January 1, 1907. To secure its payment a lien was retained on the crops raised on the farm. On December 17, 1906, appellants obtained an attachment against the property of appellees, Richard Burton and his sons, Thomas Burton and Harvey Burton, the latter having subrented a portion of the land, by filing before the judge of the Madison quarterly court an affidavit as required by section 2302 of the Kentucky Statutes of 1903. This attachment was levied on about 175 barrels of corn and 4,500 pounds of tobacco. The court below discharged the attachment. From that judgment this appeal is prosecuted.

Appellant Lizzie W. Clark testified that some time in October, 1906, she saw Richard Burton, and told him that she had no money to pay her taxes with; that, as he had already fed some of the corn to hogs and sold them, she would like for him to advance her enough money to pay her taxes; that he promised to do that, but failed to do so; that as he did not pay her, and as she could hear he was selling corn, she advised with her attorney. She went to see Mr. Burton about the 15th of December, 1906, and spent the night at his house. She hoped to talk over the business that night, but he left home and went opossum hunting. The next morning she told him he had failed to let her have the money to pay her taxes with, as he had promised, and, as more expenses would soon be added, she would be glad if he would pay her \$37. He went into the house, and came out with \$30, and said that was all he could spare. She told him that was not enough, and then asked him for an order on Sherman Cotton, to whom he had sold corn. He replied that he could not give her the order, as he had already made arrangements for all Cotton owed him. She

then told him that she was getting uneasy about her rent, as he had been selling corn, and all that his boys had raised was gone off the place. He said she need not be uneasy. It would be paid when due. She could see that one field of corn had been fed down, and that all the corn had been gathered. She looked into the crib to see how much corn was there; could see considerable corn in the crib, but could not tell how much. She also tried to estimate the tobacco, but could not. She could see that a considerable portion of the corn raised on the place had been disposed of, and was told that a portion of the tobacco raised by the subtenants had been removed. The next day she was informed by phone that the tobacco crop had been sold and arrangements were being made to deliver the same. Knowing that a considerable portion of the crops on which she had a lien had been disposed of, she was afraid, if she waited until January 1, 1907, when the rent was due, there would be nothing left on the farm. She therefore believed that unless she secured an attachment she would lose her rent. She believed this, because Mr. Burton was selling things upon which she had a lien without advising her or obtaining her consent. She did not know what stock Mr. Burton had. She looked only to the crops on which she had retained a lien in the lease. Mr. Burton wanted her to buy some corn; but, as he asked her more per barrel than he was selling it at to others in the neighborhood, she declined to take it. Dave McChord, the deputy sheriff who served the attachment, testified that when he served it on one of the defendants he said: "All right; I expected to deliver the tobacco to Beasley tomorrow, but won't take it now." R. N. Beasley testified that he lived at Paint Lick, Ky.; that he bought the crop of tobacco raised by Richard Burton and sons; that the tobacco was delivered to him on the 10th and 12th days of January; that he bought the crop from 30 to 60 days before it was delivered.

Appellee Richard Burton testified that he himself raised corn and tobacco on the farm, and that he subrented a portion of the farm to his sons, Thomas and Harvey Burton. He did feed down one field of corn and some other corn raised on the farm to hogs, and sold them some time in October. He and his sons sold possibly 100 barrels of corn before Mrs. Clark came to his house in December. At that time they had taken their tobacco off the farm; but a portion of it was in a barn close by. There was not enough barn room on the farm for both crops. They sold the tobacco on the same day the attachment was served. He had on that day corn, hogs, tobacco, horses, and mules of much greater value than the rent he owed Mrs. Clark. This property, according to his estimate, was worth about \$1,500. He offered to sell Mrs. Clark 25 barrels of corn, but did not trade. After the attachment was issued,

he sold 22 hogs for \$93, and had other hogs left worth \$80. He never asked Mrs. Clark's opinion about any sale of the crops or any stock on the farm, nor did he ask her consent to sell anything. When she was at his house in December, she did not say she was getting uneasy about her rent. She did say something about it, and he told her it would be paid when due. He did not say anything to her about how much corn and tobacco he had. It was there in the barn, and she could see for herself. He did not say anything to her about having hogs, horses, cows, and mules; did not know she was uneasy about her rent. At the time the rental contract was made plaintiffs agreed not to ask for any rent until January 1, 1907; told them that he would have to make it out of the crops, and was trying to sell the crops for the purpose of paying the rent; offered to sell Mrs. Clark 25 barrels of corn at \$2 per barrel, which was to go on the rent; did not take the produce off the farm secretly or at night. There had been only 100 barrels of corn sold off the place, and they had raised about 350 barrels. He and his sons had in five acres of tobacco, which produced about 6,000 pounds; sold this tobacco to Mr. Beasley in order to get the money to pay the balance of the rent; had let appellants have a barrel of corn at \$2; had given them \$30 in cash; had offered to sell them 25 barrels of corn at \$2 per barrel; had offered to let them have 100 barrels more corn and a couple of hogs. Besides they owed him something. All of this he wanted to go on the rent, and was doing his best to market the products of the farm for the purpose of paying the rent.

Section 2302, Ky. St. 1903, provides that an attachment for rent may issue when the person to whom the rent is due, his agent or attorney, files an affidavit stating that there are reasonable grounds for belief, and he believes, unless an attachment be issued, he will lose his rent. The only question, then, is: Did appellants have reasonable grounds for such belief? In discussing what are reasonable grounds in such case, this court, in *McLean v. McLean*, 10 Bush, 167, laid down the following rule: "It is evident from the language of the statute that landlords suing out attachments under its provisions are not to be held to the same strictness of proof as parties proceeding under the Code of Practice, who attach to secure the payment of ordinary debts. It is the policy of the law to prefer landlords, and they are given an 'exclusive lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or undertenant found upon the rented premises after possession is taken under the lease,' provided that such lien shall exist for no more than one year's rent, nor for any rent that has been due for more than four months. Act Feb. 18, 1858; 2 Stanton's Rev. St. 1867, p. 99. The sale, or

removal from the leased premises of any property bound by this lien is a violation of the landlord's legal rights, and whenever so much of it is removed or is about to be removed as to give the landlord reasonable grounds to believe that the collection of his rent will be endangered, his right to attach accrues. When he ascertains that the tenant without his consent is selling or removing any considerable portion of the property upon which he holds a lien, he may proceed to secure himself, and he is not bound to wait until there is barely enough property left upon the premises to sell at public outcry for the amount of his rent claim. He must have reasonable grounds for apprehension; but he cannot be compelled to wait until his belief ripens into absolute conviction. \* \* \*

It is true that the proof conduces to show that appellee had two or three horses that were subject to execution; but, as before stated, appellant was not bound to wait until the last moment before taking steps to secure himself." This doctrine was subsequently followed and approved in *O'Bryan v. Shipp*, 53 S. W. 1034, 21 Ky. Law Rep. 1068.

The evidence detailed above shows that appellee Richard Burton agreed, in consideration of the fact that he had fed down a portion of the corn, to advance to appellants the sum of \$37 with which to pay their taxes. This he failed to do. Mrs. Clark then rode 10 miles in the country to see him about the rent. Instead of discussing the matter with her that night, he left the place and went opossum hunting. The next morning he gave her \$30, but declined to pay her the remaining \$7, or to give her an order for that amount on Sherman Cotton, to whom he had sold a portion of the corn, stating that he had made other arrangements for all the money that Cotton owed. At that time he had disposed of about 100 barrels of corn without notifying or obtaining the consent of appellants. When Mrs. Clark told him she was uneasy about her rent, the only satisfaction he gave her was the mere statement that the rent would be paid when due. If Mr. Beasley's statement be correct, appellee at that time had already sold the tobacco on the place. Besides, a portion of the tobacco was already gone from the farm. Appellant's security to this extent was impaired. Appellee did not inform Mrs. Clark of any of these facts. Upon her return to town she was informed that the tobacco had been sold and that arrangements were being made to deliver it. Under these circumstances she sued out the attachment. True, appellee swears that he had property of the value of \$1,500. The record discloses, however, that the corn and tobacco levied on were worth about \$1,000. That being the case, the remainder of his property was worth about \$500. If, then, the tobacco and corn had been removed and sold, and no attachment levied thereon, appellants would have had to make their debt, which was fixed in the

judgment at \$413.33, out of the remaining \$500 worth of property. As appellee was a housekeeper with three children, a large portion of this would have been exempt, and it necessarily follows that appellants would have lost the greater portion, if not all, of their rent. We think these facts bring this case within the rule announced above, and that appellants had reasonable grounds to believe that, unless an attachment issued, they would lose their rent.

Counsel for appellee concedes the law to be as announced above, but contends that it has no application to this case, for the reason that it was agreed between appellants and appellee that he should sell the crops and apply the proceeds on the rent. No such agreement, however, appears in the record. True, appellee testified that he had to sell the products of the farm before he could pay the rent; but nowhere does he say that appellants agreed that this should be done. On the contrary, both he and Mrs. Clark testified that all the sales were made without her knowledge or consent.

For the reasons given, the judgment is reversed, and cause remanded, with directions to sustain the attachment.

#### McDANIEL et al. v. FAUBUSH TELEPHONE CO.

(Court of Appeals of Kentucky. Jan. 10, 1908.)

##### 1. TELEPHONES—CONDUCT OF BUSINESS.

A telephone company is a public service corporation, required to transmit messages, if within its power to do so, with authority to prescribe reasonable rules and charges for conducting the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 20.]

##### 2. SAME—REGULATIONS—REASONABLENESS.

A telephone company may, in its discretion, purchase other lines and add telephones to its lines; and, where it becomes necessary to establish a switchboard and to employ a person to take charge of it, it may require every stockholder connected with the system to pay a charge of two cents on a message, though the directors, after the stock was purchased by complaining stockholders, passed a resolution that all stockholders should have free access to the entire line.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by W. L. McDaniel and others against the Faubush Telephone Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. Z. Morrow, for appellants. Sharp, Bethurum & Cooper, for appellee.

NUNN, J. On the 7th day of June, 1902, appellee, Faubush Telephone Company, was incorporated. Its capital stock was \$800, and it was organized by five persons, who owned 16 shares each. It constructed a telephone from Somerset, through Faubush, to Royaltown, and afterwards increased its capital stock to \$1,600, and many persons be-

came stockholders therein, and the five original owners of stock sold and transferred some of their shares to others. The six appellants purchased of the original stockholders 1 share each of the original stock. They resided between Somerset and Faubush, and within three miles of Faubush, and their telephones were attached to the original line within three miles of Faubush. Four other 'phones, within three miles, were likewise attached to the original line. There were about 15 other telephones attached to the original line from the end of this three miles to Somerset. Soon after appellants purchased their stock the board of directors of the company passed this by-law or resolution: "That all stockholders having 'phones have free access to the entire line, and that all messages coming from other lines over our line to Somerset shall pay 10 cents for each message, but all local messages shall be free." Thereafter the company purchased three or four other lines, which connected with the original line in Faubush. These new lines purchased by appellee gave it connection with the county seats and several other places in the counties of Casey, Russell, and Wayne. After these connections were made the line between Faubush and Somerset was overburdened, and messages could not be satisfactorily transmitted thereon. Then it was that the directors of the company passed an order directing another line to be constructed from Faubush to William Dalton's, a distance of about seven miles in the direction of Somerset. They undertook to erect this line, but their money gave out when they had constructed only three miles. They then disconnected the 'phones of the six persons and the other four persons whose 'phones were attached within the three miles of Faubush, and attached them to this new line, and placed a switchboard in Faubush, and passed an order to the effect that every one communicating through the switchboard should pay 2 cents extra, which was to be used in paying the operator of the switchboard. This required appellants and the other four persons whose telephones were attached to this new line to pay 2 cents for each message when communicating with persons in Somerset; but they could talk to each other without any charge. This was alike applicable to all stockholders along the original telephone line.

Appellants objected to this charge of 2 cents and claimed that the company had no power or right to make it; that this act was void, and in violation of the contract, which is contained in the by-law or resolution, stating that all stockholders should have the privilege of communicating over the original line free of charge; and they brought this action for the purpose of having the court restrain appellee from collecting it. Appellants each testified that this charge would require each of them to pay about 60 cents a year. This court has repeatedly decided

that a telephone company is a common carrier, a public service corporation, and as such is subject to the laws governing and controlling such corporations. It is self-evident that a corporation engaged in business affected by public interest may prescribe reasonable rules and charges for conducting its business. It is required to transmit messages, if within its power to do so. See the case of *Williams v. Maysville Telephone Company*, 82 S. W. 995, 20 Ky. Law Rep. 945. The testimony of appellee shows that the establishment of this switchboard in Faubush was an absolute necessity in order to afford any sort of service over the line, and without this switchboard neither the stockholders nor the public could talk over the system. Appellants concede this, but claim that the company should not have purchased the new lines and attached other telephones to the original line, thus burdening it beyond its capacity. Appellants, with other stockholders, elected the directors of appellee, and they acted for the corporation. In the case of *Hewlett v. Western Union Telegraph Company (C. C.)* 28 Fed. 181, the court said: "In view of the whole system, a court cannot say that the power and discretion of the company to determine for itself what is best for all concerned has been unreasonably exercised. It has a choice of its own regulations, and the test of reasonableness is not whether some other would answer its purpose as well or better, but whether this is fairly and generally beneficial to the company and all its customers." In our opinion the company, in its discretion, had the right to purchase other lines and add other telephones, so as to more effectually advance the interest of the public and its stockholders, and to make reasonable rules and regulations for the transaction of its business. In doing this a switchboard became necessary in Faubush, and, of necessity, a person to take charge of it was required, and to pay for these services a charge of 2 cents on a message was reasonable, and of this appellants have no right to complain, especially when it is shown that every other stockholder connected with the system is required to pay this fee.

For these reasons, the judgment of the lower court is affirmed.

#### LOUISVILLE GAS CO. v. HAMMER.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

#### MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a man of mature years and in full possession of his faculties, saw a ditch dug by defendant gas company in a sidewalk when he started from a saloon in broad daylight. He walked beside the ditch for several feet before he fell into it, and at least two witnesses warned him of his danger. There was at least 2 feet of unobstructed pavement to walk on, no part of which was undermined; the ditch being dug straight down to a depth of 2½ feet. *Held*

that, plaintiff having deliberately walked on the edge of the ditch, he was bound to take notice of the fact that the pavement would cave, and was therefore negligent, precluding a recovery for his injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, §§ 1677-1679.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Casper Hammer against the Louisville Gas Company and another. From a judgment for plaintiff against the gas company alone, it appeals. Reversed and remanded.

Humphrey & Humphrey, for appellant. Max I. Greenstein and E. C. Waide, for appellee.

CLAY, C. This action was instituted by appellee, Casper Hammer, against the city of Louisville and appellant, the Louisville Gas Company, to recover damages for personal injuries alleged to have been occasioned by their negligence in digging an excavation in the sidewalk at the place where the accident occurred and thus rendering the sidewalk dangerous and unsafe for pedestrians. Appellant denied all allegations of negligence, and also pleaded contributory negligence on the part of appellee. The lower court gave a peremptory instruction in favor of the city of Louisville. Appellant also asked a peremptory instruction, both at the conclusion of appellee's evidence and at the conclusion of all the evidence. This was refused, and the case submitted to a jury, which returned a verdict in favor of appellee for the sum of \$800. A new trial was refused, and the gas company is here on appeal.

Appellant contends that the verdict is not sustained by the evidence and that the court erred in refusing appellant a peremptory instruction. It appears from the record that appellee, who was engaged in the saloon business on Market street in Louisville, Ky., had gone to the saloon of Herman Roehr on the northwest corner of Story avenue and Buchanan street. Story avenue runs east and west. In front of Roehr's saloon, and extending west 25 or 30 feet along the edge of the curbing on the north side of Story avenue, there was an excavation about 2½ feet deep and 20 inches wide, which had been made by appellant for the purpose of laying gas pipes. On the afternoon of the accident there was a meeting in Roehr's saloon of two social clubs, called the "Spoon Club" and the "Delmont Bowling Club." Of the latter appellee was a member. Its headquarters were on Story avenue, a short distance west of Roehr's saloon. After appellee's friends had taken several rounds of drinks, appellee, who claims to have drunk only seltzer water, and the others, making a party of six or eight in number, started along the sidewalk west towards the Delmont Club. Some of the witnesses say that on the pavement next to the property line the dirt had

been piled up, so that there was left only about 2 feet of unobstructed sidewalk. Others say that the dirt was piled up in the street, and that there were 5 or 6 feet of unobstructed sidewalk north of the ditch. Appellee himself fixes it at 2 feet. Three or four members of the club preceded appellee, while the others walked in his rear. All saw the ditch. No one but appellee experienced any difficulty in passing. After crossing the cellar door, which was immediately west of the saloon door, appellee proceeded from 5 to 8 feet west along the sidewalk, when he fell into the excavation and injured his kneecap.

For the purpose of getting the facts more fully before us, it will be necessary to detail the evidence at some length. Appellee testified that the accident occurred in broad daylight. He saw the ditch plainly and knew it was there. After coming out of the saloon, he crossed the cellar door, and walked 4 or 5—perhaps 6 or 8—feet beside the ditch before he fell in. There was plenty of space for him to walk on; did not walk on the very edge of the ditch, but declined to say how far from the edge of the ditch he was walking. Later on, when asked if he was walking on the edge of the ditch, he stated that that was another thing he could not tell. There were three or four people walking ahead of him. When he went across, the bricks gave way, and the ground gave way, and down he went. Dudley Gregory, one of appellee's witnesses, testified that the unobstructed space on the sidewalk was about 18 inches; didn't see appellee fall in; saw the condition of the space where appellee fell, and the north side of the bank had caved in. Anybody could see the ditch and observe the conditions which existed. Everybody else passed by without any trouble. Herman Swanacher, witness for appellee, stated that there was a space of about 6 feet between the ditch and the property line. At the time of the accident it was broad daylight and easy to see the ditch. Ben Faehlin, Jr., another witness for appellee, testified that at the time of the accident appellee was following him; heard some one say, "Casper, look out! you will fall;" said himself to appellee, "Be careful how you walk along there; somebody is liable to fall;" observed the condition of the pavement; there were a few bricks on the edge of it there; seemed that appellee fell by slipping; the dirt or brick probably gave way. Appellee was walking right along the edge of the ditch. Herman Roehr, who also testified for appellee, explained that the space which was only 18 inches wide was between the cellar door and the ditch. Appellee was 5 or 6 feet beyond this point when he fell. It was broad daylight at the time. Anybody could see the ditch; had no trouble himself in getting by. John Nolan, one of the workmen engaged in the work of excavation, also testified for appellee. He said the ditch was 22 inches wide and 2 feet 8 inches deep. The sides of the ditch were dug straight down, and no dirt had

been removed from the walls of the ditch underneath the bricks. After the accident there was no place in the ditch showing that the bricks or the edge of the ditch had caved in. It is a matter of common knowledge that, if any one steps upon the extreme edge of a ditch, the earth or bricks will necessarily cave in and cause him to fall. Could not well do the work with barriers or guards around it, as they would be an obstruction. T. S. Fitzgerald, witness for appellant, testified that no dirt had been scooped out from beneath the bricks. The sides of the ditch were dug straight down. All the dirt was thrown into the street.

Appellee bases his right of recovery upon the fact that he and two of his witnesses testified that the ground gave way and the pavement caved in, claiming that when he was injured he was traveling a public thoroughfare of the city—a sidewalk made and maintained for the use of pedestrians; that in the absence of knowledge to the contrary he had the right to assume that the sidewalk was free from latent defects and in a reasonably safe condition; that the caving in of the sidewalk showed that it was in a dangerous and defective condition; and that this condition was not known to him. There is no controversy in this case as to the right of appellant to make the excavation in question. Appellee's petition admits that it had the right. Admitting that the pavement caved in, the real question then is: Was the caving in occasioned by the negligence of appellant, or was it due to a lack of ordinary care on the part of appellee? If the evidence in this case had shown that in digging the ditch the earth beneath the bricks was removed, or that the earth was so loose or soft that props were necessary to prevent the pavement from caving in, and that no props were provided for that purpose, this would have been such evidence of negligence as to authorize the submission of the case to a jury. Furthermore, if the evidence had shown that appellee was walking at a reasonably safe distance from the edge of the ditch, and that notwithstanding this precaution on his part the pavement actually gave way and precipitated him into the ditch, this fact would of itself have been some evidence from which the jury might have concluded that appellant so constructed the ditch as to leave that portion of the sidewalk which was left open for the use of pedestrians in a dangerous and defective condition. But no such state of facts is presented by the record. There is not the slightest suggestion that the earth beneath the bricks was soft or loose. Two witnesses testified that the sides of the ditch were dug straight down, and that no dirt was removed from beneath the bricks. Whether the case should have gone to the jury, then, depends upon where appellee was walking.

Only three witnesses testified upon this point. One was the appellee, who, after deny-

ing that he walked on the edge of the ditch, declined to tell where he was walking. Indeed, he seemed to be certain of one thing only, and that was that he walked on the ground. But even this certainty was dispelled under the fire of cross-examination, for at last, in answer to the question, "Were you walking on the edge of the ditch?" appellee said, "Oh! well, that is another thing I can't tell you. I know I fell down. That is all." The other witnesses were Ben Faehlin, Jr., and T. S. Fitzgerald. The former was introduced by appellee, and the stenographer's report of his testimony is as follows: "Q. Were his tracks right at the edge of the ditch where it caved in? A. Well, he walked along there. Q. Right to the edge of the ditch? A. Yes, sir." T. S. Fitzgerald, witness for appellant, testified as follows: "Q. He was walking how close to the edge of the ditch? A. Just about as far as from here to the railing here. Q. On the edge of the ditch? A. Yes, sir." As appellee either refused to say, or really did not know, where he was walking, and as the only other witness who testified upon this point stated that he walked on the edge of the ditch, only one conclusion can be reached, and that is that he did walk on the edge of the ditch. That being the case, it necessarily follows that the giving way or caving in of the pavement, if there was any, was caused, not by the dangerous condition in which appellant left the unobstructed portion of the sidewalk, for no such condition was shown, but by appellee's walking too near the edge of the ditch.

Was appellee guilty of contributory negligence? There are authorities holding that, although a person is perfectly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk and is thereby injured, this does not constitute contributory negligence per se, but that it is still a question for the jury. *City of Carlisle v. Secrest*, 75 S. W. 268, 25 Ky. Law Rep. 836; *Smith's Modern Law of Municipal Corporations*, § 1294. There are other cases holding that where a person, in the exercise of due care, is injured by falling over an embankment in the street in front of his house, his knowledge that the street was torn up and in a dangerous condition does not, as a matter of law, make him guilty of contributory negligence. His knowledge of the dangerous condition does not prevent recovery, if he uses ordinary and reasonable care to avoid injury. *Dwyer v. Salt Lake City*, 19 Utah, 521, 57 Pac. 535; *City of Streator v. Chrisman*, 82 Ill. App. 24; *City of Huntingburgh v. First*, 22 Ind. App. 66, 53 N. E. 246. There is also authority to the effect that a recovery may be had where the traveler knows of the generally defective condition of the highway, but does not know of the existence of the particular defect which produced the injury; the latter

being a latent defect in the sense that it would not have been detected by the exercise of ordinary care. *Thompson on Negligence*, vol. 5, § 6246. But the facts of this case do not bring it within any of the rules above announced. Appellee, who was a man of mature years and in the full possession of his faculties, saw the ditch when he started out of the saloon door. He walked beside it for several feet before he fell in. At least two witnesses warned him of the danger. It was broad daylight at the time. He admits that there were two feet of unobstructed pavement to walk on. Others estimate it at from four to six feet. Under these circumstances he deliberately walked on the edge of the ditch. In doing so he was bound to take notice of the fact that the pavement would cave in. The pavement did cave in and he was injured. In thus exposing himself to danger he failed to exercise ordinary care for his own safety, and was therefore guilty of contributory negligence. That being the case, the trial court should have instructed the jury to find for appellant.

Judgment reversed, and cause remanded.

#### RAY v. ARNETT et al.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. NEW TRIAL—PROCEEDINGS TO PROCURE—TIME FOR APPLICATION.

The question of granting a new trial, where plaintiff was ill, and neither she nor her counsel appeared, and the action was dismissed, is not governed by Civ. Code Prac. § 344, providing for a new trial if grounds are discovered after the term at which the decision is rendered, or by section 340, providing for a new trial after a verdict or a decision by the court, or by section 342, providing for the time for making the application, but comes under section 518, subsec. 7, authorizing the granting of a new trial for unavoidable casualty or misfortune preventing the party from appearing.

##### 2. SAME—GROUNDS—ACCIDENT—ABANDONMENT BY COUNSEL.

Plaintiff was sick and unable to attend the term of court at which her cause was tried. Her attorney, also, was absent, and the suit was dismissed, of which action plaintiff was in ignorance until long afterwards, supposing him to be looking after her interests in the case. Her attorney failed to notify her of his intention to abandon the case. *Held*, that plaintiff was prevented from prosecuting her suit by such an unavoidable casualty and misfortune as would, under the express provisions of Civ. Code Prac. § 518, subsec. 7, entitle her to a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 173.]

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Action by Mary Ray against Joseph Arnett and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

D. D. Sublett, C. W. Napler, and M. H. Holliday, for appellant. Augustus Arnett, for appellees.

CARROLL, J. The appellant in September, 1904, brought a suit in the Magoffin circuit court against appellees, who are her brother and sister, in which she sought to set aside a conveyance of a small tract of land made to them by her mother, upon the ground that it was procured by undue influence. An answer was filed in February, 1906, controverting the averments of the petition. No proof was taken, nor was any motion made or pleading filed, until February, 1906, when the record shows that the action was submitted and the petition dismissed. In April, 1907, the appellant filed a paper styled "Petition and Motion and Grounds for a New Trial," in which she asked that the judgment dismissing the petition be set aside: (1) Because appellant was sick and unable to attend the February, 1906, term of the court, at which term the suit was dismissed, and stated that if she had been present she could have procured a continuance. (2) Her attorney was sick and unable to attend court at the term at which the suit was dismissed. (3) She had a good cause of action, and had no knowledge of the absence of her attorney, and was thus prevented from employing other attorneys to represent her interests. (4) The dismissal of the suit was due to unavoidable casualty or misfortune. (5) The judgment of dismissal was procured by fraud on the part of defendants in the suit. She filed with this paper the pleadings in the suit, which consisted of her petition and the answer thereto. At the same term of the court at which this motion was made appellant tendered a reply controverting the affirmative matter in the answer. With the record there appears the deposition of appellant in support of her motion, in which she states that she employed H. G. Arnett to institute the suit that was dismissed, and that he was the only attorney she had, and she depended upon him to take care of her interests, and that he informed her at different times that he was doing so; that she lived about 12 miles from Salyersville, where the suit was pending, and at the February, 1906, term of the court she was sick and unable to attend court, and did not know that her attorney was absent, and was not informed that the suit was dismissed until some time during the year 1907. H. G. Arnett, in his deposition taken by appellant in support of her motion, states that he prepared the suit, but did not attend the February term of court in 1906, nor did he make any effort to prosecute or have prosecuted the case; that he did not consent to nor procure the dismissal of the suit, but, being related to all the parties, abandoned it and refused to take any further part, but did not notify the plaintiff of his intention to abandon the prosecution of the case; that in April, 1906, not knowing the suit had been dismissed, he prepared a reply to be filed, and the same was verified by appellant. In June, 1907, the court overruled

the motion and grounds for a new trial, and from that order this appeal is prosecuted.

The case is presented as if the application for a new trial was made under section 344 of the Civil Code of Practice. Section 340 reads: "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by a court." Then follows the grounds that may be relied on by the party making the application. Under section 342 the application for a new trial must be made at the term at which the verdict or decision is rendered, and, except it be asked upon the ground of newly discovered evidence, must be made within three days after the verdict or decision is rendered. If a new trial is sought on the ground of newly discovered evidence, then under section 344 the application may be made by petition filed with the clerk not later than the second term after the discovery; but no such application shall be made more than three years after the final judgment is rendered. It will be observed that, when a new trial is sought under section 340, it must be in a case involving an issue of fact after a verdict by a jury or a decision by a court. Unless an issue of fact is involved in the controversy in which the new trial is sought—that is, unless evidence in some form or another has been introduced—section 340 of the Code has no application. In cases where only questions of law are involved, and when no issue of fact is raised by evidence, the party seeking a new trial must obtain it under section 518; the practice being regulated by sections 519-524. We may also add that as, under sections 340-344, the motion for a new trial, except upon the ground of newly discovered evidence, must be made at the term during which the verdict or decision is rendered, it is manifest that appellant cannot rely upon the provisions of section 344. Her application was not made on the ground of newly discovered evidence or at the term at which the judgment was rendered. As no issue of fact was made, we must treat this application for a new trial as having been made under section 518; and, if the appellant is entitled to a new trial at all, it must be for the cause mentioned in subsection 7 of section 518, which authorizes the granting of a new trial "for unavoidable casualty or misfortune preventing the party from appearing or defending." The casualty or misfortune that will authorize the granting of a new trial must be "unavoidable." A mere ordinary "casualty or misfortune" is not sufficient. It must be such casualty or misfortune as could not by the exercise of reasonable skill and diligence have been avoided. *L. & N. R. R. Co. v. Paynter*, 101 S. W. 935, 31 Ky. Law Rep. 163.

Tested by this rule, the question is: Was appellant by unavoidable casualty or misfortune prevented from prosecuting her suit? Appellant intrusted her case to an attorney, who brought this suit for her. She depended,



and had a right to depend, upon him to look after her interests and advise her of the steps taken in her case; but, without any notice to her or any fault on her part, he abandoned her case. Appellant lived in a part of the county remote from the county seat, was unacquainted with the manner and method of hearing and disposing of cases in court, and did not learn that her suit had been dismissed until 1907, when she at once took steps to have it reinstated. We express no opinion as to the merits of the controversy. It may be that appellant will not succeed; but she is entitled under the circumstances to a hearing, which she has not had. We think that, under the fair meaning of the Code provision, appellant was prevented by "unavoidable casualty" from prosecuting more diligently her suit, and that she is entitled to a new trial.

Wherefore the judgment is reversed, with directions for a new trial.

### COMMONWEALTH v. COUCH.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

#### 1. INDICTMENT — HOMICIDE — MURDER — INCLUDED OFFENSES.

Under an indictment for murder, the defendant may be prosecuted for any degree of homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 593.]

#### 2. HOMICIDE — "INVOLUNTARY MANSLAUGHTER"—DEFINITION.

Involuntary manslaughter is the killing of another in doing some unlawful act, but without intent to kill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 55.]

#### 3. SAME—KILLING RESULTING FROM UNLAWFUL ACT.

If one, while doing an unlawful act not amounting to a felony, unintentionally kills another, he is guilty of manslaughter, though he only intended to commit the act which constituted a misdemeanor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 85.]

#### 4. SAME—CAUSE OF DEATH.

Where deceased, while enroute, was frightened by the defendant's illegal discharge of firearms in a street, and thereafter gave premature birth to a child and died, her death was not the natural or probable consequence of the shooting in the highway; and hence such facts were insufficient to sustain an indictment against defendant for manslaughter.

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Robert Couch was indicted for murder. From a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., C. H. Morris, Asst. Atty. Gen., T. A. McGregor, Ira Fields, and Wooton & Morgan, for the Commonwealth. Dixon & Howard, for appellee.

LASSING, J. This is an appeal from a judgment of the Perry circuit court sustaining a demurrer to an indictment. The indictment is as follows:

"The Commonwealth of Kentucky, Plaintiff, against Robert Couch, Defendant. Indictment. The grand jury of Perry county, in the name and by the authority of the commonwealth of Kentucky, accuse Robert Couch of the crime of willful murder, committed in manner and form as follows, viz.: The said Robert Couch did on the 15th day of November, 1907, in the county, circuit, and state aforesaid, and before the finding of this indictment herein, unlawfully, willfully, feloniously, and maliciously, and with his malice aforethought, kill and murder Jemima Holliday, by firing and discharging guns and pistols at random upon the public highways of Perry county in a wreckless way and manner; the said Jemima Holliday being near by at the time of said firing and discharging of said guns and pistols in said reckless way and manner upon said public highway, and being pregnant and quick with child, and from which the said Jemima Holliday became greatly frightened and scared at the said reckless firing and discharging of said guns and pistols by the defendant, Robert Couch, upon said public highways of Perry county. The said Jemima Holliday, being pregnant and quick with child, was from her great fright and scare, caused by said reckless firing and discharging of said guns and pistols upon said public highways by the said Robert Couch, caused to and did abort, and shortly thereafter, within less than a year and a day, languish and die; her death being caused and hastened by the said Robert Couch in his reckless firing and discharging at random upon the public highways of Perry county guns and pistols, said reckless firing and discharging of said guns and pistols by the said defendant, Robert Couch, upon the public highways of Perry county, at the time being unlawful and prohibited by the statute laws of this commonwealth, and he, said Couch, being at the time engaged in an unlawful act—against the peace and dignity of the commonwealth of Kentucky."

The indictment is for murder, and under this indictment the defendant may be prosecuted for any degree of homicide, to wit, murder and voluntary or involuntary manslaughter. *Spriggs v. Commonwealth*, 113 Ky. 724, 68 S. W. 1087. Involuntary manslaughter is the killing of another in doing some unlawful act, but without intent to kill. *Madison v. Commonwealth*, 17 S. W. 164, 13 Ky. Law Rep. 813. At common law, and by statutory enactment in many of the states, if one, while doing an unlawful act not amounting to a felony, unintentionally kills another, he is guilty of manslaughter. It is not necessary that he shall have intended to violate the law in order to constitute the offense; but he must have intended to commit the act which constitutes a misdemeanor. Questions of this character have, on several occasions, been before our court for adjudication. In the case of *Sparks v. Com-*

monwealth, 3 Bush, 111, 96 Am. Dec. 196, it is said: "If a man, contrary to law and good order and public security, fire off a pistol in the streets of a town, and death be thereby produced, he must answer criminally for it, whether it be malum in se or malum prohibitum, and especially when he knows he is violating the law." And in *Hendrickson v. Commonwealth*, 85 Ky. 281, 3 S. W. 166, 7 Am. St. Rep. 596, where the husband used such force and violence during a fight and quarrel with his wife as to cause her to leave home on a cold night, poorly clad, and death resulted by reason of the exposure, an indictment for murder was upheld. So an indictment for murder has been held good where the husband beat his wife and threatened to throw her out of the window and murder her, and by reason of such threats so terrified her that she threw herself out of the window and died as the result of the fall; and likewise where one, in attempting to flee from an attack which would have endangered his life, is fatally injured, the attacking party has been held answerable on the charge of murder. But in each and all of these and similar cases it has and must appear that death was the natural and probable consequence of the unlawful act complained of.

Construing the indictment most strongly against the accused, it shows that by the discharge of firearms upon the public highway he frightened the deceased, who was quick with child or pregnant, and that by reason of this undue excitement thus brought on she gave premature birth to her child, following which she became sick and later died. Can it be said that her death was either the natural or the probable consequence of the shooting upon the highway? We think not. In the case of the wife who was driven from home, barefooted and poorly clad, in an 18-inch snow, her death was not only the natural, but almost inevitable, result of her being through fear or fright driven from home by her brutal husband. The same may be said of the other cases cited; but we have been unable to find any case wherein the doctrine has ever been extended as far as the commonwealth asks to have it extended in this case. The most that can be said of the contention of the commonwealth is that the decedent, being pregnant, became badly frightened on account of the unlawful act of the defendant, which brought on or caused her to give premature birth to her child; that following this she became sick, from which sickness she later died. Her sickness was not due to the fright, and cannot be said to be either the natural or the probable result of her becoming frightened.

There would be some plausibility in the contention of the commonwealth if deceased had died in the act of childbirth; but such was not the case. Her death may have been due to want of attention following her confinement, or to improper attention, or to dis-

ease due to other cause than her fright or confinement; and, this being true, we are of opinion that the ruling of the trial judge was correct.

### FIRST NAT. BANK v. CHRISTIAN COUNTY.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

#### 1. COUNTIES—ACTIONS—CAPACITY TO BE SUED.

Counties cannot be sued, except by express provision of statute or by necessary implication from some express power given, since they are subordinate political subdivisions of the state, created for public purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 338.]

#### 2. TAXATION—REMEDIES OF TAXPAYER—RECOVERY OF TAXES PAID.

Where taxes have been wrongfully collected by county officials and are in the hands of the collecting or disbursing officers, a direct action for their recovery may be brought by the taxpayer against the person holding the tax.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1011.]

#### 3. COUNTIES—ACTIONS—CAPACITY TO BE SUED.

An action does not lie against a county to recover taxes paid by mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 333.]

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by the First National Bank against the county of Christian. Judgment for defendant, and plaintiff appeals. Affirmed.

Downer & Russell, for appellant. John C. Duffy, Co. Atty., and Frank Rives, for appellee.

CLAY, C. Appellant, First National Bank, instituted this action against appellee, county of Christian, to recover the sum of \$850 alleged to have been paid as taxes under a mistake of law. It is alleged that at each of the times of assessment for the years 1901, 1902, 1903, and 1904 appellant owned and held government bonds of the value of \$20,000, and that at the time of assessment for the year 1905 it owned \$50,000 of government bonds; that the county levy for each of these years was 50 cents on the \$100 of taxable property; that appellant's total assessment on its shares of stock and on its tangible property for each of these years was \$60,000; and that it paid \$300 in taxes to defendant for each of these years, without any deduction from the assessed value of its shares on account of the government bonds owned and held by it. Appellant seeks to recover \$100 for each of the first four years and \$250 for the last year, making \$650 in all, with interest from the date of each payment, on the ground that the payments were involuntary and made under a mistake of law. From a judgment in favor of appellee, the First National Bank is here on appeal.

Many interesting questions are presented, but in view of the conclusion reached by the court it will be necessary to determine only

the question of the right of appellant to sue appellee. This question was before this court in the case of *Commonwealth v. Boske*, 90 S. W. 316, 30 Ky. Law Rep. 400, wherein the court said: "It is a well-established doctrine in this state, and in harmony with the rule generally prevailing, that counties are not liable to suit, unless authority for it can be found in the statute, or it follows by necessary implication from some express power given. The reason upon which this rule rests is that counties are subordinate political subdivisions of the state. They are created for public purposes, and are a part of the necessary machinery of government, and can no more be sued by the citizen than can the state. *Downing v. Mason County*, 87 Ky. 208, 8 S. W. 264, 12 Am. St. Rep. 473; *Wheatly v. Mercer County*, 9 Bush. 704; *Hite v. Whitley County*, 91 Ky. 168, 15 S. W. 57, 11 L. R. A. 122; *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 751; *Sinkhorn v. Lexington T. P. Co.*, 112 Ky. 205, 65 S. W. 356. It is true that in these cases damages were sought to be recovered for injury to person or property; but the principle announced, and the ground upon which the opinions rest, is that, in the absence of statutory authority or necessary implication flowing from the exercise of a power granted, an action against a county will not lie. We have not been able to find any authority in the statute for an action such as this. In fact, there are very few actions that can be maintained against counties. The right of these political subdivisions of the state to sue is much larger than their right to be sued, and this follows from the fact that, having control of the bridges, highways, and public buildings of the county, it is necessary that they should be invested with all needful power to protect and preserve them; and so it has been held that a county may maintain an action for injury to its courthouse or public roads. *Christian County v. Rafton & Tharp*, 2 Duv. 503, 87 Am. Dec. 705; *Lawrence County v. Chattaroi R. Co.*, 81 Ky. 225; *L. & N. R. Co. v. Whitley Co.*, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220. And where a county has authority to make a contract, it would follow as an incident that it might sue or be sued concerning it. There is a marked distinction between counties and municipal corporations, such as cities and towns, in respect to the power to sue and be sued. The latter, by the act creating them, are expressly authorized to sue and be sued, and hence may be parties plaintiff or defendant in any case, in the absence of a statute or judicial determination to the con-

trary; and it has been frequently announced that an action against them will lie in behalf of a taxpayer. *City of Covington v. Powell*, 2 Metc. 226; *City of Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220. When taxes have been wrongfully collected by county officials, and are in the hands of the collecting or disbursing officers, a direct action may be brought by the taxpayer against the person holding the tax. *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35; *Blair v. Carlisle Turnpike Co.*, 4 Bush. 157; *Commonwealth v. Stone*, 114 Ky. 511, 71 S. W. 428. But after the taxes collected have been paid out the taxpayer is without remedy as against the county."

Counsel for appellant earnestly contends that the statement in the above opinion to the effect that where a county has authority to make a contract it would follow as an incident that it might sue or be sued concerning it authorizes this action, claiming that where taxes have been illegally collected there arises upon the part of the county an implied contract to pay them back. This, however, is not the meaning of the language used. That language refers only to an express contract. It was not intended to convey the idea, nor would it be proper to do so, that the right to sue could be implied from an implied contract. It is further contended by counsel for appellant that appellant has the right to maintain this action for the reason that it does not affirmatively appear that the taxes collected have been paid out. We do not think, however, that the right of action in such cases depends upon whether or not the taxes collected have been paid out. Whether paid out or not paid out, there is no right of action at all against the county. And, even if the question depends upon whether the taxes had or had not been paid out, we think it should affirmatively appear from the petition of appellant that the taxes collected had not been paid out; otherwise, a demurrer should be sustained to the petition. In other words, appellant's whole right of action would depend altogether upon the fact that the taxes had not been paid out. It would be necessary, then to state this fact in order to set forth a good cause of action. However, as we said before, it is immaterial, so far as an action against the county is concerned, whether the taxes collected have or have not been paid out. That circumstance affects only the right of action against the collecting or disbursing officers.

For the reasons given, judgment is affirmed.

## MITCHELL v. REED'S EX'R et al.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

## 1. ALTERATION OF INSTRUMENTS—EVIDENCE.

Evidence in an action on a note *held* to show an alteration in it by the payee after its delivery and without the knowledge or consent of the makers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Alteration of Instruments, § 259.]

## 2. SAME—EFFECT ON RIGHT OF PARTIES.

The alteration of a note by the payee after its delivery and without the knowledge or consent of the makers, by changing the place of payment from a bank in one state to a bank in another state, is material, vitiating the note as between the parties thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Alteration of Instruments, § 83.]

## 3. BILLS AND NOTES—ALTERATION—NOTICE TO TRANSFEREE.

The erasure in a note of the original place of payment, and interlineation of a new place, is notice to a transferee putting him on inquiry as to a material alteration after delivery, avoiding the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 839.]

Appeal from Circuit Court, Fulton County.  
"Not to be officially reported."

Action by Ann E. Mitchell against J. M. Reed's executor and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Robert H. Winn, for appellant. Robbins & Thomas and John W. Outrar, for appellees.

CARROLL, J. In April, 1891, the appellees G. G. Wade, E. B. Wade, and J. M. Reed, now deceased, executed and delivered the following paper at Friars Point, in the state of Mississippi: "On or before April 4, 1892, we promise to pay R. A. Mitchell, assignee, or order, at the Clarksdale Bank & Trust Company, at Clarksdale, Miss., fifteen hundred dollars, with eight per cent. interest per annum from date until paid, for value received." Before its maturity this note was discounted and assigned to the New Farmers' Bank of Mt. Sterling, Ky., with an indorsement on the part of the payee, R. A. Mitchell, assignee, and William and R. A. Mitchell, to pay it at maturity. Some time afterward the New Farmers' Bank of Mt. Sterling made an assignment to the Columbia Finance & Trust Company, who brought suit on this note against the makers in the Fulton circuit court. In the settlement of the assigned estate this note, in connection with other assets, was sold, when appellant, Ann E. Mitchell, became the owner of it, and the suit has since been prosecuted in her name.

Several defenses were interposed by appellees to the note, but we only deem it necessary to notice with particularity the one that sets up that a material alteration was made in the note by the payee, Mitchell, after its execution and delivery to him. As originally written it was made payable at the "Continental National Bank, of Memphis, Tenn." A line was drawn through these words, and in place thereof there was written in the note "Clarksdale Bank & Trust

Company, at Clarksdale, Miss." Appellees' contention is that when they signed and delivered the note to Mitchell it was payable at the Continental National Bank, of Memphis, Tenn., and that without their knowledge or consent Mitchell erased the words "Continental National Bank, of Memphis, Tenn.," and inserted "Clarksdale Bank & Trust Company, at Clarksdale, Miss." The second defense is that the note was executed as a part of a written contract entered into at the time the note was executed, which contract contained mutual obligations to be performed by R. A. Mitchell and the Wades and J. M. Reed, the makers of the note. The material parts of this contract are as follows: The Wades and Reed sold, conveyed, and delivered to Mitchell a certain described tract of land in Tunica county, Miss., together with all the timber thereon, and also a large number of saw logs and a quantity of lumber, together with sawmills and fixtures, and also executed the note sued on. In consideration of these conveyances and transfers, and the execution of this note, Mitchell agreed to surrender and deliver to the Wades all the notes sued on in two attachment suits in Mississippi, and all other notes or evidences of indebtedness held by R. A. Mitchell, assignee, executed or due by the Wade Lumber Company, the Wade Bros., or any one or more members of either or both of said firms. He further agreed to pay off and satisfy certain indebtedness due by the Wades and Reed to the Continental National Bank, of Memphis, Tenn., and to pay J. M. Reed \$2,000, for which a note was executed, and to dismiss all proceedings by attachment in the circuit court in Fulton county, Ky., against the Wade Lumber Company and the members of the firm.

It seems that previous to this compromise settlement there were pending a number of suits by Mitchell, as assignee, against the Wades, and that the Wades and Reed were asserting claims against Mitchell, as assignee, and that after numerous efforts to adjust the differences between them the contract referred to was entered into. A careful consideration of the record convinces us that Mitchell did not perform his part of this contract, and that there was in this particular a failure of consideration to support the note sued on. But as the first-mentioned defense presents a complete bar to a recovery of the note, and is easier of statement, we have concluded to rest our decision affirming the case upon that.

The evidence in support of the contention of appellees that the alteration was made without their knowledge or consent may be summed up briefly as follows: The note as it appears in the record shows on its face that it was originally payable at the "Continental National Bank, of Memphis, Tenn."; that a line as with a pen was drawn through these words, and over them written the words "Clarksdale Bank & Trust Company, at

Clarksdale, Miss." The written contract of settlement between the parties, executed in connection with the note and as a part of the same transaction, recites that "E. B., G. G., and W. W. Wade hereby agree as part consideration of this instrument to pay R. A. Mitchell, as such assignee, fifteen hundred dollars on or before April 4, 1892, at the Continental National Bank, of Memphis, Tenn., for which a promissory note of even date herewith is to be executed by E. B., G. G., and W. W. Wade with J. M. Reed as surety." E. B. Wade testified, in behalf of appellees, that the alteration in the note was made without his knowledge or consent, and that he knew nothing about the change until after suit had been brought on the note; that, when signed and delivered by him, it was made payable at the Continental National Bank, of Memphis, Tenn.; that he did not know when the alteration in the place of payment was made, but it was after the note had been delivered to the payee, R. A. Mitchell. G. G. Wade states that when the note was signed by him it was payable at the Continental National Bank, of Memphis, Tenn., and that the alteration in the note was made after its delivery by him and without his knowledge or consent. W. D. Cutrar, who was one of the attorneys engaged in effecting the settlement that resulted in the execution of the contract mentioned and the note, testifies that the note as originally drawn was payable at the Continental National Bank, of Memphis, Tenn., and was so signed by the makers; that the alteration was made after the delivery of the note to R. A. Mitchell. He further said that the settlement between Mitchell, assignee, and the Wades, was made and the papers executed in accordance with the contract referred to, and when the makers of the note signed the same they signed it drawn payable at the Continental National Bank, of Memphis, Tenn., and the transaction was then entirely closed; that whatever changes were made in the note were made after the settlement between the parties had been consummated in his office. L. Nacham testified that when the settlement between the Mitchells and Wades was made, and the note and contract executed, he was employed as a clerk in the office of Cutrar, and that the note was, when signed and delivered to Mitchell, drawn payable at the Continental National Bank, of Memphis, Tenn.; that any alteration in the note was made after it was executed and delivered to Mitchell.

For appellant, on the issue as to the alteration in the note, R. A. Mitchell, the payee, testifies that J. W. Cutrar, one of the attorneys representing the makers, interlined the note and made it payable at the Clarksdale Bank & Trust Company, at Clarksdale, Miss.; that the alteration was made by him before the delivery to or acceptance by him of the note; that no alteration of any kind was made in the note after its delivery to

him. A. T. Mitchell, testifying for appellant, said he was present when the settlement and compromise was made, and that the erasure or drawing a pen through the line in the note of the words "Continental National Bank, of Memphis, Tenn.," and the words "Clarksdale Bank & Trust Company, at Clarksdale, Miss.," were written by one and the same person, and was confident they were in the handwriting of J. W. Cutrar, attorney for Wades and Reed; that he saw the note immediately after it was handed to R. A. Mitchell, and knew that no erasure or alteration of any kind was made in the note after Mitchell got possession of it. Considerable importance is also attached by counsel for appellant to the reply filed by J. M. Reed, now dead, one of the makers of the note, in the Fulton circuit court in a case of J. M. Reed v. R. A. Mitchell, in which Reed set up that this note was made payable at Clarksdale Bank & Trust Company, at Clarksdale, Miss. The pleading, which is subscribed and sworn to by Reed, is made a part of a reply filed by appellant in this case.

Upon these facts we conclude, as did the lower court, that the alteration in the note was made by Mitchell after it had been executed and delivered to him by the makers, and without their knowledge or consent. The next inquiry is, what was the effect of this alteration? That it was a material one must be conceded. It changed the place of payment of the note from a bank in one state to a bank in another state. In this particular alone it subjected the paper to the laws of the state of Mississippi, when the persons making the note payable in the state of Tennessee may be presumed to have contracted with reference to the laws of that state. Thus there was a change in the legal import and effect of the paper as signed by the parties. But aside from this view, and although the laws of both states dealing with commercial paper were the same, the change would be a material one. When delivered to the Mitchells, the paper was a complete instrument in every respect. The makers had left nothing undone about it. The alteration made caused it to speak a different language in legal effect from that which it originally spoke. And it is well settled, not only in this jurisdiction but in all courts where the integrity of commercial paper is respected, that a material change or alteration made by the holder after the execution and delivery of the paper and without the consent of the makers vitiates the instrument as effectually between the parties who are principals to it as it would as to a surety. When suit was brought against the makers on the note, the attempt was made to hold them liable upon a paper they had not signed. They might have been bound on the original contract, and it may be conceded that an action could have been maintained on the original debt for which the note was executed, without reference to the note and ignoring its existence.

This question, however, is not before us. Here the parties sued on the note, and by its terms they must stand or fall, depending upon whether the contract declared on is valid or void. As said by this court in *Elbert v. McClelland*, 8 Bush, 577: "If any alteration or mutilation is made in or of a note by which the legal or equitable rights of the parties are affected, and this alteration or mutilation is caused by the act of the holder and was intentional on his part, he invalidates the paper. And when the fact of the alteration or mutilation is established, and the proof does not disclose how, by whom, or when it was done, the holder must suffer, as the burden of proof is upon the party in possession of the paper and attempting to enforce its payment to show how the alteration or mutilation occurred, and upon his failure to do so no recovery can be had upon it." To the same effect is *Phoenix Ins. Co. v. McKernan*, 37 S. W. 490, 18 Ky. Law Rep. 617; *Bank v. McChord*, 4 Dana, 191, 29 Am. Dec. 398; *Lisle v. Rogers*, 18 B. Mon. 528; *Miles v. Major*, 2 J. J. Marsh. 153; *Cotton v. Edwards*, 2 Dana, 106. In the light of these authorities, that are in harmony with the rule prevailing everywhere, it is apparent that the alteration in the paper released the makers from liability upon it.

Neither do appellant nor her assignor, the New Farmers' Bank, occupy any better position towards this paper than did R. A. Mitchell, assignee, to whom it was executed. The bank took this paper with notice of the infirmity that was apparent on its face. The erasure and interlineation, as well as the fact that it was payable to an assignee, were sufficient to put the bank or any purchaser upon notice. Aside from these suspicious circumstances, the bank was officered by persons entirely familiar with the execution of the note and the transactions out of which it grew. Although we do not hold that this latter fact, in the absence of the others, would be sufficient to charge the bank with notice of the infirmity of the paper, yet it is a circumstance that may properly be considered in connection with the others as throwing light upon the question of whether the bank was an innocent purchaser in good faith. In 7 Cyc. 949, in an article on Commercial Paper written by the well-known author, Joseph L. Randolph, and supported by ample authority, it is said: "As a rule any irregularity, erasure, ambiguous or uncertain clause, or peculiarity connected with the paper, which is sufficient to excite suspicion or demand inquiry of a person exercising ordinary business prudence and judgment, will operate as constructive notice to a purchaser taking the same without inquiry. The effect of such notice cannot be avoided by having the irregularity corrected after receiving the note; but it must plainly appear that the erasure or irregularity existed at the time the note was taken. No alteration will constitute constructive notice unless it be a

part of the note itself, and any divergence from the ordinary form will constitute notice only where it naturally and reasonably implies or suggests an equity or defense, and then only notice of the equity suggested. The expression of a fiduciary character of a holder or transfer on the face of the negotiable instrument is notice to the purchaser of a probable limited or restricted authority to negotiate the same. This is so where the paper is signed or indorsed by an agent as such, especially where the paper is made payable to him as agent, or where it appears on the face of the paper by the indorsement to the holder, or by other papers or orders accompanying the note, that the transferor has the instrument as trustee, or guardian, or in some other official capacity." So that, without inquiring into the nature of the Mississippi statute, or expressing any opinion as to its operation and effect in cutting off defenses to commercial paper that has in good faith been transferred before maturity to an innocent purchaser for value, the assignee must be held to have taken this paper subject to all defenses that might be made against it in the hands of the original payee. Such would be the rule if the paper had been executed in this state and discounted here before maturity to a bank at which it was made negotiable.

Wherefore the judgment of the lower court must be affirmed.

#### CHESAPEAKE & O. RY. CO. v. ROBERTS. (Court of Appeals of Kentucky. Jan. 17, 1908.)

##### 1. DAMAGES—ACTIONS FOR INJURY—EVIDENCE—SUFFICIENCY.

In an action for injury to a passenger, the weight of evidence as to the extent thereof held with plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 503-507.]

##### 2. APPEAL—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the evidence as to plaintiff's mental capacity at the time he executed a release of liability for personal injury is about equally divided, finding against his capacity will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

##### 3. DAMAGES—PLEADING—SUFFICIENCY.

Under an allegation in a personal injury action that plaintiff's leg was bruised and that "he received other injuries in many places on his body," recovery may be had for injury both to his hand and side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 441.]

Appeal from Circuit Court, Floyd County.

"Not to be officially reported."

Action by William Roberts against the Chesapeake & Ohio Railway Company for personal injury. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter S. Harkins and W. H. Wadsworth, for appellant. James Goble and G. W. Castle, for appellee.

CLAY, C. On April 20, 1905, appellee boarded appellant's train at Catlettsburg, Ky., and paid his fare to a point near Prestonsburg. Before reaching his destination a freight train ran into the rear of the train on which appellee was a passenger. Appellee alleges that the collision was due to the negligence of appellant; that by reason thereof his leg was mashed and bruised, and he received other injuries in many places on his body, which caused him great suffering and pain, and disabled him from performing labor since the time of the accident, and also permanently disabled him from performing labor. For these injuries damages in the sum of \$2,000 were asked. Appellant after denying the principal allegations of the petition, pleaded contributory negligence on the part of appellee. In another paragraph appellant pleaded that it paid to appellee the sum of \$40, which he accepted in full settlement, satisfaction, and discharge of his claim for damages because of his alleged injuries. Appellee in his reply denied that he was guilty of contributory negligence, and further pleaded fraud and false representations in obtaining the compromise agreement, as well as a lack of mental capacity and understanding sufficient to enable him to appreciate and comprehend the character of the agreement. The jury returned a verdict for appellee in the sum of \$1,000. The railroad company prosecutes this appeal on the ground that the verdict is flagrantly against the evidence and the trial court erred in its instructions to the jury.

Appellee testified that he was thrown from his seat and badly hurt; did not remember anything else that occurred until three days thereafter, when consciousness returned and he found himself at home in bed; had no recollection of being examined by appellant's physician, or of seeing any acquaintances, or of signing a receipt, or of accepting \$40, or of anything else that transpired; when he became conscious, found five or six strips on his left side, a bruised nail, his kneecap mashed, his limbs mangled, a small cut on his leg, his ear cut in two and badly bruised, and a cut over his right eye; had suffered day and night from his wounds, and had never known a moment's ease since the time of the accident; his leg swelled up, and he had to lie with it on a chair for 16 days; had to walk on crutches for quite a while; the latter part of May two pieces of bone came out of his leg; prior to the accident was a strong, vigorous man; since that time had been unable to do any work; exhibited his leg to the jury, and at that time, a year and eight months after the accident, it was swollen and inflamed. J. B. Johns testified that just after the accident appellee came by and said: "Lord, have mercy! I am killed." Appellee then walked on for a few steps and lay down on his side. James Fraley testified that at the time of the collision he saw appellee holding his side and complaining and groan-

ing, and that he did not seem to be in his usual mind. Brady Buchanan testified that he saw appellee about 10 or 15 minutes after the collision, and that he was up on the side of a hill, with his head on a cross-tie. He asked appellee what was the matter, but appellee made no answer. Since the wreck appellee did not seem to be in his right mind. George Fannin testified that he had been to appellee's place of residence since the accident and had seen his leg; had seen it when it looked bad; at other times it did not look so bad; had also seen it when it was running some. Bud Taylor testified that he had seen appellee several times since the accident, and he appeared to be in bad condition; had seen his leg when it was as large as two legs. It had a large bruised place on it, and seemed to have a high fever in it. Since the accident, appellee's mental and physical condition had not been good. When appellee started to write, he would have to stop and get some one else to finish it. When he talked, he would stop and commence some other subject, and just quit the subject he was already on. Louisa Roberts, daughter of appellee, testified that her father's left side and spine were hurt, and his leg was running some. She waited on him day and night; had to help him out of bed and lift his leg on a chair. Appellee was in just as bad a fix as he could be in. She thought he was going to die. She made poultices for him, and also applied the liniments that Dr. Thatcher prescribed. The latter visited her father about twice a week. Since the injury her father had not been able to write a letter. Mr. Booton, one of appellee's attorneys, testified as to the tender to appellant's agent of the \$40 received by appellee and appellant's refusal to accept it.

T. J. Saunders, claim agent for appellant, testified that some one called his attention to appellee. He then approached appellee and asked him how much it would take to settle. Appellee first asked \$50, but finally agreed to accept \$40. He then fixed up the contract and read it over to appellee, who signed it. The contract was then witnessed and the money paid; paid appellee four \$10 gold pieces; saw nothing wrong with appellee's physical condition, nor anything that would indicate that he was not in his proper understanding. H. D. Johns was the man who witnessed the paper. H. D. Johns testified that there were parties on the train settling claims. Roberts seemed to have some bruises, and he told Roberts he might get a little pay for them. Roberts told him to go down and get him something. Roberts agreed to give him all over \$30 he could get. He then hunted up the claim agent and brought him back to where Roberts was. Roberts first agreed to \$50, but changed his mind and said: "No; give me \$40." Mr. Saunders fixed up the papers and Roberts signed them. As they came to a station, he asked Roberts if he had not forgotten some-

thing. Roberts was then preparing to get off. Roberts threw him \$2. He then got off the train, and that was all there was of it; looked to him like appellee was rational; had some trouble with appellee about some timber. Dr. Wroten, the company's physician, testified that he examined appellee shortly after the accident. Found bruises on his left shoulder, and the skin rubbed up a little on his left hip. That was all. He saw nothing that indicated mental aberration, lack of memory, lack of knowledge or of his surroundings, nor anything of the kind; saw appellee's leg when it was exhibited to the jury; did not think its condition then was due to the injuries received at the time of the accident, but to the application of poultices and strong liniments and the use of bandages such as were shown to have been used during the treatment.

It is manifest from the foregoing abstract of the transcript that the weight of evidence upon the extent of appellee's injuries is rather with appellee. There being no evidence that the compromise agreement was obtained by fraud or misrepresentation on the part of appellant's claim agent, the validity of the agreement was submitted to the jury upon the one question of appellee's mental capacity at the time of its execution. Upon this point the evidence pro and con is about equally divided. Under these circumstances we are unable to say that the verdict is flagrantly against the weight of evidence, and the verdict will not be disturbed on that ground.

The only complaint made of the instructions is that the court authorized a recovery for injuries to appellee's leg or hand or side, when neither the petition alleged, nor the proof showed, any injury to either his hand or side. In this contention counsel for appellant is mistaken. The petition, after stating that appellee's leg was bruised and mashed, alleges that "he received other injuries in many places on his body." Manifestly this allegation is broad enough to cover injuries both to his hand and side. Furthermore, appellee testified that he found a bruised nail on one of his hands, and both he and his daughter testified that his side was injured.

Perceiving no substantial error in the record, the judgment is affirmed.

#### S. M. BURGESS & CO. v. PATTERSON. (Court of Appeals of Kentucky. Jan. 14, 1908.)

##### 1. LIBEL—WORDS ACTIONABLE PER SE.

A letter stating that the writer had before advised addressee that plaintiff was moving timber unlawfully off the writer's land, and that the writer again notified addressee that when he received ties from plaintiff cut off the writer's land he was receiving stolen property, and that if the notice was not heeded the matter would be laid before the proper officials, was libelous per se.

##### 2. SAME—PLEADING—ALLEGATION OF SPECIAL DAMAGE.

Where a letter is libelous per se, it is not necessary to allege or prove special damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 218.]

##### 3. SAME—PERSONS LIABLE—PARTNERSHIP.

A libelous letter written in respect to the business of a partnership, asserting title by the partnership as such to the personal property in regard to which it is written, and signed with the partnership name by a member thereof, renders all the partners liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Libel and Slander, § 175.]

##### 4. SAME—DAMAGES—EXCESSIVE.

A verdict of \$1,500 for a libelous charge of theft is not so excessive as to indicate passion or prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Libel and Slander, § 353.]

Appeal from Circuit Court, Edmonson County.

"Not to be officially reported."

Action by T. J. Patterson against S. M. Burgess & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

J. S. Glenn and Milton Clark, for appellants. M. M. Logan and Ora E. Hazelp, for appellee.

SETTLE, J. Appellee, T. J. Patterson, recovered of appellants, S. M. Burgess & Co., in the court below, a verdict and judgment for \$1,500 in damages for an alleged libel. Appellants were refused a new trial, and now seek by this appeal a reversal of the judgment complained of.

The alleged libel consisted in the publication by appellant of the following letter: "Mr. J. B. Toms, Big Reedy, Ky.—Dear Sir: We have your favor of the 20th, and from it we judge that you want to be technical about the deal you have with Mr. T. J. Patterson. We advised you once before that Mr. Patterson was moving timber unlawfully off of our land, and asked you kindly to not encourage him in the matter. As you seem disposed to lean to Mr. Patterson, we will again notify you that, when you receive ties from him cut off of our land, you are receiving stolen property, and if you do not heed this notice we expect to lay the matter before the proper officials of your county." The letter contained the signature of appellants as a firm or partnership, admittedly written by the appellant S. M. Burgess, a member of the firm. The defense interposed by appellants' answer was (1) that the writing in question was not libelous; (2) that it was written by S. M. Burgess as an individual, and not as a member of the firm of S. M. Burgess & Co., and that in writing the letter and signing the name of the firm thereto he acted without authority from the other members of the firm, and they were not liable for the writing or publication of the libel; (3) that the letter was written and published without malice, and its statements constituted a privileged communication; (4) that its statements were true, and therefore justified its publication. It is fairly apparent from the record that appellee had a right to sell and deliver to J. B. Toms the ties mentioned in the letter, and further appar-



ent that the letter in question was seen and read by several persons besides Toms, to whom it was written.

Numerous grounds were urged by appellants in support of the motion for a new trial, but we deem it necessary to consider only such of them as are relied on for a reversal of the judgment. The most serious contention of appellants is that the writing complained of by appellee is not libelous, and therefore it is argued that the lower court erred in overruling their demurrer to the petition. It is insisted that the language of the letter does not charge or import the commission of a crime; that it does not, in meaning or effect, tend to disgrace or degrade appellee, or make him odious, contemptible, or ridiculous, nor was its language such as to injure him in his profession or calling. We cannot sustain this contention. The matter of the letter was clearly libelous. Its statements did more than impute to appellee an unlawful taking of appellants' ties, amounting to a trespass. A false charge that one has committed a trespass, though not slanderous, if merely spoken, will, if maliciously written and published, constitute libel, provided it is charged to have been committed under such circumstances as would be reasonably calculated to degrade, disgrace, or render odious the person charged. Such was the effect of the communication from appellants. Indeed, it did not stop with the charge of unlawful taking of ties by appellee, but by the following words in effect added the charge that appellee had stolen them: "We will again notify you that when you receive ties from him, cut off of our land, you are receiving stolen property, and if you do not heed this notice we expect to lay the matter before the proper officials of your county." The meaning conveyed by these words is, not that appellee was guilty of a mere trespass committed by cutting from appellants' land ties which he had sold or was about to sell Toms, but that he had stolen ties cut from their land. It is not charged the ties were cut by appellee from appellants' land; and if they were cut by another, though without right, and allowed to remain on the land, and were appellants' property and constructively in their possession, they became, by reason of their severance from the soil and having been converted into ties, the subject of larceny, and, if then feloniously taken from the land by appellee and sold to Toms, that act constituted the crime of larceny. The language of the letter being susceptible of this construction and meaning, its effect was to disgrace appellee and injure his reputation. The communication was, therefore, actionable per se, and it was not necessary for appellee to allege or prove special damages.

We find little merit in the objections made by appellants to the instructions. It would have been better for the trial court to have set forth in instruction No. 1 the libelous

words complained of; but the omission to do so was, we think, cured by the manner in which the instructions as a whole presented to the jury the entire law of the case. We have been unable to discover any substantial error in the instructions. The jury were not authorized by the evidence to conclude that the communication complained of was privileged.

We are also unable to see that the evidence relieved the other members of the firm of S. M. Burgess & Co. from liability for the act of S. M. Burgess in writing and publishing the libelous letter. It was written in respect to business of the firm, asserted title by the firm as such to the ties in regard to which it was written, and contained the name of the firm, signed by a member thereof. In *Newell on Slander and Libel*, § 27, it is said: "If a partner, in conducting the business of a firm, causes a libel to be published, the firm will be liable, as well as the individual partner. So if any agent or servant of the firm defames any one by the express direction of the firm, or in accordance with the general orders given by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it, or if, having authority to forbid it, he permitted it, the act was his."

The amount of the verdict is not so excessive as to indicate that it was superinduced by passion or prejudice on the part of the jury.

Judgment affirmed.

#### GIBSON v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Jan. 23, 1908.)

#### 1. RAILWAYS—INJURY TO ANIMALS ON TRACK — INSUFFICIENT CATTLE GUARDS — COMPLAINT.

In an action for injuries to plaintiff's cattle, a complaint alleging that the injuries resulted from defendant's failure to keep in repair a cattle guard where the track left plaintiff's farm and entered an adjoining one was insufficient, since cattle guards are not required to be maintained except at road crossings or at the terminal points of parallel fencing along the right of way, though a road may, if so desired, put cattle guards along the track at points where not required without liability to the owner of trespassing stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1551-1560.]

#### 2. SAME.

A railroad is not liable for injuries to cattle resulting from their being frightened and caused to run by the unnecessary blowing of the engine whistle or the escaping of steam, unless the trainmen are aware of the presence of the cattle and know that injury is liable to result to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1402, 1403.]

Appeal from Circuit Court, Madison County.  
"Not to be officially reported."

Action by F. W. Gibson against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. R. Burnam & Son, for appellant. Benjamin D. Warfield and Jere Sullivan, for appellee.

O'REAR, C. J. A demurrer was sustained to appellant's petition, and it was dismissed. He sued the appellee to recover damages because of injury sustained by his cattle under the following circumstances: Appellee's railroad track and right of way traverse appellant's farm in Madison county. Where the track leaves appellant's farm and enters a neighbor's, the railroad company had erected a cattle guard; and it is alleged that it was allowed to fall into disrepair, so as that appellant's cattle, being "induced" to cross it, were injured by its defective condition. The other item of damage sued for is that appellant's cattle were caused to run, lose flesh, and to fail to take on flesh as they otherwise would have done, by reason of appellee's servants in charge of its engines permitting and causing steam to escape and the whistles to be blown when not necessary in the prudent operation of its trains.

Cattle guards are not required to be maintained, except at road crossings, or at the terminal points of parallel fencing along the right of way. *McKee v. C., N. O. & T. P. Ry. Co.*, 102 Ky. 253, 43 S. W. 241; *Payton v. L. & N. R. R. Co.*, 72 S. W. 346, 24 Ky. Law Rep. 1896. It is not alleged that the cattle guard in question was either at a crossing or at the end of parallel fences along the right of way. Appellee had the right to put cattle guards along its track at points where not required, if it so desired, without liability to the owner of trespassing stock. It was not bound to make its roadbed safe for trespassing cattle. As to the damage caused by frightening the cattle, the petition does not disclose where the cattle were, whether upon the right of way of appellee, or in appellant's pastures, or elsewhere. Nor does it show whether the trainmen were aware of the presence of the cattle. Unless the trainmen knew or had reason to foresee the result of the acts complained of as they affected the cattle, their master would not be liable, as the acts were not per se wrongful, but would be wrong only when done for the purpose and with the effect of frightening and injuring the cattle needlessly, or with the knowledge that it was doing so, which is the same thing. Whistling of locomotives might be indulged in so needlessly and continuously as to become a common nuisance, when an injury sustained by it would be actionable, without reference to the purpose of the perpetrator; but, unless it is so, it will be classed as innocent folly, unless it appears to the perpetrators that it is injuring, or is likely to cause injury to, another.

Judgment affirmed.

## J. D. HUGHES LUMBER CO. v. VALENTINE.

(Court of Appeals of Kentucky. Jan. 16, 1908.)

### 1. BOUNDARIES—AGREED LINE—EVIDENCE.

Evidence held to require a finding that adjoining owners under overlapping patents anciently agreed that the boundary line between them should be the top of a ridge which constituted the boundary line between the several counties in which their lands were located.

### 2. SAME.

An ancient agreement between adjoining owners, establishing a boundary line between overlapping surveys, under which they had acted and held possession for many years, will be enforced by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 212-226.]

Appeal from Circuit Court, Leslie County. "Not to be officially reported."

Action by the J. D. Hughes Lumber Company against Mat Valentine. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Cleon K. Calvert, O. H. Harrison, and N. A. Richardson, for appellant. Lewis & Begley, for appellee.

HOBSON, J. The J. D. Hughes Lumber Company brought this suit to enjoin Mat Valentine from cutting some timber on land which it claimed to own. Valentine claims under Faris Begley. The lumber company claims under William Bowling. The court below adjudged in favor of Valentine, and the lumber company appeals.

Begley lived in Leslie county on one side of the dividing ridge which was the boundary line between Leslie and Perry counties. William Bowling lived in Perry county on the opposite side of the dividing ridge. They each had patents which lapped over the ridge, and the boundary line between them was in some doubt. The proof for the plaintiff is to the effect that many years ago they agreed that the top of this ridge, which was the county line, should be the line between them. The proof shows that Begley's patent at one point would run on the Leslie side of the dividing ridge and at another point would cross the ridge and run on the Perry side of the dividing ridge. From the map in the record it is clear that, if he made the dividing ridge the line, he would gain land at some points and lose land at others. The same seems to be true of the Bowling patent. The plaintiff showed by one witness, who was offering to buy the timber as far back as 20 years ago, that he went to both of them and they both told him that they had agreed for the dividing ridge to be the line. Another witness testifies that he surveyed the line for them, and after he surveyed it, Begley asked him how he had run the line. He answered that he had run it with the dividing ridge, and Begley said that was all right. In the deeds made by Bowling for property, he calls for corners in this agreed line and calls to run with it. On the other hand, the defendant proved by

a witness that he bought land from Bowling on Trace Fork, and both of the parties then told him that the dividing ridge was the line between them at that point. They did not tell him whether it was the line all the way through or not.

This evidence does not seem to us to conflict with the other testimony, but rather to confirm it, as we cannot see why they would have made an agreed line of the dividing ridge for a part of the way. The weight of the evidence sustains the conclusion that the agreement was that the dividing ridge should be the line; and agreements of this sort, when ancient, and when they have been for years acted upon by the parties, and possession has been held under them, will be enforced. The evidence here is as strong for the plaintiff as in several other cases recently before this court, in which such lines were upheld. *Berry v. Evans*, 89 S. W. 12, 28 Ky. Law Rep. 22; *Cheatham v. Hicks*, 88 S. W. 1093, 28 Ky. Law Rep. 66, and cases cited.

Judgment reversed, and cause remanded for a judgment as above indicated.

#### RENO v. BLACKBURN.

(Court of Appeals of Kentucky. Jan. 22, 1908.)

##### JUDGMENTS—RES JUDICATA.

In an action to recover land, plaintiffs alleged that their father died intestate in possession of the land; that his widow, plaintiffs' mother, later married defendant and resided on the land with him until her death; that thereupon plaintiffs became entitled to possession as heirs at law of their father. Defendant recovered judgment on the ground of adverse possession by himself and wife. *Held*, that as long as the judgment remained unopened plaintiffs were precluded from maintaining another action against defendant setting up that their father left a will devising the land to his widow for life and to plaintiffs after her death, and the fact that they sued in the former action as heirs at law and in the latter as devisees was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1248, 1253.]

Appeal from Circuit Court, Carlisle County.  
"Not to be officially reported."

Action by Elizabeth Reno against Cal Blackburn. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Nichols & Son, for appellant. Robins, Thomas & Bridgewater, for appellee.

HOBSON, J. Lloyd Pickett died in the year 1872, a resident of Carlisle county. He owned at his death a tract of 50 acres of land, on which he resided. After his death his widow married Cal Blackburn. She and Blackburn continued to reside on the land until her death in the year 1900. He has since resided on it. After her death, and in the year 1902, the children of Lloyd Pickett brought an action against Blackburn, in which they charged that their father had died intestate and that the land had descended to them subject to the wife's right of occupancy; that, she being dead, they were then entitled to possession. Blackburn by way of defense

denied that Pickett had died intestate, and alleged that he had left a will by which he devised the land to his wife absolutely. He also alleged that his wife had been in adverse possession of the land, claiming it as her own, from the year 1872 to her death; that she had devised it to him; and that he had been in adverse possession of the land since her death. The plaintiffs by their reply controverted the affirmative matter in the answer. Proof was taken. On final hearing, judgment was entered in favor of the defendant. The plaintiffs took an appeal to this court, and the judgment was here affirmed. See *Reno v. Blackburn*, 72 S. W. 775, 24 Ky. Law Rep. 1976. After the decision of that case in this court Elizabeth Reno, who was one of the plaintiffs in that case, brought this suit against Cal Blackburn, in which she alleged that her father, Lloyd Pickett, died testate; that his will was duly admitted to probate after his death; that by his will he devised the land in controversy to his wife for life, and to his children at her death. Blackburn denied the allegations of the petition, pleading the same facts that he had pleaded in the former action, and also pleaded the judgment in that case in bar of this suit. The circuit court sustained the plea in bar and dismissed the action. From this judgment, Elizabeth Reno appeals.

The confusion in the case arises from the fact that the courthouse in Carlisle was burned in the year 1880 and the records were destroyed. If it is true that Pickett left a will by which he devised the land to his wife for life, proof of this fact would have defeated the plea, made in the former action, that she had held the land adversely, claiming it as her own, since 1872. The opinion of this court rendered on the former appeal shows that the judgment was affirmed on the ground of adverse possession by Blackburn and wife. The facts now alleged, if proved in that action, would have made it impossible for Blackburn to win that case on the ground of adverse possession. A title may be acquired by adverse possession, no less than by deed. In that case it was determined that Blackburn's title had become perfect by adverse possession. This adjudication that he had a perfect title is conclusive on the parties to that action, because it was incumbent on them to present their whole case. If Elizabeth Reno was in ignorance of the facts, and has learned of new evidence since that case was determined, her remedy was to open that judgment as provided by the Code. So long as it remains in force, it is conclusive on her that Blackburn's title to the land has become perfect by adverse possession. It is not material that Elizabeth Reno sued in the former action as heir at law, and that she sues in this action as devisee. The facts alleged here, if proved in that case, would have defeated Blackburn's claim of title. Blackburn has secured a judgment against her that his title to the land has been perfect-

ed by adverse possession. She cannot avoid the effect of this judgment by suing here as devisee, and thus be enabled to introduce here proof which she failed to make then. This would be to give her two days in court on the question. A party is entitled to his day in court; but he cannot demand that he be heard twice on the same question.

Judgment affirmed.

**UNITED STATES FIDELITY & GUARANTY CO. v. PAXTON (two cases).**

(Court of Appeals of Kentucky. Jan. 21, 1908.)

**1. INSURANCE—FIDELITY BOND—NOTICE OF DEFAULT—WAIVER.**

A sheriff, after discovering the default of his deputies, gave notice to the local agent of defendant fidelity company which was surety on the deputies' bonds, from whom notice was transmitted to defendant's home office, pursuant to which a representative was sent to examine the accounts and finally struck a balance showing an indebtedness. *Held*, that such notice, so acted on, constituted a waiver of a written notice required to be sent to the president of the surety company immediately after discovery of default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1390.]

**2. APPEAL—PLEADING—DEMURRER—SEARCHING RECORD—OBJECTIONS AT TRIAL.**

Where a demurrer was sustained to certain paragraphs of the answer but no motion was made that it be carried back and sustained to the petition, defendant could not object for the first time on appeal that the petition was defective, and that the demurrer should have been treated as searching the record and have been sustained to the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1226.]

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by J. R. Paxton against the United States Fidelity & Guaranty Company. From a judgment for plaintiff in each of two cases involving the same issues, defendant appeals. Affirmed.

Wilkes H. Morgan, for appellant. Willis & Todd and F. R. Feland, for appellee.

O'REAR, O. J. Appellee, as sheriff of Anderson county, appointed Johnson and Crossfield deputies. They gave bond to the principal sheriff for the faithful performance of their duties, and for accounting to him for all money collected by them to which he was entitled, or with which he was chargeable, with appellant guaranty company as surety. These actions upon the bonds allege that during the last year of their services the deputies had collected and failed to pay over a considerable sum of money due to the sheriff. The amounts are not in dispute now. That the deputies were each indebted to appellee in the sums adjudged is admitted. But the judgments of the circuit court against the surety for the sums owing by the deputies are assailed solely upon the ground that appellant did not have notice of the delinquen-

cies as was provided in the contracts of guaranty. The contracts contained the following provision: "The company shall be notified in writing addressed to the president of the company, at its office in the city of Baltimore, state of Maryland, of any act of omission or of commission on the part of the employé which may involve a loss for which the company is responsible hereunder, immediately after the occurrence of such act shall come to the knowledge of the employer; that any claim made in respect to this bond shall be in writing, addressed to the president of the company as aforesaid, immediately after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid."

It is conceded that the sheriff did not give the notice in writing to the president of the company at its office in Baltimore, Md. Nor was there a claim made in writing, addressed to the president aforesaid, immediately after the discovery of the loss. What did occur was this: These deputies were not required to settle till the end of the year. Nothing had occurred to indicate that they would not settle when required; but, when called upon, they gave first one excuse and then another, but failed to settle. When it became apparent that they were dallying with him, the sheriff gave verbal notice to appellant's local agent at Lawrenceburg, who in turn gave notice to the state agent. He must have notified appellant's head office in Baltimore, for they sent out to Lawrenceburg a special representative to look into the accounts of the deputies. This representative went over the accounts with the deputies and the sheriff, and finally struck a balance showing the indebtedness. For this the sheriff then sued. We hold that the action of the surety company was a waiver of the notice provided in the policy contract. The provision for notice was for its benefit, so that it might promptly act to secure itself against the person for whose delinquency it was called upon to answer. When it had such notice from the obligee as gave it all the information it required, and upon which it acted without complaint, lulling the obligee into a feeling of security on that score, it will not be heard to say at the trial that it did not have the notice called for by the contract. It has waived the notice by its conduct, which is as effectual as a formal waiver in writing.

A question of pleading is presented. The petition did not aver notice or waiver. The answers in certain paragraphs presented immaterial matters not constituting defenses. The plaintiff demurred to the paragraphs alluded to. The demurrers were sustained. The defendant (appellant) now complains in this court that the circuit court erred in not carrying plaintiff's demurrer back to his own petitions, and in not sustaining the demurrer to the petitions. With us a demurrer, as at

the common law, "searches the record," and might be carried back to a former pleading, subject to the Code provisions as to costs. But a party claiming that such ought to have been done must have called the trial court's attention to the fact by motion, or it will be deemed to have been waived, especially after the parties had without other objection gone to trial and adduced their testimony upon the point as if it were at issue. A demurrer, not acted on by the lower court, does not have the effect in the appellate court to "search the record," unless the circuit court refused to act upon it when moved to do so, or, acting, overruled the demurrer.

Judgments each affirmed.

**CINCINNATI, N. O. & T. P. RY. CO. v. ZACHARY'S ADM'R.**

(Court of Appeals of Kentucky. Jan. 21, 1908.)

**1. MASTER AND SERVANT — RAILROADS — SAFE SIDE TRACKS.**

A railway company must furnish reasonably safe side tracks for use by its employes in switching cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 221.]

**2. SAME — EVIDENCE — SUFFICIENCY.**

A verdict cannot stand upon scintilla evidence, against overwhelming evidence to the contrary; and a verdict for plaintiff in an action against a railway company for death alleged to have been caused by the derailment of a car by a defective track cannot stand on testimony tending to prove circumstantially that decedent was thrown from the car by its derailment, where the overwhelming testimony tended to show that he had fallen and was dragged 40 to 60 feet before the car was derailed by his body catching on a switch point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 959-963.]

**3. NEGLIGENCE — ACTION FOR — BURDEN OF PROOF.**

In a personal injury action, it is not enough to prove negligence and injury, the burden being on plaintiff to prove negligence naturally resulting in the injury; and unless the proof connects the proven injury as the proximate result of the proven negligence there is no issue for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 223.]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

Action by Charles Zachary's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

A. L. Bronaugh and John Galvin, for appellant. Robert Harding, E. V. Puryear, E. B. Hoover, John Welsh, and Greene & Van Winkle, for appellee.

O'REAR, C. J. Charles Zachary, a freight conductor in appellant's service, met his death under the following circumstances: His train, going north, stopped at Nicholasville to set out two cars and to await the passing of a superior train. One of the cars, an

empty gondola flat car, was to be set on the connecting track between appellant's road and the Louisville & Atlantic road, which crossed at that point. Leaving the main portion of the train on a siding, the decedent went with the engines (it was a double-header train) and the gondola flat to set it on the connecting track, where it was to be later taken up by the Louisville & Atlantic Railroad Company. The time was about 2:30 o'clock in the morning, in December. The weather was cloudy and heavy. It had been raining. The brakemen were detained elsewhere, and did not go with the engine and cars to make this switch. It was decedent's duty to throw the switch after the engine and cars had passed and then to give the signal to the engineers to back. As the cars came back by him onto the siding his duty was to mount the car to be detached (which was coupled to the second engine), and, after setting its brake when it had cleared the main track, to uncouple it and signal the engines to go ahead. He did throw the switch, signaled the engineers with his lantern to back in, and was seen to go toward the end of the car and in front of it as it moved backward. His light then disappeared from the view of those on the engine. The fireman on the second engine was looking out for his signal to stop; but it was not given, although the car had gone in far enough on the siding to clear the main track. The engines and cars were moving back slowly, at about three or four miles an hour. Suddenly the lantern of the decedent was seen to fly out onto the ground to the side of the car and his body fell beside it. Instantly the fireman signaled the engineer, who promptly applied his air brake and stopped the train. It had gone but a few feet after the occurrence. An investigation showed the decedent to be horribly mutilated and dying. He never spoke again, and was dead in a minute or so. No one saw anything else of the occurrence. It was also discovered that the front trucks of the gondola car—furthest from the engine—were off the track, and the brake on that end of the car was found tightly set. The car had jumped the track at the point where a spur track led off into a handle factory. On the point of the split rail of this spur switch was found blood and a bit of torn cloth. For about 3 or 4 feet back of the position of the derailed wheels were marks on the ties showing where the flanges had cut into the earth and ties. For 45 to 60 feet further up the track, whence the car had lately passed, the cinders and dirt between the rails of the track were scraped, showing where a body had been dragged. On the car wheels and axle of the truck were splashes of blood. The body was torn open from near the hip to the ribs in front. One arm was broken and both thighs.

This suit was brought against appellant by the administrator of the decedent to recover damages for his death. The actionable negli-

gence charged was in failing to keep the road-bed of the connecting track in a reasonably safe and fit condition for use; it being alleged that it was negligently permitted to be out of repair, whereby the car was derailed, and the decedent thereby thrown from it and killed. The case turns upon the fact whether the condition of the track did cause the derailment of the car, and whether decedent was thereby thrown from the car and killed. It will not be doubted that the company's duty was to furnish a reasonably safe siding to receive the car—safe for the company's employes using it. That decedent was killed by the car is conceded. That the car was thrown from the track is shown indisputably. That the track was not in fit condition is controverted. But, assuming, in accordance, apparently, with the jury's verdict, that it was not in a fit condition it remains to be determined whether the car was derailed because of the unfit condition of the track and whether decedent was thrown from the car because of the derailment. One witness, a brakeman, who examined the car and track by the light of his lantern shortly after the accident, testified that he saw marks on the ties for 60 or 90 feet back, where the wheels had been off the track. A half dozen or more witnesses, who examined the track immediately and some of them the following morning and during that day, when the condition had not been changed, testified that the marks upon the ties made by the flanges of the wheels did not appear for more than 3 or 4 feet back, and began at the point of the switch rail where the blood and cloth were found. The evidence on this point is simply overwhelming that the car did not leave the track before it came to that switch point. It is equally convincing that decedent had fallen and was being dragged for 40 to 60 feet back before that point was reached. His body's catching on the switch point is, undoubtedly, what pulled the car truck around and threw those wheels from the track. The witness who testified that the marks showed the wheels were off before that was evidently mistaken, basing this statement upon marks and appearances which all the other witnesses who testified on the point said looked like where the heel of a shoe, or one's knees, had been dragged along. If this witness for appellee was correct in his statement, the evidence of the fact would have remained so plain that after daylight there could have been no room for doubt. Two days later, a brother-in-law of decedent, a railroad track worker of experience, came and examined the premises with minute and interested care. He failed to discover—at least failed to testify—to the presence of such marks. Other intelligent witnesses, some of them without apparent reason for bias, failed to sustain, but explicitly refute, the statements of appellee's witness on this point.

We have in this state what is known as

the "scintilla rule," under which it is the duty of the trial court to submit the case to the jury if there is a scintilla of evidence to sustain the plaintiff's case. But we do not have the rule of letting a verdict stand upon a scintilla of evidence against overwhelming and creditable evidence to the contrary. Such an application of the rule would be an abdication of trial upon evidence in favor of trial by form. But for the testimony of the witness mentioned (Regney) there would be no evidence in the record of actionable negligence on the part of appellant. Regney's testimony tends to prove, circumstantially, that decedent was thrown from the car by its derailment. The circumstances in that event justify the inference that the effect was produced by the proven causes. But, in the absence of such fact, the case would be without explanation in evidence as to the cause of the injury. In such event the duty of the court would be to withdraw the case from the jury. It is not enough to prove negligence and injury. The burden is on the plaintiff to prove negligence naturally resulting in the injury. Unless the proof connects the proven injury as a rational and proximate result of the proven negligence, there is nothing to be submitted to the jury. The absence of evidence upon any material point is as fatal to him who has the onus as the absence of all evidence would be. *Hughes v. L. & N. R. R. Co.*, 67 S. W. 984, 23 Ky. Law Rep. 2288; *Hughes v. C. N. O. & T. P. Ry. Co.*, 91 Ky. 526, 16 S. W. 275; *Louisville Gas Co. v. Kaufman*, 48 S. W. 434, 20 Ky. Law Rep. 1069; *Wintuska's Adm'r v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

## DAVIS' ADM'R v. OHIO VALLEY BANKING & TRUST CO.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

### 1. NEGLIGENCE — ACTION — PETITION — SUFFICIENCY.

A petition alleging that decedent was killed by the gross negligence of defendant, its agents, servants, and employes while conducting and managing a passenger elevator, was sufficient; plaintiff not being required to state the circumstances or details of the injury, so as to show that it was caused negligently, or to state facts showing that decedent was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 174, 175, 186-193.]

### 2. SAME — PASSENGER ELEVATOR ACCIDENT — LIABILITY.

Though one owes a trespasser no duty respecting injury, except to prevent injury to him after his peril is discovered, a boy riding on top of a passenger elevator, with the knowledge and at least implied consent of the operator, was not a trespasser, and, being killed through the operator's failure to exercise ordinary care, the operator's employer is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 45-47.]

### 3. SAME—CONTRIBUTORY NEGLIGENCE OF INFANT—DEGREE OF CARE REQUIRED.

A 12-year old boy's contributory negligence in riding on top of a passenger elevator and attempting to get off through an opening in the shaft does not necessarily defeat recovery for his death, caused by a negligent starting of the elevator, he being bound to exercise only the discretion reasonably expected of children of his age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 121-123.]

### 4. MASTER AND SERVANT—INJURY TO THIRD PERSON—SERVANT'S NEGLIGENCE—UNAUTHORIZED ACT.

The owner of a passenger elevator cannot escape liability for the negligent killing of a boy who was permitted to ride on top of the elevator by the operator, on the ground that the operator was unauthorized to grant such permission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217-1225.]

### 5. SAME.

Where death was caused by a passenger elevator operator's negligence, his employer cannot be held negligent merely because the operator was a boy; the employer being held to the same degree of accountability as if the operator had been a careful and experienced man, and its liability not being tested by the operator's age, understanding, or fitness.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by Johnnie Davis' administrator against the Ohio Valley Banking & Trust Company for negligent death. From a judgment for defendant, plaintiff appeals. Reversed, and new trial directed.

Wm. P. McClain, for appellant. Lockett & Worsham and Yeaman & Yeaman, for appellee.

CARROLL, J. Alleging that his intestate, Johnnie Davis, a boy about 12 years of age, was killed by the negligence of the servants of appellee in operating an elevator in its building, this suit was brought by the administrator to recover damages for his death. The petition charged that decedent lost his life "by the gross negligence of the defendant, its agents, servants, and employees while conducting and managing the said elevator." In amended petitions it was alleged that the decedent at the time of his death was, by the consent, knowledge, and permission of the agents and servants of defendant, riding on top of the elevator, and was there for the purpose of carrying dinner to his sister, who was employed in one of the office rooms of the building in which the elevator was located, and while in this dangerous position was carried to the fourth floor of the building, and brought back to the first floor, when the elevator was stopped, and while it was standing, and decedent was in the act of getting off, the employees of defendant suddenly started the elevator, with the result before stated. The answer, after controverting generally the affirmative matter in the petition, pleaded contributory negligence on the part of the decedent. The orig-

inal petition, to which a demurrer was sustained, was sufficient. It has been declared time and again by this court that in an action for personal injuries it is sufficient to charge in a general way that the injury or death for which the recovery is sought was caused by the negligence of the defendant. The plaintiff is not required to state the circumstances or details under which the infliction of the injury was accomplished, in order to show that it had been occasioned by negligence, or to state facts showing that he was not guilty of negligence, thus anticipating the defense. An allegation of the extent of the injury, and the manner in which it was caused, has always been regarded as sufficient. *Chiles v. Drake*, 2 Metc. 146, 74 Am. Dec. 406; *L. O. & L. R. Co. v. Case*, 9 Bush, 728; *L. & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *L. & N. R. Co. v. Rains*, 23 S. W. 505, 15 Ky. Law Rep. 423; *W. A. Gains & Co. v. Johnson* (Ky.) decided Nov. 20, 1907, and reported in 105 S. W. 381. Upon the conclusion of the evidence offered for appellant, the jury, by direction of the court, returned a verdict for appellee. This ruling makes it necessary to relate with some detail the evidence for the purpose of ascertaining whether or not the case should have gone to the jury.

The elevator is situated on the ground floor of the building. The elevator cage is constructed of iron openwork, through which any person might be seen, and the top of the elevator was also made of openwork, with probably a solid piece in the center of the top. A person in the elevator could plainly see through the openwork a person riding on the top of it. Immediately by the side of the elevator is a stairway leading to the upper stories of the building, and when the elevator is standing at the ground floor a person on top of the elevator can crawl through an open space in the net work surrounding the elevator shaft onto the stairway. The elevator was in charge of a boy, but the record does not show his age. In the elevator with the operator was another boy. Johnnie Davis, who had been riding on top of the elevator, was in the act of crawling out, feet foremost, to the stairway, when the elevator, which at this moment was stationary on the ground floor, was suddenly started. His head was caught by the elevator in its upward movement, and almost severed from his body, death resulting instantly. The proof showed that Johnnie Davis was 12 years of age; that his sister was working in a telephone office in the building in which the elevator was located; and that he had gone there on the day of his death for the purpose of taking dinner to her, she being employed in one of the top stories of the building that could be conveniently reached by taking the elevator. The proof of one witness was that Johnnie Davis was in the act of getting off of the elevator, which was standing at the ground

floor, through the opening in the shaft, when it suddenly started; by another witness, who had been looking at the elevator for a few minutes, that there were two boys in the elevator, and one on top of the elevator; that it went up to about the fourth story, and came down and stopped, and the boy on top of the elevator was in the act of getting out when the elevator boy started it and killed him. This witness said the boys in the elevator were laughing and talking to the boy on top of the elevator, that he heard them as the elevator went up and when it came down, that the boy on top did not try to get out until the elevator stopped. Another witness, who came in the building just as the accident happened, said he asked what was the matter, and the elevator boy said: "I have killed little Johnnie Davis, and didn't go to do it. We were just playing with the elevator, and he went to get off and got killed." The boy who was in the elevator when the accident happened said that John Gillum was the operator and that Johnnie Davis was on top; that he went up to the second floor and got on; that he could have seen him if he had been looking, and heard him talking at the fifth floor. He didn't know whether the boy operating the elevator saw him when he started the elevator or not. It will thus be seen that there was evidence conducing to establish two propositions, first, that the operator was a boy; second, that he knew Johnnie Davis was riding on top of the elevator just before he was killed, and could have seen him in the act of getting off if he had looked before starting it on its upward journey.

Counsel for appellee insist that the little boy who was killed was a trespasser, and that the operator owed him no duty except to prevent injury to him after his peril was actually discovered. The correctness of this principle, as applied to trespassers, will be conceded. It has been so adjudged in a number of cases by this court (*C. & O. Ry. Co. v. Barbour's Adm'r*, 93 S. W. 24, 29 Ky. Law Rep. 339; *Davis v. L. H. & St. L. Ry. Co.*, 97 S. W. 1122, 30 Ky. Law Rep. 172), and we have no disposition to modify it. But, under the evidence, Johnnie Davis, although riding in a dangerous place not intended or set apart for passengers, was not a trespasser when he was killed, or while riding on the top of the elevator. He was there with the knowledge, and at least implied permission and consent, of the operator. The operator may not have known that he was in the act of escaping from the top of the elevator at the very time it was started, but he did know he was there a few moments before, and, knowing his perilous position, it was his duty under the circumstances to have exercised ordinary care for his safety. It would be a cruel and inhuman doctrine to announce that a person operating a dangerous instrumentality like an elevator might have actual knowledge of the fact that some

person was riding on it in an unsafe place, where he was likely to be injured at any time, and yet not be responsible for his injury or death, on the theory that at the very moment of the accident, caused by his sudden starting of the machine, he did not actually know the person was yet in his perilous position, although he could have known it merely by looking in the direction. *McVoy v. Oakes*, 91 Wis. 214, 64 N. W. 748. Indeed we might with propriety say that, although Davis be treated as a trespasser, and the rule of nonliability be applied to him that was laid down in the *Barbour and Davis Cases*, yet, under the facts, this case should have gone to the jury. A trespasser is not an outlaw, nor are persons upon whose premises he intrudes at liberty to kill or cripple him at pleasure. The same care must be taken to avoid injury to him after his peril is discovered as is exercised towards other persons. The peril of Davis was discovered when the operator knew he was riding on top of the elevator. With this knowledge, it was his duty to have exercised ordinary care to prevent injury to him. We may safely add that, when an employé in charge of a dangerous agency permits persons to take places or positions in or about it that are hazardous, and that he knows or should know may result in their injury or death, if they remain where they are, the master will be responsible if the servant fails to exercise ordinary care to prevent injury to them. Our attention is called by counsel for appellee to the case of *Dalton's Adm'r v. L. & N. R. Co.*, 56 S. W. 657, 22 Ky. Law Rep. 97. Dalton, while riding on a freight train with the consent of the persons in charge of it, was killed in a collision between the train he was riding on and another train. In the course of the opinion, denying a recovery, the court said: "The only obligation appellant owed to him was not to injure him after knowledge of his danger. There is no allegation that anything was omitted which might have been done for the intestate's safety after the danger was discovered." The material distinction between the cases is that in the *Dalton Case*, as well as in *L. & N. R. Co. v. Thornton*, 58 S. W. 796, 22 Ky. Law Rep. 778, and in *Thornton v. L. & N. R. Co.*, 70 S. W. 53, 24 Ky. Law Rep. 854, nothing was omitted which might have been done in the exercise of ordinary care to prevent the injury after the danger was discovered. In the case at bar the liability of appellee company grows out of the failure of its servant to exercise ordinary care to prevent injury to Johnnie Davis after his peril was discovered. Whether it did or not exercise this degree of care was a question for the jury.

It is also insisted that appellant's intestate, in voluntarily riding on top of the elevator, and in attempting to get off through the opening in the shaft, was guilty of such contributory negligence as prevents a recovery. It may be conceded that he was guilty



of contributory negligence, but in determining the extent to which his contributory negligence affects his right to recover, his age must be taken into consideration. A boy 12 years old is not held to the same degree of care as an adult. The amount of contributory negligence that might as a matter of law defeat a recovery on the part of a grown person will not necessarily prevent a recovery by a child, as is settled by the following authorities and many others that might be mentioned. Thus, in *Shearman & Redfield on Negligence*, vol. 1, § 73, it is said: "It is now settled by an overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age." In *Kentucky Hotel Co. v. Camp*, 97 Ky. 425, 30 S. W. 1010, which was a case to recover for injury to a boy, an instruction that "the jury ought not to find plaintiff contributed by negligence to the cause of his injury, unless they shall believe from the evidence that he failed to exercise that degree of care for his own safety which ordinarily careful and prudent children of his age, experience, and discretion are accustomed to observe under same or similar circumstances," was approved. In *City of Owensboro v. York*, 77 S. W. 1130, 25 Ky. Law Rep. 1397, which was an action to recover damages for the death of a boy 12 years of age, the court said: "It was a question for the jury to determine under all the facts whether the boy who was injured exercised such care and discretion as might be reasonably expected of one of his age situated as he was." The appellee company did not, of course, owe to Johnnie Davis the same care that would be demanded of it in the transportation of passengers. The extent of its duty in respect to passengers is very clearly set forth in *Kentucky Hotel Co. v. Camp*, supra. But it did owe him the duty heretofore pointed out of exercising ordinary care to protect him after his peril was discovered. The argument is made that the operator had no authority to permit the boy to ride on top of the elevator, and that if he did so he was acting outside the scope of his employment, and the master is not responsible. The operator was placed in charge of the elevator, and what he did in connection with its operation was done under and by virtue of his employment. If he permitted the elevator to become overcrowded, or failed to close one of the doors at a landing, or in any other respect was careless or negligent, there would be no question about the liability of his employer; and we are unable to perceive the distinction between his acts in these respects and in letting a person ride on the elevator in a place not intended for passengers.

It is earnestly insisted by counsel for appellant that appellee was guilty of negligence in permitting a boy to manage the elevator.

It seems entirely probable that, if the operator had been a grown person, and competent, in place of a thoughtless boy, the accident would not have happened; but whether or not the operator was qualified to discharge the duties of the place is not a material inquiry, under our conception of the law of the case. The operator was placed in charge of the elevator by appellee. It thus assumed responsibility for his acts. If he permitted boys to play on the elevator, or ride on it in dangerous places, his employer must be held to the same degree of accountability as if the person in charge of the elevator had been a careful and experienced man. The liability of appellee is to be tested in this particular case, not by the age, understanding, or fitness of its employé, but by his acts. The principal questions in this case are (1) whether or not the operator actually knew that Johnnie Davis was on top of the elevator; (2) if he did, could he by the exercise of ordinary care have prevented injury to him; (3) although the operator knew, or by the exercise of ordinary care could have known, these facts, appellee is not liable if Johnnie Davis, by his negligence, measured by the standard heretofore laid down, contributed to his death to such an extent that, except for his negligence, it would not have happened.

Wherefore the case is reversed, with directions for a new trial in conformity with this opinion.

#### V. BOWERMAN & CO. v. TAYLOR.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

##### 1. LOGS AND LOGGING—STANDING TIMBER—SALE—CONSTRUCTION—REASONABLE TIME.

Where a contract for the sale of standing timber does not specify the time for the removal of the timber, the buyer is required to remove it within a reasonable time, and the sale operates to convert the timber into personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 9, 14.]

##### 2. SAME.

Where a deed conveying standing timber authorized the removal thereof within 10 years, the trees were not converted into personalty, but remained real estate, though they were marked for identification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 11, 14.]

##### 3. SAME—SUBSEQUENT BONA FIDE PURCHASERS.

Ky. St. 1903, § 1409, subsec. 13, declares that no contract for the sale of standing trees shall be enforceable by action, unless the contract or some memorandum thereof be in writing, signed by the person to be charged, or his duly authorized agent, and subsection 14 declares that, when any timber has been branded by the seller, or by another with his consent with the brand of the purchaser, or other person or corporation, then the title to the timber shall at once pass to the person or corporation whose brand is placed thereon. Section 1908 provides that every voluntary alienation of personal property, unless accompanied by actual

possession, shall be void as to a purchaser without notice, prior to the lodging of the transfer for record, etc. *Held* that, where a grantee of standing timber by deed indorsed on the deed a recital that he thereby conveyed all his right, title, and interest in and to the timber described in the deed to R., such indorsement, duly signed, operated as a valid transfer of the timber to R. as between the parties, but R., not having branded the trees, it was invalid regarding the trees as personality as against a subsequent innocent purchaser from the transferor.

4. SAME.

Ky. St. 1908, § 496, declares that no deed conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice until such deed shall be acknowledged or proved according to law and lodged for record. *Held* that, where a grantee in a deed of standing timber transferred his interest therein to R. by an indorsement on the back of the deed, which was not recorded after indorsement, R. was not entitled to the trees, treated as real estate, as against a subsequent bona fide purchaser from the transferor.

Appeal from Circuit Court, Pulaski County.  
"To be officially reported."

Action by V. Bowerman & Co. against Mitchell Taylor. From a judgment for defendant, plaintiffs appeal. Affirmed.

Virgil P. Smith, Stone & Stone, and Smith & Burtram, for appellants. Wesley & Brown and O. H. Waddle & Son, for appellee.

LASSING, J. Appellants sued appellee for cutting and converting to his own use 3,000 white oak trees of which they claim to be the owners. Issue was joined upon the question of ownership, and the case submitted to the court upon an agreed state of facts, whereupon the court found that appellee was the owner of the timber in litigation, and dismissed appellants' suit. Believing that he erred in so doing, appellants prosecute this appeal.

The facts are as follows: On the 12th day of October, 1899, Shelby Coffee and others by deed conveyed to D. Hungerford all of the white oak timber above 18 inches in diameter upon about 1,500 acres of land, except 28 board trees, which had at the date of this sale been branded. All of the timber embraced in this sale was blazed and branded with a branding hammer with the letter "M" thereon, and it was specified that in the use of the "M" it had been inverted at times so that it made the brand on some of the trees a "W," and it was further specified in the deed that this timber was to be cut and removed from the premises within 10 years after the date of the conveyance. This deed was duly recorded in Wayne county, in which this timber was located. On the 15th of November, 1899, after the timber had been blazed and branded as aforesaid, D. Hungerford, by written indorsement on said deed, which after being recorded had been returned to him, conveyed to G. M. Rosengrant all of his right, title, and interest in the timber described in the deed. Said indorsement is in words and figures as follows: "For the

purpose of carrying out the provisions of the contract referring to the manufacture of staves entered into by G. M. Rosengrant, J. H. Zarecor, Louis Baxter, and D. Hungerford, I hereby convey, assign, and set over to the said G. M. Rosengrant all my right, title, and interest in and to the timber described in this deed. Witness my hand this 15th day of November, 1899. [Signed] D. Hungerford." On the 24th day of August, 1901, D. Hungerford sold and conveyed the timber on this same land, by deed similar to the deed from Coffee and others to him, to William B. Marr and R. D. Herbert, and this deed to Marr and Herbert was duly recorded on the 10th day of October, 1901, in the clerk's office of Wayne county. At the time of this sale and conveyance to Marr and Herbert there was no evidence of record in the Wayne county clerk's office of the sale by Hungerford to Rosengrant. Marr and Herbert sold this timber to others, and by different conveyances, regularly made, the title thereto was passed from purchaser to purchaser until it was finally sold to appellee, and at the time he became the purchaser thereof he had no notice of the sale to Rosengrant. The provisions of his deed were the same as those contained in the deed from Coffee and others to Hungerford, except it was provided in the deed that he should have 10 years from the 12th day of October, 1899, to remove the timber, as provided for in the original deed. On the 16th day of May, 1902, Rosengrant and his associates sold and conveyed the same timber to J. H. Stout, by deed duly acknowledged and recorded in the proper office on the 29th day of July, 1902, and thereafter Stout sold this timber to appellants, and it is through this title that appellants claim ownership.

For appellants it is insisted that this timber in question, though the purchaser had 10 years within which to remove it, was personality, and they base this claim upon the opinion of this court in the case of *Byassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481, in which it is said: "A sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or vendee, is a constructive severance of them, and they pass as chattels." In that case the sale was verbal. The timber was branded, but no date fixed within which it should be removed, and the court said that this was contemplation of immediate severance. For appellants it is contended that this language, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, which passes no interest in the land except a right to enter upon it for the purpose of removing the timber, from a contract conferring the exclusive right to the land for a time for the purpose of making a profit out of the growth of the timber upon it; that the court did not intend by the expression, "in contemplation of immediate severance," that the timber should be taken

off at once, but intended to convey the idea that no profit was to be made out of the growth of the timber, and that the words "immediate severance," or "immediate separation from the soil," were used, not in their absolute sense, but are relative terms, and that what would be a reasonable time in which to take the timber from a small tract of land would not be a reasonable time within which to take it from a large tract of land. This is doubtless true; but we have been unable to find any case, and the learned counsel for appellants have referred us to none, where any court has ever held that the standing timber was regarded as personal property where anything like so long a time as 10 years was given to remove it from the soil. The statute now requires the evidence of a sale of standing timber to be in writing. Ky. St. 1903, § 1409, subsec. 13, is as follows: "No contract for the sale of standing trees or standing timber shall be enforceable by action, unless said contract or some memorandum thereof, be in writing, signed by the person to be charged, or his duly authorized agent." The memorandum of sale, indorsed on the back of the original deed from Coffee and others to Hungerford, was sufficient, under this statute, to uphold a sale between the contracting parties as between them, and it would be unnecessary to determine whether by such sale the timber was to be treated as personality or not; but, as the rights of third parties intervene, it is necessary to determine this question. It has long been the rule of this court in the construction of contracts of sale of growing trees, where the parties did not contemplate that they were to be immediately severed from the soil, that such sale did not convert the trees into personality, but that they still adhered to and formed a part of the realty, whether they were marked for identification or not. This rule was laid down in the case of Asher Lumber Company v. Cornett, 63 S. W. 974, 23 Ky. Law Rep. 602, approved in the cases of Dills v. Hatcher, 69 S. W. 1092, 24 Ky. Law Rep. 826, and Wiggins v. Jackson, 73 S. W. 779, 24 Ky. Law Rep. 2189, and reaffirmed in the recent case of Bell County Land & Coal Company v. Moss, 97 S. W. 354, 30 Ky. Law Rep. 6. Should these trees be treated as realty or personality? Unquestionably, if the parties to the original contract had in contemplation their immediate severance from the soil, then they were personality; and, treating the word "immediate" as a relative term, they contemplated that, proceeding as fast as they could reasonably be expected to, it would require the full length of the 10 years to remove said timber from the land, and that they therefore inserted in the contract of sale the time which they regarded as reasonable for this purpose, to wit, 10 years. This is the contention of appellants.

For appellee it is urged that the parties to the original contract did not treat these

trees as personality, and, as evidence of that fact, they had the writing evidencing the contract of sale prepared and executed in due form as a deed to realty, and that after its execution it was placed on record, as any other deed conveying realty would be. These circumstances tend most strongly to support the contention of appellee. In order to comply with the statutory provisions in every respect, all that would have been necessary would have been to have the deed of sale reduced to writing. The statute does not require that it be recorded. The contemporaneous construction placed upon their contract by the parties, as evidenced by the contract itself, is entitled to much weight. As stated in the case of Asher Lumber Company v. Cornett, above referred to, "the contract of sale in this case left the trees a part of the real estate, and this seems to have been the idea of the parties interested, as they executed a deed, which was formally acknowledged and recorded." In the original deed from Coffees to Hungerford the timber is not identified further than the statement that it passes title to all white oak trees growing on the land, 18 inches or more in diameter, and the marking of the trees was to be done thereafter, and this idea appears to have been carried out, as they were blazed and marked shortly after this sale and conveyance. In the case of Wiggins v. Jackson the sale was by parol, and the timber was to be removed within two years, and therein this court said: "Standing timber is a part of the realty. It was not sold in contemplation of immediate separation from the soil, and therefore the case is not within the rule announced by this court in the case of Cain v. McGuire, 13 B. Mon. 341, and Byassee v. Reese, 4 Metc. 372, 83 Am. Dec. 481." It may be stated that, in passing upon various questions involving the sale of standing timber that have come before this court, where the sale is made in contemplation of the timber's being cut immediately and separated from the soil, it is treated as personality; but, where it was not in the contemplation of the parties that it should be immediately cut or severed from the soil, then it is to be treated as realty. We are of opinion that, if no time be fixed in the contract of sale for the severance and removal of the timber, then it must be done, if it is to be treated as personality within a reasonable time. This court has held that 2 years is not a reasonable time, and if two years is not, most surely the contention of appellants that 10 years is a reasonable time must fail. If the parties, by agreement, could extend the time 10 years in a contract, and thereby make it reasonable, they could, with as much propriety, extend it 50 years, and say that that was a reasonable time.

We come next to a consideration of the second question involved in this litigation, and that is, without regard to the character of the property which these trees assumed,

and treating them as either realty or personality, did any title to this timber pass from Hungerford to Rosengrant, as against appellee, an innocent purchaser for value? The title was in Hungerford, and was of record. The only evidence of title which Rosengrant had was the indorsement on the back of the deed from Coffees to Hungerford, and this indorsement was never acknowledged or recorded, and there is not the slightest claim that appellee, or Marr and Herbert, from whom he acquired title, had any notice whatever that Rosengrant had purchased or was claiming said property. As above stated, this memorandum on the back of the Coffee deed was sufficient to pass title as between Hungerford and Rosengrant, as it complied fully with subsection 13, § 1409, Ky. St. 1903. Prior, however, to this sale by indorsement on the back of the deed, the trees had been blazed and branded as aforesaid, and in order to protect himself, and give vitality and life to his purchase, Rosengrant should have complied at once with subsection 14 of section 1409, which is as follows: "Whenever any timber has been branded by the seller or by another with his consent, with the brand of the purchaser or other person or corporation, then the title to said timber shall at once pass to the person or corporation whose brand is thus placed upon it, but this shall not affect the rights of the contracting parties with respect to the payment of the purchase money." The purpose of this statute we assume was to protect bona fide and innocent purchasers. Had Rosengrant, following his purchase, branded these trees, it would have, at least, had the effect of putting prospective purchasers from Hungerford upon notice, but he took no step whatever to inform the public or prospective purchasers that he had any interest whatever in said timber in question. The written memorandum on the back of the original deed was the only evidence of the transaction between himself and Hungerford, and this he kept in his pocket. At common law the rule was that a sale of personal property, unaccompanied by possession, was void as to innocent purchasers without notice. This same rule is now recognized and enforced by courts of last resort generally. Subsection 13, above stated, was complied with; but the provisions of subsection 14, above referred to, were not complied with, and the trees were not branded or marked, evidencing their sale and symbolical delivery. The title was not perfected in the purchaser so as to protect him against the rights of an innocent purchaser, and in the absence of some mark or brand upon the trees to notify a prospective purchaser of their symbolical delivery the possession remained in the original owner, and therefore the transaction falls within the provisions of section 1908, Ky. St. 1903, which is as follows: "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies

the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides."

Neither appellee nor those under whom he claims at the date of their purchase had any notice whatever that appellants were claiming title to the property in litigation. They were innocent purchasers for value, and under section 1908, above referred to, are protected in their purchase, even if the contention of appellants is correct, and the timber regarded as personal property. If it is regarded as realty, then appellee is protected in his purchase under section 496 of the Kentucky Statutes of 1903, wherein it is provided: "No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record." Appellant Rosengrant does not claim that he ever received a deed from Hungerford to the timber in question, and hence, of course, could not have complied with the provisions of section 496, above referred to. So that, considering the trees in question as either realty or personality, the claim and contention of appellants thereto must fail, in as much as the record clearly establishes the fact that appellee was an innocent purchaser thereof for value. At the time that appellee and those under whom he claims made their respective purchases the record evidence showed that the title to this timber was in their immediate grantor. By the record he traces a perfect chain of title back to the original grantors, Coffee and others, whereas appellants trace their title back to Rosengrant, and there is no record evidence whatever connecting his title with that of Hungerford, and the Coffees, from whom he purchased.

Perceiving no error in his ruling, the judgment of the lower court is affirmed.

#### CRAWFORD v. HURD.

(Court of Appeals of Kentucky. Jan. 15, 1908.)

##### 1. REPLEVIN—EVIDENCE—ADMISSIBILITY.

In an action to recover a grocery stock delivered under a contract for exchange for a lot, which defendant failed to convey to plaintiff, having previously deeded it to another, the deed was admissible on plaintiff's part.

##### 2. SAME—SUFFICIENCY OF EVIDENCE.

In an action to recover a grocery stock delivered under a contract for exchange for a lot, which defendant failed to convey to plaintiff, having previously deeded it to another, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 292-295.]

##### 3. SALES—FRAUD—RECOVERY OF GOODS.

Generally, where a contract has been obtained by fraud, the proper remedy is a suit to rescind, but one from whom goods have been pur-

chased through fraudulent representations, upon discovering the fraud, may elect to treat the contract as a nullity, and sue to recover the specific property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 262, 893.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by A. C. Hurd against O. D. Crawford. From a judgment for plaintiff, defendant appeals. Affirmed.

Hodge & Wolff, for appellant. John S. Roebuck, Jr., for appellee.

CARROLL, J. In March, 1906, appellee Hurd sold and conveyed to appellant, Crawford a stock of groceries and merchandise at a price amounting to the aggregate of what the invoice of the goods might show, and the fixtures for \$300. Hurd, it seems, believed that the total value of the stock would be \$1,700, or \$1,800. In payment therefor Hurd agreed to take a city lot owned by Crawford at a valuation of \$3,000; Hurd assuming to pay incumbrances amounting to \$2,000. This left a balance of \$1,000 due by Hurd on the lot, for which Crawford was to receive credit on the amount due Hurd for the groceries, and the remainder of the purchase money, if any, was to be paid by Crawford in trade, in cash, and by the execution of notes. Crawford agreed as a part of the contract to execute a deed to Hurd. In April, 1906, Hurd brought this suit against Crawford, under section 180 of the Civil Code of Practice, alleging that he was the owner of and entitled to the possession of the groceries, that Crawford had wrongfully detained them since the date of the contract, and obtained an order of delivery. Hurd executed a bond under section 188 of the Civil Code of Practice, and retained possession of the property taken under the order of delivery. Crawford filed an answer, denying that Hurd was the owner of the property or that it was wrongfully detained. Afterwards he filed a supplemental answer, setting out that in October, 1906, he offered to deliver the possession of the stock of groceries to Hurd, who refused to accept them; and, further, that he was the owner of the groceries, but was ready and willing to have the contract rescinded, and each party placed in the position he occupied before the contract was made. A reply was filed to this supplemental answer, stating, among other things, that Crawford falsely and fraudulently represented to Hurd at the time the contract was made that he was the owner of the lot, and that it was free from incumbrances, except those mentioned in the contract, and that, by misrepresentation and fraud, he induced Hurd to enter into the agreement and exchange his groceries for the lot, when, in fact, Crawford had no title to the lot, and consequently obtained no title to the groceries; that he had demanded a deed to the lot,

which Crawford failed to make. He further stated that the stock of goods and property sold by him to Crawford was appraised by representatives of each of the parties at the sum of \$1,158, but that Crawford had sold a quantity of the groceries and converted same to his own use. By consent the affirmative matter in the reply was controverted of record, and upon a trial before a jury appellee Hurd obtained a verdict for \$1,000. A new trial is sought by appellant upon the ground that the court erred in admitting testimony as to Crawford's title to the lot, in refusing and giving instructions, and that the verdict was contrary to the evidence.

Appellant and appellee are the only witnesses who testified. Appellee testified that the invoice of the stock of goods showed their value to be \$1,158, and that Crawford took possession of the groceries at once; that he demanded a deed from Crawford, but he did not furnish any, and also demanded the groceries back, but Crawford refused to give them up; that, before the contract was made, Crawford had conveyed the lot to one Snyder by fee-simple deed, which deed was, over the objection of appellant, introduced as evidence; that Crawford had disposed of the stock of goods, but had never paid him anything, except about \$130; that, when the contract was made, Crawford told him that he owned the lot and had good title to it, and that he did not know any better, or that the title was in Snyder until some time after Crawford had taken possession of the stock of goods, and, when he discovered that Crawford did not own the lot, he demanded the goods. Appellant, Crawford, in his behalf, stated that Hurd fully understood that the title to the lot was in Snyder, who was holding it in trust for him, Crawford; that the inventory of the stock of goods was improperly taken, and only amounted to \$700; that Hurd had never demanded a deed to the lot, and owed him for groceries and claims paid \$158; that the stock of goods was old, and many of them were worthless.

Appellant asked the court to instruct the jury to find for him, unless they believed from the evidence that he entered into a contract with the intent to defraud Hurd; and that, if they found for Hurd, they should only find the value of the stock of goods, subject to a credit by the amount received by Hurd. The court refused to give this instruction, which was the only one requested, and upon its own motion instructed the jury as follows: "If the jury believe from all the evidence that the defendant agreed and promised the plaintiff to convey to him a certain lot in Newport, Ky., in payment of the stock of groceries in controversy, and that the defendant concealed from plaintiff the fact that he was not the owner of the lot, then he came wrongfully in possession of the stock of groceries, and the jury should find for plaintiff, not exceeding \$1,150, sub-

ject to a credit of \$158; otherwise, for the defendant." To this instruction appellant objected. It will be seen from the pleadings and evidence, which are very brief, that the only issues between the parties were (1) the value of the goods and the credit to which appellant was entitled; (2) whether appellant practiced a fraud upon appellee in representing to him that he was the owner of the lot when in fact he was not. It is conceded that appellant was not the owner of the lot, nor did he at any time offer to tender to appellee a deed for same. There was no error in the admission or rejection of testimony. The instruction given by the court presented to the jury the only issue in the case; and, although the evidence is conflicting in some respects, the verdict of the jury is not against the weight of the evidence. Generally speaking, where a contract has been obtained by fraud, the proper remedy is a suit to rescind the contract; but a vendor from whom goods have been purchased by means of fraudulent representations, upon discovering the fraud, may elect to treat the contract as a nullity, and bring an action for the recovery of the specific property. *Dietz v. Sutcliffe*, 80 Ky. 650.

Perceiving no error in the record, the judgment is affirmed.

#### PSIMER v. STEELE et al.

(Court of Appeals of Kentucky. Jan. 16, 1908.)

##### 1. WILLS—PROBATE—CONCLUSIVENESS.

The probate of a will is conclusive in a subsequent action between adverse claimants of land, and evidence that the will probated was not the will of testator and contradicting the same, and of declarations by testator as to what he intended to do with his property, cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 911-916.]

##### 2. SAME—EVIDENCE—IDENTIFICATION OF PROPERTY.

Proof may be heard to show what testator meant by the words "my home farm."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1047-1052.]

Appeal from Circuit Court, Carter County.

"Not to be officially reported."

Action between Margaret P'Simer and J. H. Steele and others. Judgment for Steele and others, and P'Simer appeals. Affirmed.

H. L. Woods and R. H. Paynter, for appellant. Theobald & Theobald, for appellees.

**HOBSON, J.** William Clark died in the year 1875, a resident of Carter county, leaving a will. The will was lost, but a copy of it was probated in the Carter county court. He owned at his death something over 200 acres of land lying in one body, and on which he resided. The house in which he lived was on what was known as the "Locker tract." This tract contained 123 acres. In addition to this, he had what was known as the "Scott tract," of 50 acres, and two patents which he

had taken out, one of 100 acres and the other of 50 acres. All of these tracts aggregated 323 acres, lying in one body; but off of this he had sold 80 acres, leaving 243 acres, if all of the boundaries had been distinct, but the different tracts lapped one on the other, so that he had, in fact, something less than 240 acres. This was all the land he had. It was known as the "Clark farm," and had been so known for many years before his death. It lay all in one body, and was used by him as one farm without regard to the sources of title. He left a widow, three sons, and six daughters surviving him. Appellees claim title in the land through the widow and the three sons. Appellant claims title to it through the daughters. The controversy turns on the proper construction of his will, which as probated in the county court is in these words:

"In the name of God Amen.

"I, Wm. Clark, of the county of Carter and state of Kentucky, being of sound mind and memory, and considering the uncertainty of this frail and transitory life do therefore make, ordain, publish and declare this to be my will and testament, that is to say, First after all my lawful debts are paid, and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of, as follows to-wit:

"To my beloved wife Mary Clark, the land and appurtenances, situated thereon, known and described as my Home Farm, lying and being on Tygarts creek, in the county of Carter and state of Kentucky. If she shall survive, she is to have full control of said land in and during her natural life and at her decease the land is to be divided equally among my three sons, James M. Clark, Wm. Clark, and Thomas M. Clark. Thomas M. Clark, is to have a roan filly, about one year old, and immediately after the decease of my wife, Mary Clark, all of my personal property is to be equally divided between my six daughters, Nancy J. Nolen, Margaret P'Simer, Ann Harris, Louisa Duncan, Lucinda Ramey, and Susan D. Clark. Likewise I make, constitute and appoint Harvey Henderson to be executor, of this my last will and testament, hereby revoking all former wills by me made. In witness whereof, I hereunto subscribe my name, affix my seal, the 6th day of July, in the year of our Lord, one thousand eight hundred and seventy-one.

"Wm. Clark."

The proof for the appellant on the trial was that William Clark always called the Locker tract his home place, and that the rest of the land was not known as his home place. The proof for appellees was to the effect that the whole body of land was known as the "Clark farm," and was recognized as his home place. The circuit court sustained the latter view, and of this appellant complains. Appellant introduced some proof to the effect that the copy probated was not the will of William Clark, and that by the will he

left to his daughters all the land, except the Locker tract. She also offered proof of declarations by Clark as to what he intended to do with his property. None of this latter evidence can be considered. When the copy was offered for probate in the county court in 1875, the question was presented whether it was the will of William Clark, and the court having determined that it was his will, and no appeal having been taken from that judgment, it is conclusive on all the parties; for it was incumbent on all the parties then to present their case as to what was the will of William Clark. The court determined that the paper above copied was his will; and, if proof could now be heard contradicting the probated paper, the judgment of courts probating wills would be of little value.

But, while proof cannot be heard to contradict the paper, proof may be heard to show what was meant by the words "my home farm." Such proof does not contradict the paper. It only shows the application of the words of the will. The circuit court, therefore, properly admitted the evidence as to what was known as the "home farm." The evidence on this subject was very conflicting, but perhaps preponderated somewhat in favor of appellee. It is clear that Clark owned no land at his death but the tract on which he resided. We conclude, also, that he did not die intestate as to any part of his property. He first directs that his debts shall be paid. Then follow these words: "The residue of my estate, real and personal, I give, bequeath and dispose of as follows." In the next clause he names the land "known and described as my home farm." This land is evidently what he had in mind in the preceding clause when he used the words "residue of my estate, real and personal." He intended to give his wife a life estate in the land on which he lived, and that at her death it should be equally divided between the three sons. All of his personal property he left to his six daughters. The will, therefore, disposed of his entire estate.

Judgment affirmed.

#### CHIPMAN et al. v. TURNER, DAY & WOOLWORTH MFG. CO.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

#### MASTER AND SERVANT—CONTRACT FOR SERVICES—TERMINATION.

Where a corporation contracted to employ plaintiff as its sales agent for five years, reserving no right to discharge him in the meantime, it is liable to him for breach of the contract by discharging him at the end of one year solely because it had merged its business into a combination with competitors formed by a new corporation; thus rendering his services unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 23, 24.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by H. S. Chipman and others

against the Turner, Day & Woolworth Manufacturing Company and the Turner, Day & Woolworth Handle Company, dismissed by plaintiff as to the latter. From a judgment for the manufacturing company, plaintiffs appeal. Reversed and remanded.

James Quarles and Richards & Quarles, for appellants. Trabue, Doolan & Cox and Chas. H. Shields, for appellee.

O'REAR, C. J. This action for damages for the breach by the appellee was based upon the following written contract: "This agreement, made the 11th day of May, 1900, between Turner, Day & Woolworth Mfg. Co., manufacturers of hickory handles, of Louisville, Kentucky, U. S. A., and H. S. Chipman, manufacturers' agent, of Sidney, N. S. W., Australia, witnesseth: The parties of the first part constitute and appoint the party of the second part, their sole and exclusive agent for the sale of their manufacture, in the Colonies of Australia, Tasmania and New Zealand, for the term of five (5) years from date. They agree to supply sufficient catalogues, price lists, and advertising matter to properly conduct the business. The prices (which may be changed from time to time) are to be f. o. b. vessel New York, and subject to change only after sixty (60) days' notice to the party of the second part, and it is agreed that the party of the second part is always to have the benefit of the lowest T. D. & W. list that exists for the markets named. The parties of the first part agree to pay to the party of the second part a commission of five per cent. on all shipments to said territory, whether orders are received through him direct or through his agents, direct from the buyer, through commission agents of U. S. A., or the customers' British agents. Said commission to be made up and paid quarterly of each year. This agreement does not contemplate that the party of the first part shall pay the party of the second part commission on such orders as do not originate through the party of the second part or his agents during the first two years of this contract. The party of the second part agrees not to market the goods of any other manufacturer of handles; but to use his best endeavors in every way to market the goods and promote the interests of the party of the first part. The parties of the first part agree to draw upon such parties in Australia as their agent may nominate as worthy of such terms at ninety days' sight, with instructions that documents be delivered on acceptance of draft, if so desired, but for such goods as the party of the second part requires for his own use in the promotion of this contract, he is to pay for by cash in New York, unless other terms shall be agreed upon. Turner, Day & Woolworth Mfg. Co., by C. M. Garth, Pres. H. S. Chipman." H. S. Chipman represented the Turner, Day & Woolworth Manufacturing

Company under this contract in Australia and the other countries named until June, 1901, when they wrote him a letter, saying that a combine of handle factories was about to be formed, that they would probably be in the combine, and, if so, that his further services would be dispensed with. A few weeks later they wrote him that the combine had been formed, and revoked his commission as sales agent. He continued to send in orders for a while; but, as they were declined upon the sole ground that he no longer represented the manufacturers, he ceased to send them further orders.

The appellee is an incorporated company. It had certain competitors in the business of manufacturing and selling handles, who were also incorporated companies. The combine was effected by the several corporations selling out their plants, stock, and good will to another corporation, styled the "Turner, Day & Woolworth Handle Company," composed in the main of all the stockholders of appellee company, and the majority, if not all, of the stockholders of the other companies which had been absorbed. In addition to the shares of the new company issued to the stockholders of the old companies, which were absorbed by it, it paid certain cash considerations to some of the old companies (but not to appellant). Upon the formation of the new company, it assumed the business of each of the old constituents; the latter going into liquidation. It was claimed by the new concern that it had nothing to do with the agency contracts of any of the old companies, and it refused to allow Chipman to represent it in selling its product under his contract with appellee. Appellant sued appellee and the Turner, Day & Woolworth Handle Company, alleging the merger of the corporations, charging it was but a reincorporation, a change of name of the contracting company, and sought to charge both with the breach of the contract sued on. Before the close of the case, the suit as against the new company was dismissed without prejudice by appellant. The verdict of the jury was for appellee in the suit against the other defendant. The defense was (1) that Chipman had not used his best endeavors to sell appellee's product in Australia; and (2) that he had violated the contract in associating himself with a representative of competitors of appellee. The proof heard was upon these issues. The principal contention of appellant is that the verdict is flagrantly against the evidence. Much of the evidence, and by far the most convincing part of it, is shown by the correspondence between the parties, all of which is in the record. There is no evidence that appellant did not diligently represent appellees in endeavoring to introduce their manufactures in his country. On the contrary, he and others testified that he did. Appellees relied upon certain circumstances in evidence, from which it is argued that it was shown that he did not. The circum-

stance is that appellee's sales, through appellant, after the first eight months fell off considerably, while that of its competitors seems to have held up. But, if the premise were true, it would not prove that appellant did not use his best endeavors. The fact is that there is no evidence in the record that appellee's competitors for the same five or six months of which complaint is made in this case (from January 1901 to July 1901) did a better business in that country comparatively than appellee did. The figures given by them cover the year, and, if the year is taken, then appellee also showed a considerable gain, more in per cent. than its competitors in the same territory. Nor was there any proof that appellant had associated himself with a rival of appellee. On the contrary, the evidence wholly disproves the charge. A study of the record convinces us that the trouble was that appellee and its competitors went into a combine, the purpose and result of which was to eliminate certain expenses and other factors affecting their profits, among them being several selling representatives of the manufacturers. Appellant was on that ground alone discharged. We hold that this contract protected him from such action, or, if he was discharged, then he was entitled to compensation in lieu of his commissions. A corporation may not terminate its contracts, without a stipulation in them to that effect, by voluntary liquidation, or merging its corporate existence and plant with others. It must comply with the terms of its contracts with its employes, or pay them the equivalent in damages.

The argument complained of by appellant was unauthorized and prejudicial. The action of the court in not sustaining appellant's objections to it was erroneous. The verdict is palpably against the evidence.

Judgment reversed, and cause remanded for proceedings consistent herewith.

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#### LEXINGTON RY. CO. v. WOODWARD.

(Court of Appeals of Kentucky. Jan. 17, 1908.)

##### 1. STREET RAILROADS—INJURIES FROM COLLISION—ACTIONS—INSTRUCTIONS.

In an action for personal injuries, caused by a collision between plaintiff's buggy and defendant's street car, instructions to find for plaintiff, unless the motorman, after he saw, or by the exercise of ordinary care could have seen, the danger of a collision, "used such means as were at his command" to avoid it, are erroneous, where it appeared that there were two ways of stopping the car—by reversing the current and by applying the brake—since the jury may have been misled to believe that he did not use both means at his command, and that he was negligent in not doing so, while the law only requires that he use ordinary care in the exercise of the means at his command to avoid the danger, etc.

##### 2. SAME—CARE REQUIRED AS TO PERSONS USING STREET.

A street car company owes to those having a right to the common use of the streets with it only that degree of care that a person of ordi-



nary prudence would exercise under like circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 172.]

### 3. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Plaintiff was thrown from a buggy in a collision with a street car. She was considerably bruised about the arm and hip, though no bones were broken. She suffered violent pains in the hip, leg, arm, back, and head, and was confined to her bed for about two months, and at the time of the trial, a year or more after the injury, was still suffering severely as a result thereof. Held that \$3,000 damages was excessive, in the absence of evidence that the injury was permanent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357-396.]

### 4. WITNESSES — IMPRACHMENT — CONTRADICTION—PARTY'S CONTRADICTORY PLEADINGS.

The rule that, where a witness who has verified a pleading makes statements which contradict or are at variance with its allegations, the pleading may be read to the jury to affect the witness' credibility, does not apply to an unverified pleading, where the part which it is proposed to read has been expressly withdrawn.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1251.]

Appeal from Circuit Court, Fayette County.  
"Not to be officially reported."

Action by Anna Woodward against the Lexington Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Stoll & Bush and Morton, Webb & Wilson, for appellant. Maury Kemper and W. D. Nicholas, for appellee.

LASSING, J. A reversal of this judgment is asked upon three grounds: First, that the verdict was clearly against the law and evidence; second, that the damages awarded plaintiff are excessive; third, because of the court's error in instructing the jury. The facts of the case are as follows: Mrs. Woodward, who lived in the country some distance from the city of Lexington, accompanied by her daughter and little grandchild, had come to Lexington for the purpose of disposing of her marketing. She drove from Constitution street across the street car track on Limestone to a point in front of Stansel's grocery, which is some little distance south of the intersection of Constitution and Limestone streets. When she stopped, the horse was standing with his head near the curb, and the buggy was out some distance in the street. Just as she was in the act of alighting from the buggy, the hind wheel thereof was struck by one of appellant company's cars, and she was thrown from the buggy to the street, and in this fall sustained the injury upon which she bases this suit. It is the contention of appellee that the buggy had not cleared the track when she was run into and injured, that the horse was standing still at the time that the car ran into her buggy; while, on the other hand, it is the contention of appellant company that after the horse and buggy had crossed and cleared the track and stop-

ped at the curb, and just as the car approached, the horse backed the buggy upon the track so suddenly that it was impossible for the agent of the company in charge of the car to stop same in time to prevent the accident. On the afternoon of this same day appellee returned to her home, after having received medical aid from a physician in Lexington. She was later attended by a neighborhood doctor at her home. She was considerably bruised about the arm and the hip, though no bones were broken. She complained of violent pains in the hip, leg, arm, back, and head. She alleges that she was confined to her bed the better part of two months, and at the time of the trial, which was some year or more after the date of the injury, was still suffering severely as a result thereof. The physician who treated her at the time of and immediately after the injury, as well as the physician who examined her under an order of court during the trial, testified that they saw no evidence resulting from the injury that would lead them to believe that it was permanent. And the neighborhood doctor who treated her was unwilling to say, from his examination of her, whether she was permanently injured or not. So that of the three doctors who had treated and examined her two testified positively that the injuries were not permanent and the third refused to express an opinion. The verdict was for \$3,000.

Appellant complains of all of the instructions given, but more particularly of instructions 1 and 2, which are as follows: "(1) If the jury believe from the evidence that the motorman in charge of defendant's car saw, or by the exercise of reasonable care could have seen, that there was danger, unless his car should be slowed up or stopped, of said car and the buggy in which the plaintiff was riding colliding with each other, and if the jury further believe from the evidence that after said motorman saw, or could so have seen, that there was such danger, he could, by the exercise of such means as were at his command, have slowed up or stopped said car in time to avert such collision, and if the jury further believe from the evidence that by reason of the failure on the part of the motorman to stop said car the said car and buggy did collide, the jury should find for the plaintiff, unless the jury also believe from the evidence that the plaintiff was guilty of negligence by backing the horse attached to the vehicle in which plaintiff was riding, and that by so backing said horse said collision occurred, and when but for said backing of said horse said collision would not have occurred; or the jury should find for the plaintiff, even if the plaintiff was guilty of negligence, as herein described, if the jury believe from the evidence that the motorman saw that there was danger of his car and plaintiff's buggy colliding, unless said car should be slowed up or stopped, and that he saw such danger at a time when,

by the use of the means at his command, he could have slowed up or stopped said car in time to avert said collision, and that he failed to use such means to slow up or to stop said car, and by reason of such failure such collision occurred, and when but for such failure such collision would not have occurred. (2) The jury should find for the defendant, unless the jury believe from the evidence that the motorman in charge of defendant's car saw, or by the exercise of reasonable care could have seen, that there was danger of a collision between said car and the buggy in which plaintiff was riding unless said car should be slowed up or stopped, and that after he saw, or could so have seen, said danger he failed to use the means at his command to slow up or stop said car in time to avert such collision, and that by such failure such collision occurred, and that but for such failure such collision would not have occurred; or, if said motorman did fail to use reasonable care to discover such danger, yet the jury should find for the defendant, if the jury believe from the evidence that the plaintiff was negligent in backing her horse, if she did back it in such a way as to contribute to cause such collision, and but for such horse being so backed such collision would not have occurred. But the jury should not find for the defendant on account of any negligence of the plaintiff, if the plaintiff was guilty of any negligence, if the motorman, in charge of car, saw the danger of a collision between the car and the buggy at a time when he could, by the use of the means at his command, have slowed up or stopped said car in time to avert such collision." It will be observed that in each of these instructions the jury is told that they must find for plaintiff, unless they believe from the evidence that after the motorman saw, or by the exercise of ordinary care could have seen, the danger of a collision he "used such means as were at his command" to avoid it. By neither of these instructions was the jury told what degree of care was required of the motorman after he discovered, or by the exercise of ordinary care could have discovered, that there was danger of a collision, but left the jury to speculate, as it were, upon this point, and to determine for themselves what degree of care he was required to exercise. The proof shows that there were two ways of stopping the speed of the car, one by reversing the current, and the other by applying the brake. Both of these means were at his command, and the jury may have concluded that it was negligence on his part to fail to use both means, whereas the law only requires of him that he use ordinary care in the exercise of the means at his command to avoid the danger after it is discovered, or could, by the exercise of ordinary care, have been discovered by him. The company and its employees owe to passengers the highest degree of care for their safety and to avoid injuring them;

but as to trespassers, licensees, and others having a right to the common use of the streets with the company they are required to exercise only that degree of care that a person of ordinary prudence and habits would exercise under like or similar circumstances. The jury may have concluded that the motorman did not use the most effective means at his command, or that he did not use all and every means at his command for stopping the car. They should not have been left to speculate upon this point, but should have been told that he was only required to take such steps towards stopping the car as a man of ordinary care and prudence would have taken under the same or similar circumstances.

As, in our judgment, this case must be reversed because of the error in the instructions above cited, we refrain from commenting upon the other grounds urged for reversal, further than to say that the verdict for \$3,000 is excessive in this case, in the absence of a showing that the injury is permanent. The jury was influenced, no doubt, in fixing this verdict as high as they did by reason of the fact that they did not understand from the instructions what degree of care was required of appellant's motorman, after discovering appellee's peril. In lieu of the instructions given, upon the next trial the court will give the following instructions: "(1) It was the duty of the motorman in charge of defendant's car to keep a lookout for persons and vehicles upon the track, and to exercise reasonable care in discovering and avoiding injuring them; and, if you believe from the evidence that said motorman saw, or by the exercise of reasonable care, could have seen, that there was danger of a collision between his car and plaintiff's buggy, and after he saw, or by the exercise of reasonable care could have seen, that there was such danger, he failed to exercise ordinary care to prevent same, and by reason of such failure on his part the collision occurred, and plaintiff was injured, then you should find for plaintiff, unless you shall further believe from the evidence that the plaintiff was herself guilty of negligence as defined in instruction No. 3. (2) If you believe from the evidence that the motorman in charge of the car did not see, or by the exercise of reasonable care could not have seen, that there was danger of a collision between said car and the buggy in which plaintiff was riding, in time to have prevented the collision and injury by the exercise of ordinary care, then you should find for the defendant. (3) If you believe from the evidence that appellee backed her buggy upon the track at a time when appellant's car was so near that the motorman in charge thereof could not, by the exercise of ordinary care, prevent the collision, then you will find for the defendant. (4) Ordinary care is such care as persons of ordinary care and prudence usually exercise under like or similar circumstances. (5) If you

find for the plaintiff, you should award her such sum, not exceeding \$5,000, as will fairly compensate her for any suffering, mental or physical, which she endured by reason of the injury complained of, and for any loss of time occasioned by said injury." If, upon the next trial, proof is offered tending to show that the injury is permanent, then there should be added to instruction No. 5 the following: "And for any reduction of her power to earn money, if there was any such reduction of such power by reason of said injury."

Appellant also complains that the trial court erred in refusing to permit certain portions of the petition to be read to the jury. We are of opinion, however, that in this the trial court did not err for the twofold reason, first, that the petition was not sworn to; and second, that by a pleading, later filed, that portion of the petition which counsel for appellant desired to read to the jury had been expressly withdrawn, and hence, was no longer a part of the pleading in the case. Where a witness has verified a pleading, and upon the witness stand makes statements which contradict or are at variance with the allegations of the pleading, which he has filed and sworn to, it is proper and in harmony with the rule laid down by this court that such pleading may be read to the jury for the purpose of affecting the credibility of the witness. But this rule has never been adopted in a case where the pleading is not verified, and especially where the objectionable portion thereof has been expressly withdrawn.

For the reasons indicated, this cause is reversed and remanded, for further proceedings consistent with this opinion.

#### WRIGHT'S EX'R v. WRIGHT.

(Court of Appeals of Kentucky. Jan. 17, 1908.)

##### 1. CONTRACTS—VALIDITY OF ASSENT—UNDUE INFLUENCE.

Where the maker of a contract had mind enough to understand the nature and character of the transaction, and it appears that he was executing a fixed purpose of his own, the contract cannot be set aside on the ground of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 441.]

##### 2. SAME.

That a contract whereby a father gave to his son the use of his two farms for a year without rent recited that it was made because the father had never advanced anything to his son, whereas his will, theretofore executed, recited that he had made an advancement to his son which was to be charged to him, does not justify an inference of fraud or undue influence in the execution of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 441, 450.]

##### 3. SAME.

The fact that a contract whereby a father gave to his son the use of his two farms for a year without rent was drawn by an attorney other than the one preferred by the father does not warrant the conclusion of fraud or undue influence in the execution of the contract.

##### 4. SAME.

The fact that a contract whereby a father gave to his son the use of his two farms for a year without rent was witnessed, whereas, another contract executed at the same time, leasing the farms to another, was not witnessed, does not tend to throw suspicion on the former contract as having been procured by fraud or undue influence.

##### 5. SAME—EVIDENCE—SUFFICIENCY.

Evidence in an action to set aside a contract, whereby a father gave to his son the use of his two farms for a year without rent, held not to show any fraud or undue influence by the son.

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

Action by E. M. Dickson, executor of A. W. Wright, deceased, against John W. Wright. Judgment for defendant, and plaintiff appeals. Affirmed.

Neville C. Fisher and E. M. Dickson, for appellant. McMillan & Talbott and Denis Dundon, for appellee.

CLAY, C. This is an action instituted by E. M. Dickson, suing as executor of A. W. Wright, deceased, to set aside and cancel a contract executed by A. W. Wright to his son, John W. Wright, appellee. Appellant charges that the contract was procured by the exercise of fraud, covin, misrepresentation, and undue influence. The answer of appellee is a general denial of appellant's petition. It appears from the record that on the 20th day of October, 1905, when he was then about 92 years old, A. W. Wright executed and delivered to appellee, John W. Wright, a contract, by the terms of which he leased to appellee his two farms in Bourbon county—one containing about 100 acres and the other about 175 acres—for the period of one year, beginning March 1, 1907, and ending March 1, 1908. The consideration for this contract was an agreement on the part of appellee to take good care of A. W. Wright's business from and after the execution of the contract. The contract further provided that the lease was made because of the fact that A. W. Wright had never advanced anything to second party, who was his only son. Previous to this time, and on the 30th day of December, 1901, A. W. Wright, who was then 87 years of age, made and published his last will and testament, to which he afterwards added several codicils. By the third section of the original will he stated that it was his purpose to make all of his children equal, and, as he had advanced the sum of \$5,000 to his son John W. Wright, he directed that the same be charged to him as an advancement. By a codicil executed on the 9th day of April, 1904, when A. W. Wright was then 90 years of age, he made the following provision: "My son, John W. Wright and his family are now residing with me at my home place and I desire to state that I owe him nothing whatever for board or services rendered to me, because I have fully compensated him for

the same in the liberal and advantageous terms upon which he and his son, Frank, use and occupy my farms—receiving as they do one-half of all they make upon the farm, and there is no understanding or agreement that I am to pay or am to be charged anything for any board or services rendered to me.” By a codicil dated December 12, 1906, E. M. Dickson was appointed executor of the will. In the latter part of February appellee, John W. Wright, took steps to have appointed for his father a committee to take charge of his business. A committee was appointed for that purpose. A. W. Wright, who was quite ill at the time, died in March following.

Incompetency or a lack of mental capacity to execute the contract in question is not charged in the petition, nor is there any proof upon this point. Indeed, the appellant, who is an honored member of the Bourbon county bar, frankly admits that A. W. Wright was a man of good mind and capable of attending to business, and he himself qualified as executor under and by virtue of a codicil which was executed within less than two months after the contract in question was executed. Furthermore, Mrs. Barnett, who is a daughter of A. W. Wright, and her husband, obtained an assignment of another contract for the rent of the same farms involved in this controversy which was executed to J. P. Sousley for the year March 1, 1906, to March 1, 1907, on the same day as the contract in question. If, then, A. W. Wright had grown so old that his mind was impaired, the contract under which his daughter and her husband occupied the farm, and the codicil under which appellant qualified as executor, were not the acts of a person qualified to act. There is abundant evidence to the effect that A. W. Wright was capable of entering into the contract in question. Dr. Lapsley, the attending physician, states that he was just as capable of attending to business at the time of the execution of the contract as he ever was. Mrs. Sousley, who nursed him, says that his mind was clear, and that he was capable of attending to business. Her evidence is corroborated by that of John W. Wright and two or three other witnesses, including Miss Benthall, one of the public school teachers of Bourbon county. Indeed, the evidence is overwhelming in favor of A. W. Wright's capacity to contract. While incompetency is not charged, yet it is manifest that appellant desired all evidence in regard to his physical and mental condition at the time of the execution of the contract to be considered in connection with the charge of fraud, misrepresentation, and undue influence. It appears that at the time the contract was made, appellee, John W. Wright, was not living with his father, A. W. Wright. He had lived with his father for several years prior to March 1, 1906, but for the year beginning March 1, 1905, Mr. A. W. Wright rented his farm to Mr. Sousley. At that time appellee

was living on the farm with his father, and wanted to remain there for the year beginning March 1, 1905, and offered to pay more rent than his father afterwards required of Mr. Sousley. Mr. A. W. Wright, however, declined to let his son have the property. His reasons for so doing do not appear in the record; but certain it is that he had his own way in this matter. It cannot be contended that appellee was able to exercise undue influence over his father at that time; for, in spite of his desire to rent the farm and of his offer of more rent than his father subsequently rented it for, he was unable to obtain the farm. We think this shows that A. W. Wright was a man of his own mind. He then had with him appellee, who was his only son—the latter having a family had to have a home for the ensuing year. He had none of his own. He was compelled, when he left the home of his father, to rent another farm, which he did. The average man, situated in Mr. A. W. Wright's position, even had he regarded it as better business to have an outsider, would naturally have been embarrassed by considerations of sentiment and regard for the feelings of his son, and would have hesitated to turn his son out and put a stranger in his place. So far as the record shows, however, there was no hesitation on the part of A. W. Wright. If appellee had had such undue influence over his father at the time as to make him execute the contract in question, we think he could have easily persuaded him at the time of the lease to Mr. Sousley to let appellee have the farm. Furthermore, when the contract in question was made, John W. Wright was not living with his father, but was living on a rented farm. At that time A. W. Wright was living with Mr. Sousley on A. W. Wright's home place. After John W. Wright moved away from his father's house on March 1, 1905, up to the making of the contract in question, he was rarely with his father, and but little passed between them during that time. In the fall of 1906 appellee purchased what is known as the “Rogers farm” at public sale for about \$18,000, as a home for himself and family. His wife had a trust fund of about \$15,000 which was invested in this farm to that extent, and the residue was conveyed to appellee. His father, A. W. Wright, no doubt felt more than an ordinary interest in his son's acquiring a home of his own, and made known his interest in a substantial way by offering to help him. It appears that the subject of giving his son the use of his farm, as carried out by the written contract in question, originated with A. W. Wright himself. It does not appear that he executed the contract by request and persistent effort and pleading on the part of his son, but, so far as the record shows, the offer came from A. W. Wright himself, and the execution of the contract was altogether unsolicited by appellee. It was undoubtedly the purpose of A. W. Wright in making such a contract to

help his son pay for his home. Having no money to give him, he did the only thing that he could do—gave him the use of his lands for a year in order that he might have an opportunity, by his own work, to make the money necessary to pay for his interest in the farm. All the evidence bearing on the subject is to the effect that A. W. Wright, on his own motion, sent for his son John W. Wright to come to his home, and he stated before his son came why he wanted him to come. He explained that he meant to help him, and how he was going to help him pay for his home by giving him the use of his land for one year. At the time the contract was made A. W. Wright had but three children—two daughters married and settled in life, and a son, appellee herein, who had been a renter, but was then pursuing the commendable purpose of acquiring a home of his own. It was, no doubt, one of the pleasures of his last days to feel that his son was going to have a home of his own, and that he was helping him to pay for it—not in money, but by furnishing his son land out of which his son could make a part of the money to pay for the home. There is a total absence of any testimony to the effect that appellee importuned his father to aid him. Not a single witness pretends to say that appellee even requested his father to assist him. On the contrary, the whole record shows that A. W. Wright, on his own motion, adopted the plan embodied in the written contract complained of, and carried it into effect by executing the contract. The record shows that whenever A. W. Wright went to his son for advice or help his son always freely gave it to him; but the record does not disclose any such confidential relations existing between them as to justify the conclusion of undue influence. The law is well settled that where it appears that the maker of a contract had mind enough to understand the nature and character of the transaction, and that he was executing a fixed purpose of his own, the contract cannot be set aside on the ground of undue influence. *Garner v. Garner*, 4 Ky. Law Rep. 823. Applying this principle to the facts of this case, it is perfectly plain that the charge of undue influence is not sustained. When A. W. Wright executed the contract in question, he carried out his own fixed purpose. He knew the character and nature of the transaction.

Much is said as to the alleged contradiction in the will of A. W. Wright, and in the contract on the subject of advancement to John W. Wright. What is called in the will "advancements" appears to have been money paid by the testator as surety for John W. Wright for the rent of land for his son. It seems, however, that the latter regarded his father as having gotten the full benefit of all the money paid out as rent in the way of feeding certain corn to cattle and grazing certain lands, etc. However this may be, it seems that Mr. A. W. Wright felt it proper to charge his son with money paid out by

him as surety for rents, etc. It is evident that these sums so paid for rent were not of the character of what is usually understood as "advancements"—money or property given to a child to start it in life. In this sense appellee had received no "advancements." Mr. A. W. Wright's will was written by an attorney; and, while it was correct to speak of the money paid as "advancements," A. W. Wright himself doubtless paid but little attention to the technical phraseology, and regarded that part of the will no further than to see that it meant that the son was to be charged up with those rents. When the contract was written, it recited that John W. Wright had received no "advancements." This was true when the word "advancements" is used in the ordinary acceptance of the term as meaning "money or property given to a child to start it in life." However, whether this be true or not, A. W. Wright had the power and capacity to make this contract embracing the statement referred to, and the fact that it differed from his will as theretofore written does not, we think, justify an inference of fraud or undue influence.

Appellant complains at great length that A. W. Wright did not have his regular attorney, Mr. Dickson, draw the contract in controversy. It does not appear from the record, however, that Dickson was his regular attorney, or that he had any regular attorney. It is true that Mr. Dickson wrote his will and was appointed executor, but the record shows that, when he had law business, he went to different attorneys as he saw fit for any particular occasion. There is some evidence to the effect that A. W. Wright expected Mr. Dickson on the occasion on which the contract was written. From Mr. Wright's manner on that occasion, it is evident that he did prefer Mr. Dickson. The fact, however, that the contract was drawn up by another attorney does not, however, justify the conclusion of fraud or undue influence. Both appellee and Mr. Souseley testify that A. W. Wright gave no directions as to who should draw up the contract. This being the case, Souseley suggested Judge Dundon, who was agreeable to both Wright and Souseley. Accordingly they went to Dundon, and the contract was drawn up by him. Furthermore, it appears from the testimony of these two witnesses that the contract was drawn up exactly as A. W. Wright had directed that it be drawn up. As said before, the contract between A. W. Wright and Souseley was drawn up by the same attorney and executed at the same time as the contract in question. Some point is made of the fact that appellee and Souseley were upon very intimate terms, and that it is apparent from the intimacy of their relations and the fact that the contracts were executed at the same time that each was acting in the interest of the other. The proof, however, shows that Souseley made his contract several months before Wright's contract was thought of.

True, it was never reduced to writing until October 20, 1905. There was therefore nothing to be done at that time, so far as A. W. Wright and Sousley were concerned, except to reduce the contract to writing. It was not a new agreement, but simply the old agreement reduced to writing. When the subject of John W. Wright's contract came up, Sousley had already agreed fully with A. W. Wright as to his contract for the rent of the farm for another year. There is no claim and no proof that either Sousley or A. W. Wright sought to change or modify the already existing verbal agreement. There was accordingly no particular wherein John W. Wright, at the time he entered into a contract with his father on his own behalf, could be of service to Sousley in the matter of the contract between Sousley and A. W. Wright. Furthermore, the proof shows that in drawing up the contract between Sousley and A. W. Wright John W. Wright represented his father, and took issue with Sousley as to some of the terms of the contract, assigning the reason that his father, A. W. Wright, had so directed the contract to be drawn.

Counsel for appellant further contends that the fact that the Wright-Sousley contract was not witnessed and the contract in question was witnessed tends to throw suspicion upon the latter contract. We confess that we are unable to see the force of this position. Witnesses are generally selected for the purpose of proving the execution of an instrument and the capacity of him who executes it. It is certainly a rare thing when they are selected for the purpose of fraud or misrepresentation. So far as the record shows, A. W. Wright must have known that there were some jealousies and dissensions in his family, that each of his children was apprehensive that the other child would get some advantage; and he furthermore knew better than any one else that his other children would be dissatisfied with what he was thus giving to his son, the appellee herein. Furthermore, appellee knew that his sisters would be displeased with the assistance thus rendered by his father. Both of them, therefore, wanted witnesses to the contract, so that his daughters could learn from them when and where and under what circumstances the paper was executed. Mrs. Gaines and Mrs. Barnett, daughters of A. W. Wright, both testified that their father stated to them that he had no such contract as the one in question with the appellee; that he was willing for appellee to have the farm for the year 1907-08, provided appellee would construct a fence around the entire farm. What A. W. Wright's purpose was in making this statement we are not able to say. Perhaps it was to keep down dissensions among his daughters who he knew would be displeased with his action. But even their statement, however, shows that he contemplated letting his son have the farm for the year in question. Furthermore, he did state to several witnesses whose verac-

ity is not impeached that he had made a contract with his son to let him have the farm free of taxes for the year 1907-08. It appears that A. W. Wright in his last sickness was ill for several weeks, and his mind failed. The 1st of March was at hand when all rents were to be collected, and all agency created by the contract with John W. Wright was necessarily terminated by the loss of A. W. Wright's mind. Taking this view of the case, appellee, who had been his father's agent while he was competent to have an agent, felt enough interest in his father and his estate to have some one appointed who could legally transact his father's business, and it was perfectly natural for the son rather than the daughters to undertake this step. It furthermore appears that both of his daughters, who claim that they were opposed to the appointment of a committee, were present at the inquest, and neither of them undertook to oppose the action then pending. Several witnesses testify that they were present at this inquest, and heard John W. Wright, appellee, swear that his father during the last four or five years of his life did not have capacity enough to attend to business. Appellee contends that his statement was that during his spells of sickness his father's mind was flighty, and he was then unable to attend to business. Whether appellee made this statement or not we are unable to say. It may be that he made it as claimed by witness for appellant, or that his statement was as claimed by himself. In either event, we do not regard it as material to the decision of this case, for the reason that all the witnesses who testified state positively that A. W. Wright was a man of strong mind, and that he was capable of transacting business at the time the contract was executed.

Counsel for appellant contends that the improvidence shown by the execution of the contract is evidence of fraud, misrepresentation, or undue influence. The proof does show that at the time of the execution of the contract A. W. Wright was indebted by way of mortgage on his property, to the extent of \$3,500, but the proof further shows that on the 1st of March following the time of the execution of the contract he was to receive \$2,100, and on the 1st of March thereafter the further sum of \$2,100, and that during the latter year he was to receive his board free. That being the case, he would have had sufficient money to pay off his indebtedness and maintain himself during those two years, and no doubt he did not feel that he would not have a place to live when he had a son whom he had just rewarded in such a substantial way.

We have carefully considered this whole record, and there is nothing in it to show any fraud, covin, misrepresentation, or undue influence on the part of appellee. The chancellor below took this view of the case; and we are of the opinion that the judgment should be affirmed.

## STEIN'S ADM'R v. STEIN.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

## 1. BASTARDS — LEGITIMATION — MARRIAGE OF PARENTS — RECOGNITION.

Under Ky. St. 1903, § 1398, providing that, if a man having had a child by a woman shall afterwards marry her, such child or its descendants, if recognized by him before or after the marriage, shall be deemed legitimate, the recognition of a child by a man as his son is not sufficient to render him legitimate. It must also appear that he was the father of the child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 16, 17.]

## 2. SAME.

The policy of the law is to declare children legitimate when it can fairly be done, and the presumption that they are legitimate is not confined to children born after marriage, where by statute children born before marriage are legitimated by subsequent marriage and recognition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 4, 5.]

## 3. SAME—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to show that a child was the legitimate son of a decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 9, 10.]

Appeal from Circuit Court, Boyd County.

"Not to be officially reported."

Action between Charles Stein's administrator and Albin Julius Stein, alias Weidling. From the judgment, the administrator appeals. Affirmed.

Thomas R. Brown and L. T. Everett, for appellant. R. S. Dinkle, Watt M. Prichard, and Hager & Stewart, for appellee.

CARROLL, J. This appeal is prosecuted from a judgment of the Boyd circuit court adjudging appellee to be the legitimate heir of Charles Stein, deceased, and therefore entitled to his estate. His right to the property is denied by the brothers of Charles Stein, who insist that appellee was an illegitimate child of the wife of Charles Stein, and hence not entitled to inherit from him.

Charles Stein was born in 1831 in Zeitz, Prussia, and while on a visit to his birthplace in 1900 died there intestate. In 1855 he emigrated to the United States, remaining here until April, 1859, when he returned to Prussia in obedience to a request of the authorities for the purpose of entering the army then being mobilized in anticipation of war with a foreign state. He remained in the army until he was discharged in 1860. After his discharge he established in Zeitz a tannery, and on the 12th day of February, 1861, married Liberta Adeline Weidling, a girl who lived at Mutchau, Prussia, with her father, who was a landowner. Mutchau was a village eight or ten miles distant from Zeitz, a city of about 20,000 inhabitants. Before her marriage to Charles Stein Liberta on February 3, 1860, gave birth to appellee. After his marriage his wife and her child lived together in Zeitz until 1866, when he again came to the United States, leaving his wife and their child in Zeitz. In 1878 the child, whom we will hereafter designate as "Albin,"

came at his father's request to the United States on a visit; and in the fall of that year returned to Zeitz, and brought his mother back with him to this country. From that time until the wife died in 1898 all of them lived together in Catlettsburg, Boyd county, Ky. After his wife's death, Charles Stein made his home principally with Albin, who then resided in Vanceburg, Lewis county, Ky.

A question is raised as to whether the jurisdiction to grant letters of administration on the estate of Charles Stein was in the county court of Lewis county or the county court of Boyd county, but we will not stop to consider this unimportant feature of the controversy. The real question in the case is whether or not Albin, although begotten before the marriage of his mother to Charles Stein, was the child of Charles Stein. If he was, being his only heir at law, he is entitled to his estate. It is conceded that Albin was born before the marriage of his mother and Charles Stein; but, under our laws of descent and distribution found in the Kentucky Statutes of 1903, it is provided in section 1398 that: "If a man having had a child by a woman shall afterwards marry her, such child or its descendants, if recognized by him before or after the marriage, shall be deemed legitimate." As Charles Stein died a citizen of this state, and the property owned by him was situated here at the time of his death, its devolution must be controlled by our statute on the subject of descent and distribution. Under this statute, the real and personal estate of a person who dies intestate descends first to his legitimate children, if any. So that, if Albin was his legitimate child within the contemplation of section 1398, supra, he is entitled to the real and personal estate of which Charles Stein died seised and possessed. The chief efforts of appellants, the brothers of Charles Stein, are directed to the establishment of the fact that Charles Stein was not the father of Albin; and in support of this position they introduced evidence conducing to show the following facts: Albin was born on the 3d day of February, 1860, and in the ordinary course of human events was begotten about May 3, 1859. There is no direct evidence that Charles Stein knew the girl Liberta prior to the fall or winter, of 1859. Gustav, the brother of Charles, testifies that, although not present at the wedding, he heard his brother say before his marriage that his future wife would bring a son Albin born out of wedlock, but he did not tell him that he was the father of the child. He also observes that this would have been unnecessary, as his brother did not become acquainted with his wife until after the child was born. A witness, Kabish, testifies that he was a laborer at the home of Liberta's father from 1857 to 1863; that during the time he lived with her father he had a love affair with Liberta before her marriage, and frequent illicit intercourse with her; that she gave birth to

Albin before her marriage with Charles Stein, but he did not say who was the father of the child. The credibility of this witness, or the weight that should be attached to his evidence, we will not comment upon further than to remark that under the unwritten standards of morality and truth generally prevailing in this country and that are accepted without question as correct little credence is given to the testimony of a witness who attempts to dishonor the virtue of a good woman, whose entire life with one exception has been free from reproach, by relating immoral transactions with her for the purpose of casting discredit upon her chastity. Other witnesses, who apparently had good opportunities to know the facts, testified that they had never known of any acquaintance or meeting between Charles Stein and Liberta before the birth of the child, and that it was generally rumored in the neighborhood that the hired man, Kabish, was the father of Albin.

Giving to the evidence of these witnesses its fair and reasonable effect, the conclusion may be drawn from it that the witnesses did not have any personal knowledge or positive information as to who was the father of the child; but based their opinion that Charles Stein was not, because it was generally rumored and understood that Kabish was his father, and they had no knowledge or information that Charles Stein became acquainted with Liberta until after the birth. That Charles Stein had opportunity to know and become acquainted with Liberta about the time Albin was begotten is shown by the fact that on his return to Germany, in 1859 he arrived at Bremen on the 16th day of April, but did not join his regiment until June 21st. Bremen is only a short distance from Zeltz; and it may fairly be inferred that, when Stein landed at Bremen, he went immediately to his home at Zeltz, and remained there and in that vicinity until he entered the army on June 21st. As Liberta lived only a few miles from Zeltz, which was quite a city, it may be assumed that she visited there, and that Stein became acquainted and intimate with her, and as a result Albin was born. These assumptions, although not based on the evidence or established by facts, are strongly supported by reasonable inference and persuasive probabilities that, in the absence of convincing evidence to the contrary, are entitled to the highest consideration, and must be allowed to overbalance the speculative conclusions of some witnesses, as well as the testimony of others that is inherently discreditable. Charles Stein was a member of a good family, occupying a highly respectable position in society, and it seems unreasonable that he would have voluntarily and publicly married a young woman with a baby in her arms that was not his own flesh and blood, and bring the mother and child into his family, or that ever afterwards and until his death he should

recognize at all times and places both in public and private Albin as his son, and treat him as a kind and affectionate father would his child. Numerous witnesses testified that he always spoke of him as his son; and in letters written by him, appearing in the record, he addressed him as such, signing his name as his father. There is not a suggestion nor a circumstance appearing in the manner or conversation of Charles Stein towards or about Albin from the time of his marriage until his death to discredit the fact that he was his son. In everything that he did and said, in all his actions and conduct, he recognized him as his child; and he was so regarded and treated by neighbors, friends, and acquaintances, as well as members of the family.

We appreciate the fact that under the statute, *supra*, the recognition of a child by a man as his son is not sufficient to render him legitimate. In addition to recognition, it must appear that he was the father of the child. But continued and uninterrupted recognition through many years, from early infancy to middle age, is a most convincing circumstance that the recognition has its origin and growth in the knowledge that the child was his. It is not reasonable or probable that a man would marry a young girl with an infant at her bosom, and live with her through a long period of years, without at some time or in some way giving expression to the feeling that the child was not his if in truth it was not, but there is not in this record a circumstance or suspicion growing out of anything that Charles Stein said or did that Albin was not his son. So that, in the absence of testimony to the contrary, and there is none, all the circumstances and facts proven in this case point with almost unerring certainty to the conclusion that Charles Stein knew that Albin was his offspring, and with knowledge of this fact he made amends for his youthful indiscretion by marrying the mother; and in the 30 years that passed between that time and his death he never let fall an expression, nor did an act, that might cast discredit on the paternity of this boy, who although born out of lawful wedlock, was no less his child. It would be difficult to establish by facts and circumstances a stronger case showing that Charles Stein was the father of Albin than is found in this record. Nor must it be overlooked that the policy of the law is to declare children legitimate when it can fairly be done. Nor should the presumption that they are legitimate be confined to children who are born after marriage. The statute before quoted was intended to enable persons guilty of indiscretions that result in the birth of children to make reparation for the wrong that might be visited upon the heads of the innocent by enabling them by marriage to remove the stigma of illegitimacy. The marriage of an unmarried man to an unmarried woman, who has



a child born out of lawful wedlock, should create at least some presumption that it was his child, although the presumption is not as strong as when the child is born after marriage. *Dannelli v. Dannelli's Adm'r*, 4 Bush, 51; *Lewis v. Sizemore*, 78 S. W. 122, 25 Ky. Law Rep. 1354; *Sams v. Sams*, 85 Ky. 396, 3 S. W. 593.

The judgment of the lower court is affirmed.

BELL, Sheriff, et al. v. CITY OF LOUISVILLE et al.

(Court of Appeals of Kentucky. Jan. 21, 1906.)

**TAXATION—EXEMPTION—PUBLIC PROPERTY.**

Though a municipality has acquired all the shares of stock of a water company, the property of the water company is not thereby converted into public property used for public purposes within Const. § 170, exempting from taxation public property used for public purposes; the shares of stock not being identical with the corporate property itself for taxation purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 353.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the city of Louisville and others against H. A. Bell, sheriff, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Gregory & McHenry, R. L. Page, and D. W. Sanders, for appellants. A. E. Richards and Carroll & Middleton, for appellees.

**BARKER, J.** This is an action by the city of Louisville to enjoin H. A. Bell, sheriff of Jefferson county, from selling the property of the Louisville Water Company for state and county taxes. The Louisville Water Company was originally chartered as a private corporation, and granted a franchise for supplying the city of Louisville with fresh water. All of its property is situated in Jefferson county, Ky., and most of it within the corporate limits of the city of Louisville. There is no dispute that originally it was a private corporation, and its property taxable for all purposes. Since the date of its incorporation, 1854, the city of Louisville, under proper legal authority, has purchased, or otherwise acquired, all of the shares of stock of the Louisville Water Company, and these shares constitute a part of the assets of the sinking fund of Louisville, set apart for the extinguishment of the bonded indebtedness of the municipality. It is now contended that, because the city has acquired all of the shares of stock of the water company, its corporate property has thereby been converted into public property, used for public purposes, within the meaning of section 170 of the Constitution, and is thereby exempted from taxation.

Undoubtedly, the shares of stock of the Louisville Water Company, owned by the city of Louisville, are public property used for public purposes; but the fundamental error

underlying the position of the city is in assuming that the shares of stock in the corporation are for fiscal purposes identical with the corporate property itself. Now, it is undoubtedly true from an economic standpoint that one who owns all of the stock of a corporation is really the owner of the corporate property; but this is not true in law, and especially for fiscal purposes. The corporation is a separate legal entity. It has a legal status which it can maintain in court or elsewhere entirely independent of the owners of its shares; and, as said before, especially is this true in fiscal matters. It is now too well established to be questioned that for purposes of taxation the shares of the corporate stock, and the corporate property and franchise, are entirely different, and that both may be taxed without imposing double taxation. This very question arose in *City of Louisville v. McAteer, etc.*, 81 S. W. 698, 1 L. R. A. (N. S.) 766, 28 Ky. Law. Rep. 425, and the whole subject that we have here with reference to the taxation of the identical corporation at bar was thoroughly considered. The same question raised here was raised there—i. e., inasmuch as the city of Louisville owned all the shares of the Louisville Water Company's stock, therefore to tax the corporate property for city purposes was taxing the city's own property—and it was there pointed out that the shares of stock in the Louisville Water Company were different from the corporate property, and that the latter was taxable for municipal purposes, although the municipality owned all the shares of the corporate stock. In addition to the authorities cited in that case to establish the principle that there is a difference between the corporate shares and the corporate property for the purpose of taxation, we cite the following: *Farrington v. Tennessee*, 95 U. S. 686, 24 L. Ed. 553; *Sturges v. Carter*, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; *National Bank v. Commonwealth*, 9 Wall. (U. S.) 353, 19 L. Ed. 701; *Delaware Railroad Tax*, 18 Wall. (U. S.) 231, 21 L. Ed. 588; *New Orleans v. Houston*, 119 U. S. 277, 7 Sup. Ct. 198, 30 L. Ed. 411. Under our prior constitution exemptions of property from taxation were granted by statute, and there was often a difference made between exemption from taxation for state and county purposes and exemption for city purposes; but under the present Constitution (section 170) all permissible exemptions from taxation are specifically pointed out, and, when any property falls within this category, it is exempt from all taxation, whether state, county, or municipal. The only property of municipalities which is exempt from taxation under section 170 of the Constitution is public property used for public purposes. Therefore, if the property of the water company is not exempt from municipal taxation, as was held in *City of Louisville v. McAteer, etc.*, supra, then it is not exempt from state and county taxation, unless that case is to be overruled.

The question at bar is in nowise controlled

by the cases of Commonwealth of Kentucky v. City of Frankfort, 94 S. W. 648, 29 Ky. Law Rep. 690, and Commonwealth of Kentucky v. City of Paducah, 102 S. W. 882, 31 Ky. Law Rep. 528. In both of these cases it was sought to tax the property owned by the municipality, and it was held that it, being the property of the cities, and used for public purposes, was exempt. Now, in the case at bar, if it were sought to tax the shares of stock of the Louisville Water Company owned by the city of Louisville, then the question would be identical with those raised in the above-named cases; but, as we have pointed out, the taxation of the corporate property is not the equivalent of the taxation of the corporate shares. The question at bar is controlled by the principle enunciated in *City of Louisville v. McAtteer*, supra, to which we adhere. The act of the General Assembly of Kentucky, approved March 6, 1906, entitled, "An act in relation to the control, management and operation of water works in cities of the first class" (Acts 1906, p. 52, c. 16), does not change the status of the water company towards the city. The changes made are merely as to the management of the water company, and the appointment of its board of directors; but the corporate entity remains, and the shares of stock are still owned by the sinking fund of Louisville.

For the reasons herein stated, the judgment is reversed for proceedings consistent herewith.

#### MARTIN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 17, 1908.)

##### 1. CRIMINAL LAW—APPEAL—REVIEW.

In a criminal case, the Court of Appeals is not authorized to reverse a judgment on the ground that the verdict is against the evidence, or is not supported by sufficient evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

##### 2. HOMICIDE—EVIDENCE—SUFFICIENCY.

In a prosecution for murder, evidence held to sustain a conviction of voluntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Homicide, § 540.]

Appeal from Circuit Court, Scott County.  
"Not to be officially reported."

John Martin was convicted of voluntary manslaughter, and appeals. Affirmed.

Bradley & Bradley, for appellant. James Breathitt, Atty. Gen., Tom B. McGregor, and Chas. H. Morris, for the Commonwealth.

CARROLL, J. Under an indictment charging him with the murder of Lige Beatty, appellant was found guilty of voluntary manslaughter, and his punishment fixed at imprisonment in the state penitentiary for 12 years. The only ground upon which a reversal is sought is, as stated by his counsel, "that there is not a scintilla of evidence to support the finding of the jury, and that Martin testified to facts which showed a

plain case of self-defense; and there was not a single word on the part of any one contradicting his statement as to how the deceased met his death." In criminal cases this court is not authorized to reverse the judgment of the lower court upon the ground that the verdict is flagrantly against the evidence or not supported by sufficient evidence to sustain it, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused. *Vowells v. Commonwealth*, 83 Ky. 196; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387; *Green v. Commonwealth*, 88 S. W. 638, 26 Ky. Law Rep. 1221. Keeping in view the limitation upon our right to reverse for this ground, we will examine the testimony with some care, for the purpose of ascertaining whether or not there was evidence conducing to show that appellant was guilty.

Appellant and the deceased were colored boys between 17 and 20 years of age; the deceased being a little larger and heavier than appellant. They were well acquainted, and had been on friendly terms. The shooting that resulted in the death of Beatty occurred at a negro festival, at which they had the usual accompaniments of whisky and pistols, given at the house of Zach Wilson in Boston, a suburb of Georgetown. The appellant went to the festival about 11 o'clock at night, and had been there about an hour when Beatty was killed. Maj. Letcher, a witness for the commonwealth, testified that he was at the festival, and during the night appellant got into an argument with him and wanted to wrestle with him, when Beatty came up and remarked to Martin that he (Martin) was not going to do anything to that boy (meaning Letcher), when appellant cursed Beatty, and then they got into an argument, and presently appellant went into the house, and remained there about five minutes and came out, when the quarrel was renewed and appellant again cursed Beatty, who struck him. They clinched, and fell on the side of the road, and while they were down appellant shot Beatty. He said that Beatty had not done anything to appellant before he went into the house, nor after appellant came out until he called Beatty a bad name, when Beatty struck him. He did not know with what; that they fell rather side by side, and were engaged in a scuffle about two minutes when the shot was fired. Will Young, for the commonwealth, said he was in the house when the shot was fired, but immediately ran to the place where Beatty and appellant were, and pulled appellant off of the top of Beatty. Zach Wilson testified that appellant came into his house and went to his (appellant's) uncle, who was drunk, and started to go through his pockets, when he said to appellant, "Don't go into his pockets," and appellant replied that his uncle always told him when he got drunk to take his things away from him, and he saw

appellant take a pistol out of his uncle's pocket, and put it in his own pocket, and go out of the house. He was only in the house a few minutes. Irvine Crutcher heard appellant and Beatty quarrelling, and heard appellant curse him, and, when he cursed Beatty, he saw Beatty strike him—did not know what he struck him with. When he struck him, they clinched and fell in the ditch, and about half a minute afterward a shot was fired—could not say which was on top of the other at the time.

Appellant in his own behalf testified as follows: "Me and Maj. Letcher started arguing over wrestling, and so we got to arguing about it, and he was standing there, and Lige Beatty steps up and he says, 'You ain't going to do nothing to him,' and I says, 'You ain't going to do nothing to me either,' and he commenced cursing me, and I cursed him back, and we stood arguing about five minutes, and so I goes on back into the house, and was standing about in the house there, and my uncle was sitting there drunk. I pulled him up and searches him, and takes his gun and puts it in my pocket and his money, and Zach Wilson says, 'John, you oughtn't to do that. John, it might get you into trouble'; and I says, 'No, uncle Zach, when he gets to drinking this way, he has always told me to take what is on him and keep it for him.' And I goes on in the dancing room, and stays in there where they were dancing a while, and I goes on back out in the road to the front gate; and Lige was standing there, and he walked down past me, and started to cursing me and I cursed him back, and he hit me in the mouth with a rock and knocked me down, and when I fell he was on top of me, and commenced choking me, and I tried to holler and I couldn't holler, and so I shot." He further said that when he went into the house at the time he took the pistol from his uncle's pocket, that he remained about 20 minutes before going out. The jailer testified that when appellant was placed in jail, a little while after the killing, his lip and mouth was badly swollen.

From this evidence the jury might reasonably have come to the conclusion that in the first quarrel between appellant and Beatty appellant used very offensive language towards Beatty, and, if serious fault or wrongdoing could be attributed to either at this time, appellant was more to blame than Beatty. They might also have reasonably concluded that, when this first quarrel ended, appellant went into the house for the purpose of getting a pistol, with the intention of renewing the quarrel, as after getting the pistol he went to the place where Beatty was, and again commenced the trouble. It is true that appellant makes out in his own behalf a fairly good case of self-defense, as, if Beatty was choking him and he apprehended he might choke him to death, he had the right to shoot to preserve his life; but

the jury were not compelled to accept as true his statements. They had the right to disregard the whole or any part of his evidence, and it seems likely that they did not believe that Beatty was about to choke appellant to death when the shot was fired, or that it was necessary that appellant should shoot and kill Beatty in order to prevent death or great danger to himself. From a consideration of all the evidence, the jury could very well conclude that appellant was guilty of voluntary manslaughter. It is conceded that Beatty was unarmed, and the fact that appellant went into the house immediately after his first quarrel with Beatty and took a pistol out of his uncle's pocket, and in a few minutes went to the place where he expected Beatty might be, are strong circumstances pointing towards his guilt.

In our opinion there was evidence sufficient to authorize the jury to find a verdict of guilty; and the judgment is affirmed.

#### JOHNSON et al. v. KELLEY et al.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

#### 1. TROVER AND CONVERSION—ACTIONS—EVIDENCE.

In an action to recover the value of timber alleged to have been converted by defendants, who claimed to have purchased it from plaintiffs' vendors, the burden is on plaintiffs to prove only their prior purchase of the timber from the owners and defendants' actual or constructive notice thereof prior to the latter's purchase, and it is not necessary to prove an allegation of the vendors' title to the land upon which the timber stood, especially where it was not denied by the answer.

#### 2. SAME—EVIDENCE—QUESTION FOR JURY.

In an action for the conversion of timber, evidence examined, and held for the jury.

Appeal from Circuit Court, Harlan County.  
"Not to be officially reported."

Action by A. Johnson and another against A. Z. Kelley and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Isham G. Leabow, for appellants. H. C. Clay, for appellees.

BARKER, J. A. Johnson and N. L. Johnson, the appellants, instituted this action in the Harlan circuit court to recover of the appellees the value of certain trees which they purchased from the owners, David and Carr Eldridge, and which were standing upon the Eldridges' land in Harlan county, Ky. The answer placed in issue all of the material allegations of the petition, except the title of the Eldridges to the land on which the trees stood, and also pleaded ownership of the trees in question in themselves by purchase from David and Carr Eldridge, the alleged vendors of appellants, without notice of appellants' claim. The issues were completed by a reply which denied the affirmative allegations of the answer. A trial resulted in a peremptory instruction from the court

to the jury to find for the defendants at the close of plaintiffs' testimony. From this ruling, the appellants are here on appeal.

We think the court erred in granting a peremptory instruction. It was not necessary for the plaintiffs to show that the Eldridges owned a good title to the land deducible from the commonwealth. Both parties to the litigation claimed to own the trees in question by purchase from common vendors, and there was no necessity for the plaintiffs to prove anything more on this point than a prior purchase of the timber from the owners, and notice thereof—actual or constructive—to the defendants prior to the time the latter purchased. Passing this, however, as said before, the answer does not deny that David and Carr Eldridge owned the land described in the petition, on which the trees in question stood. We do not deem it necessary to discuss the evidence in minute detail, it being sufficient to say that the testimony and the admission in the pleading showed the original ownership of the trees in David and Carr Eldridge, and a sale by them to the appellants, with notice thereof to the appellees. The evidence further showed the branding of these trees by the appellants, in company with, and under the direction of, one of the vendors; also the cutting of the timber by the appellees, and the conversion of it to their use. This was sufficient to take the case to the jury; and, if this evidence is true, clearly the plaintiffs are entitled to recover from the defendants. It is true that David and Carr Eldridge originally gave to appellants only a written option for the purchase of the trees, which expired in 30 days from its date; but the testimony shows that within the 30 days the plaintiffs foreclosed the option and paid for the timber.

The judgment is reversed for proceedings consistent herewith.

### B. F. AVERY & SONS v. LUNG.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

#### 1. MASTER AND SERVANT—INJURY TO SERVANT—OBVIOUS DANGERS.

While plaintiff was moving a truck from one room to another, a heavy board leaning against a post near which plaintiff passed was jarred, and toppled over on plaintiff's foot, injuring it. The situation of the board was obvious and actually known to plaintiff, who could have avoided the injury either by passing further from the board or by laying it down on the floor. *Held*, that defendant was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 703.]

#### 2. SAME—ASSUMPTION OF RISK.

Employees working in and about shops using machinery and heavy articles of wood and metal assume the risks ordinarily incident to their employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 533, 550.]

#### 3. SAME.

An adult may assume the risks incident to insecure premises or insufficient tools, and, if he does so with full knowledge of the conditions,

the master is not liable for injuries resulting therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551, 574-600.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Hezekiah A. Lung against B. F. Avery & Sons. Judgment for plaintiff, and defendants appeal. Reversed.

Bingham & Davis, for appellants. Kinney & Thomas and Stotsenburg & Weathers, for appellee.

O'REAR, C. J. Appellee, a man aged nearly 50 years, was engaged in appellant's plow factory as a truckman. His duty was to move hand trucks loaded with castings from one part of the premises to another. He had been so engaged for more than five months at the time of his injury for which he sues in this action. He was trundling a truck load of metal from one room to another, when, passing close to a post against which was leaning a heavy board, 30 inches long by 17 inches broad and 2 inches thick, the board was jostled or jarred so that it toppled over on his foot, injuring two or three of his toes. The ground of this action is that appellants failed to provide and maintain a reasonably safe place in which the injured servant was to do his work.

Passing by the question whether such a thing is a failure to provide a reasonably safe working place, we rest our decision upon the fact that the situation of the board was not only obvious, but was actually known, to appellee. He could have avoided his injury by either passing further from it, as he well might have done, or more simply by stopping and laying it down on the floor where it would have been harmless. In manufacturing plants such things are to be expected as boards setting about, whether left there for a purpose or without intention. They are not necessarily dangerous; but, to the extent that they are dangerous, it is as apparent to the workman who has to pass by them as it could be to any one else. The doctrine which requires the master to provide and maintain a reasonably safe place in which his servant is to labor does not admit of that construction which excuses the servant from using his eyes, and the plainest precaution for his own safety. Dangers lurk in all shops using machinery and heavy articles of wood and metal. Men who engage to work in and about them assume the risks ordinarily incident to their employment. They must do something to prevent an injury to themselves, although the place in which they are put to work is not ideally safe, as few places, indeed, are. When they can see and actually see the conditions, and without complaint or assurance undertake to do their work under these conditions, in the absence of statutory responsibility, they assume such risks as are incident to the conditions. An

adult may assume the risks incident to insecure premises, or insufficient tools, if he wants to. If he does so, with full knowledge of the conditions, there is no law in this state that makes the master liable to him if injury befalls him on account of the very conditions he knowingly assumes. Where he has not knowledge of them, he, of course, does not assume the risk from them. The motion for a peremptory instruction ought to have been sustained.

Judgment reversed, and cause remanded for a trial under proceedings consistent herewith.

### HIGHLAND LAND & BUILDING CO. OF DAYTON, KY., v. AUDAS.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

#### 1. MORTGAGES — FORECLOSURE — JUDGMENT — CONSTRUCTIVE SERVICE — PERSONAL JUDGMENT.

Under the express provisions of Civ. Code Prac. §§ 56, 419, a personal judgment in a mortgage foreclosure suit, rendered against a defendant summoned out of the state and who did not appear, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1600.]

#### 2. JUDGMENT — DEFAULT — FAILURE TO GIVE BOND.

In an action to foreclose a mortgage against a nonresident constructively summoned or summoned without the state, and who did not appear, failure to give bond, as required by Civ. Code Prac. § 410, before judgment of foreclosure and sale is reversible error.

#### 3. MORTGAGES — FORECLOSURE — ATTACK TO SET ASIDE JUDGMENT — COLLATERAL ATTACK.

An original action to set aside a mortgage foreclosure and sale, filed in the same court in which the judgment of foreclosure was entered, constituted a direct, and not a collateral, attack on the judgment, though plaintiff did not proceed by motion, as authorized by Civ. Code Prac. § 414.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1457, 1470.]

#### 4. SAME — VOID JUDGMENT — SALE — BONA FIDE PURCHASER.

Where a mortgagee bought the property at the foreclosure sale, and then sold it to defendant, the fact that defendant purchased the property in good faith would constitute a good defense to an action by one of the mortgagors to set aside the judgment of foreclosure and sale, under Civ. Code Prac. § 417, providing that the title of purchasers in good faith to any property sold under a judgment shall not be affected by a new trial permitted by section 414, except the title of property obtained by plaintiff, and not bought of him in good faith by others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1537, 1560.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Cynthia Audas against the Highland Land & Building Company of Dayton, Ky. From a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Healy, Jr., and E. W. Hawkins, Jr., for appellant. Hazelrigg, Chenault & Hazelrigg and Arthur C. Hall, for appellee.

CLAY, C. On the 29th day of August, 1893, Thomas Audas and wife, the appellee herein, borrowed \$2,500 from one John W. Kearney, and as security therefor gave him a mortgage on a certain tract of land in Campbell county, Ky. On April 28, 1900, John W. Kearney instituted proceedings against Thomas Audas and wife, who were then nonresidents of this state, to enforce his lien, and obtained a judgment and sale of the land to pay the same. Thereafter, at a sale by the master commissioner, Kearney bought said tract of land for \$2,200. The sale was reported to the court and confirmed. On December 10, 1903, Kearney sold the land in question to appellant, the Highland Land & Building Company of Dayton, Ky. On the 16th day of August, 1904, Thomas Audas died, leaving a will making appellee Cynthia Audas his sole devisee. On the 12th day of May, 1906, Cynthia Audas brought this action in the Campbell circuit court for the purpose of setting aside the judgment and order of sale, and all proceedings thereunder in the action of John W. Kearney v. Thomas Audas, as well as the conveyance from John W. Kearney to appellant, and asked that this be done on the payment by her into court of a sum sufficient to pay the original note of \$2,500, with interest and costs in the action of Kearney v. Audas. To appellee's petition the defendant John W. Kearney filed answer asking that if the court held that the judgment in the case of Kearney v. Audas was void, and that appellee, upon the payment by her into court of \$2,500, with interest from August 29, 1896, and the costs in said case, was entitled to a reconveyance of the property to her, that of this money so paid into court his codefendant, the Highland Land & Building Company of Dayton, Ky., be adjudged entitled to \$2,200, with interest from March 6, 1901, and that he be entitled to remainder. On February 23, 1907, the court entered an order, directing appellee on or before March 9, 1907, to pay into court the amount of money which she offered to pay. Appellant demurred to appellee's petition. The court overruled the demurrer, and, the appellant declining to plead further, entered a judgment directing that the judgment and order of sale, the sale and the confirmation thereof, in the case of Kearney v. Audas, etc., and all conveyances of said real estate to appellant, or from appellant to the other defendants, be set aside and declared null and void. The order further directed that an account be taken of the sums of money paid upon said void sale, with interest thereon, and of the costs in the original action, and that this cause be referred to the master commissioner for the purpose of taking said account; that until the coming in of the report of the master commissioner, the apportionment of the sums of money so found to have been paid upon said invalid sale be deferred for the further action and order of

the court. From this order, the Highland Land & Building Company prosecutes this appeal.

While other grounds for setting aside the proceedings in the case of *Kearney v. Audas* are set forth in the petition, it will be necessary, in view of the conclusion reached by the court, to consider only the following: (1) A personal judgment was rendered against appellee and her husband when no summons had been served upon either of them, and neither had entered appearance. (2) No bond was executed before judgment, as required by section 410 of the Civil Code of Practice, nor had the court, in pursuance of section 411, retained control over and preserved the property, or the proceeds thereof. The law is well settled that no personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state as provided in section 56, and who has not appeared in the action. Section 419 of the Civil Code of Practice; *Harris v. Adams*, 2 Duv. 141; *Berry v. Berry's Ex'r*, 6 Bush, 594. The law is equally well settled that the failure to give bond before judgment against a nonresident who has not appeared in the action is reversible error. *Webber v. Tanner*, 65 S. W. 848, 23 Ky. Law Rep. 1694; *Morrison, etc., v. Beckham*, 96 Ky. 72, 27 S. W. 868; *Gill v. Johnson's Adm'rs*, 1 Metc. 649. As the personal judgment in the case of *Kearney v. Audas* was void, and as the judgment directing a sale of the land was erroneous because no bond had been given as required by section 410 of the Civil Code of Practice, it was certainly proper for the trial court to set aside the judgment in question. Upon proper proceedings had, either of these errors would have been sufficient to authorize a reversal by this court; and, wherever the errors are such that this court will reverse the action, we think it is the duty of the trial court to set aside the judgment upon the same grounds.

Counsel for appellant contends that this proceeding involves a collateral attack upon the judgment in the case of *Kearney v. Audas*, and that as that judgment was only voidable, and not void, this proceeding cannot be maintained. This contention, however, is not tenable. This proceeding is not a collateral attack upon the judgment in question, but a direct attack. The main purpose of this action is to set aside the judgment in question. True, appellee did not proceed by motion, as provided by section 414 of the Civil Code of Practice, but filed her petition in the same court where the original action was instituted, and gave the necessary security for costs. In the case of *Barbee v. Fox, etc.*, 79 Ky. 588, this court held that, although the defendants did not make a formal motion to have the action retried, they gave security for costs and filed their pleadings of record, and these steps were sufficient to enter their appearance and motion. We are of opinion that,

under this ruling, the proceeding by appellee was a sufficient compliance with the provision of the Code. Had appellant, in pursuance of section 417 of the Civil Code of Practice, pleaded and proved that it acquired the title to the property in question in good faith, this would have been a good defense to appellee's action. Instead of doing this, however, appellant elected to stand on its demurrer. As the facts set out in the petition stated a good cause of action, appellant's demurrer was properly overruled.

For the reasons given, the judgment is affirmed.

#### BOYD et al. v. MORRIS.

(Court of Appeals of Kentucky. Jan. 17, 1908.)

##### 1. EASEMENTS—RIGHT OF WAY—PRESCRIPTION—PERMISSIVE USE.

Where one is given permission to pass over the land of another, he acquires no rights by any length of use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 23, 24.]

##### 2. SAME—ADVERSE USE.

The continuous adverse use of a way over lands of another, when unexplained, creates the presumption of a grant, and, after the expiration of 15 years, the burden is upon one denying the right to show that the use was merely permissive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

##### 3. SAME.

It is immaterial whether the adverse use of a passway over the land of another is claimed as a matter of right, or merely as a matter of convenience.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 18.]

##### 4. SAME—LOCATION OF ROUTE—EFFECT OF CHANGE.

The acquiescence of one who has an easement of way over the lands of another in changes in the location of the way for the convenience of the owner of the servient estate does not operate as an abandonment of the original way, nor does such acquiescence prevent the claimant of such an easement from asserting his claim of right based upon an adverse use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 77-79.]

##### 5. APPEAL—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS.

The findings of a trial court will be sustained on appeal, though opposed to the testimony of the greater number of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3990-3992.]

##### 6. EASEMENTS—RIGHT OF WAY—PRESCRIPTION—EVIDENCE.

Evidence examined, and held to show the acquirement of a right of way across the lands of another by prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 88-93.]

##### 7. PLEADING—AMENDMENT OF ANSWER.

In an action to enjoin defendants from interfering with plaintiff's passway on a line between the lands of the two defendants, after the submission of the case to the court, one of the defendants moved for leave to file an amended answer setting up that he had acquired the land on both sides of the passway, and praying that, if plaintiff should be found entitled to the way, he should be required to erect gates across it. Held, that the court properly disallowed the

amendment which would have necessitated reopening the case and continuing it for trial on a new question, as to which a special statutory proceeding was authorized.

Appeal from Circuit Court, Graves County.  
"Not to be officially reported."

Action by J. W. Morris against J. V. and S. H. Boyd. From a judgment for plaintiff, defendants appeal. Affirmed.

Moorman & Warren, for appellants. W. J. Webb and Robbins & Thomas, for appellee.

LASSING, J. This litigation involves the right of appellee to a passway from the middle prong of Terrapin creek to the J. C. Pitman road, along the line between the lands of appellants, J. V. and S. H. Boyd. This passway in question was obstructed by the appellants, and appellee filed suit against them because of its obstruction, and asked for a mandatory order compelling them to remove the fence obstructing the passway, and enjoining them from further interfering with his free use and enjoyment of same. Appellee bases his claim on prescriptive right, asserting that he and those under whom he claims have used and claimed this passway as a matter of right adverse to all others for more than 40 years. The answer denies the material allegations of the petition, and further charges that appellee's use of the passway in question and of other passways over the uninclosed lands of S. H. Boyd was altogether permissive. Issue is joined in the pleadings on several other points, none of which it is deemed necessary to consider in this opinion, for the case turns upon the question as to whether or not the passway in question had been used adversely by appellee, and those under whom he claims, for more than 15 years before the date upon which it was closed by appellants, and the determination of this question of necessity settles all disputes between the parties to this litigation relative thereto.

Quite a number of witnesses have been introduced on each side in support of their respective claims and contentions. For appellants it is earnestly insisted that, while it is true that appellee and those under whom he claims have for a number of years passed out from his home to the public roads over the lands of appellants, yet this use was merely a permissive right; appellants' lands being during the greater portion of said time uninclosed woodland. The passway used by appellee and the public through this woodland was, from time to time, changed as the timber was cleared away, or the passway in use became obstructed or washed and worn and unfit for further travel. That no passway was recognized as fixed or established for the use of appellee or the public, but that appellants, in order to encourage good fellowship and in a neighborly spirit, permitted appellee and the public to thus pass over their places until 1892, when, the timber having become in a large measure cleared up, they fenced up

their farms, leaving a strip something like 16 feet wide on the line between them from the middle fork of Terrapin creek out to the Pitman road aforesaid. The timber was cleared out of this strip which was left open between the two farms, and from 1892 down to 1904, a period of 12 years, it was used by appellee and others who desired to travel same without objection from appellants. In 1904 appellants fenced up this passway. For appellee it is insisted that he and those under whom he claims and the neighborhood in general have for more than 40 or 50 years used the passway passing along the route above described and extending eastwardly to the Mayfield and Paris public road; that in so doing they sought and received the permission of no one, but used same at pleasure as a matter of right, and that in 1889 appellants, for their own benefit and convenience, established the passway along the line between them each contributing one-half of the ground over which it ran, and fenced same throughout its entire length; that as thus laid out and fenced by appellants it was used by the appellee and the general public for more than 15 years, not by and with the consent of appellants, but as a matter of right. Thus the issue is sharply drawn. Practically all of the witnesses in this case agree that appellee and those under whom he claims and the traveling public, when they so desired, have for a great number of years passed over the lands of appellants in going from the Pitman road to appellee's home, and points on the Mayfield and Paris road beyond. They all practically agree that the roadbed of this passway has at various times changed during the 25 or 30 years prior to 1889. The only sharp conflict between the testimony offered by appellants and that offered by appellee is the testimony as to the date that the passway was removed to and placed upon the line between the lands of appellants; the witnesses for appellants claiming that this was done in 1891, while the witnesses for appellee all claim that it was done in the latter part of 1888 or in the early part of 1889.

There is no question but what there was considerable travel from the Pitman road east over the lands of appellants toward the home of appellee and to points beyond, and that this continued for a great number of years. It is altogether probable, and the decided weight of the testimony supports the theory, that the traveling public in earlier years passed over this land wherever it was most convenient to do so. When their business or interests took them to the north on the Pitman road, they would pass out over appellants' land in that direction, and, when they were going to points south on the Pitman road, they would branch out in that direction, and, as the whole of this land was uninclosed, this general use by the public called forth no objection or remonstrance from the landowners. Later, however, as the land was cleared

and cultivated, it became necessary to confine the travel to a beaten path, and it was, no doubt, for this purpose and for this purpose alone that the passway in question in this litigation was established along the line and fenced on either side. Appellants offer no satisfactory explanation as to why it was fixed in the way that it was, and we are unable to account for their action on any other theory than that it was a recognition on their part that appellee and the public did have a right, prescriptive it is true, to the use of a passway from the middle fork of Terrapin Creek to the Pitman road aforesaid. Upon no other theory can we understand why it was that each of the adjoining landowners should build a fence on his own land, and why each should, in building this fence, move it back seven or eight feet from the boundary line. Had it not been for the purpose of establishing the road upon the division line and confining the travel to it, a fence upon one side only would have answered all conceivable purposes. Nor are we able to understand why, if it was not so fenced for the purpose of establishing the road and confining the travel to the road as so established, that after it was fenced appellants permitted it to be converted into a roadway, and used without objection for a period of at least 12 years as admitted, or 15 years, as claimed in this litigation. It appears from the record that the county court had some years before this litigation by proper orders recognized and established the passway from the middle fork of Terrapin creek east to the Mayfield and Paris road as a public road, and there is no particle of evidence in all of this voluminous record that appellants, or those under whom they claim, during the entire time covered by the evidence in this litigation, ever offered any objection to or made any protest against appellee or those under whom he claims, or the public's use of the passway from the middle fork of Terrapin creek out to the Pitman road. It does seem that if this use, as above described, was merely a permissive right, and was recognized as such by appellants, that during all of the years that it was used they would have done something or said something indicative of this fact. This court has repeatedly held that, where one is given permission to pass over the lands of another, he acquires no rights by reason of any number of years use thereof. *Patterson v. Griffith*, 62 S. W. 884, 23 Ky. Law Rep. 334. But not so in a case where the use was taken or acquired without the consent or the permission of the owner, and in the latter case the unexplained and uninterrupted use of a passway for a great number of years creates the presumption of a grant. *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. 638; *Conyers v. Scott*, 94 Ky. 123, 21 S. W. 530. And, where the right to the passway is claimed by reason of its use for 15 years or more, the burden is upon the person denying this right to establish that it was merely permissive. *Byars v. Rash*, etc.,

100 S. W. 806, 30 Ky. Law Rep. 1153; *Newcome v. Crews*, 98 Ky. 839, 32 S. W. 947. And, after the continued use of a passway for a great number of years, the burden is on the landowner to show that this use was merely permissive. *Burch v. Blair*, 41 S. W. 547, 19 Ky. Law Rep. 641. It is immaterial whether the adverse use of a passway over the land of another is claimed as a matter of right or merely as a matter of convenience. It cannot be denied or disturbed if it has been permitted to run uninterrupted more than 15 years. *Benedict v. Johnson*, 42 S. W. 335, 19 Ky. Law Rep. 937.

Appellants practically admit that if the passway in question had at all times been confined to the same roadbed that appellee would be entitled to hold same, but they earnestly contend that, inasmuch as the roadbed during the 40 or 50 years covered by this litigation was repeatedly altered or changed, that therefore appellee acquired no such right, but in the case of *Johnson v. Clark*, 57 S. W. 474, 22 Ky. Law Rep. 418, this court held that the acquiescence of the owner of the easement in temporary changes in a passway from one route to another for the convenience of the owner of the servient estate does not operate as an abandonment of the original way granted. Hence, the fact that the roadbed was changed at different points on several occasions cannot afford appellants any relief, so long as they admit that during all the period of years covered by this litigation appellee and those under whom he claims continued to pass from the residence of appellee and points east thereof over the lands of appellants to and from the Pitman road; and, inasmuch as these appellants apparently acquiesced for the record evidence does not show that they ever made any objection thereto, the above rule applies here. So likewise in 1889 or 1892, it is immaterial which, the appellants, for their own convenience, changed the road so as to make it run upon the division line between them. Appellee acquiesced in their so doing, and he lost no rights by reason thereof, nor is he estopped because thereof from asserting his claim of right to a passway by reason of its adverse use prior to the date upon which this alteration or change was made. The numerical weight of the testimony is in support of the contention of appellants that this last alteration in the roadbed was made in 1891, but some weight and consideration must be given to the judgment of the chancellor. He was upon the ground, was no doubt acquainted with the witnesses, familiar with the lay of the land, and acquainted with the habits and customs of the people in that locality, and in the possession of such knowledge was certainly qualified to pass judgment upon the weight that should be given to the testimony of the various witnesses upon this question, and hence, viewed in the light of this testimony alone, we are not prepared to say that he was wrong in his conclusion that appellee and those under



whom he claims had held the passway in question adversely for a period of more than fifteen years. And, when we take into consideration the testimony of all of the witnesses that appellee and those under whom he claims had been enjoying an uninterrupted and an unquestioned right to pass over the land of appellants to the Pitman road for a period of at least 25 years prior to the establishment of the passway where it now is, we are convinced that his finding was correct.

After the case was prepared and submitted appellants offered to file an amended answer, in which it was set out that inasmuch as appellant J. V. Boyd now owns the land on both sides of the passway in question, that, if the case should be decided adversely to their contention, appellee should be required to erect and maintain gates over the passway. The trial judge refused to permit this amendment to be filed, and we think correctly so. The issue as made by the pleadings was as to whether or not appellee had acquired a prescriptive right to the use of this passway. The proof had all been taken upon this issue, and to have permitted the amendment to be filed would have necessitated opening up the case and continuing it for preparation upon the question as to whether or not gates should be established. The statute makes ample provision for the establishment of gates on roads and passways, and, if appellants desire to have gates erected across this passway, they should proceed as therein directed. As this question is not before us, we expressly refrain from expressing any opinion on the question as to whether or not he is entitled to erect gates over this passway.

Perceiving no errors in the rulings of the trial judge, the judgment is affirmed.

#### LOUISVILLE BRIDGE CO. et al. v. MORONEY.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

#### RAILROADS—ACCIDENTS AT CROSSINGS—FAILURE TO LOWER GATES—CONTRIBUTORY NEGLIGENCE.

Where defendant railroad failed to lower its gates at a street crossing on the approach of a train, plaintiff, a motorman on a street car was justified in assuming that it was safe to cross, and was not guilty of contributory negligence as a matter of law in not looking to see whether trains were approaching before undertaking to cross, being bound only to exercise ordinary diligence for his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1071-1074.]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division. "Not to be officially reported."

Action by J. M. Moroney against the Louisville Bridge Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

C. H. Gibson and Trabue, Doolan & Cox, for appellants. Caruth, Chatterson & Blitz, for appellee.

BARKER, J. The appellants, the Louisville Bridge Company and the Illinois Central Railroad Company, jointly operate a double-track railroad over Fourteenth street, in Louisville, Ky., running from north to south. The Louisville Railway Company operates a street car line over Walnut street, running east and west. The appellee, J. M. Moroney, was at the time of the accident complained of, and had been for many years theretofore, a motorman in the employ of the Louisville Railway Company. At the time of the accident appellee was operating as motorman a street car propelled along Walnut street, going west. At Fourteenth and Walnut streets the appellants maintain for the protection of the public drop gates, which are opened by a watchman stationed in a tower maintained there. When the car on which appellee was acting as motorman reached the intersection of Fourteenth and Walnut streets, he stopped the car in obedience to a rule of the company by which he was employed. He saw that the railroad gates were open, or raised, and, deeming this sufficient evidence that he could cross Fourteenth street in safety, he started his car across, but, when it was on the track of the railroad company, he found that there were two trains, one going north and in other going south, approaching the intersection of the streets, one of which collided with the street car, knocking it off the track, turning it over, and seriously injuring the motorman. To recover damages for this injury he instituted this action, alleging in his petition that the injury he received was the result of the gross negligence of the employé of the appellants. The defense is rested on the contributory negligence of the appellee.

It is not denied that the gatekeeper or watchman of the appellants knew that a train of cars was approaching the intersection of Fourteenth and Walnut streets; but, thinking that he could go down from the tower and get a bucket of coal which he needed, and return in time to let down the gates, he undertook this errand with the result that the gates were not lowered, and the collision took place as hereinbefore detailed. The appellants do not deny the gross negligence of their agent, the watchman; but, admitting it fully, they say that the plaintiff was guilty of such contributory negligence in not looking himself to see whether trains were approaching before he undertook to cross the railroad track that they were entitled to a peremptory instruction to the jury to find for them at the close of the testimony. In this conclusion we cannot concur. The fact that the railroad corporation maintained the watchman and gates at the intersection of the streets where the accident occurred was an invitation to the public to cross, and an assurance to them that they would be safe in so doing when the gates were open or raised. In the case of *Sights v. Louisville & Nashville Railroad Co.*,

117 Ky. 436, 78 S. W. 172, the following statement of the law as applicable to the question in hand was cited with approval: "And, when gates or a flagman have been maintained by railroad companies at the crossing of streets in cities and towns, the public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties; and it is not negligence on their part to act on the presumption that they will not be exposed to a danger which could only arise from the disregard of his duties, and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine was approaching a crossing, without giving some signal of danger." In the case of *Dick v. Louisville & Nashville Railroad Company*, 64 S. W. 725, 23 Ky. Law Rep. 1068, this court, in reversing a judgment by which a peremptory instruction was given to find in favor of the defendant railroad corporation, where the plaintiff went on the track under circumstances similar to those at bar, said: "The court cannot say as matter of law that because she failed to look and listen for the approaching train before she went onto the track she was guilty of contributory negligence, in view of the fact that appellee was required and did keep a watchman and gates across the street at that crossing, and that it was his duty to let down the gates on the approach of trains. If the gates were up, as appellant's proof tends to show, it might reasonably be concluded by the traveler that there was no danger in crossing. As to whether there was negligence in failing to look for a train when the gates are up is a question that cannot be said as a matter of law to be entirely settled in the affirmative. Different persons, judging from the conduct of the ordinarily prudent person, might differ as to whether this was or not negligence." Both of these opinions were approved in *Louisville & Nashville Railroad Co. v. Wilson*, by, etc., 100 S. W. 802, 80 Ky. Law Rep. 1048, where it was said: "The obvious purpose in raising the gate was to take the gate out of the way of the people so that they could pass over. The raising of the gate was necessarily an invitation to the public to use the crossing, and, as has been well said, it can make no difference that a gatekeeper expresses that the road is safe by opening the gate or by word or gesture. The railroad company is required to maintain the gates for the better security of the public, and they would be not only a mockery, but actually misleading, if the raising of the gates when they are down is not an invitation for the public to pass." These cases settle the question of the right of the defendant to a peremptory instruction, at the close of the plaintiff's testimony, to the jury to find in their favor, adversely to them. The trial court submitted the contributory

negligence of the plaintiff to the jury, and there is no complaint of the instructions on the part of appellants. This is not a suit by the passengers on the street car against the street car company for the negligence of the motorman in running his car on the track of the railroad, whereby they were injured. There is a vast difference in the degree of care which the street car company owes to its passengers and that which the motorman owed to himself. The plaintiff in this case, in his individual capacity, is entirely dissociated from the motorman on the car who was an agent for the railroad company as a common carrier of passengers. Here he represents himself. His rights against the appellants are precisely the same as if he had driven on the track in his own vehicle. The street car company owed to its passengers the highest degree of care for their safety which is usually exercised by persons or corporations in the same line of business; but the plaintiff, so far as he was himself concerned, was only bound to exercise ordinary diligence for his own safety, and this being so, his attitude is the same as were those of the plaintiffs in the cases above cited.

There is no complaint of the amount of the verdict, \$2,500, nor of any other errors than of the failure of the trial court to grant a peremptory instruction in favor of appellant. Judgment affirmed.

#### JACKSON et al. v. McHARGUE et al.

(Court of Appeals of Kentucky. Jan. 9, 1908.)

##### 1. DEDICATION—ACQUIESCENCE IN PUBLIC USE.

Where the owner of a strip of land contracted for the laying of a sidewalk over the same, under a city ordinance requiring the laying of a sidewalk, it amounted to a dedication of the strip.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 20-30.]

##### 2. MUNICIPAL CORPORATION—STREETS—ASSESSMENTS.

Where for over 20 years that portion of a road within the limits of a city had been maintained as a street, and, though it had originally been a county road, the county made no claim to it or attempted to exercise any dominion over it, the part within the city was a city highway, for improvements of which the city might levy special assessments.

##### 3. SAME—ENFORCEMENT OF ASSESSMENTS—ACTION ON WARRANT.

In an action under Ky. St. 1903, § 3706, on a warrant issued to the contractor for a street improvement, the procedure being in rem, it was error to award a personal judgment against the property owner.

Appeal from Circuit Court, Laurel County.  
"Not to be officially reported."

Action by Millie McHargue and others against Jarvis L. Jackson and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Henry C. Hazelwood, for appellants. E. H. Johnson, for appellees.

BARKER, J. London, the county seat of Laurel county, is a city of the sixth class. Jarvis L. Jackson and Mayme F. Jackson (the latter being an infant) are the owners of a lot of land in London fronting on Main street. In this property the mother of the infants, Maggie E. Dyche, owns a dower interest, and her second husband, A. R. Dyche, is the guardian of his step-daughter. The board of trustees of the town of London duly and legally passed an ordinance for the improvement of Main street by making a flagstone sidewalk five feet in width in front of the property owned by the appellants. This ordinance is numbered 104. Afterwards Ordinance No. 104 was amended by Ordinance No. 112; the amendment being to strike out the words "not exceeding a square." With this exception Ordinance No. 112 is in all respects the same as Ordinance No. 104. By the terms of the ordinance it is provided: "That if the owners of said property in said square and along said street, fronting and abutting on Main street as aforesaid, shall fail for thirty days after the passage and publication of this ordinance to enter upon the construction of said walk in good faith, it shall be the duty of the Street Supervisor to advertise by notice printed in a newspaper published in said town, that on a day to be named in said notice, at least ten days from the publication of said notice and up to one o'clock P. M. on the day named, sealed bids will be received by the Street Supervisor for the construction of the aforesaid sidewalk according to plans above set forth." After the passage of this ordinance, the appellants, through A. R. Dyche, contracted with J. N. Russell to do the work in front of their property for the price of 75 cents per lineal foot; and, in pursuance to this contract, Russell proceeded with the work, placing a lot of stone upon the ground, and receiving an advance of \$33 from Dyche. Subsequently Dyche became offended because the grade established by the city engineer was not satisfactory to him, and, in some way not clearly explained in the record, Russell abandoned the contract, hauled off his rock, and paid back to Dyche the money advanced by the latter. And this was all that Dyche ever did toward making the sidewalk. After the expiration of the 30 days, the city authorities advertised the work to be let to the lowest and best bidder; whereupon J. N. Russell made a bid for the contract at the price of \$1 per lineal foot, and this, being the lowest and best bid, was accepted, and a contract made with Russell by the city authorities. Russell proceeded with the work under the new contract, and completed the sidewalk, which was received and accepted by the board of trustees, and thereupon a warrant was issued to the contractor for the sum of \$659; it having been ascertained that the appellants owned 659 feet fronting on the improvement. This warrant the contractor, Russell, sold to Mrs. Millie McHargue, who

instituted this action against the appellants to recover of them the contract price due for the construction of the sidewalk. The petition states in detail all of the necessary steps taken in the matter leading up to the liability of the defendants, and, without reciting these with particularity, we deem it sufficient to say that it states a good cause of action for a recovery upon the apportionment warrant. The answer of the defendants presented several defenses. They denied that the sidewalk was completed in accordance with the contract and the ordinance, or that they owned 659 feet, or more than 627 feet fronting on the improvement; also that J. N. Russell sold or transferred his right, title, or interest to the apportionment warrant to Mrs. Millie McHargue. They then pleaded affirmatively that Main street was not a part of the highway belonging to the city of London, but that it was a part of the old Wilderness road, belonging to the county, and that the city had no right to improve it as a highway. They also pleaded the fact that they, as owners, had entered into a contract with J. N. Russell to make the sidewalk, and that they had not been given a reasonable time in which to complete the work, and that the city was without right or power to advertise for bidders after they, as owners, had undertaken to improve the property themselves; that, under their contract with J. N. Russell, he had obligated himself to construct the sidewalk in accordance with the terms of the ordinance at the price of 75 cents per lineal foot, and they alleged that the subsequent attempt to amend Ordinance No. 104 by Ordinance No. 112, the advertising for bids on the work, and the letting of the same to J. N. Russell at \$1 per lineal foot, was a corrupt scheme enacted for the purpose of defrauding them. They further alleged that Lee B. McHargue was a member of the board of trustees of the city of London, which enacted the ordinance under which the work was done; that he was really the contractor, and Russell was merely his instrument and agent for the purpose of performing a contract which he, as trustee of the city, could not legally perform; and that the sale of the apportionment warrant to Mrs. Millie McHargue was a part and parcel of the fraudulent scheme of her husband, Lee B. McHargue, in securing the benefits of a contract which he as a trustee of the city could not himself complete. The defendants also set up the facts herein recited as to the attempt on their part to construct the sidewalk at the price of 75 cents per lineal foot, and the fact that the city had wrongfully let the work under the amended ordinance at \$1 per lineal foot to J. N. Russell; and this they pleaded as a counterclaim against the city, praying that, if the court should reach the conclusion that they were bound under the apportionment warrant to the assignee of the contractor for one dollar per lineal foot, they should be awarded a judgment on

their counterclaim against the city for the 25 cents per lineal foot which they would be forced to pay by reason of the wrongful acts of the city authorities.

After the issues were completed by appropriate pleading, and the evidence taken, the case was submitted to the chancellor for final adjudication. The chancellor found as a matter of fact that the appellants owned only 648 feet of ground fronting on the improvement, and awarded Mrs. Millie McHargue, the assignee of the contractor, a personal judgment against them for \$648, with interest at the rate of 8 per cent. per annum from the 12th day of March, 1904, until paid; and, to secure the payment of this, it was held that the assignee had a lien on the property of the defendants fronting on the improvement, which was enforced in the judgment. He also held that the work was not constructed in accordance with the contract and ordinance, and was really worth only 75 cents per lineal foot, and he therefore awarded the defendants a judgment over on their counterclaim against the city of London for the 25 cents per lineal foot in excess of the real value of the contract work which they were required to pay by the negligence of the city in failing to supervise the work properly. This counterclaim amounted to \$161.50. From this judgment, the original defendants are here on appeal.

We think the contention of the defendants that Main street, being a part of the old Wilderness road, belongs to the county, and that the city could not legally order its improvement, is not maintainable under the evidence. So much of the road or street as is involved in this litigation has been within the city limits since 1884, during all of which time the city authorities have considered it a public street of the city, and maintained it as such. The county makes no claim to the road; nor has it, within the time mentioned, so far as this record shows, exercised, or attempted to exercise, any act of dominion over it, and we are of the opinion that so much of the road as lies within the corporate limits of the town constitutes a part of its highways over which it may exercise the dominion authorized by its charter. Moreover, it may be said that the sidewalk involved here is the third one that has been laid on this particular strip of ground since 1884.

The defense that the ordinance and contract were void because Lee B. McHargue, one of the trustees of the town, was the real beneficiary under them, is not sustained by the facts. The chancellor found that the evidence did not support this charge; and in his conclusion we concur. The evidence of the defendants on this point, at best, serves only to create a suspicion, but would not authorize the court to reach the conclusion that the trustee had been as false to his duty as is charged in the petition.

The claim of the defendants that the side-

walk, as laid, overlaps a part of their private property, does not seem to be supported by the facts. The evidence shows, as said before, that the sidewalk in question is the third laid on the same strip of ground, and one of the defenses of the appellants is that they had contracted with J. N. Russell, under Ordinance No. 104, to make the pavement which they now claim overlaps their land. This of itself would constitute a dedication of the small strip of ground belonging to the appellants, which it is now claimed was wrongfully taken. There is no doubt that the defendants proceeded in good faith, under Ordinance No. 104, to do the work themselves as authorized by its terms; and there is evidence to support the conclusion of the chancellor that the further prosecution of the work under this contract was abandoned by the defendants, and the contract between them and Russell rescinded. If they had constructed the pavement themselves under the contract between them and Russell, the work would have cost them 75 cents per lineal foot; and this, of course, under their contract, they would have had to pay. Now, assuming that they are right in the position that the chancellor erred in reaching the conclusion that they had abandoned their contract with Russell, still the judgment in its practical outcome (so far as the amount is concerned) gives them precisely what they contend for on this branch of their defense. It is true the contractor is given a judgment for \$1 per lineal foot; but at the same time the defendants are given a judgment over against the city for the excess of 25 cents per lineal foot. So that, upon the whole judgment, the defendants will have paid only 75 cents per lineal foot. This is what they pleaded they had a right to do under their contract with Russell, and therefore they are not injured because the chancellor gave them 25 cents per lineal foot in a way different from what they desired it. It might have been difficult to sustain the chancellor in his conclusion that after the acceptance of the work by the city authorities he had the right, as against the city, to abate the contract price from \$1 per lineal foot to 75 cents per lineal foot, and give judgment over against the city for the excess (Eversole v. Walsh, 76 S. W. 358, 25 Ky. Law Rep. 784; Mudge, etc., v. Walker, &c., 90 S. W. 1046, 28 Ky. Law Rep. 996); but of this the municipality is not complaining, and therefore, as we have said before, the defendants will have paid upon the whole judgment only 75 cents per lineal foot, and this they contracted to do.

We are of opinion that Ordinance No. 112 was merely amendatory of Ordinance No. 104, and that the work involved in this litigation was done under the original ordinance. The amendment made by No. 112 was, so far as this case is concerned, immaterial, and it may for all practical purposes be considered as void without any change

being made in the rights of the parties under Ordinance No. 104. But the court erred in awarding a personal judgment against the defendants. This procedure is under section 8708, Ky. St. 1903, and, being strictly in rem, it was error to award a personal judgment against the defendants for the improvement of the highway in question. *Meyer v. City of Covington*, 103 Ky. 546, 45 S. W. 769; *Woodward v. Collett*, 48 S. W. 164, 20 Ky. Law Rep. 1066.

For this reason alone, the judgment is reversed, with directions to the trial court to set aside so much of the judgment as awards a personal judgment against the appellants.

#### DEVOU v. PENCE et al.

(Court of Appeals of Kentucky. Jan. 21, 1908.)

##### 1. INJUNCTION—"IRREPARABLE INJURY."

An "irreparable injury" is one for which the complainant cannot be adequately compensated in damages, or where there is no pecuniary standard for measuring the damages, either because the inadequacy of damages as compensation is due to the nature of the injury itself, the nature of the right or property injured, or the want of responsibility of the person committing the injury.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3772-3774.]

##### 2. SAME—TRESPASS—IRREPARABLE INJURY.

Where a drain costing nearly \$2,700, constructed under a turnpike, was a public necessity to preserve the pike, and discharged surface water onto complainant's property of slight market value, part of which was in a ravine which would have received a large part of the water in the course of nature, and the damages to such property could be ascertained and awarded on the theory of a permanent injury, defendants being fully responsible, complainant had not sustained an irreparable injury, and was not, therefore, entitled to an injunction restraining the maintenance of the drain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 14.]

##### 3. SAME.

Equity will not restrain a trespass, unless it is accompanied by such peculiar circumstances as will make the injury irreparable at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 98.]

Appeal from Circuit Court, Kenton County.  
"Not to be officially reported."

Suit by Sarah O. Devou against James L. Pence and others. From a decree dismissing the petition, plaintiff appeals. Affirmed.

Herbert Jackson, for appellant. F. M. Tracy, for appellees.

LASSING, J. The Amsterdam pike is a public highway in Kenton county running along near the foot or base of what is known as "Light's Hill" and connecting with Montague street. The drainage of surface water from Light's Hill is heavy, and frequently the surface water would flood said pike to such extent as to wash away the macadam and parts of the roadbed. In order to prevent this, the fiscal court of Kenton county

ordered a sewer pipe laid along said pike from a point some 450 feet above its intersection with Montague street, and thence under said street where it emptied into and upon the property of appellant. The contract for this work was let to appellee Pence on December 7, 1905, and appellant was notified that the work was to be done. Work was commenced on February 13, 1906, and appellant was again notified of this fact. On March 22, 1906, she filed suit in the Kenton circuit court, seeking to enjoin the county and contractor from completing this sewer, upon the ground that it would cause a large and unnatural flow of water over her land, and would thereby do her a great and irreparable injury. Issue was joined on the material allegations of the petition. By the proof heard on this motion it was developed that the county had already spent some \$2,000 or more in the prosecution of this work. The application for a temporary restraining order was denied, and the sewer was completed while the case was being prepared for trial. The total cost of the sewer was something like \$2,700. Upon final hearing the trial judge refused to grant the injunction and dismissed plaintiff's petition.

No part of this sewer is laid on appellant's land. The only element of damage set forth in the petition is that by reason of its construction it will cause a heavy and unnatural flow of water over her land, and that residents living along the line of this sewer will tap the pipe and discharge the drainage and waste water and matter from their respective homes through this sewer upon her land, and thereby do her a great and irreparable injury. These allegations are denied by appellees, and there is no proof in the record tending to support the allegations of the petition, other than that by reason of the construction of this sewer a considerable flow of water would be, during the rainy season, thrown upon and over appellant's land. A deep ravine runs through appellant's property almost parallel with Montague street, and the water which would be collected from the hillside and discharged through this sewer pipe upon appellant's property would pass down the hill and into this ravine. A considerable part of the water which would be discharged upon her property through the sewer pipe would, even if there was no pipe, find its natural outlet over her property to the ravine running through it. It is a well-settled rule that equity will interfere by injunction where irreparable injury is threatened; but it is equally well settled that the threatened injury must be substantial in its character in order to warrant the court to grant an injunction. Equity will not interpose where the complainant's injury is merely nominal or theoretical. An irreparable injury is one for which the complainant cannot be adequately compensated in damages, or where there is no pecuniary standard for the measurement of the damages. The inad-

equacy of damages as a compensation may be due to the nature of the injury itself, or to the nature of the right or property injured, or may be due to the insolvency or want of responsibility of the person committing it; but, where compensation in money would be adequate, the injury cannot be said to be irreparable. 22 Cyc. 764.

It appears from the pleading in this case that appellant's property has a frontage of some 79 feet on Lewis street, and extends thence up a hillside about 300 feet. Of this 79 feet fronting on Lewis street, some 30 or more feet are in the ravine, and the balance of this property is a rough hillside. A decided majority of the witnesses testified that this property has but slight market value, and none of them say that the ravine itself has any market value. Considered in the light of the testimony offered by appellant's witnesses alone, the damage complained of would necessarily be small. The construction of the sewer drain along the Amsterdam pike is shown to have been an absolute public necessity. Some means had to be provided for carrying off the surface water, or else the pike had to be abandoned. Being a public necessity, and having cost in the neighborhood of \$2,700, we are of opinion that under the rule laid down in the case of *L. & N. R. Company v. Smith*, 78 S. W. 160, 25 Ky. Law Rep. 1459, wherein this court said: "Where the benefit secured by the party applying for an injunction would be small, and it would operate oppressively to the other party and to the public, unless the wrong complained of was wanton and unprovoked, an injunction will not be granted to restrain it"—the trial court was warranted in refusing to grant the injunction. Besides the injury or damage which will result to appellant can be easily ascertained, as the property is real estate. The value of this real estate before the construction of this sewer and its value since the construction of it can be as easily ascertained as can be any other damage to real estate. Nor is this such an injury

as would require a multiplicity of suits. This sewer by its construction will necessarily empty all of the water which passes through it upon appellant's property, and the damage to her property is therefore of a permanent nature and is easily ascertainable. As the injury to appellant's property is not an irreparable one, but one for which the damages can be ascertained, and appellees are solvent, she was not entitled to the relief sought. In *Hillman v. Hurley*, 82 Ky. 628, this court, in a thorough and exhaustive review of the authorities upon the question of injunction, thus states the law: "An injunction to restrain a trespass will not ordinarily be granted, if the threatened trespass will destroy the very substance of the estate in the character in which it has been enjoyed, or if so permanent and continuous that it can never be said to be complete, so that the injury can be computed, or if the injury cannot be estimated in money, or if so vexatiously persisted in that a multiplicity of suits must result, or if committed by one who is insolvent and against whom a verdict will be valueless." In the case of *Barker v. Warner*, 6 Ky. Law Rep. 86, this court said: "It is true equity will sometimes enjoin a trespass, but such is not the general rule. \* \* \* In order to authorize the chancellor to interfere, it must be accompanied by such peculiar circumstances as will make the injury irreparable at law."

The injury complained of in this case is a trespass, and, measured by the rule laid down by this court in the case of *Hillman v. Hurley*, it is not such a one as would warrant the granting of an injunction. As before stated, at the time this case was heard in the lower court the sewer had been completed. It was shown to be an absolute public necessity, and that appellant's damage is slight and easily ascertainable. Being of opinion that the trial court was warranted in refusing to grant the injunction, we deem it unnecessary to consider the other questions raised by counsel in their brief upon this appeal. Judgment affirmed.

**THOS. LONERGAN & CO. et al. v. SAN ANTONIO LOAN & TRUST CO. et al.**

(Supreme Court of Texas. Jan. 15, 1908.)

On motion for rehearing. Overruled.

For former opinion, see 104 S. W. 1061.

**BROWN, J.** The judgment in this case will be corrected, by interlineation, so as to affirm the judgment of the Court of Civil Appeals as between John W. Rapp and Thos. Lonergan and Thos. Lonergan & Co., and affirm the judgments of the district court and Court of Civil Appeals as between John W. Rapp and the San Antonio Loan & Trust Company; and said judgment will be corrected, by interlineation, so as to award the costs as between them in favor of John W. Rapp against Thos. Lonergan and Thos. Lonergan & Co., and also to award the costs as between them in favor of the San Antonio Loan & Trust Company against the said John W. Rapp; and the opinion of this court will be corrected, by erasing the words "of the trial court and," so that the opinion will read, "and the judgment of the Court of Civil Appeals as between Rapp and the original contractor, and also between Rapp and the trust company, is affirmed."

The motion for rehearing is overruled.

**MOORE et al. v. HANSCOM et al.**

(Supreme Court of Texas. Jan. 22, 1908.)

**1. BANKS AND BANKING—DEPOSITS—TRUST FUNDS—GUARDIAN AND WARD.**

Money, deposited in a bank by a guardian to his credit as guardian, is the property of the ward, and the bank cannot apply it to the payment of any order made by the guardian in any other character than that of guardian, nor can it apply the money to the payment of any debt from the guardian personally to it or to any other person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 313-320.]

**2. INSANE PERSONS—POWERS OF GUARDIAN—MANAGEMENT OF ESTATE.**

Where a guardian of an insane person deposited money in a bank to his credit as guardian, and placed the certificate of deposit in the hands of sureties, to be preserved for the estate so long as they remained sureties, the money was in possession of the estate, and the county court might, under Rev. St. 1895, arts. 2640-2644, direct the disposition thereof by the guardian, and he had no authority to make any investment thereof, except by the direction of the court.

**3. SAME—LIABILITY ON BONDS—DISCHARGE OF SURETY.**

Where a guardian of an insane person, after misapplying the funds of the ward, made complete restitution by borrowing money and depositing the same in a bank to his credit as guardian, his bond was satisfied, and an order of the county court discharging the surety terminated its liability for the fund, though the guardian intended to obtain possession thereof and again misapply it.

**4. JUDGMENT—COLLATERAL ATTACK—PRESUMPTIONS.**

Where the record of the county court does not negative the existence of facts authorizing the court to make an order, the law conclusively

presumes that facts essential to warrant the order were established by evidence, and in a collateral attack evidence of matters outside the record to the contrary will not be received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933-934.]

**5. SAME—BURDEN OF PROOF—ORDER DISCHARGING SURETIES ON GUARDIAN'S BOND.**

In a collateral attack on an order of the county court discharging sureties on a guardian's bond, the burden does not rest on the sureties to prove the existence of facts sustaining the order, but it rests on the guardian's successor and a subsequent surety seeking to hold the sureties liable to prove by the record in the case that the facts essential to sustain the order do not exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933-934.]

**6. INSANE PERSONS—GUARDIAN—BONDS—DISCHARGE OF SURETIES—RENEWAL BONDS.**

Under Rev. St. 1895, art. 1949, empowering the county court to require a guardian of an insane person to give a new bond when the sureties petition the court to be discharged from future liability, an order of the court requiring a new bond and discharging the sureties of an existing bond on the oral application of the sureties is not void, though it is an error of law for the court to act on such application.

**7. JUDGMENT—COLLATERAL ATTACK—PRESUMPTIONS.**

Where the record of the county court in proceedings resulting in an order requiring a guardian to execute a new bond and discharging the sureties on his existing bond shows that the judge may have considered the existing bond defective, though in fact it was correct in form, or the sureties in the existing bond may have applied to the court for their discharge, the law presumes that one or more of the facts enumerated in Rev. St. art. 1949, authorizing the court to discharge sureties on guardians' bond and require a new bond, exist to sustain the order as against a collateral attack, and as against such attack the sureties are discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933-934.]

Error from Court of Civil Appeals, of Fourth Supreme Judicial District.

Action by S. S. Hanscom, guardian of the estate of Menard James, against Jennie B. Compton, executrix of A. J. Compton, deceased, and others, in which W. L. Hanscom was substituted as plaintiff on S. S. Hanscom's death. There was a judgment of the Court of Civil Appeals (103 S. W. 665) affirming in part and reversing in part a judgment for plaintiff, and defendants C. H. Moore and others bring error. Affirmed in part, and reversed in part.

Harris & Harris, Kleberg, Davidson & Neethe, Hunt, Myer & Townes, Jas. B. & Chas. J. Stubbs, and Wheeler & Clough, for plaintiffs in error. Clay S. Briggs, Jno. W. Campbell, and Maco & Minor Stewart, for defendants in error.

**BROWN, J.** On March 21, 1901, A. J. Compton was appointed guardian of Menard James, a person of unsound mind, and his bond fixed at the sum of \$20,000 by the county court. He gave the bond with the American Surety Company as his surety. The court approved the bond, and Compton took the oath required by law, returned an inven-

tory, and received his letters of guardianship. Subsequently Compton returned another inventory into court, which showed that the property of the estate was worth \$38,056.83. The probate court of Galveston county entered the following order: "In the Matter of the Estate of Menard James, Non Compos. October 21, 1902. A. J. Compton, guardian of said estate, having filed herein a duly approved and conditioned bond in the sum of \$76,118.66, in lieu of the bond heretofore filed by him, it is ordered by the court that the bondsmen on his previous bond herein filed be and they are hereby discharged and relieved from all further liability herein, and the clerk will record the bond herein filed this day in the minutes of the court." The bond, mentioned in the order above copied, was executed by Compton as guardian, and C. H. Moore and M. Marx as his sureties. On February 20, 1903, Compton applied to the court to reduce the bond for various reasons, none of which are embraced in the statute, and the court made this order: "In the Matter of the Estate of Menard James, Non Compos. March 3, 1903. Whereas the amount of bond required of A. J. Compton, as guardian of said estate, having been by an order of the court duly made and entered herein on the 20th day of February, 1903, reduced to and fixed at the sum of \$30,000, and said A. J. Compton having on this 3d day of March, 1903, presented to the judge of this court his bond as such guardian, made in pursuance of said order in said sum of \$30,000 with the United States Fidelity & Guaranty Company of Baltimore, Md., as surety, which said bond has been duly approved by said judge and filed by the clerk of this court: Now, therefore, on this, the 3d day of March, 1903, it is ordered, adjudged, and decreed by the court that C. H. Moore and M. Marx, the sureties on the bond of said A. J. Compton, as guardian of said estate, in the sum of \$76,118.66, filed herein on the 21st day of October, 1902, be and they are hereby fully and completely discharged from all liability as such sureties henceforth." On April 23, 1904, Compton reported cash on hand \$11,718.91. Compton died, and the county court of Galveston county directed S. S. Hanscom, the then guardian of the estate of James, to institute suit against Compton's executrix and all of his sureties on the three bonds.

We condense the statement made by the Court of Civil Appeals as follows: Compton having appropriated to his own use the cash on hand, he borrowed money from his brother and from Adoue & Lobit, bankers in Galveston, and before the bond was executed made a deposit with Adoue & Lobit in the sum of \$11,913.83, which was the full amount of the cash due by him to the estate. The bankers issued to Compton a certificate of deposit, as guardian, which certificate, with some gas stock and wharf stock which belonged to the estate, he deposited with C. H.

Moore and M. Marx, who became sureties on his second bond. After the deposit was made the sureties held the certificate of deposit, and the money remained in bank to the credit of Compton, as guardian, until the third bond was given and approved. Adoue & Lobit were solvent bankers, and the certificate of deposit would have been paid by them at any time. After the third bond was given Compton misappropriated the cash on hand, and died without making restitution of the same. Hanscom, in pursuance of the decree of the county court, instituted suit in the district court of Galveston county against Mrs. Jennie B. Compton, independent executrix of A. J. Compton, deceased, the American Surety Company of New York, C. H. Moore and M. Marx and the United States Fidelity & Guaranty Company, the sureties upon the three several bonds. At the trial the honorable district judge instructed the jury to return a verdict in favor of the plaintiff against all of the defendants, which was accordingly done, and the court entered a judgment in favor of the plaintiff against the independent executrix and against each and all of the sureties, with a provision that the American Surety Company would ultimately be liable for the whole amount, and that C. H. Moore and M. Marx and the Fidelity & Guaranty Company should be equally liable as between themselves. Upon appeal the Court of Civil Appeals affirmed the judgment as to the executrix, and reversed it as to the other parties, rendering judgment in favor of the American Surety Company that the plaintiff take nothing by his suit, and that the said Surety Company recover all costs expended, etc.; "that as to C. H. Moore and M. Marx and the United States Fidelity & Guaranty Company the guardian have judgment for \$11,839.85, with interest at the rate of 6 per cent. per annum from February 18, 1905, and for all costs occasioned by them in this court and the lower court."

When Compton deposited in the bank of Adoue & Lobit the sum of money due to the estate of Menard James, and the money was entered to the credit of A. J. Compton, guardian, the fund so deposited became the money and property of the ward's estate. *Anderson v. Walker*, 98 Tex. 119, 53 S. W. 821; *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423. Lobit testified that the bank would have paid the money on presentation of the certificate of deposit by Compton, or by any person holding it with Compton's indorsement on it. Adoue & Lobit were notified by the fact that Compton made the deposit as guardian that the money belonged to the estate of the ward, and they could not lawfully pay it to any person except by Compton's order, and then only for the uses of the estate; that is, they could not have knowingly applied the money in their hands to the payment of any order made by Compton in any other character than that of guardian, nor could they have



applied the money to the payment of any debt due from Compton personally to them, or to any other person. The fact that the certificate of deposit, with the stocks mentioned, were placed in the hands of Moore & Marx to be preserved for the estate, so long as they were upon the bond, did not affect the title of the estate to the money, but, on the contrary, evinces a purpose to preserve it for the benefit of the estate, and, in their hands as such securities, the money was in law in the possession of the estate and belonged to the estate. *Johnson v. Jones* (Ky.) 68 S. W. 14. If any arrangement to the contrary had been made between Moore and Marx and Compton, it could not have affected the title of the estate, nor could it in any way have interfered with the power of the county court, in which the estate was being administered, in the disposition of the said money. The money being in the bank under the circumstances named, the county court had the authority to direct the disposition of it by the guardian, but the guardian had no legal authority to make any loan or investment of the money except by the direction of the county court. Rev. St. 1895, arts. 2840-2844. Complete restitution of the misapplied funds having been made by Compton, the bond upon which the American Surety Company of New York was surety was satisfied, and the order by which the said surety was discharged from the further obligation terminated its liability for that fund. If it be true that Compton intended to get possession of the fund and again to misapply it, such evil purpose could not affect the discharged surety. There can be no question that the county court had jurisdiction of the subject-matter and of the parties when it made the adjudication by which the American Surety Company was discharged from its liability upon the bond, and the Court of Civil Appeals correctly rendered judgment in favor of said American Surety Company of New York. When the third bond was given by Compton, as guardian of James, all of the money which belonged to the estate was in the hands of the bankers, Adoue & Lobit, and, together with the shares of stock, were by the said bankers delivered to Compton, and thereby the order of the county court which discharged Moore and Marx from further liability upon the second bond became effective, and the said Moore and Marx cannot be held liable for any subsequent misapplication of the funds by Compton, unless the contention of the plaintiffs and of the Fidelity & Guaranty Company be sustained, to the effect that the order discharging Moore and Marx was void. This is the next question to be decided.

The law applicable to collateral attacks upon judgments, like the one under consideration, is clearly and forcibly expressed by Mr. Justice Denman in the case of *Templeton v. Ferguson*, 89 Tex. 57, 33 S. W. 329, in this

language: "In such cases it may be considered the settled rule that, if the record of the cause in which such judgments were rendered does not negative the existence of the facts authorizing the court to make the particular order, the law conclusively presumes that such facts were established by the evidence before the court when such orders or judgments were rendered, and evidence of matters dehors the record to the contrary will not be received." *Martin v. Robinson*, 67 Tex. 379, 3 S. W. 550; *Bouldin v. Miller*, 87 Tex. 366, 28 S. W. 940. In *Martin v. Robinson*, above cited, Judge Stayton said: "The rule suggested in this respect in some of the cases would be the rule in a proceeding appellate in character, if the cause be tried *de novo*; but it seems to us that no such rule can exist when the validity of an administration granted by a decree of a court of record having general jurisdiction is sought to be attacked or held for naught in a collateral proceeding, for if it would be possible to prove facts sufficient to sustain the administration it must be presumed, on such attack, that these very facts were proved before administration was granted. We understand the rule to be, when the judgment or decree of such a court is collaterally called in question, that it must be deemed valid, unless it appears that no facts could have been shown which would render it so." Article 1949, Rev. St. 1895, is in this language: "An executor or administrator may be required to give a new bond in the following cases: (1) When the sureties upon the bond or any one of them shall die, remove beyond the limits of the state, or become insolvent. (2) When in the opinion of the county judge the sureties upon any such bond are insufficient. (3) When in the opinion of the county judge any such bond is defective. (4) When the amount of any such bond is insufficient. (5) When the sureties or any one of them petition the court to be discharged from future liability upon such bond. (6) When the bond and the record thereof have been lost or destroyed."

It will be seen that a broad discretion is given to the judge of the county court over the subject of demanding or permitting new bonds to be given by the guardian or administrator. The county judge in the case now before us was authorized to take the bond in question if any one of the conditions named in article 1949 existed at the time. For instance, if in the opinion of the county judge the sureties upon the second bond were insufficient, or if, in his opinion, the bond was in any wise defective, or if the sureties or any one of them petitioned the county judge to be discharged from liability on the bond, the order would be sustained. The burden did not rest upon Moore and Marx to prove the existence of the facts, which under the statute would sustain the order, but it rested upon the plaintiffs Hanscom and the Fidelity & Guaranty Company to prove that they did not exist by something which appears of record in

the case. In *Bouldin v. Miller*, above cited, the question was upon the validity of an order by the probate court for sale of land by a guardian, and it did not appear in the record that the required notice had been given, and it was contended that there was not sufficient time in which notice could have been given. Mr. Justice Denman said: "The law, in the absence of proof, presumes that all jurisdictional facts existed. If notice was a jurisdictional fact, the defendant, relying upon the judgment, was not called upon to establish such notice, nor to show the order of sale to have been entered at such a time as to make notice possible, but the burden was upon plaintiffs to establish the fact that notice was not given. We, therefore, conclude that the probate proceedings, aided by the legal presumptions above discussed, were not void, but were sufficient to pass the title of plaintiffs to the purchaser at the guardian's sale." It may have been that Moore and Marx joined with Compton, the guardian, in the request to the court to take a new bond, and if it be a fact that no application was made in writing, still it would have been an error of law for the court to have acted upon the application of the sureties, made orally, but would not render the order void. So far as the record shows the judge who made the order may have considered the bond defective, although in fact it may have been perfectly correct in its forms and provisions, which would have been an error that would not render the order invalid. In the condition of this record the law will presume that one or more of the facts enumerated in the statute did exist in order to sustain the action of the court, which had jurisdiction both of the subject-matter and of the parties concerned therein.

Upon giving the third bond Moore and Marx were discharged from liability for any future misapplication of the funds by Compton, and the full restitution of the money which had been misapplied under the first bond discharged the American Surety Company of New York from liability on that bond. It, therefore, follows that the ultimate and sole liability in this transaction devolved upon the Fidelity & Guaranty Company of Baltimore under the third bond. It is therefore ordered that the judgment of the Court of Civil Appeals in favor of the American Surety Company of New York be, and the same is hereby, affirmed. It is further ordered that the judgment of the said Court of Civil Appeals as to the liability of Moore and Marx and of the United States Fidelity & Guaranty Company of Baltimore, Md., be, and the same is hereby, reversed, and this court now here proceeds to render such judgment as should have been rendered by the said courts as follows: It is ordered that the plaintiff Hanscom take nothing as against Moore and Marx, who shall go hence without day, and recover of the plaintiff Hanscom all of their costs in all of the courts. It is also ordered that

judgment be here entered in favor of W. L. Hanscom, plaintiff, against the United States Fidelity & Guaranty Company of Baltimore, Md., as surety upon the bond of A. J. Compton, guardian, and that the said W. L. Hanscom recover all costs in all of the courts as between him and the said last-named company.

## PARIS & G. N. RY. CO. v. CALVIN.

(Supreme Court of Texas. Jan. 22, 1908.)

### 1. RAILROADS — FRIGHTENING ANIMALS — BLOWING WHISTLE—QUESTION FOR JURY.

Where the evidence as to the loud blowing of a whistle on defendant's engine, which was claimed to have frightened plaintiff's horse and caused the injury in question, was conflicting, the issue was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1368.]

### 2. TRIAL — INSTRUCTIONS — REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Where, in an action against a railroad for causing plaintiff's injury by the alleged loud blowing of the whistle of an engine which frightened plaintiff's horse, the court charged that, if the injuries were not caused by negligence on the part of defendant, to find for defendant, such instruction covered a request that, if plaintiff's horse became frightened at the ordinary noise made by defendant's engine in approaching the crossing, the finding should be for defendant, which instruction was also objectionable as ignoring the fact that an unusual and unnecessary blast of the whistle may have been given, and may have co-operated in causing the horse's fright.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Callie Calvin, by next friend, etc., against the Paris & Great Northern Railway Company. From a judgment for plaintiff, affirmed by the Court of Civil Appeals (103 S. W. 428), defendant brings error. Affirmed.

Edgar Wright, C. H. Yoakum, and L. F. Parker, for plaintiff in error. Fagan & Hathaway and J. G. McGrady, for defendant in error.

**BROWN, J.** By her father as next friend, Callie Calvin, a minor, instituted this suit against the Paris & Great Northern Railway Company in the district court of Lamar county to recover damages for personal injuries alleged to have been inflicted upon her at the crossing of a public street in the city of Paris through the negligence of the employees of the railway company engaged in operating a train of cars upon its track, and through such negligence causing a horse which was being driven by Callie Calvin and her sister to run into the train at said crossing, whereby she received the injuries alleged. At the trial before a jury plaintiff recovered a judgment which was affirmed by the Court of Civil Appeals. 103 S. W. 428. The Court of Civil Appeals states the facts

found by them as follows: "The evidence shows that on the morning of July 2, 1904, Callie Calvin and her sister, Lillie, aged, respectively, 18 and 11 years, were driving in a buggy with an old, gentle horse, partially blind, along Shiloh street, in the city of Paris, and, when approaching the railroad crossing on said street, and within 30 or 40 yards of said crossing, they saw one of appellant's trains coming from the north about 80 or 90 yards away, and stopped the horse to let the train pass. The horse threw down its head to eat grass. When the train reached the crossing, it gave a loud, keen whistle which frightened the horse, and caused it to run into the train, killing the horse and seriously injuring the two girls. The train did not give the statutory signals for the crossing." The judge of the district court submitted this case to the jury on the question of negligence of the defendant's employees who were engaged in operating the train at the time in unnecessarily causing the locomotive to give an unusual and loud blast or whistle when it was crossing Shiloh street, in the city of Paris, near which plaintiff and her sister were sitting in a buggy, waiting for the train to pass, in order that they might cross over the railroad track. It is unnecessary for us to determine whether it was the duty of those operating the train to keep a lookout at such a place for persons who might be near the crossing of the railroad track, because the engineer and the fireman both testified that they were keeping such lookout at the time for the purpose of discovering persons who might be crossing the said railroad track at that place, and the fireman testified that he did see the plaintiff and her sister sitting in the buggy near the track. Both testified that there was no loud blast or whistle nor any unusual noise at the time the train crossed Shiloh street, but there was evidence to the contrary which justified the court in submitting the issue to the jury. The charge complained of was justified by the evidence of the fireman and the engineer.

The plaintiff in error has presented many assignments of error, but we do not deem it necessary to discuss them in detail. The plaintiff in error asked of the court the following charge: "Should you believe from the evidence that the horse drawing the buggy in which plaintiff was at the time of the accident became frightened at the ordinary noise made by defendant's train in approaching the said crossing and caused the injury to the plaintiff, you are instructed to return a verdict for the defendant." The charge ignores the fact that an unusual and unnecessary blast of the whistle may have been given and may have co-operated in causing the fright. In the main charge the court instructed the jury as follows: "(4) The court further instructs you that if you believe from the evidence that the injuries, if any, received by the plaintiff were not caused

by negligence as herein defined on the part of the defendant, its servants, or employees, \* \* \* then you will find for the defendant." This charge was more definite with regard to the facts which were actually submitted to the jury than the one requested, and we are of opinion that it rendered the special charge unnecessary. We have carefully examined all of the assignments, and we find no reversible error in the proceedings of the trial court.

The judgments of the district court and Court of Civil Appeals are therefore affirmed.

#### OWENS v. CAGE & CROW et al.

(Supreme Court of Texas. Jan. 22, 1908.)

##### 1. JUDGMENT—ACTION TO VACATE—JURISDICTION OF PARTIES—APPEARANCE.

Where, in an action to vacate a judgment and cancel certain deeds and vendor's lien notes forming the basis thereof, the evidence showed that, in the action in which such judgment was rendered, plaintiff was not served with process, but that an answer was filed for her therein by an attorney, as she claimed, without authority, and, though the judgment recited her appearance and adjudged a foreclosure as against both her and her husband, the evidence was conflicting as to whether she actually appeared and participated in the trial, the court erred in charging as matter of law that she was not a party to such former action, and that the judgment against her was void.

##### 2. APPEARANCE—WHAT CONSTITUTES—ANSWER BY ATTORNEY.

Where, in an action against a husband, his wife was not served, and the answer pleaded a defense to the notes sued on, prayed relief on behalf of both the husband and wife, and was signed by an attorney for both, such answer, though informal, if authorized by her, was sufficient to make her a party to the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Appearance, §§ 23-41.]

##### 3. JUDGMENT—EQUITABLE RELIEF—GROUNDS—UNAUTHORIZED APPEARANCE BY ATTORNEY.

Where an attorney answered for both husband and wife, though the wife was not served, and judgment was rendered against both, the wife was entitled, in an action to set aside the judgment, to show that she did not authorize the filing of the answer, and did not become a party to the litigation, and have the judgment set aside in so far as she was able to sustain a defense against it as affecting her homestead and separate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 794.]

##### 4. WRIT OF ERROR—DECISIONS REVIEWABLE—INTERMEDIATE COURT—REVERSAL.

An application for a writ of error to review a decision of the Court of Civil Appeals may be granted, though the decision reversed the judgment and remanded the cause, where it practically settled the case, so that on retrial the court would be bound to render judgment against the applicant for the writ.

##### 5. JUDGMENT—EQUITABLE RELIEF—OTHER REMEDY.

Where, in an action against a husband, his wife was not named as a party, and was not served with process, but judgment reciting her appearance was rendered, foreclosing a vendor's lien on certain property against both husband and wife, she was not required before bringing suit to vacate the judgment, alleging that she had not authorized any appearance in the action, to move for a new trial or to appeal from the

judgment, though she had knowledge thereof in time to have done so, as would have been necessary had she been properly made a party to the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 768-771.]

**6. APPEAL — RECORD — CONTRADICTION — RE-HEARING.**

Where the record on appeal to the Court of Civil Appeals showed jurisdiction, and an order purporting to have been entered by the district court of the proper county overruling a motion for a new trial, and reciting the giving of the notice of appeal in open court, appellee could not contradict the record for the first time on motion for rehearing, by affidavits showing that the notice of appeal was not so given, and that the order overruling the motion for a new trial was made in another county than that in which the trial was had, by a special judge.

**Error from Court of Civil Appeals of Second Supreme Judicial District.**

Action by Mrs. V. C. Owens against Cage & Crow and others. Judgment for plaintiff was reversed by the Court of Civil Appeals (108 S. W. 1191), and plaintiff brings error. Reversed and remanded.

Riddle & Keith, for plaintiff in error.  
Marshall Ferguson and Theodore Mack, for defendants in error.

**WILLIAMS, J.** This writ of error was granted upon the allegation in the application that the judgment of the Court of Civil Appeals reversing the judgment of the district court and remanding the cause for a new trial practically settled the controversy. The action was brought by Mrs. Owens to enjoin a sale of land, alleged to be her separate property, and the homestead of herself and her husband, R. T. Owens, under a judgment of the district court of Erath county against R. T. Owens for money and foreclosing a vendor's lien on the land as against both him and his wife. Mrs. Owens based the present action to enjoin the sale and to vacate the former judgment upon allegations that she had never been made a party to the former suit, and had never appeared nor authorized any one to enter an appearance for her therein. She also set up facts sufficient, if true, to show that the land was not subject to the lien which had been adjudged against her. It appeared upon the trial of the present case from the record of the former suit that Cage & Crow sued R. T. Owens alone to recover upon promissory notes alleged to have been given by him for the purchase money of the land; that an answer was filed beginning, "Now comes the defendant, R. T. Owens," and setting up some of the facts now relied on by Mrs. Owens to defeat the alleged lien. In this answer it was alleged that the land in question had formerly belonged to Mrs. Owens as her separate property; that under duress Owens and wife had executed a deed, apparently conveying it to one Edwards absolutely, but on an agreement that Edwards was to hold it only as security for an indebtedness of Owens to other persons, which Edwards, as their agent, was en-

deavoring to collect or secure; that in violation of his agreement Edwards had executed a deed for the land to one Oxford, who conveyed it to Owens, taking the notes sued on ostensibly for the purchase money. The answer set up these facts as a defense against the notes and the alleged lien, and asked that the prayer for relief "be heard in his and his wife's behalf." It was signed by the attorney as "Atty. for R. T. Owens and wife." The judgment recited the appearance of the plaintiffs and of the defendants, R. T. Owens and his wife, V. C. Owens, a trial by jury, and a verdict against Owens for the amount of the notes, and against him and Mrs. Owens for the foreclosure, and adjudged the debt against Owens and the foreclosure against both him and Mrs. Owens. In addition to these facts, appearing from the record of the former suit in the trial of the present action, evidence was introduced tending to show that Mrs. Owens actually appeared and participated as a defendant in the former trial, and was represented therein by counsel. As to this there was a conflict of evidence. We think the Court of Civil Appeals correctly held that the trial court erred in instructing the jury, as matter of law, that Mrs. Owens was not a party to the former action, and that the judgment against her was void.

The answer which we have stated, if authorized by her, was sufficient, although very informal and defective in this respect, to make her a party. The judgment shows that it was so held and treated by the court which tried that case. Had verdict and judgment gone for her, upon that record, we think there can be no doubt that it would have concluded the plaintiffs therein in her favor; and if that record were all, we think it equally clear that it would conclude her, not only as to the defenses set up, but as to all that might have been set up against the alleged lien. It is nevertheless permissible for her in this action to show that she did not authorize the filing of the answer, and did not become a party to that litigation. If she can show this, and establish her defense against the lien set up by Cage & Crow upon her homestead and separate property, she will be entitled to equitable relief. The Court of Civil Appeals also held that, although it should be found that she never appeared and answered, or authorized any one to appear and answer for her, she yet would not be entitled to have the decree against her vacated, if she knew of its existence in time to have moved for a new trial, or to appeal, and if those steps would have availed her. It is this part of the decision which is alleged in the application for writ of error to have practically settled the case, should it be allowed to stand, and to give this court jurisdiction, although the cause was remanded. It is conceded that Mrs. Owens did know of the judgment in time to have moved for a new trial and to have appealed, and that she

did neither. If the cause should go back for trial under the opinion of the Court of Civil Appeals, the trial court would be bound to render judgment against Mrs. Owens for this reason, and we conclude that it is true that the decision practically settles the case against her. We are not prepared to assent to this view of the law as expressed in the opinion under review. The farthest this court has gone in that direction is in the case of *Hamblin v. Knight*, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818. In that case a defendant, regularly sued, and against whom a judgment had been rendered upon a return of the sheriff showing regular service of citation upon him and upon an answer filed for him, sought an injunction against such judgment during the term at which it was rendered, for the reasons that no service, in fact, had been made upon him, and that the answer was unauthorized. It was held that an adequate remedy by motion for new trial existed, and that hence the remedy by injunction could not be resorted to. This holding is well supported by authority (23 Cyc. 981 et seq. and cases cited); but we think there is a substantial difference between that case and this. There the plaintiff, by suing the defendant, had entitled himself to proceed against him, and the defendant was, by that fact, entitled as a party to move for a new trial as a matter of course. Although he had neither been served nor appeared, he was a party to the cause. In the present case Mrs. Owens was not sued. She only became a party if she voluntarily made or authorized some one else to make her one. Her position is that she did neither, and was therefore never properly brought into the case as a defendant. Only parties to a suit are required or ordinarily permitted to move for new trials, and this condition could be imposed upon her only upon the theory that she was properly in the case. The court, it is true, treated her as a party, and rendered judgment against her as such, and would doubtless have given due consideration to any motion she might have presented; but to deny her any relief because she made no such motion would be in effect to hold that she must have abandoned her position and have become a party against her will. Had she moved for a new trial, she would have become subject to all further proceedings in the case. We think she was not required to do this as a condition upon which to ask relief against a judgment rendered against her in a cause in which she had in no lawful way been made a party, if that be the fact. While the Court of Civil Appeals properly held that the charge of the trial court was erroneous, the opinion went too far, we think, in the further holding just discussed.

This cause was submitted in the Court of Civil Appeals, without objection, upon a transcript of the record, which contained the usual order purporting to have been entered

by the district court of Erath county overruling a motion for new trial and reciting the giving of notice of appeal in open court. After the decision by the Court of Civil Appeals the appellee for the first time in her motion for rehearing sought to have the appeal dismissed upon affidavits showing that the notice of appeal was not given in open court, but that the order overruling the motion for new trial containing the recital of notice was made by the special judge who tried the cause in Knox county after he had left Erath county. The refusal of the Court of Civil Appeals to grant the rehearing and dismiss the appeal is made one of the grounds for the writ of error. None of the authorities relied on are exactly applicable. The jurisdiction of the Court of Civil Appeals over the appeal was fully shown by the record, and the effort here is to oust that jurisdiction by contradicting that record after the court, upon the invitation of both parties, had decided the cause. Whether it would have been proper for the Court of Civil Appeals, in order to determine its jurisdiction, to have made inquiry into the truth of the recitals in the minutes of the district court, or to have required the parties to go into that court to correct those minutes, had the question been raised in time, we need not decide. The record showing jurisdiction, it was too late for the appellee to question it after the decision had been rendered. Holding, as we do, that the Court of Civil Appeals properly reversed the judgment, and remanded the cause for a new trial, we simply modify its opinion, as above indicated, in that part which would otherwise have the effect of practically settling the cause.

Reversed and remanded.

#### PARRISH et al. v. MILLS et al.

(Supreme Court of Texas. Jan. 15, 1908.)

##### 1. TRUSTS—CONSTRUCTION OF INSTRUMENT—INTENTION OF MAKER.

In the construction of a deed of trust, the intention of the donor, arrived at by considering every part of the instrument, governs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 162.]

##### 2. SAME—MAINTENANCE AND COMFORT OF BENEFICIARIES.

A recital in a deed of trust for the benefit of the members of the family of a deceased relative of the donor that the donor wishes to provide as safely and permanently as possible for their comfort, maintenance, and support, shows an intention to provide, not only for their maintenance, but also for their comfort, and that the provisions shall be permanent, as long as they may live.

##### 3. DESCENT AND DISTRIBUTION—NATURE OF "DESCENT" OR "SUCCESSION."

Descent or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate as his heir at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 1-15.

For other definitions, see Words and Phrases, vol. 3, pp. 2017-2019; vol. 7, pp. 6745-6746.]

## 4. "DESCENDANT"—"ISSUE."

The word "descendant," according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is the correlative of ancestor. The word "issue" is a word of broader import, and may include the children of a living parent as well as the children or descendants of one who is dead. But in an accurate sense one cannot have a living ancestor, nor can a living person, although he may have children, have descendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 74-83.]

For other definitions, see Words and Phrases, vol. 3, pp. 2014-2017; vol. 4, pp. 3782-3793; vol. 8, pp. 7635, 7693-7694.]

## 5. DEEDS—ESTATE CREATED—REMAINDER.

A trust deed conveying property to trustees during their lives and the life of the survivor of them recited that the grantor wished to provide for the maintenance of the beneficiaries named, directed the trustees to distribute the proceeds among the beneficiaries, provided for the distribution thereof on the death of one or more of the beneficiaries with or without "lineal descendants," and that, on the termination of the trust estate by the death of the last surviving trustee, the "lineal descendants" of the beneficiaries named should take the body of the fund, and further provided that the beneficiaries should not take any other interest in the grantor's property in the state than that therein granted. *Held*, that the phrase "lineal descendants" must be taken in its technical sense, and the contingencies on which the corpus of the fund devolved on the issue of the beneficiaries were that all the beneficiaries, as well as all the trustees, should be dead.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4172.]

## 6. APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where a deed, in the light of the evidence received without objection, demanded the construction placed on it by the court, error in admitting other evidence was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171-4177.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by S. W. Parrish and others against Mary H. Mills and others. There was a judgment of the Court of Civil Appeals (102 S. W. 184) affirming a judgment for defendants, and plaintiffs bring error. Affirmed.

Z. T. Fulmore, D. W. Doom, and D. H. Doom, for plaintiffs in error. Newton & Ward, for defendants in error.

GAINES, C. J. This action was brought by the plaintiffs in error to recover of defendants in error certain property, real and personal, in the petition described. All parties claim under a deed of trust, executed by Morgan C. Hamilton to Frank Hamilton, James R. Johnson, T. F. Mitchell, and Robert A. Smith, trustees. Since the decision of the case depends upon the construction of that deed, we here set it out in full. It reads as follows:

"State of Texas, Travis County. Know all men by these presents: That I, Morgan C. Hamilton of the county of Kings, in the state of New York, for and in consideration of the natural love and affection that I have for

the surviving family of my late brother Andrew J. Hamilton, viz.: his widow, Mary J. Hamilton, who resides in Travis county in the state of Texas; and his daughters, Mary Mills, née Hamilton, wife of W. W. Mills, who resides in El Paso, Texas; Bettie Woodburn, née Hamilton, wife of Frank Woodburn, who resides in Waco, McLennan county in the state of Texas; and Lillie Maloney, née Hamilton, wife of Jas. P. Maloney, who resides in the city of St. Louis, in the state of Missouri, and Frank Hamilton, who resides in Travis county in the state of Texas; and wishing to provide as safely and permanently as possible for their comfort, maintenance and support, have given, granted and conveyed, and by these presents do give, grant, aliene, convey, allot, set over and deliver unto the said Frank Hamilton, Jas. R. Johnson, T. F. Mitchell and Robert A. Smith, jointly, the following real estate and personal property, viz.:

"First. All and singular that certain lot of land in the said state and county, known and designated on the maps of the city of Austin as lot No. seven (7) in block No. forty-three (43), situated on the corner of Colorado and Pine streets, within the said city.

"Second. I have elected, set apart, transferred and delivered unto the trustees aforesaid personal property consisting of bonds secured by mortgage, bonds secured by the vendor's lien and cash to sum and value of sixty-two thousand (\$62,000) dollars.

"To have and to hold all and singular the lands, premises, funds and credits aforesaid, unto them, the said Frank Hamilton, Jas. R. Johnson, T. F. Mitchell and Robert A. Smith, and to the survivors and survivor of them for and during their natural lives and unto the limit of the life of him of them who shall latest survive.

"In trust nevertheless, and with the powers and obligations, and for the uses and purposes hereinafter set forth, that is to say:

"First. That power of the said trustees is joint, so long as more than one of them remain alive; and so long as so many as three (3) of them are alive; the signature of a majority of them shall be necessary in all acts, the evidence of which, under the laws of the state of Texas, is required to be registered as notice to third parties; and when but two (2) of them remain alive, then all such acts as are designated by this clause shall require to be subscribed by both; and when but one survives, his separate act and deed shall be valid and binding on this trust estate.

"Second. As to all transactions, the evidence of which is not required by law to be registered, the said trustees or a majority of them may by written instrument, duly executed, acknowledged and registered, select and appoint one of their number who shall thereupon have the management, control and determination of such business as is described or indicated in this clause, and so far

as the beneficiaries under this trust and third parties are concerned, the action of such selected trustee shall be valid; it shall be competent, however, for the majority of said trustees to revoke such appointment by a written instrument such as is required above for his appointment; in case one of said trustees shall remove from the state of Texas with the intention of remaining away, he shall be regarded to all intents and purposes as dead.

"Under the limitations above prescribed, the power of the said trustees are in all respects as ample as if this deed were to them in fee simple and for their own use and benefit.

"Third. Said trustees are hereby instructed and enjoined to invest and keep the body of this donation invested so far as they may be able, in improved city real estate, using, however, their best discretion and judgment, in view of the welfare of the beneficiaries of the trust, as to the time when such investments shall be made.

"Fourth. The said trustees shall collect the annual rents, interest and revenue of whatsoever kind arising from or growing out of all investments of the said fund, as well from those now on hand as those to be made hereafter, and shall apportion and distribute said annual income as follows—that is to say:

"(a) They shall first set apart and appropriate a sum of cash sufficient to meet and satisfy all obligations and expenses of whatsoever kind growing out of or necessary for the proper conduct of said business, including taxes, insurance and repairs.

"(b) Annually or oftener if in their judgment it can be consistently done, they shall divide the net revenue at that time in their hands into five (5) shares, and shall distribute them as follows, viz.: They shall pay to the said Mary J. Hamilton two (2) shares, to the said Mary Mills one (1) share, to the said Bettie Woodburn one (1) share, and to the said Lillie Maloney one (1) share; and the receiving of her distributive share aforesaid of the net annual accretions of the said fund as aforesaid, is the full limit of the rights of the said distributees in said fund during the existence of the particular estate hereby vested in said trustees.

"(c) In the event of the death of the said Mary J. Hamilton, the said trustees shall apportion the said annual net revenue into three (3) equal distributive shares and shall pay one (1) of such shares to each of said distributees, viz.: Mary Mills, Bettie Woodburn and Lillie Maloney.

"(d) In the event of the death of the said Mary J. Hamilton, and of one or more of the other named distributees without lineal descendants, the said net annual revenue shall be equally divided, share and share alike, between the survivors and the said Frank Hamilton.

"(e) In the event of the death of either the said Mary Mills, Bettie Woodburn or

Lillie Maloney without lineal descendants, the said Mary J. Hamilton being still living, the said net annual revenue shall be divided into five (5) equal shares, two (2) of which shares shall be paid over to said Mary J. Hamilton, and one (1) share to each of the other living distributees.

"(f) In the event of the death of two of the said distributees, Mary Mills, Bettie Woodburn and Lillie Maloney without lineal descendants, the said Mary J. Hamilton being still alive, the said annual revenue shall be still divided into five (5) equal shares, two-fifths (2/5) to be paid over to the said Mary J. Hamilton and the remaining three-fifths (3/5) to be equally divided between the survivor of the said three sisters and the said Frank Hamilton.

"(g) When one or more of the said distributees, Mary Mills, Bettie Woodburn, Lillie Maloney or Frank Hamilton shall have died leaving lineal descendants such descendants shall take or be entitled to take the share of the said net annual revenue the deceased parent would have been entitled to, had he or she continued living.

"(h) In the event of the death of all of said distributees except the said Frank Hamilton without lineal descendants surviving them, then in that case the particular estate hereby created in said trustees shall terminate and the said Frank Hamilton, his heirs or assigns be entitled to demand from his co-trustees, a quitclaim of all their interest in the said property, and the said Frank Hamilton shall thereupon take, have and hold all and singular the said entire property to his, his heirs and assigns own proper use and behoof forever.

"Fifth. When the particular estate hereby and above created in said trustees shall expire by the death of the last one—them, as is before provided shall be the case, then the lineal descendants of the said Mary Mills, Bettie Woodburn, Lillie Maloney and Frank Hamilton shall be entitled to take the body of the said fund, and in that case they shall take per stirpes for their own use and behoof, and have and hold the same to them, their heirs and assigns forever.

"Sixth. I hereby direct and require that the last of the said trustees who shall be acting in this behalf, shall provide by his last will and testament for the immediate partition and distribution of the body of this fund in accordance with section fifth of this deed.

"Interlineations made before signing as follows: Second page, twenty-eighth line, 'majority'; fourth page, thirty-first line, 'annual'; sixth page, tenth line, 'of the said net annual revenue.'

"The beneficiaries or cestui que trust herein, shall at no time demand, take or hold any other interest or estate in any of my property, real, personal, or mixed, within the state of Texas, than that herein granted.

"Witness my hand at Austin, in the state

and county first above written, this the second day of May, A. D. 1883. Morgan C. Hamilton."

It was alleged and proved that all of the trustees were dead at the time the suit was brought, and the claim of the plaintiffs in error is that they, as the surviving issue of Mary Mills, Bettie Woodburn, Lillie Maloney, and Frank Hamilton, were entitled under the fifth clause of the deed to the property in fee simple. The following facts are stated in the opinion of the Court of Civil Appeals as being supported by the evidence: "It was shown by undisputed testimony that Morgan C. Hamilton and all of the trustees named in the deed in trust are dead, and that B. A. Smith, who survived the other trustees, died on the 7th day of March, 1906. It was shown by like proof that all of the beneficiaries named in the trust deed, except Frank Hamilton, were still living. There was no conflict in the testimony, except as to the value of the A. J. Hamilton homestead. The trial judge found, and the finding is supported by testimony, that it is worth \$8,000, and rents for \$20 per month. \* \* \* According to the record in this case, the grantor in this instrument had never married, but had acquired a fortune. His brother, A. J. Hamilton, at one time Governor of Texas, died in 1875, leaving a wife and several children surviving him, and very little property outside of a 50-acre homestead. The proof shows that shortly before Gov. Hamilton's death his brother, Morgan C. Hamilton, commenced donating to the former's wife, presumably for the use of the family, \$200 per month; that this donation was continued up to the time of the execution of the instrument under consideration, and was discontinued thereafter. It was also shown that on the same day, and soon after the execution of the instrument, Morgan Hamilton went to his sister-in-law, the widow of Gov. Hamilton, and told her, in substance, that he had provided for her and her daughters as long as they might live. It was also shown that aside from her homestead neither Mrs. Hamilton nor her daughters had any property of their own at the time the instrument was executed, and that Morgan Hamilton knew that fact. The testimony further shows that most of the plaintiffs in this case, who are the children of Mrs. Woodburn and Frank Hamilton, were born after the deed of trust was made. \* \* \* The testimony shows that at the time the instrument was executed Morgan Hamilton, the grantor, was an old man; that he came from Brooklyn, N. Y., where he was then residing, to Austin, Tex., for the purpose of making provision for the support of his deceased brother's family out of his own large estate."

It is a cardinal rule in the construction of deeds that the intention of the donor must govern; and it is one equally familiar that in arriving at that intention every part of the instrument must be considered. The instru-

ment in question leaves no doubt as to its purpose. The declaration, "wishing to provide as safely and permanently as possible for their comfort, maintenance, and support," shows clearly that the intention was to provide, not only for the maintenance, but also for the comfort of the family mentioned, and further that the provision should be permanent; that is to say, as long as they might live.

In the fourth paragraph of the deed provision is made for the distribution annually of the net proceeds of the fund, and in subdivision (b) it is provided that the proceeds shall be divided into five equal shares, of which Mrs. Hamilton is to receive two shares, and each of the other beneficiaries one share each. In subdivision (c) provision is made for the case of the death of Mrs. Hamilton; that is to say, in case of her death, the proceeds are to be divided into three shares, of which each of the beneficiaries are to receive one share each. In subdivision (d) provision is made in case of the death of Mary J. Hamilton and one or more of the other beneficiaries named above, without lineal descendants, the net proceeds of the fund are to be equally distributed between the surviving beneficiaries previously named and Frank Hamilton. In subdivision (e) it is declared that in case of the death of Mary Mills, Bettie Woodburn, or of Lillie Maloney, Mary J. Hamilton still living, the net proceeds are to be divided into five equal shares of which Mrs. Hamilton is to receive two and the other living distributees one share each. Subdivision (f) provides that in case of the death of two of the daughters without lineal descendants, Mary Hamilton being still alive, she shall take two-fifths of the proceeds of the property and the other three-fifths shall be equally divided among the survivors of the three sisters and Frank Hamilton. Subdivision (g) provides that when one or more of the beneficiaries shall die, leaving lineal descendants, such descendants shall be entitled to the deceased ancestor's share. And by subdivision (h) it is declared that in the event of the death of all the beneficiaries except Frank Hamilton, without lineal descendants, that he shall take the estate discharged of the trust.

Next follows paragraph fifth, which gives rise to the difficulty in this case. We quote it again: "When the particular estate hereby and above created in said trustees shall expire by the death of the last one—them, as is before provided shall be the case, then the lineal descendants of the said Mary Mills, Bettie Woodburn, Lillie Maloney and Frank Hamilton shall be entitled to take the body of the said fund, and in that case they shall take per stirpes for their own use and behoof, and have and hold the same to them, their heirs and assigns forever." Now in construing this provision it is important to ascertain the precise sense in which the grantor used the words "lineal descendants." Did he mean the issue of the living beneficiaries, or the



issue of those who were dead? In *Barclay v. Cameron*, 25 Tex. 233, Chief Justice Wheeler says: "Descent, or hereditary succession, is the title whereby a person on the death of his ancestor acquires his estate as his heir at law." And in *Hillen v. Iselin*, 144 N. Y. 374, 39 N. E. 370, the Court of Appeals of New York say: "The main ground of assault upon the validity of the appointment of the remainder by the will of Emily Hillen to the child or children of her son Thomas is that such child or children were not at the death of his mother descendant or descendants in a legal sense of their father, who was then living, and were not, therefore, objects of the power under the will of Columbus O'Donnell, which authorized an appointment to the 'child or children of my [his] daughter Emily, or his, her or their descendant or descendants.' The learned counsel for the appellant has shown that the word 'descendant,' according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is the correlative of 'ancestor.' The word 'issue' is a word of broader import, and may include the children of a living parent, as well as the children or descendants of one who is dead. But in an accurate sense one cannot have a living ancestor, nor can a living person, although he may have children, have descendants." This seems to be based upon the theory that since property only descends upon the death of the ancestor the issue of a living ancestor is not a descendant of such ancestor. But since in a popular sense the words are sometimes used in the sense of issue from a living person, we think we should look to the whole instrument in order to determine the signification the grantor had in mind when he used them. In the case above cited of *Hillen v. Iselin* the Court of Appeals of New York held that the words were not used in "its accurate lexicographical and legal meaning," but in its popular sense, and gave judgment accordingly. If the words were used in their technical sense, then the issue of the beneficiaries named in the fifth paragraph of the deed could not take until the beneficiaries were all dead. Hence, while the paragraph contains but one express provision, there would be another necessarily implied—the one that the trustees shall all be dead, and the other that all the beneficiaries shall have departed this life—provided, always, that the grantor by lineal descendants meant descendants from deceased persons and not from living persons. Conceding that the technical sense does not necessarily apply, we are driven to the instrument and to every part of it to determine in what sense the grantor employed the terms. In the first place we have seen that the declared purpose of the instrument is to provide permanently for the comfort and support of the beneficiaries named. In the fourth paragraph provision is made for the contingency of the death

of one or more of the beneficiaries (one or more of them surviving), and it is declared that the fund shall be divided into certain proportions named among the survivors and the lineal descendants of those who may be dead. Here the words show expressly that they are used in the sense of descendants of a dead ancestor. What more natural than that, after providing with great particularity what shall be done in case of the death of one or more of the beneficiaries (another or others surviving), the grantor should have provided for a case in which all the trustees and all the beneficiaries should die? What more reasonable in such a contingency than that he should devolve the corpus of the estate upon the lineal heirs of the beneficiaries?

But let us look at some of the consequences of holding that by "lineal descendants" the grantor meant the issue of the beneficiaries whether dead or alive. As we have seen, the purpose of the deed was to provide for the permanent comfort and support of the grantor's sister-in law and her four children, three daughters and one son. The deed was made in 1883. The daughters as the deed shows were all married, from which it follows that Mrs. Hamilton must have been a lady well advanced in years, and her daughters being married must have been persons of mature years. If the construction of the deed be that contended for by plaintiffs in error, the result must be that instead of a permanent benefaction in their old age, and when they would most likely be in need of a support, they are entirely stripped of it. Is it conceivable that any man in his sober senses should desire to support his relatives in comparative affluence for a part of their lives and to deprive them of such support when by reason of advancing years their necessities would be greater? It is the more remarkable that this result should depend upon a contingency of the death of all the trustees; a contingency having no relation to the status of any of the beneficiaries, but merely as to the status of those to whom was confided the execution of the trust. Why this marked change in the objects of his bounty, merely by reason of the death of all the trustees? Again, while it appears that the trustees lived many years, it was in the range of possibility, and not wholly improbable, that they might have died within a year from the execution of the deed; in which event, under the contention of plaintiffs in error, the benefaction of the grantor towards the beneficiaries named would have ceased. Can it be possible that the grantor should have intended such a result? We also think that the final paragraph of the deed, which provides that the beneficiaries of the deed should "at no time demand, take or hold any other interest or estate in my property, real, personal or mixed within the state of Texas than that herein granted," is not without significance. It indicates that the grantor thought that in providing for them for life, and in also pro-

viding that the corpus of the fund to go to their lineal descendants, he had carved out for them all that he thought they were entitled out of his estate. Would he have made such provision had he contemplated that before their death they might be deprived of all benefits under the deed? We attach no importance to the habendum clause in the deed. They were mere trustees, and their powers and duties necessarily ceased when they departed this life. So with the sixth paragraph. The will that is therein provided for is to be executed "in accordance with section fifth of this deed." If section 5 was only to take effect upon the death of all the beneficiaries and all the trustees, the will was not to be executed until both contingencies had happened.

Our conclusion is that intention of the testator, as derived from all the provisions of the deed, was that the words "lineal descendants" should be taken in their technical sense, and that the contingencies upon which the corpus of the fund should devolve upon the issue of the beneficiaries were (1) that they should all be dead, and (2) that the trustees should all have departed this life. We think the question of *res adjudicata* presented by the second assignment of error was correctly disposed of by the Court of Civil Appeals. We are not satisfied that all that was testified to by Mrs. Hamilton was admissible; but, if error, we deem it harmless. The face of the deed in the light of the testimony to which no objection was made demands the construction placed upon it by us, and needs no support from that of the witness, to which objection was made.

The judgment of the Court of Civil Appeals, and that of the district court, are affirmed.

#### STARK v. HARRIS.\*

(Court of Civil Appeals of Texas. Nov. 27, 1907. Rehearing Denied Jan. 8, 1908.)

##### 1. APPEAL — SUBSEQUENT PROCEEDINGS IN LOWER COURT — STRIKING OUT STATEMENT OF FACTS.

The statement of facts having been changed before the judge approved it, and the approval obtained by sharp practice, the trial court may strike it from the record after the perfecting of the appeal.

##### 2. SAME — CORRECTING BILLS OF EXCEPTIONS.

Where, after approval of bills of exceptions, changes are made therein without the knowledge of the court or appellee, the trial court cannot, after the appeal has been perfected, strike the bills of exceptions from the record, but can only correct them, at least in the absence of proof of direct complicity of appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 2803.]

##### 3. ACKNOWLEDGMENT — APPOINTMENT OF OFFICER — PRESUMPTIONS.

One claiming under a deed of land in Texas, dated in 1859, acknowledged before an officer in New York, whose certificate of acknowledgment recited that he was a commissioner in and for New York, appointed by the Governor of Texas to take acknowledgment of deeds to be used and

recorded in Texas, need not prove the appointment and qualification of the officer, but it will be presumed he was appointed as authorized by the law at the time, and that he acted in conformity to law and within the scope of his duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 322.]

##### 4. SAME — SEAL.

The seal of a commissioner of deeds not impressed on his certificate of acknowledgment by a seal, but engraved thereon, with the exception of the word "Texas," which was in writing, was sufficient, the form of the seal not being prescribed in 1859, when the certificate was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 172.]

##### 5. DEEDS — RECORDING — PLACE OF RECORD — UNORGANIZED COUNTY.

Under Rev. St. 1895, art. 783, providing that till a new county is organized its territory shall remain in all respects subject to the county from which it has been taken, a deed of land in the new county is, prior to its organization, properly recorded in the old county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 224.]

##### 6. SAME — BURDEN OF PROOF.

One attacking the registration of land of one county in the county from which its territory was taken, proper, under Rev. St. 1895, art. 783, if the registration was prior to the organization of the new county, must show that such organization was prior to the registration.

##### 7. SAME.

Act March 30, 1861, Gen. Laws 1881, p. 72, c. 67, as well as Rev. St. 1895, art. 4641, amendatory thereof, relative to place of recording deeds of land in unorganized counties, referred only to the future, and did not affect the validity of prior registrations of deeds of such land.

##### 8. EVIDENCE — ANCIENT INSTRUMENT.

A deed over 30 years old, and therefore an ancient instrument, and offered as such, being free from suspicion of any kind and coming from the proper custody, was admissible, without being filed among the papers in the suit, as required by the statute regulating the introduction of registered instruments.

##### 9. SAME — PROPER CUSTODY.

A deed comes from the proper custody to be admissible as an ancient instrument, coming from the one in possession of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1618.]

##### 10. SAME — REGISTERED INSTRUMENTS — FILING IN PAPERS OF SUIT.

The statute regulating the introduction in evidence of registered instruments, providing for their filing among the papers in a suit for three days before the trial, having for its object the giving of opportunity for scrutiny of, and for preparation to attack, the instruments, is satisfied where such an instrument has been so on file for months, though it is temporarily withdrawn just before the trial for the purpose of recording in another county than that in which it had been recorded.

##### 11. SAME — REGISTRATION.

Rev. St. 1895, art. 2312, authorizing the admission in evidence of recorded instruments, without proof of their execution, provided they be filed among the papers of the suit three days before the trial, applies only to an instrument which has been recorded prior to such filing among such papers; so that the recording of the instrument just before the trial would add nothing to its admissibility, but it having conveyed land, other than that in controversy, situated in another county, in which county it had been recorded, such registration, with the three-

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

days filing, would make it admissible, without proof of execution in any county, and as to any land conveyed by it.

**12. VENDOR AND PURCHASER—NOTICE—REGISTRATION.**

A deed having been properly registered in the county in which the land was situate, such registration was sufficient to prevent one taking against it as a bona fide purchaser after territory embracing such land was organized as a new county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 525.]

Appeal from District Court, Menard County; J. W. Timmins, Judge.

Action by Sidon Harris against Ennis Stark, others being impleaded by defendant. From an adverse judgment, defendant Stark appeals. Reversed and remanded.

John Brown, for appellant. Sidon Harris, for appellee.

**FLY, J.** This is an action of trespass to try title to 640 acres of land, granted to F. Selks, in Menard county, Tex., instituted by appellee against appellant, Ennis Stark. Appellant pleaded not guilty, and impleaded Anna Mohr, Charles Mohr, Agnes Grandpre, Frank L. Nuse, and Henry L. Nuse, on their warranty of title to him, and they answered, adopting his pleadings. The cause was tried by the court, and resulted in a judgment for appellee for the land, and a judgment for \$1,858 in favor of appellant Stark against his warrantors, and against appellee for the sum of \$1,595 on value of improvements.

The original transcript in this case was filed in this court on February 27, 1907, and on November 13, 1907, a motion to strike out the statement of facts and bills of exceptions 1, 5, and 6, because of material alterations made in the bill of exceptions since they were approved by the trial judge, and on account of improper conduct in securing approval of the statement of facts, was filed in the district court; and on a hearing of the matter, after notice to appellant's attorney, it was found by the court that bills of exceptions numbers 1, 5, and 6 had been materially altered, "without the knowledge or acquiescence of this court or appellee," and that the approval of the statement of facts had been procured by sharp practice, and the same were stricken from the record of the case. A transcript of those proceedings is before this court, and it appears therefrom that appellants did not contest the motion in the lower court, but seek to contest the order of the court on the ground that the court had no authority to make such order.

The proceedings in this case, in connection with the statement of facts, which was shown to have been changed before the judge approved it, are fully sustained by several decisions of this court and the Supreme Court of Texas. *Railway v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805; *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565; *Willis v. Smith*, 90 Tex. 636, 40 S.

W. 401; *Ennis Mercantile Co. v. Walthen*, 93 Tex. 622, 57 S. W. 946; *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316, 72 S. W. 624. The lower court had the papers and other evidence before it, and we see no error in its action in striking the statement of facts from the record.

It is evident from the motion to strike out, as well as the order of the court, that the alterations in the bills of exception were made after they had been approved by the court. It will be noted that in all the cases cited, where trial courts are permitted to strike out bills of exception or statements of facts after appeals had been perfected, the signature of the judges had been procured by undue practice or fraud. No such question arises as to the bills of exception in this case, and the affidavit of appellee, upon which the court in terms based its order, shows the specific alterations that were made, after they had been approved by the judge, either by appellant or his attorney. Under such circumstances, we know of no authority vested in a trial court, in the absence of proof of direct complicity of a party in the alteration of the record, to strike the altered paper from the record, but it would seem fair and just that the court should only make the record speak the truth, so that the rights of the parties could be preserved and passed upon by the appellate court. *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565; *Johnston v. Arrendale*, 30 Tex. Civ. App. 504, 71 S. W. 45. In the last-named case it is said: "It is a matter of prime importance in the administration of justice that the records of the trial courts should speak the truth. If they become mutilated, falsified, tampered with and changed so as to make it appear that the trial court did what in fact it did not, we are powerless to correct them; and if not corrected in the trial court, which has custody and jurisdiction over their records so far as made by them, they must go uncorrected, and justice be defeated on appeal." That language was used in a case in which the charge of the court had been altered, and the trial court had corrected it. Undoubtedly the district court had the right to correct the altered bills of exception, and cause them to speak the truth, but it did not have the authority to strike the bills of exception from the record, in the absence of fraud or sharp practice having been used in procuring their approval, simply on the ground that they had been altered after being signed. It may be that if appellant had been shown to have made the alterations, or that he had connived at, or acquiesced in, some one else making the change, he should be punished by being totally deprived of the benefit of the altered paper; but such does not appear in this case, and the court should have been content with correcting the record so as to make it speak the truth to this court. The order of the court, taken with the matters set out in the affidavit to which it refers, clearly indicates

the alterations made in the bills of exceptions, and forms a basis for the consideration of the bills of exception as they were when approved by the court, and they will be so considered.

The land in controversy was patented in 1856 to Henry F. Fisher, who died intestate in 1867, leaving surviving him his wife and four children. Appellee claims the land by mesne conveyances from the heirs of Fisher, and to meet his case appellant sought to introduce in evidence a deed from Henry F. Fisher to George Butler, dated November 17, 1859, conveying to him the 640 acres of land in controversy as well as other lands. The deed was acknowledged before an officer in New York, describing himself as a commissioner of deeds for Texas, and was recorded in the records of deeds of Bexar county on July 20, 1869, and was recorded in Tom Green county on January 6, 1881. It was not recorded in Menard county until November 18, 1906, just before the trial of this cause. The court excluded the deed upon objections that no evidence was introduced that the commissioner of deeds who took Fisher's acknowledgment to the deed was properly qualified, and no proper seal was affixed thereto; that it was not proven as at common law; that it was not admissible as an ancient instrument; that it was not filed for three days among the papers and notice of filing given; and that it had not been properly recorded in Bexar county in 1869. Appellant was not required to prove that the commissioner of deeds, who took the acknowledgment in 1859, was duly qualified to take acknowledgments. The certificate of acknowledgment recited that the officer taking it was "a commissioner in and for the state of New York, appointed by the Governor of Texas to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the said state of Texas," and that was sufficient. If the acts of one claiming to be an officer of the state could be invalidated by a failure to prove his appointment and qualification after a lapse of nearly 50 years, those acts would generally be declared invalid. The presumption will prevail that the commissioner was appointed, as authorized by the law in force in 1859, and that he acted in conformity to law and within the scope of his duty. All persons proved to have acted in a public office are presumed to have been duly appointed until the contrary appears. 1 Greenl. Ev. § 92. The seal of the commissioner of deeds was not impressed upon the certificate of acknowledgment by a seal, but all of it was engraved thereon with the exception of the word "Texas," which was in writing, and this seems to have been the subject of objection. A similar objection to the engraved seal of a commissioner of deeds was made in the case of Davis v. Roosevelt, 53 Tex. 305, and was thus met by the Supreme Court: "The answer is that there was no statute in force at the time the

certificate was made (1868) requiring the commissioner to provide for himself a seal with a star of five points in the center. \* \* \* At the time when the certificates were made the form of the seal does not appear to have been prescribed, and the one used cannot be pronounced insufficient."

The deed offered in evidence was executed in 1859, and was placed on record in Bexar county in 1869. Menard county was a part of the Bexar land district, and was not organized at least as late as July, 1870, when it was attached to Mason county for judicial purposes. Gammel's Laws of Texas, vol. 6, pp. 911, 913. It is provided in article 783, Rev. St. 1895, that "until a new county is organized in accordance with law the territory thereof shall remain in all respects subject to the county from which the same has been taken." In construing that statute the Supreme Court has held that until the county is actually organized it remains in all things subject to the jurisdiction of the old county, and that the placing of the unorganized county in a different judicial district did not sever its connection with the parent county. O'Shea v. Twohlg, 9 Tex. 336; Clark v. Goss, 12 Tex. 395, 62 Am. Dec. 531. In the first case cited the Supreme Court was considering the status of Kinney county, and after stating the gravity of the questions presented the court proceeded: "We believe, however, that a satisfactory conclusion can be obtained by fixing on the point of time when the jurisdiction of the mother county, Bexar, ceased, or will cease, to exist over the citizens of the territory designed to form the new county. Was it from the date of the passage of the act of the Legislature creating and defining the boundaries of Kinney county? We think not. If it ceased to exist at that time, it would be in the power of the Legislature to deprive a portion of the citizens, for a time, of all protection by the laws of the state, and to let crime go unpunished and lawlessness wholly unrestrained. \* \* \* The Legislature never believed or intended that such would be the result where the act creating the new county was passed; and by the expression used, that it should take effect from its passage, it did not mean that the jurisdiction of Bexar county should cease—it only meant that it should so far take effect as to authorize immediate measures for organization being taken, and authorized the chief justice of the nearest county to proceed to complete the organization. Until that was completed, the jurisdiction of the mother county remained in full force." That the registration of deeds is included within the purview of the jurisdiction of the mother county, has been amply established by decisions of the Supreme Court. Lumpkin v. Muncy, 66 Tex. 311, 17 S. W. 732; Baker v. Beck, 74 Tex. 562, 12 S. W. 229; Trimble v. Edwards, 84 Tex. 497, 19 S. W. 772. In this case, as in the one last cited, there was no proof as to when the county was organized,

and it was held: "In the absence of proof that Hamilton county had in fact been organized when plaintiff's deed was recorded in Coryell county, it will be presumed, in favor of the act of the clerk who recorded the deed, that it was recorded in the proper county, and the copy of the deed should have been admitted in evidence as a certified copy of an instrument properly of record." It would seem from that opinion that the duty of proving that the county had not been organized did not devolve upon appellant, but if appellee desired to attack the validity of the registration, on the ground that Menard county had been organized before the time of the registration of the deed in Bexar county, he should have shown that fact.

Under the act of March 30, 1881 (Gen. Laws 1881, p. 72, c. 67), provision was made for the registration of instruments concerning lands in unorganized counties, in the county to which they were attached for judicial purposes, but the act contained the proviso "that nothing in this act shall be construed to affect the registration of any such instruments heretofore made, in either a land district to which any unorganized county may have been attached, or any county to which any unorganized county may have been attached for judicial purposes." It is said by the Supreme Court in *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037: "While this act settled for the future the disputed question as to where such records should be made, it did not in any way affect the legality of the records previously made." The court might have gone further, and said that absolute legislative recognition of the validity of the registration in question was given by the language of the act. Under the law, therefore, the deed was properly recorded in Bexar county, and there is nothing in article 4641, Rev. St. 1895, which is an amendment of the act of 1881, and was enacted in 1887, that impairs such registration. It is required therein that instruments relating to land in unorganized counties shall be recorded in the counties to which they are attached for judicial purposes, and it is provided that when the counties shall be organized, or attached to other counties for judicial purposes, the record books, or certified transcripts thereof, shall be turned over to such counties. That act has reference only to the future and does not affect the validity of registrations theretofore made.

The original deed from Fisher to Butler was offered as an ancient instrument, and being over 30 years old, and free from suspicion of any kind, and coming from the proper custody, it was admissible in evidence without having been filed among the papers. *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049; *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 751; *Woodward v. Keck* (Tex. Civ. App.) 97 S. W. 852. The deed was filed for record in 1880, more than 30 years before it was offered in evidence, and, being offered

by the party in possession of the land, it came from the proper custody and should have been admitted in evidence. In whose custody could it more naturally have been, if not in that of the man in possession of the land? Coming from that custody, as it must have done, it should have been allowed in evidence.

As before stated, being an ancient instrument, it was not necessary that the deed should have been filed among the papers, as required by statute regulating the introduction of registered instruments. *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054; *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 243; *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079. The question as to whether the deed was properly filed among the papers for three days before the trial will not probably arise on another trial. However, we will say that the spirit of the law was complied with in regard to the filing of the deed among the papers. The object of such filing is to give opportunity for scrutiny of the instrument, and for preparation to attack it, and, the instrument having been on file for months, its temporary withdrawal for the purpose of having it recorded in Menard county did not invalidate its former filing. We conclude that the deed was not only admissible as a recorded instrument, but as an ancient document.

Article 2312, which authorizes the admission in evidence of recorded instruments, without the necessity of proving their execution, applies only to such instruments as have been recorded previous to being filed among the papers in a suit, and it follows that the record of the instrument in Menard county just before the trial added nothing to its admissibility in evidence. *Gaines' Adm'r v. Ann*, 26 Tex. 340. It may be said, however, in this connection, that it appears that a portion of the land, conveyed in the Fisher deed was situated in Tom Green county, and that the deed was duly recorded in that county, and that fact rendered it admissible in evidence as a muniment of title in any county of the state, although not recorded in the county in which the land was situated. *Hancock v. Tram Lumber Co.*, 65 Tex. 225; *Ansaldna v. Schwing*, 81 Tex. 198, 16 S. W. 989. While the proper registration in another county than that in which the land in controversy was situated would not serve as notice, still, as said by the Supreme Court in the Hancock Case above cited: "If valid registration establishes execution it does so for all purposes for which the deed may be used, and at all places, subject to the law which makes this registration in effect prima facie proof of execution. There cannot be a rule of evidence in force in this state which makes a deed evidence of title in one county and not in another, except as title may be affected by the question of notice."

Under our view, that the deed was properly registered in Bexar county, the question of

innocent purchaser is eliminated from the case, because appellee is charged with the notice given by the registration of the instrument. The law does not require the registration in the new county of a deed duly recorded in the parent county, and, although the record of the deed may not be included in the transcript of the record of the old county which officers are required to file in the new county, that failure would not destroy the efficacy of the registration in the old county as to the matter of notice. "We are not apprised of any statute which would require an owner of land, having his deed properly registered in the county where the land lies, to have his conveyance again recorded as often as by subdivision and changes the land may fall into a new or different county. Very prudent men may use such precautions. But it is not necessary for the protection of their rights, the first registry being amply sufficient." *McKissick v. Colquhoun*, 18 Tex. 148; *Frizzell v. Johnson*, 30 Tex. 81.

The judgment is reversed, and the cause remanded.

#### TARBROUGH et al. v. MOODY.

(Court of Civil Appeals of Texas. Dec. 14, 1907.)

##### ADVERSE POSSESSION—PAYMENT OF TAXES.

One pays taxes on the J. survey, so as to give title under the five years' statute, his receipts from the tax collector so stating, though such survey is not where the patent and deed under which he claims show it to be located.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 518.]

Error from District Court, Hemphill County; B. M. Baker, Judge.

Action by Jane W. Tarbrough and others against Robert Moody. Judgment for defendant. Plaintiffs bring error. Affirmed.

Hendricks & Ewing, for plaintiffs in error. Willis & Willis, for defendant in error.

**SPEER, J.** This was an action of trespass to try title brought by plaintiffs in error against defendant in error to recover the William F. Johnson survey, situated in Hemphill county. There was a trial before a jury resulting in a verdict for defendant in error.

The sole question presented by the appeal is whether or not the trial court erred in submitting to the jury the issue of limitations of five years pleaded by the defendant. The proposition announced under the assignment raising this error is: "In order to warrant a recovery perforce the five years' statute of limitation, it must be shown that all the taxes for the full five years have been paid upon the identical land described in the conveyance upon which the plea is based." To make clear the position of appellant, it should be stated that there was evidence tending to show that the William F. Johnson survey

was not where the patent and deed under which appellee claimed showed it to be located, but was in truth considerably south and west thereof. In other words, these instruments described the survey as calling for section 169 on the east and section 182 on the north, while other evidence introduced on the trial tended to show that it lacked considerable of reaching these sections. We overrule the assignment, however, because if the proposition above quoted is abstractly, or even concretely, true, it is nevertheless met by the record, since appellee indisputably did pay the taxes on the William F. Johnson survey for the full time necessary to prescribe under his plea of limitation. If, by reason of a resurvey, appellee thought the William F. Johnson was in fact misdescribed in the patent and his deed, and that it in truth lay west and south of the calls therein, and he paid the taxes under such belief, yet it cannot be gainsaid that he has paid the taxes on the William F. Johnson survey, wherever that survey may be situated. His receipts from the tax collector prove this. The fact of paying taxes on a particular survey is not an act of intention (*Hoehn v. House* [Tex. Civ. App.] 31 S. W. 83; *Spence v. Johnson*, 3 Tex. Civ. App. 627, 22 S. W. 1042), but is a matter-of-fact thing capable of more definite proof. Appellants' brief raises no question of the character of appellee's possession of the land, but, as above stated, presents only the contention that the taxes were not paid on the survey according to the description in the deed, under which appellee claims.

The judgment is affirmed.

#### DALLAS CONSOLIDATED ELECTRIC ST. RY. CO. v. SUMMERS.

(Court of Civil Appeals of Texas. Dec. 7, 1907. On Rehearing, Jan. 11, 1908.)

##### 1. DAMAGES—EVIDENCE—PECUNIARY CONDITION OF PERSON INJURED.

Where an action for personal injuries received by a married woman after her husband had abandoned her was tried after she had obtained a divorce, it was reversible error to permit her to allege and prove that she was in destitute circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 498.]

On Rehearing.

##### 2. APPEAL—HARMLESS ERROR.

In an action for personal injuries, the admission of evidence over defendant's objection that plaintiff was in a destitute condition when the suit was brought was reversible error, though defendant showed that plaintiff had ruined her health by overwork and anxiety prior to the time of the accident.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by M. V. Summers against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

This was an action for damages for personal injuries sustained by appellee in alighting from one of appellant's street cars in the city of Dallas September 8, 1904. When the suit was brought and when the accident occurred her husband had abandoned her, and before the trial she obtained a divorce, and this fact was alleged in an amended petition. She recovered a verdict and judgment in the sum of \$2,600, from which this appeal is prosecuted.

Finley, Knight & Harris and Walter H. Walne, for appellant. Obenchain & Paine and W. A. Kemp, for appellee.

**STEPHENS, J.** The court erred in permitting appellee to allege and prove that she was "in destitute circumstances." *M., K. & T. Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Ft. Worth Ironworks v. Stokes*, 33 Tex. Civ. App. 218, 76 S. W. 231. This ruling seems to have been made on the theory that it was necessary for appellee to make such allegation and proof in order to maintain the action without the joinder of her husband, although he had deserted her, and numerous cases have been cited to sustain the ruling, but we do not understand any of them to so hold, and, on principle, the position is clearly untenable. But, however this may be, there was clearly no necessity for such allegation and proof after appellee had been freed from her husband by a decree of divorce.

The judgment is therefore reversed, and the cause remanded for a new trial.

#### On Rehearing.

It is earnestly insisted in support of this motion that appellant was not entitled to a reversal of the judgment on account of the error pointed out in the opinion, because what was therein held to be inadmissible was more fully established by testimony drawn out by appellant on cross-examination as a basis for its claim that the injuries for which appellee sought to recover damages were due to the overwork and anxiety incident to her struggles for a livelihood rather than to the causes alleged as ground of recovery. In view of the earnestness and seeming force with which the contention is made, we have examined the pages of the transcript referred to in the motion, only to find that the evidence elicited by appellant was to the effect that appellee had ruined her health by overwork and anxiety prior to the time of the accident, whereas the evidence, admitted over its objection and on account of which the judgment was reversed, placed before the jury the further fact of her destitute and helpless condition peculiarly when the suit was brought. It is doubtless true that proof of overwork and anxiety would naturally suggest pecuniary necessity as a cause, but it is also true that such a course of conduct is often due to oth-

er causes. Such proof, therefore, is not equivalent to proof of poverty and destitution. See opinion in *Hannig Case*, 91 Tex. 347, 43 S. W. 508.

The motion is therefore overruled.

#### NEWTON v. CONNESS.

(Court of Civil Appeals of Texas. Dec. 11, 1907. Rehearing Denied Jan. 22, 1908.)

#### 1. BROKERS—COMPENSATION—SUFFICIENCY OF SERVICES.

Where a broker procures a purchaser, willing, able, and ready to purchase on the terms fixed by the owner, the owner cannot evade payment of commissions by discharging the broker and selling the property at a lower price for the purpose of defrauding the broker out of his commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 70-81, 85-89, 94-96.]

#### 2. SAME.

Though, where an owner had contracted with a broker for the sale of land at a stipulated price, reserving to himself the right to sell, good faith demanded that he notify the broker that he had sold a portion of the land, yet the broker, not having procured a purchaser at the stipulated price, but only one willing to pay a less sum, the owner had the right to reject the offer, and himself sell the land that remained, and would not be liable for commissions on such sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 70-72.]

#### 3. SAME—PROCURING CAUSES OF SALE.

Though a broker may have given the name of the intending purchaser to the owner of the land, and the owner utilized that knowledge in making a sale of the remainder of the land after the sale of a portion by him, yet the broker would not be entitled to a commission, where the purchaser was not willing to pay the price for which the broker was authorized to sell the whole land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 74-81.]

#### 4. SAME—TIME OF SALE.

Where no time has been agreed on in which a sale by a broker is to be made, an agency may be revoked after a reasonable time, provided it is done in good faith, and not to evade the payment of commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 45.]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by W. S. Conness against J. M. Newton. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Guy S. McFarland and Marcus W. Davis, for appellant. Paschal & Hill, for appellee.

**FLY, J.** This is a suit for commissions, in the sum of \$150, for the sale of real estate, instituted by appellee against appellant. The cause was tried by jury, and resulted in a verdict and judgment for the amount sued for.

It was alleged in the petition that the land was listed with appellee for sale, for \$3,500, and that about July 25, 1906, he procured an offer of \$3,250, which was refused by appellant; "that afterwards, for the purpose of

defrauding plaintiff out of his right to a commission, the defendant changed the terms of sale, and negotiated the sale directly with the same purchaser to whom plaintiff had shown the property, and on the 2d of August, 1906, made the sale to him direct for the purpose of defeating plaintiff and defrauding him out of his commissions, and thereby became liable to pay plaintiff 5 per cent. commission on the \$3,000 for which the property was sold." This is not a case of exclusive agency vested in appellee for a certain time, as it was in the case of *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 818, in which the rule is thus stated: "If the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of the sale as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, in either case the broker will be entitled to his commission at the rate specified in his agreement with his principal." In this case appellee did not have the exclusive agency to sell the land, but appellant and other agents with whom the land had been listed had full authority to sell the land, and appellee's recovery can only be sustained upon the theory that appellant changed the terms of sale, and negotiated a sale with a purchaser who had been procured by appellee, for the purpose of defrauding appellee out of his commissions. Under the terms of the contract between appellant and appellee the former had the right to sell the land, and unless the sale was brought about through the agency of appellee, he would not be entitled to commissions. But if appellee procured a purchaser who was willing, able, and ready to purchase on the terms fixed by appellant, he could not evade the payment of commissions by discharging appellee, and then selling the property at a lower price, if he did those things for the purpose of evading the payment of commissions.

There was no evidence of fraud, unless it would arise from proof of facts that appellant had, some two months before the sale of August 2, 1906, was perfected, sold five feet off one side of the land to J. A. Frazier for \$500, but had not informed appellee of that fact; that one Abdo had offered for the whole tract, whose boundaries were shown by fences, the sum of \$3,250, which was \$250 less than appellant had agreed to take for the whole tract; that appellant had refused to take that sum, and revoked appellee's agency, and afterwards sold the balance of the land for \$3,000. The purchaser at the time he offered \$3,250 for the land, as well as appellee, thought the whole of the land was intended to be sold, and appellant must have thought the offer was for the whole of the land, because his conduct in selling the remaining land for \$3,000, a sum less than that offered by Abdo after deducting the commissions claimed by appellee, can be explained on no

other reasonable hypothesis. Certainly there is nothing to indicate such ill-will and spite towards appellee that appellant was willing to lose \$100 himself in order to deprive appellee of \$150. We must conclude, therefore, that the offer of \$3,250 was understood by all the parties to have been for the whole of the land placed in the hands of appellee for sale, and when appellant said to appellee that he could not or would not take \$3,500 for the land he must have meant the whole of the land, because he knew that the offer was for the whole of the land.

Appellant had contracted with appellee to give him 5 per cent. of a sale of the whole of the land for \$3,500, and had reserved the right to sell the land himself, and good faith and fair dealing demanded that he should have notified his agent that he had sold a portion of the land, in order that a new contract might be made, or at least that the agent might have been deterred from expending time and labor in an effort to effect a sale that had been rendered impossible by the acts of his principal. And if appellee had procured a purchaser who was willing, able, and ready to pay \$3,500 for the whole of the land, he would have been entitled to recover his full commissions, but this was not done. Appellee did not procure a purchaser who was willing, able, and ready to pay the sum of \$3,500 for the whole of the land, but had procured one who was willing to pay only \$3,250 for the whole of the land, and appellant had the right to reject that offer, and to sell the land that remained for any sum that he saw proper, and upon no principle of law would he be liable for commissions on such a sale. The fact that appellant had failed to notify appellee of the sale of a portion of the land was in no way responsible for the failure of appellee to consummate a sale under the contract. He failed to make a sale because he failed to find a purchaser at the contract price, and by reason of that failure he cannot recover commissions for his labor. The rules applicable to this case are clearly stated by Justice Neill, for this court, in the following language, used in the case of *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269: "It is now the well-settled doctrine that in the absence of any usage or contract, express or implied, or conduct of the seller, preventing the completion of the bargain by the broker, an action by the broker for his commissions will not lie until it is shown that he has effected or procured a sale of the property, and it is not enough that the broker has devoted his time, labor, or money in the interest of his employer, as unsuccessful efforts, however meritorious, offer no ground of action, and that, where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own."

It may be, as claimed by appellee, but denied by appellant, that he gave the name of the intending purchaser to appellant, and that the latter utilized that knowledge in



making a sale of the remainder of the land; but that act does not alter the fact that appellee had not procured a purchaser of the land for the sum of money named in the contract. The uncontroverted evidence is to that effect. In order to recover the broker must show his employment, that he has completed his undertaking, or has been prevented from so doing by his principal. The particular terms of the contract must be complied with in order to earn remuneration, and no performance upon other terms will suffice, unless accepted by the principal, even though the other terms be considered more favorable than those specified. The purchaser found by the broker must be not only ready, willing, and able to purchase, but to purchase upon the terms specified in the contract of employment, and when the owner of land has not expressly waived the right to sell, he is at perfect liberty to sell the property by his own efforts, and he will not be liable for commissions, unless the efforts of the agent procured the sale. *Mechem, Agency*, §§ 966, 967. Where no time has been agreed upon in which the sale is to be made, the agency may be revoked after a reasonable time, provided it is done in good faith, and not for the purpose of evading the payment of commissions. The rule is thus clearly stated in *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441: "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor." In the same case, speaking of another New York case approvingly, the

court said: "In that case, after the termination of the broker's authority, the principal sold to the person with whom the broker had negotiated at a less price; and it was held that he had a right to do so, unless his action was a mere device to escape the payment of commissions." The quotations announce correct rules, and under their application appellee failed to make out a case against appellant. There was no evidence tending to show that the agency was revoked to avoid the payment of commissions, but on the other hand appellant swore that he revoked appellee's authority because the latter did not treat him courteously when appellee called on him. Appellee had not earned any commissions, because he had not found a purchaser for the land at the specified price, and the revocation of his authority could not have been done to avoid the payment of commissions.

The statement of facts indicates that the case has been fully developed, and we conclude that there is no testimony to sustain the verdict, and the judgment is therefore reversed, and judgment here rendered that appellee take nothing by his suit, and that appellant recover all costs of this court and the county court.

#### TEXAS & P. RY. CO. v. SHIVERS.

(Court of Civil Appeals of Texas. Dec. 7, 1907.)

##### 1. RAILROADS—PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Though ordinary contributory negligence, in attempting to cross a railway track, is a question for the jury, where the evidence showed that plaintiff in walking through a railway yard attempted to cross the track immediately in front of a car approaching from behind, without looking or listening, or taking any other caution, there was shown contributory negligence entitling the company to a directed verdict in an action by him for his injury; the accident not occurring at a crossing or other place where signals were required, and it being immaterial whether he was a trespasser or a licensee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1305-1310.]

##### 2. SAME—NEGLIGENCE—FAILURE TO KEEP LOOKOUT.

A railway company is not liable for injuries to one struck by a car while attempting to cross a track, for failure to keep a lookout for him, where it would have been unavailing, he having stepped immediately in front of the car from a safe place.

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Personal injury action by C. C. Shivers against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

J. A. Germany, for appellant. Wynne & Collins and Nat M. Crawford, for appellee.

SPEER, J. Appellee recovered a judgment against appellant for personal injuries received by him under the circumstances hereinafter shown, from which judgment this appeal is prosecuted.

The first assignment presented challenges the ruling of the court in refusing to give a peremptory instruction to find for appellant. The contention is that the appellee's evidence shows such contributory negligence on his part as would require the giving of such instruction. The appellee thus describes the accident and the circumstances leading up to it: "I got on the railroad at the crossing of the Fielder Salt Works, and as soon as I got on the road I looked up west and saw a train up there. I always look to see if there is a train coming. The train was coming east. I then stepped across the two switch lines, and got between the middle switch line and the main line, and walked on down until the engine got pretty close to me, and I was afraid that something might happen. Very often large lumps of coal fall off, and I was afraid something of that sort might happen and knock me down, and I just stepped back across this middle switch line, and walked on down between the switch lines until the caboose of this train passed. I was not thinking of anything behind me; didn't know there was anything coming, and for the roaring of the train I could not hear anything; and just as the caboose of this train passed me I started to step across this track again to get over between the main line and the switch line where it was smoother walking, and as I stepped up on the end of a cross-tie, and just as I stepped up on and straightened myself something struck me and I was down that quick. I did not see it. I do not know whether I shut my eyes when it hit me or what. It struck me and whirled my back to it, and I fell with my back right at the ends of the cross-ties. I did not know what had hit me at all. I did not hear anything of any caboose there; didn't hear a thing but the roaring of this train as it went on by. I knew nothing of the caboose until I was hit. I heard no signal given. I did not hear a thing until I was down. I did not know what had struck me; didn't even get a glimpse of it. After it had passed I crawled up on my feet, and this man Crump was in 8 or 10 feet of me, and I asked him what it was knocked me down there. \* \* \* I was going northeast, back across the switch track, when I was struck. This train had just got by me when I was struck. I suppose it had passed me 10 or 15 steps. Just as soon as it passed me I started back across the track, and was struck. \* \* \* If I had walked down between the main line and the middle switch, there was room enough for the train to pass without the train striking me. I just crossed over the middle switch for fear something might happen. \* \* \* When I got on the south side of the middle switch, there was plenty of room for me to pass along there without any train hitting me. If I had stayed over there between the middle switch and the south switch, the caboose would not have hit me. If I had known it was coming, it would not have hit

me, anyhow. If I had known it was coming and had walked along over there, it would not have hit me; but it was rough walking, and I wanted to get where it was smooth walking. \* \* \* I never looked back to see if there was any train coming on that track. When I first got on the railroad, I looked up west, and didn't see anything. After I got up I looked towards the depot. I did not see the dodger engine and caboose until they got away down there where they stopped. When I crossed over the middle track going south, I did not see them at all. I did not know they were up there. As to whether I would have seen the caboose if it had been standing in there on the switch, I don't suppose it was there at all. I could just see the train. It is considerable over a quarter of a mile from where I got on the railroad up to the switch, and I don't know whether this train had got to the switch or not when I saw it coming down the main line. I just saw the train coming, and then I never looked back any more."

The evidence shows that the caboose which knocked appellee down had been shoved or kicked down the track by what the witnesses called a "dodger" engine, and that it was going at a rapid rate of speed when it struck appellee; and the evidence further shows that the place where the accident occurred was one which the public generally had been using for a footway for a great number of years, under such circumstances as to warrant the finding that the company had assented thereto, and that appellee was therefore a licensee, though upon this last issue the evidence, as we view it, was not conclusive, since appellant had its right of way fenced at this point and the crossings suitably protected by cattle guards. Under these circumstances we cannot avoid the conclusion that appellee's own evidence showed him to be guilty of contributory negligence, and that the trial court should have instructed a verdict for the appellant. We understand that ordinarily contributory negligence, even when such negligence consists in a failure to look and listen for approaching cars in attempting to cross a railroad track, is a question of fact to be determined by a jury; but where, as here, the injured party himself testifies and offers no excuse whatever for his failure to take this or any other precaution for his own safety before going into a place of known danger, no other conclusion but that of negligence can be entertained. Appellee was not caused to take the step he did, relying upon the assumption that appellant would give him timely warning, for the accident did not happen at a crossing or other place where signals were required to be given; nor can he insist that the employees of the company should have kept a lookout for him, since a lookout, if kept, would have been of no avail in this case, in that he was not run down while walking on the track, but was injured

solely because he stepped immediately in front of a moving car without so much as lifting his eyes to see if there was any danger to him. A proper lookout, if one had been maintained, could have resulted only in finding appellee off the track and in a place of perfect safety until, under all the evidence, he stepped in front of the car, when it was too late to avoid injuring him.

The trial court instructed the jury that it was the duty of appellant to maintain a lookout to discover persons on its track, and to avoid injuring them, and for this we would remand the case, were the error not swallowed up in the greater error of refusing the summary instruction. As before stated, the matter of keeping a lookout to discover appellee was foreign to any issue in the case, and the company's failure in this respect could not under the facts have caused the injury. We, therefore, hold that the undisputed facts, as detailed by appellee himself, show that he was guilty of contributory negligence, which would bar a recovery herein. *Sanches v. Railway*, 88 Tex. 117, 80 S. W. 431; *Ft. Worth & Denver City Ry. Co. v. Wyatt*, 85 Tex. Civ. App. 119, 79 S. W. 349, 9 Tex. Ct. Rep. 619, and authorities there cited. It can make no difference, so far as the issue of contributory negligence is concerned, whether appellee was a trespasser or a licensee. His relations to appellant might affect the measure of the latter's duty toward him, but it could hardly relieve him of the duty of exercising ordinary care for his own safety.

The judgment of the district court is reversed, and judgment here rendered for appellant.

#### FARRIS v. GILDER.

(Court of Civil Appeals of Texas. Jan. 11, 1908.)

##### 1. COURTS—MINUTES—CORRECTION.

Under *Sayles' Ann. Civ. St.* 1897, arts. 1120, 1146, requiring the judge to correct and sign the minutes in open court, etc., the clerk is without authority after the approval of the minutes and the adjournment of the term to change the minutes, but the matter must be called to the attention of the court, which must order the correction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 372.]

##### 2. APPEAL—APPEAL BOND—TIME OF FILING.

An appeal will on motion be dismissed because of the failure of appellant, a resident of the county in which the judgment was rendered, to file an appeal bond within 20 days after the adjournment of the term at which the judgment was rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2064-2070.]

Appeal from Ellis County Court; J. T. Spencer, Judge.

Action between W. D. Farris and U. M. Gilder. From a judgment for the latter, the former appeals. Dismissed.

W. H. Brown, for appellant. McRae & Lumpkins, J. W. Stinnett, and Sadler & Arnold, for appellee.

**BOOKHOUT, J.** This is a motion made by appellee to dismiss this appeal. The transcript filed in the case on appeal shows that the term of court at which this case was tried and judgment rendered adjourned on July 27, 1907; that the appeal bond was not filed in the trial court until August 29, 1907, more than 30 days after the date of the adjournment of the court. The appellant was a citizen and resident of Ellis county, and the appeal bond should have been filed within 20 days after the adjournment of the term of court at which the judgment was rendered. The appellee replied to the motion, alleging that as a matter of fact the term of the court at which the judgment appealed from was rendered did not adjourn until the 10th day of August, 1907; that, while the minutes of said court did show at the time the certificate to the transcript in this cause was made, the term of said court adjourned on the 26th of July, 1907, but that this was an error of the clerk in dating said minutes; that the minutes have been changed so as to speak the truth, and show that said term of court adjourned on August 10, 1907, the true date of adjournment. The reply had the certificate of the clerk attached, in which the clerk certifies to the facts as stated. The reply asked that a certiorari be awarded to correct the record. We granted the motion for certiorari, and in reply thereto it is shown that the term of court could, under the order of the commissioners' court fixing the terms of the county court, have continued until the Saturday before the second Monday in August. If the court adjourned on the 27th of July, the appeal bond was not filed in time, but was filed within time if the court actually adjourned on the 10th of August. The certificates of the clerk are, in substance, "that the civil minutes of said court, did on the 25th day of October, 1907, at the date of the certificate to the transcript in cause No. 2809 in said court styled W. D. Farris vs. U. M. Gilder show that said term of said court adjourned on the 26th day of July, 1907, but that this was an error of the clerk of said court in dating said minutes, and that since his attention has been called to said error, he has changed same so that it speaks the truth, and now shows that said term of said court did adjourn on the 10th day of August, 1907, which was the true date of said adjournment."

It is gathered from the clerk's certificate that the minutes, as first written and when approved by the judge and when the transcript was made out, showed that the June term of court at which the judgment was rendered adjourned on July 27, 1907, and that the clerk, upon his attention being called to the matter after the transcript was

filed herein, changed and corrected the minutes so as to show that the court adjourned August 10, 1907. It was the duty of the judge to correct and sign the minutes in open court. *Sayles' Ann. Civ. St. 1897, arts. 1120, 1146.* We are of the opinion that the clerk had no authority after the minutes had been approved and the court had adjourned to change the minutes in this respect. The matter should have been called to the attention of the court by motion, and, if the facts as shown by the certificate of the clerk filed herein be true, the court could, and presumably would, upon proof of the facts, have entered an order authorizing the minutes to be corrected so as to show the true date of the adjournment of the June term, 1907, of the court. *Rhodes v. State, 29 Tex. 190; Holman v. Chevallier, 14 Tex. 339.* In the absence of such an order, the clerk was not authorized to correct the minutes. There is no other evidence before us, except these certificates, tending to show the true date of the adjournment of the term of court at which the judgment appealed from was rendered. It follows from these remarks that the motion to dismiss this appeal must be sustained.

The appeal is dismissed.

**GALVESTON, H. & S. A. RY. CO. v. WAFER.\***  
(Court of Civil Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 22, 1908.)

**1. MASTER AND SERVANT—ACTIONS FOR INJURY—EVIDENCE—SUFFICIENCY.**

Evidence in an action for injury to an employé who was run down by an engine held to warrant a finding that no switchman was on the footboard of the tender to keep a lookout ahead.

**2. SAME—ACTS CONSTITUTING NEGLIGENCE.**

Where a track in the yards of a railroad company was used only in a limited way by engines or cars, and might be used at any time by some employé, the question of negligence in backing an engine over the track without a switchman on the footboard of the tender to keep a lookout did not depend on the existence of any rule requiring a switchman to be so stationed.

**3. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

A charge defining contributory negligence did not constitute reversible error because of the transposition therein of the words, "plaintiff" and "defendant," where the part of the court's charge which explained and submitted the issues that the jury were to decide, and for or against whom they were to find according to their determination of the issues, was so plain and unmistakable that the jury could not have been misled or confused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

**4. SAME—INSTRUCTIONS COVERED BY THOSE GIVEN.**

Where, in an action for injury to an employé who was run down by an engine, the court plainly allowed the jury to find against the railroad only if it had been negligent and its negligence proximately caused the injury, a requested charge that negligence cannot be presumed from the happening of an accident, and that, if plaintiff was injured as the result of an

accident not caused by defendant's negligence, to find for defendant, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

**5. SAME.**

Where, in an action for injury to an employé who was run down by an engine, the court charged to find for defendant if plaintiff was guilty of negligence, a requested charge that, if both the engineer and plaintiff were guilty of negligence proximately causing the injury, plaintiff could not recover, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

**6. MASTER AND SERVANT—INJURIES TO SERVANT—QUESTION FOR JURY.**

In an action for injury to an employé who was run down by an engine, whether he was guilty of negligence in standing where he did from three to five minutes held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action for personal injury by J. N. Wafer against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Beall & Kemp, for appellant. Patterson & Wallace, for appellee.

**JAMES, C. J.** The action was by Wafer, who alleged that he was an employé of defendant, and while performing his duties in defendant's yards, inspecting a gauge and oil pump located on which is known as the "dead engine track," and while standing on or near said track with his back in a westerly or southwesterly direction, and while his attention was engrossed in watching said pump, a switch engine of defendant was operated eastward on said track at an unlawful and dangerous speed, and without any notice or warning struck plaintiff and seriously and permanently injured him. The grounds of negligence alleged were that the engineer saw plaintiff in his dangerous position, or should have known it, and failed to slow down or stop the engine, but negligently ran upon plaintiff, and also that defendant negligently failed to have a switchman or other employé on the footboard of the tender to keep a lookout, and warn persons who might be upon the track of the approach of the engine. The answer was general denial; that plaintiff's injuries were caused by risks and dangers incident to his employment and by his contributory negligence.

The first assignment complains of the seventh paragraph of the charge, which submitted the issue that if plaintiff, an employé engaged in the performance of his duties, stood upon or in close proximity to the track and was struck, and that if defendant should have had some one on the footboard of the tender to keep a lookout ahead, and to warn persons upon or in dangerous proximity to the track, and that such failure was negli-

\*Writ of error denied by Supreme Court.  
106 S.W.—57

gence, and such negligence the proximate cause of plaintiff being struck, and that plaintiff himself was not guilty of negligence contributing to cause his injury, to find for plaintiff. There are two points directed against this charge, neither of which is well founded. One is that there was no evidence warranting the submission of the issue, and the other is that the court should not have submitted such issue in the absence of any rule requiring a switchman or other employé to be stationed on the footboard of the tender for such purpose. It was testified to by the witness Borcharding, general foreman of the car department, that he knew a switchman was generally on the footboards in switching in the yards, and that he thought it was necessary for men to be on the footboards the way the engine is going; that he had often seen them there. He did not testify to the existence of a rule to that effect, as is asserted by appellee, but said "I think there is. I do not know." The evidence was that this dead engine track was not a regular switch track, and was as a rule used only for the purpose of conveying engines to and from the roundhouse. Plaintiff's duties called him to this place, and he had been watching the gauge of the oil pump through a little hole in the roundhouse fence. The pump did not seem to be working, and plaintiff stepped upon the track, and from there was watching the gauge over the fence when he was struck. He testified that he stood there three to five minutes, or something like that, looking over at a car to see if it was taking up oil. In doing this he was looking east, and the engine came from the west. There was testimony showing that no warning was given of the approach of the engine, and no one was stationed on the footboard. Plaintiff testified that as a rule this track was not used for switching, but for carrying engines in and out of the roundhouse, and, when they had any switching or bringing in of cars to do, some of the crew generally came and told him that they were coming in; that this was the regular practice; that no one told him about this engine coming, and the first he knew about it being upon the track was when it hit him. At that time there was hammering going on, and engines in the vicinity were making noises that prevented him from hearing it approach. The place of the accident was 10 or 15 feet from the crossing of a public street. The engineer, Gaddis, testified that there was no person on the footboard of the tender that he saw, and that, when he discovered plaintiff, the latter was looking in the opposite direction. Borcharding, who was the first man to reach plaintiff, testified that he saw no one on the footboard. The testimony of these witnesses, who testified in person, may have impressed the jury as evasive on the subject, and from what they stated or admitted it seems to us that it was admissible for the jury to conclude that no switchman was

there. Borcharding testified that his attention was on Mr. Wafer, and that, if there had been a switchman on the footboard, he would have been right near Wafer. We conclude that the question of negligence of defendant did not depend on the existence of any positive rule requiring persons to be on the footboards. Whether or not such a precaution was demanded by the dictates of ordinary care depended not upon a rule entirely, but fundamentally upon the exigencies of the situation. Here was a track used only occasionally and in a limited way by engines or cars, in the yards of defendant, where the track might be used at any time by some employé in performing a duty, as it appears this plaintiff was doing at the time, the employé not suspecting, and having reason, from the ordinary practice in such matters, not to expect, that an engine would attempt to back over it without notice of its approach, and it cannot be said as a matter of law that ordinary prudence would not require, under such conditions, the precaution of stationing some person on the footboard. The case is not that of a trespasser occupying a track, but of an employé occupying it in the performance of his work. We think the charge complained of was not erroneous. The testimony of plaintiff, if accepted by the jury, as the true version of the transaction, as it doubtless was, would acquit him of contributory negligence. They had the right to disbelieve the contrary testimony.

The second and third assignments complain of the following portion of the charge: "And by contributory negligence is meant some negligent act or omission on the part of the defendant which, concurring or co-operating with some negligent act or omission on the part of plaintiff, is the proximate cause of the injury complained of." Also, the following: "In determining whether or not plaintiff was guilty of negligence, or whether or not defendant was guilty of contributory negligence, you may look to all the surrounding facts and circumstances in evidence before you bearing upon these issues." The part of the court's charge which explained and submitted the issues the jury were to decide, and for or against whom to find according to their determination of such issues, was so plain and unmistakable that the jury could not have been misled or confused by the inadvertent misplacing of the words "plaintiff" and "defendant" in the portions of the charge which are complained of.

The fourth and fifth complain of refused charges which were as follows: "(1) You are charged that negligence cannot be presumed from the mere happening of the accident, if accident it was. Therefore, if you find that plaintiff was injured as the result of an accident, not caused by the negligence of the defendant as charged by plaintiff, you will find for the defendant." This charge we think would have been improper. The court

plainly allowed the jury to find against defendant only if it had been negligent and its negligence proximately caused the injury. We do not comprehend how the court could make the matter plainer to men of ordinary intelligence by charging, in addition, that an event brought about by negligence is different from a mere accident. It seems to us that what the proposed charge states about accident was more in the nature of argument than useful explanation. (2) If you believe from the evidence that both the engineer and the plaintiff were guilty of negligence, proximately causing or contributing to plaintiff's injury, then plaintiff cannot recover." We do not see how this form of expression would have been more serviceable to defendant's purposes than the charge that the court gave to find for defendant if plaintiff was guilty of negligence.

We overrule the sixth assignment. The supplemental instruction was not calculated to have the effect claimed for it.

The seventh is also overruled. The testimony was amply sufficient to support the finding that there was no switchman on the rear end of the tender.

The eighth is also overruled. It was for the jury to say whether or not, under the circumstances developed in plaintiff's testimony, he was guilty of negligence in standing where he did from three to five minutes.

The ninth is that the court erred in refusing a new trial, for the reason that the evidence shows that the engineer saw plaintiff when the latter was far enough from the track to be out of danger, but that, when the engine approached to within six or eight feet of him, he suddenly stepped on the track, and the engineer used every means in his power to prevent said injury, and these facts were established by the testimony of the engineer and the witness Borcharding, and the jury were not warranted in disregarding their testimony; they being unimpeached. It seems useless to discuss this, as it assumes that the jury had no right to believe plaintiff.

The verdict and judgment entered thereon was for \$4,500. Afterwards, when the motion for new trial came on to be heard, and the court announced that it would grant the motion unless plaintiff would remit \$1,700, plaintiff entered a remittitur reducing the sum to \$2,800, which the court approved, and then overruled the motion.

We find that this amount was not excessive, and overrule the remaining assignments. Affirmed.

#### TITTERINGTON v. KIRBY.

(Court of Civil Appeals of Texas. Nov. 23, 1907.)

#### BOUNDARIES — EVIDENCE — QUESTIONS FOR JURY.

A survey called for corners of two other tracts as a common point, but those corners did

not coincide, and, compared with the amount called for, there would be a deficiency or an excess in the actual survey according to which call was taken as true, though the deficiency would be greater than the excess. *Held*, that the issue as to which call should govern was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 201.]

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by George A. Titterington against J. M. Kirby to recover certain land. From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed and remanded.

Gano, Gano & Gano, for appellant. Thompson & Thompson and Jeff. Word, for appellee.

STEPHENS, J. This suit was brought to recover a small strip of land located in recent years between two old surveys, to wit, the Jesse Starkey and the T. Payne, situated in Dallas county, in which the right of plaintiff, appellant here, to recover, depended upon the correct location of the western boundary of the Payne survey. The field notes of this survey contain erroneous and contradictory calls, particularly the calls for its southwest corner, in that the southeast corner of the Jesse Starkey and the northeast corner of the H. H. Hall survey, also an old survey, are called for as a common point; whereas, the southeast corner of the Jesse Starkey is west of the northeast corner of the Hall, the width of the strip of land in controversy, both of these corners being still well marked by objects found on the ground. There was also evidence of marked lines running north from each of these corners. If the south line of the Payne be extended to the southeast corner of the Starkey, there would be a slight excess in the quantity of land called for in the Payne, and, if controlling effect be given to the call for the northeast corner of the Hall, a slight deficiency results; the deficiency however, being considerably greater than the excess. In submitting the case to the jury, the court in a charge reviewing the evidence at considerable length reached the conclusion that the western boundary of the Payne should be established by the call for the southeast corner of the Starkey, rather than by the conflicting call for the northeast corner of the Hall, and instructed the jury to return a verdict accordingly, on which the judgment appealed from was entered.

It seems clear to us, however, that even on the facts recited in this charge appellant was entitled to have the jury in the first instance determine the issue. This conclusion involves a consideration of numerous circumstances; but, in view of another trial, we abstain from a discussion of the relative importance and weight of these circumstances. The matter to be ascertained from the sketch and field notes of the locat-

ing surveyor, read in the light of all other relevant facts and circumstances in evidence, was: Where did he intend to place the western boundary of the Payne survey? That, in view of the conflicting calls and other elements of uncertainty, was clearly an issue of fact, and, however cogent may be the reasons for the view entertained by the trial court as set forth in the charge, we are unable to say that the circumstances to the contrary were entitled to no weight whatever.

The judgment is therefore reversed, and the cause remanded for a new trial.

### RAHT v. STATE

(Court of Civil Appeals of Texas. Dec. 7, 1907.)

#### TAXATION—COLLECTION OF TAXES—COSTS.

Under Acts 1897, p. 136, c. 103, § 9, providing that, where two or more unimproved town lots belonging to the same person are included in the same suit for taxes, the costs shall be taxed against the lots collectively as if they were one tract, the costs in a suit for taxes against unimproved town lots, owned by one person, but separately assessed in the name of an unknown owner, must be taxed on the basis of the lots being one tract.

Appeal from District Court, Archer County; A. H. Carrigan, Judge.

Action by the state against A. W. Raht. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

W. G. Eutis, for appellant. C. H. Henley and W. E. Forgy, for the State.

#### Statement.

STEPHENS, J. This suit was brought under section 9, c. 103, p. 136, Acts 1897, to recover taxes assessed against four unimproved lots in the town of Archer City, all owned by appellant, but separately assessed as the property of "unknown owner," for the years from 1891 to 1906, inclusive, and to recover costs as provided in said act, together with the foreclosure of lien on said lots. There is no controversy as to the amount of the tax; but it is claimed that the judgment for costs in the sum of \$71 was erroneous, in that the four unimproved lots should have been treated as one tract or lot of land, which would have reduced the costs to \$15.75. There is no controversy about the facts.

#### Conclusions.

We agree with appellant that the following provision in section 9 of the act under which the suit was brought was applicable to the facts of this case, and that the court erred in not applying it, to wit: "Provided, that where two or more unimproved city or town lots belonging to the same person, and situated in the same city or town, shall be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number

less than ten, taxed against them collectively, just as if they were one tract or lot." The cases cited and relied on by the appellee were not cases of town lots at all, and therefore not authority for the judgment in question, since the proviso above quoted applies only to unimproved city or town lots. The fact that these lots had been separately assessed in the name of "unknown owner" can make no difference, since the proviso requires (all being included in the same suit) the costs to be taxed on the basis of their being one tract or lot. This is a statutory proceeding, and the right of the state to recover is limited by the terms of the act itself, excluding the contention urged by the appellee that the officer making the assessments was entitled to a fee for each assessment, although all of the lots were included in one suit. If he has any such right, it is not enforceable in this proceeding.

The judgment as to the costs will therefore be reversed and rendered for \$15.75, and affirmed as to the taxes.

### DALLAS CONSOLIDATED ELECTRIC ST. RY. CO. v. LITTLE et al.\*

(Court of Civil Appeals of Texas. Dec. 7, 1907. Rehearing Denied Jan. 18, 1908.)

#### 1. DEATH—ACTION FOR NEGLIGENT DEATH—PETITION.

A petition in an action for negligent death which alleges that the injuries inflicted on decedent consisted of bruises on her left knee, causing inflammation of the joint, injury to the left lung, causing traumatic pneumonia, a blow on the head, producing concussion of the brain, a blow on the neck, producing an aneurism, with other injuries described, which injuries caused death, sufficiently specifies the injuries causing death within the rule that defendant in an action for negligent death is entitled to reasonable notice of the number, character and results of the injuries resulting in death.

#### 2. TRIAL — INSTRUCTIONS — ASSUMPTION OF FACT.

Where, in an action for negligent death, a witness testified that decedent's death was the result of a blow received on the neck causing an aneurism, and other witnesses testified to other injuries and results therefrom, which might contribute to cause death, the court in its instructions could not assume that the injury causing an aneurism was the cause of death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 420.]

#### 3. SAME.

Where, in an action for negligent death, the fact that decedent received injuries in a collision was undisputed, and a witness testified that a blow received on the neck caused death, and other witnesses testified to other injuries which also might have produced death, an instruction authorizing a verdict if death was caused by any of the injuries, etc., was not misleading as assuming that decedent received the blow on the neck in the collision, as to which there was a conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

#### 4. DEATH—TRIAL—INSTRUCTIONS.

Where, in an action for negligent death, brought by the husband and daughter of decedent, the evidence showed that decedent had

\*Writ of error denied by Supreme Court.

been running a laundry producing a net weekly income, and that the daughter had received a weekly contribution from decedent, a charge that, if the death caused any pecuniary loss to "plaintiffs or either of them," the verdict should be "for such plaintiffs," was not misleading as authorizing a verdict for both plaintiffs on proof that one of them only sustained pecuniary loss by decedent's death.

##### 5. TRIAL—APPLICATION OF INSTRUCTIONS TO EVIDENCE.

Where, in an action for the death of a street car passenger in a collision between cars, caused by the negligent construction of a switch and the running of a car at an excessive rate of speed, the answer was a general denial, and there was nothing in the evidence to show that a third person had displaced the switch, and the court required the jury, before they could find for plaintiff, to find that the collision was caused by negligence of the carrier, and restricted the inquiry to the negligent acts alleged, the refusal to charge that, if the switch was thrown by a person not connected with the carrier, there could be no recovery, was not erroneous.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by George Lytle and another against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Finley, Knight & Harris, for appellant. K. R. Craig and G. G. Wright, for appellees.

CONNER, C. J. This suit was instituted in the Forty-Fourth judicial district court of Dallas county by appellees, seeking to recover damages on account of the death of Annie Lytle, alleged to have been caused by injuries sustained by her in a head-end collision between two of defendant's cars. Appellees claimed in their petition that "Geo. Lytle was the husband, and Jennie Burch the daughter, of Annie Lytle, and that by reason of her death they had sustained pecuniary loss, that appellant's negligence consisted, first, in the manner of the construction of the switch; second, in the failure of its motorman in charge of its west-bound car to keep a proper lookout; and, third, that said west-bound car violated the city ordinance regulating the speed of cars, that, had said car not been running at said unlawful speed, the motorman in charge might and probably would have discovered the condition, would have had such control of his car that he could have stopped it and avoided a collision, which control, because of the high rate of speed, he did not have." Appellee Geo. Lytle alleged that he had suffered loss of the services of his wife, and, in addition thereto, that his wife was engaged in the hand laundry business which yielded and was of the value of \$100 per month, and that, by reason of her death, said business was lost and destroyed, to his damage \$30,000. Appellee Jennie Burch alleged that, although married, her husband was blind and incapacitated from supporting his family, and that she was dependent upon her mother, Annie Lytle, who was accustomed to and did, and would for the remainder of her life have continued to,

contribute out of her earnings to the support of her and her family and provided them with a home; that by her death she was deprived of such assistance and support, to her damage \$5,000. Appellant answered by general and special demurrers and general denial. A trial was had on March 10, 1906, resulting in a verdict and judgment in favor of appellees for the sum of \$900, which was by said verdict and judgment equally divided between the appellees.

In the first assignment complaint is made of that part of appellees' petition alleging injuries which charged that "such injuries so inflicted consisted chiefly of severe bruises on her left knee, causing inflammation of the joint; both hands bruised and lacerated and torn; her left lung was seriously injured, causing traumatic pneumonia; left foot and ankle seriously sprained, mashed and bruised; displacement and serious injury to her womb; a severe blow on her head, producing concussion of the brain; and a severe blow on the right side of the head and neck, which produced an aneurism of the right carotid artery; her face, head, and forehead were bruised and lacerated; severe nervous shock and serious injuries to all parts of her body, both external and internal—which injuries so inflicted as aforesaid caused the death of the said Annie Lytle as aforesaid." The contention is that "such allegation is too general, and does not specify which of said injuries caused Annie Lytle's death, nor how, when, or wherein said injuries caused her death, and does not set forth with sufficient particularity in what manner said injuries caused her death." We think the petition is quite as specific in the particulars complained of as should be required. While appellant was entitled to reasonable notice of the number, character, and results of the injuries claimed, in order to be prepared to meet the case if it could with evidence, yet this rule is not to be construed as requiring a plaintiff to hazard a recovery by unnecessary descriptive matter or by averments of facts that are in their very nature uncertain. In this case numerous severe injuries were specified. All may have contributed in varying degrees and in obscure ways to the final result, and appellees were not required to limit their right by restricting the general result to any single injury, nor to any specified manner in which the injuries worked death. The objection that the petition fails to sufficiently plead the ordinance of the city of Dallas regulating the speed of street cars seems to be immaterial in view of the evidence and of the court's failure to submit this issue to the jury.

Error is assigned to the following paragraph of the court's charge: "Annie Lytle, the deceased wife of the plaintiff George Lytle, and mother of the plaintiff, Jennie Burch, was on the 12th day of January, 1904, a passenger on one of defendant's street cars, and was injured in a collision which occurred between said car upon which she was a passenger and



another car belonging to the defendant, which ran into the car upon which the said Annie Lytle was a passenger, aforesaid. The said Annie Lytle is now dead. If you find from the testimony before you that her death was caused by any of the injuries sustained by her in said collision, and if you further find from the testimony before you that the said collision was caused by negligence on the part of the defendant, and if you further find from the testimony before you that the death of the said Annie Lytle has caused any pecuniary loss to the plaintiffs, or either of them, then your verdict should be for such plaintiffs. But, if you fail so to find that the death of the said Annie Lytle was caused by any injury sustained by her in the aforesaid collision, or if you fail so to find that the said collision was caused by negligence on the part of the defendant, or if you fail so to find that the plaintiffs or either of them have sustained pecuniary loss as the result of the said Annie Lytle's death, then in either such event your verdict should be for defendant."

It is insisted that the evidence shows that Annie Lytle's death was caused by an aneurism—one only of the injuries claimed—and that, therefore, the charge was erroneous, in that it permitted a recovery if the death of the deceased was caused by "any of the injuries sustained by her." It is further insisted that there was a sharp conflict in the evidence as to whether Annie Lytle received the injury causing an aneurism, and that the charge, therefore, was upon the weight of the evidence in assuming that Annie Lytle was injured; the evidence, as before stated, further showing that none of the other injuries could have caused the death for which recovery was sought. It is further insisted that the charge permitted a recovery by both plaintiffs upon proof that one of them only had sustained pecuniary loss by the death of Annie Lytle. While these objections have been presented with force and seeming plausibility, we yet think the difficulty more apparent than real. It is true that one of appellees' witnesses—perhaps the principal one—testified that Annie Lytle's death was the result of a blow received on the neck, causing an aneurism, yet there were other witnesses who testified to the number and character of her injuries substantially as charged in the petition, and to a generally impaired condition of Annie Lytle's health and strength after the accident, testifying that she was in a continuous nervous condition, had palpitation of the heart, sleeplessness and tendency to suffocation, and other results which, in our judgment, would have made it improper for the court to have assumed that the jury were bound to believe the expert witness, and to reject the hypothesis that injuries other than aneurism may have contributed to Annie Lytle's death. Nor do we think it can be fairly said that the charge was misleading in assuming that there was an aneurism. While the charge instructed the jury that

Annie Lytle received injuries in the wreck under consideration, such fact is undisputed, and the issue of whether among others one on the neck causing aneurism was received was fully comprehended in the charge and fairly submitted to the jury, so that, on the whole, we do not think the charge was misleading or on the weight of evidence in this respect. And, while the charge apparently authorized the jury to find a verdict for both plaintiffs if pecuniary loss resulted to either of them, we yet think it so appears from the inadvertent use on the part of the court of the letter "s" following "such plaintiff." We think it evident that the court meant to say that if the jury found from the testimony that the death of Annie Lytle caused any pecuniary loss to the plaintiffs, or either of them, then that their verdict should be for "such plaintiff" so receiving pecuniary loss. Besides, as we read the evidence, it tends to show that both plaintiffs received pecuniary loss. The testimony tended to show that appellee George Lytle was the husband of Annie Lytle; that she had been running a hand laundry which produced a net income of more than \$30 per week; that appellee Jennie Burch was the daughter of Annie Lytle, and received a regular contribution from her mother of \$25 per month. The verdict was small, less apparently than would have been justified by the evidence. There is no complaint of the verdict and judgment as excessive, and we cannot see that appellant is materially concerned in the manner in which the damages were apportioned.

In the fourth assignment appellant complains of the court's refusal to give its special charge No. 1, which is as follows: "You are instructed that if you find and believe from the evidence that defendant was not negligent in the manner of construction of the switch as complained of, and that its employes engaged in the operation of the car were not negligent in the manner of the operation of the car, but should find that said switch was thrown by some person or persons not connected with the defendant in any way or by some unknown cause, then you are instructed that the act of said third person in throwing said switch could not be attributed to defendant herein, and defendant would be entitled to a verdict, and, in the event you so find and believe, you will return your verdict for the defendant." The contention is that this special charge was necessary in order to present appellant's defense affirmatively. There was evidence tending to show that the collision was possibly caused by a displaced switch. The operatives of the two cars concerned testified to the effect that they did not do so, but there is nothing in the evidence that indicates that some third person not connected with the appellant railway company was guilty of such wrong. If, in fact, the switch was displaced, it is a matter of mere conjecture as to the time, manner, or person concerned

therein. The possession, management, and control of the switch in question was that of appellant, and it seems to us that it would have been erroneous for the court to have assumed, as the special charge did, that there was evidence that some one not connected with appellant displaced the switch and caused the wreck. Besides, no defense of the character indicated by the contention was affirmatively pleaded, appellant's only answer to the merits being a general denial, and the court's general charge specifically required the jury, before they could find for appellees, "to find that the said collision was caused by negligence on the part of the defendant"; the court in another clause giving a definition of negligence that, in effect, restricted the inquiry to the negligent acts alleged, which do not include a charge of negligence in moving the switch.

The remaining assignments relate to special charges refused, but we think the questions presented are sufficiently disposed of by what we have already said; and believing that the evidence sustains the verdict and judgment, and that the case has been fairly tried, it is ordered that the judgment be affirmed.

#### CARVER, FRIERSON & CO. v. GRAVES.

(Court of Civil Appeals of Texas. Nov. 16, 1907. Rehearing Denied Dec. 14, 1907.)

##### 1. SALES — REMEDIES OF SELLER — RESALE — MANNER AND CONDUCT OF SALE.

Where a seller, on the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price and that obtained on the resale, he must resell within a reasonable time, and at the best price he can reasonably obtain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 920, 921.]

##### 2. SAME — ACTION FOR BREACH OF CONTRACT — INSTRUCTIONS IGNORING ISSUES.

In an action by a seller on breach of the contract to recover the difference between the contract price and the price obtained on his resale of the goods, where the issue was raised as to whether he had exercised reasonable diligence in making the resale, an instruction that the measure of damages was the difference between the contract price and the price obtained in the resale was erroneous as ignoring that issue.

##### 3. SAME — RESALE — DILIGENCE — QUESTION FOR JURY.

Whether a seller who, upon the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price and that obtained on the resale, has exercised reasonable diligence to sell within a reasonable time, and at the best price he could obtain, is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 924.]

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by N. C. Graves against Carver, Frierson & Co. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. M. Neblett and Spoonts, Thompson & Barwise, for appellants. Beckham & Beckham, for appellee.

STEPHENS, J. Appellee sold appellants 24 bales of cotton of the aggregate weight of 12,415 pounds, to be delivered on the cars at Tloga, Tex., claiming and offering evidence to show that he had sold the cotton at 15½ cents per pound, while the appellants contended and offered evidence tending to show that the price was 14½ cents. Appellants refused to receive the cotton, and this suit was brought to recover the difference between the contract price and the price at which appellee subsequently sold it to another purchaser. Appellee alleged that he had been compelled by reason of a decline in the market to sell the cotton at 13.81 cents per pound, alleging that that was the highest price obtainable for the same. The only defense was a general denial. The evidence tended to prove that appellee did not resell the cotton until after what was described in the testimony as "the Sully failure," which took place about a week after the cotton had been delivered on the cars at Tloga, and that this failure was followed by a sudden decline of 2 cents per pound in the price of cotton. Appellee testified that the price at which he sold the cotton was the best he could obtain after diligent efforts, but whether he offered to sell the cotton within a reasonable time was a matter of inference from the circumstances about which there might arise a difference of opinion. It is at least doubtful from the evidence whether he made any effort to sell the cotton for a week or more after appellants refused to take it.

The court instructed the jury to measure the damages by the difference between the contract price and the price obtained in the resale of the cotton. One ground of objection to this charge in effect is that it took from the jury the issue of reasonable diligence on the part of appellee in his effort to make a resale of the cotton after the breach. It is undoubtedly the duty of the seller in adopting the remedy chosen in this instance to resell within a reasonable time, and at the best price he can reasonably obtain; that is to say, he must pursue the course "which prudence would dictate to a man of ordinary prudence." *Waples & Co. v. Overaker & Co.*, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727, and authorities there cited. But where the circumstances leave any room for controversy as to whether he has pursued this course, the issue is one of fact for the determination of the jury. It is contended, however, in behalf of the appellee, that in this instance the issue was not raised by the pleadings; but it seems to us that it was tendered by the petition itself, and if in any case it would be necessary for the defendants to plead it specially, it was not so in this instance. The general denial was sufficient.

Because the court erred in the charge on the measure of damages, the judgment is reversed, and the cause remanded for a new trial.

**BRIGGS v. AVARY.\***

(Court of Civil Appeals of Texas. Nov. 16, 1907. Rehearing Denied Dec. 21, 1907.)

**1. BANKRUPTCY—PROPERTY OF BANKRUPT—TITLE—RIGHT TO SUE.**

Ordinarily the title to nonexempt property of a bankrupt passes to his trustee, who, pending the bankruptcy proceedings, is alone entitled to sue to enforce rights incident thereto.

**2. SAME—UNPROFITABLE PROPERTY—NON-ACCEPTANCE BY TRUSTEE.**

A trustee in bankruptcy is not bound to accept property of an onerous or unprofitable character, and has a reasonable time within which to elect whether he will accept it or not, and if he declines the bankrupt may assert title thereto.

**3. SAME—EVIDENCE.**

Evidence that water power privilege, granted to a bankrupt, was claimed adversely by another, and at the time of the bankruptcy was not being used by the bankrupt, and that the trustee in bankruptcy made a written waiver of all his right, title, and interest therein, and granted the bankrupt permission to prosecute any rights that he had with reference thereto, support a conclusion that the trustee never accepted the bankrupt's right to the privilege.

**4. WATERS AND WATER COURSES—ADVERSE POSSESSION—NATURE OF HOLDING.**

An irrigation company let a water power and gin site to plaintiff for 10 years, reserving the right to use or dispose of the surplus water over the amount necessary to operate a gin. Plaintiff leased the premises to D. from year to year until the gin burned, after which defendant obtained a conveyance from the irrigation company of the "surplus water," and later obtained a transfer of D.'s rights. Both conveyances recited the conveyance under which plaintiff claimed, and defendant testified that at the time he bought D.'s interest D. informed him that he had arrangements with plaintiff to use the site and water power for 10 years, and that he was to gin 10 bales of plaintiff's cotton as rental, etc., and also stated that he intended to pay plaintiff for the use of the premises and water power, but that plaintiff tendered him no cotton to gin. Held, that defendant's occupation of the site and water power was not adverse to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 150.]

**5. LIMITATION OF ACTIONS—LANDLORD AND TENANT—ACTION FOR RENTS.**

Where plaintiff permitted defendant to occupy a mill site and water privilege without payment of rent, plaintiff's right to recover rents was limited to two years prior to the commencement of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 273-279.]

Appeal from District Court, Ward County; James L. Shepherd, Judge.

Action by J. C. Avary against George E. Briggs. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Heffner, for appellant. McKinzie & Brady, for appellee.

CONNER, C. J. J. C. Avary filed this suit in the district court of Ward county on the 27th day of April, 1904, against Geo. E. Briggs, to recover the rental value for the years 1902, 1903, 1904, and 1905 of a certain gin site, and of a certain water power used in operating a gin erected on the right of way of an irrigation ditch formerly owned by the,

Margueretta Company. The trial resulted in a verdict and judgment for appellee in the sum of \$700, and the assignments of error on appeal to this court present two principal questions: First, did the court properly entertain the suit as against appellant's plea in abatement setting up a want of capacity in appellee to sue? and, if so, was appellee's recovery barred by the two years' statute of limitation, as appellant pleaded both by way of exception to appellee's petition and by a special plea to that effect? We have concluded that both questions must be decided in appellee's favor.

Appellee's pleading and proof shows that he was claiming the premises and water power in question under a conveyance from the Margueretta Company, the then owner, dated May 18, 1896, granting to appellee for the space of 10 years from that date "the right and privilege to construct and maintain said gin on said right of way of said canal at the point indicated, and to utilize and employ for said 10 years so much of the waterfall or power at said point in said canal as may be necessary and proper to run said gin." The conveyance, however, reserved the right of the company to use or dispose of the "excess or surplus of water power over and above that necessary to properly run said gin," in event there was any such excess. Appellee's evidence further tends to show that at a subsequent day in 1896 he leased the premises described in the conveyance from the irrigation company to one G. W. Donaldson for the term of one year, Donaldson agreeing to erect upon said premises and right of way a cotton gin and plant for the ginning of cotton, and to develop the water power in the canal at that point, and to pay appellee for the use of the gin site and water power certain specified rent; that Donaldson did erect the gin as agreed upon, and at the end of the ginning season of that year, which was about March 1, 1897, appellee again made verbal lease for one year to Donaldson for the specified rent of \$150; that in December of 1897 the gin burned; that neither Donaldson nor appellee thereafter erected or operated a gin, but appellant on the 14th day of December, 1897, secured from the Margueretta Company an instrument in writing which recited the former conveyance to appellee and the reservation of the right to dispose of the surplus water power therein mentioned, and declaring that such surplus then existed, and which conveyed to appellee "the right and privilege to utilize and employ such surplus power for any purpose that he may deem fit and proper"; that yet later, to wit, on September 2, 1898, appellant purchased from G. W. Donaldson the water power and water rights acquired by appellee from the Margueretta Company, and immediately thereafter erected a ginhouse and plant, which he has operated during a majority of the cotton seasons since. It further appears that on the 18th day of May, 1899, appellee was declared and adjudged

\*Writ of error denied by Supreme Court Jan. 22, 1908.

a bankrupt in the United States District Court for the Western District of Texas at El Paso, and that on the 13th day of June, 1899, John R. Harper was appointed by said court trustee of appellee's individual and personal estate; that Harper afterwards qualified as such trustee, as required by the act of Congress, and had not resigned or been discharged prior to the institution of this suit, nor has appellee at any time received his discharge as a bankrupt. It was agreed that appellee's right, title, or claim, if any, accrued prior to the 6th day of March, 1899, when the bankrupt proceedings were commenced; but it was shown on the hearing of the plea in abatement that on the 8th day of April, 1904, John R. Harper, trustee in bankruptcy, in writing waived all his right, title, and interest as trustee in bankruptcy in and to the property above mentioned, and so far as permitted by law so to do, granted to appellee permission to prosecute any rights that he had in the subject-matter of the suit. Ordinarily the title to the property of a bankrupt of whatever character or description save exempt property passes to the trustee in bankruptcy, and when thus invested the trustee during the pendency of the bankrupt proceedings alone is entitled to sue. But it has been frequently held by the Supreme Court of the United States that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can then assert title thereto. See *Bank v. Lasater*, 196 U. S. 115, 25 Sup. Ct. 203, 49 L. Ed. 408, and authorities therein cited. Appellant claimed title under the Donaldson conveyance to him, which in form was antagonistic to appellee's right, and on the trial set up his possession, averring it to have been adverse, and it seems appellee's title under all of the circumstances might reasonably be considered onerous and unprofitable, and while we are not inclined to hold that the title to property once accepted and vested in the trustee can be by such trustee reinvested in the bankrupt, so as to entitle him to sue, by mere written consent, we nevertheless think the written consent of the trustee shown in this case was evidence tending to show that the trustee in fact never accepted or consented to act as trustee for the property in consideration. There is no evidence that he ever took any other action in relation to it whatever, and we are of opinion that the evidence as a whole supports the conclusion that we must impute to the court's ruling on the plea in abatement that the trustee Harper in fact never accepted appellee's right to the gin site and water power, or to the rents and revenues thereof, and that therefore appellee was authorized to institute the suit.

But little need be said on the remaining issue of limitation, as many of the facts already stated are also relevant to that subject.

Appellant's conveyance from the Margueretta Company did not purport to convey more than the "surplus" water power, and the evidence otherwise shows that the power in fact is not more than sufficient to operate a gin such as has been operated at the specified place. Both the conveyance from the irrigation company and from Donaldson to appellant recited the conveyance under which appellee claims, and appellant upon the trial, while a witness, testified that at the time he bought the Donaldson interest Donaldson informed him "that he had arrangements with Avary whereby he was to have use of the site and water power for 10 years. He also informed me that he was to gin for Avary each year 10 bales of cotton as rental provided Avary had the cotton of his own." Appellant further testified on cross-examination: "Yes; I knew the contents of the contract between J. C. Avary and the Margueretta Company at the time I purchased from Donaldson. Yes; I knew that Avary had leased the premises to Donaldson, and whatever rights Donaldson had by reason of the lease or rental contract from Avary I succeeded to them by reason of the purchase I made of Donaldson. Yes; I intended to pay Avary for the use of the premises and water power, if Avary had had any cotton to gin, but he did not tender me any cotton to gin. \* \* \* I knew that Avary had some kind of a contract with Donaldson for the rental of said premises and water power, but I did not inquire of Avary anything about the contract. Yes; when I bought from Donaldson I stepped into Donaldson's shoes, and took whatever contract Donaldson had." It thus appears that appellant's possession was not of that adverse character necessary to support title to appellee's property in the gin site and water power under the two years' statute of limitation. Appellant insists, however, that the conveyance from the Margueretta Company to appellee was no more than appellee's personal privilege to erect a gin and to use the water power specified, but we do not so interpret the conveyance under which appellee claims. Mr. Gould, in his work on Waters, § 305, declares the law to be that, "if a 'mill' be granted, reserved, or devised, either with or without the word 'appurtenances,' it includes, not only the mill itself, but the land under it, and so much of the land adjacent to it as is necessary to its use, or commonly used in connection with it; also, the fixtures used in operating the mill, including its machinery, race, booms, etc., in use or in their appropriate position at the time of the conveyance, and the water privileges appurtenant and essential to the mill, as corporeal hereditaments." The right to erect and operate a gin and use the water power at a specified place therefore certainly carries with it the right to the land upon which the gin is to be erected and upon which the water power is situated. Appellee's conveyance vested in him an estate in lands that was assignable,

or that might be subtle in the absence of any restrictions in the conveyance to him, and there was none. We hence see nothing in the nature of appellee's right that would authorize the conclusion that his right of recovery was barred by limitation on this ground. Of course, appellee's right to recover rents for more than two years prior to the institution of his suit would be barred; but, so far as we are able to see, he was not permitted by the court's charge to recover rents for a greater period. Besides, appellant, as we interpret his presentation of the case before us, insists upon his plea of limitation upon the ground only that appellee's right to the property from the use of which the rents proceeded has been lost by limitation.

We conclude that there is no error in the proceedings below, and that the judgment should be affirmed.

DURHAM, County Judge, v. ROGERS et al.  
(Court of Civil Appeals of Texas. Nov. 13, 1907. On Rehearing, Dec. 14, 1907.)

1. COUNTIES—COUNTY-SEAT ELECTION—CONTEST—EXCLUSION OF RETURNS.

At a county-seat election the election officers at a certain precinct made three returns, one being retained by the presiding officer, and two locked up in an empty ballot box with poll lists and tally lists. One of these showed the total votes cast and the number cast for each place for county seat, but the other did not show the number of votes cast. The returns, tally lists, and poll lists, with the ballot box, were delivered to the county judge, but the election officers failed to deliver to the county clerk a copy of the returns or the ballots cast. The county judge did not consider the votes from that precinct; but, after canvassing the returns and declaring the result of the election, he delivered the box and the contents to the county clerk in the same condition in which he received them. On trial of the contest in the district court, the court found that the returns from the precinct in question had not been tampered with. *Held*, that the votes from the precinct in question, all having been cast by legal voters, should not be excluded in determining the contest.

2. SAME—BALLOTS—INDORSEMENTS.

On a county-seat election, ballots should not be excluded because of not being signed by the presiding election officer, since the statute prescribes the form of ballot for such election, thus dispensing with the official ballot, including the mandatory requirement as to signature of the presiding officer.

3. SAME—JUDGMENT ON CONTEST—CROSS-ASSIGNMENTS OF ERROR.

A county-seat election was adjudged void by the district court, and a new election ordered. On an appeal by the contestee, the contestants filed cross-assignments of error, but did not perfect an appeal. The appellate court found that the election was valid, and resulted in favor of the town of W., as claimed by the appellees. *Held*, that judgment should be rendered in favor of W. as the county seat.

4. SAME—COSTS.

Under the statute providing that costs in contested election cases shall be taxed according to the laws governing costs in civil cases, except when otherwise specially provided, and that the costs of such contest shall not be adjudged against the county judge or other officer made

the contestee, or against the county, where contestants are successful, they should be required to pay merely the costs created by them.

Appeal from District Court, Wheeler County; H. G. Hendricks, Judge.

Proceeding to contest county-seat election by R. B. Rogers and others against W. M. Durham, county judge. From a judgment of the district court declaring the election void and ordering a new election, the contestee appeals, and contestants file cross-assignments of error, without perfecting an appeal. Reversed and rendered.

Hoover & Taylor, C. Coffee, and Theodore Mack, for appellant. J. B. Reynolds and B. M. Baker, for appellees.

Statement.

STEPHENS, J. The appellees instituted this proceeding to contest an election held in Wheeler county to determine the question of the removal of the county seat from Mobeetie, a town more than five miles from geographical center of the county, to Wheeler, a town within five miles of such center. The ground of contest was the failure of the county judge to estimate the returns from "Center Box." With the votes cast at this box excluded, Mobeetie had a majority of 5 votes, and the result was so declared by the county judge; but, if these votes had been counted, Wheeler would have had a majority of 11 votes. The county judge was made the contestee, and filed an answer in which it was charged that certain ballots cast at other boxes and counted for Wheeler were illegal, the exclusion of which would give Mobeetie a majority. The issues were tried in the district court, and the election was adjudged void on the ground that such a number of legal voters were by the officers of election denied the privilege of voting, as, had they been allowed to vote, would have changed the result, and a new election was ordered. From that judgment the county judge appealed, and the contestants have filed cross-assignments of error. From the agreed statement of facts and the court's findings it appears that the officers of election at Center Box made out three returns, one of which was retained by the presiding officer, and the other two were locked up in an empty ballot box, together with poll lists and tally lists, and that one of these returns showed the total number of votes cast and the number cast for each place for the county seat, but the other did not show the number of votes cast, and that both were properly certified by the officers of election to be correct. The returns, tally lists, and poll lists, together with the ballot box, were delivered by one of the judges of said election within the proper time to the county judge of the county at his office; but the officers of election failed to deliver to the county clerk a copy of the returns of said election, or the ballots cast at said election, and the same were delivered to the county clerk by the county

judge after he had canvassed and declared the result of the election, and in the same condition as they were when he received the same from the election judge, and they have ever since remained in the custody of the county clerk, the court finding affirmatively that they had not been tampered with or changed in any respect whatever. The ballots cast at this box were all cast by legal voters, but one ballot failed to have the indorsement of the presiding officer of the election. At other boxes votes to the number of 15, challenged by the contestee, though cast by legal voters, were in the same condition, that is, without the signature of the presiding officer, making a total of 16 votes which were held by the district court to be illegal for want of the signature of the presiding officer. With these excluded, and all others counted, Mobeetle had a majority of 3 votes; but, if these had not been excluded, Wheeler would have had a majority of more than 3 votes.

#### Conclusions.

We approve the action of the trial court in refusing to exclude the votes cast at Center Box because of the irregularities urged against the returns made by the officers of election. In no other way could the true result of the election, which was the purpose of the contest, have been ascertained. But on the authority of *Walker v. Mobley* (Tex. Sup.) 103 S. W. 490, we are constrained to hold that the court erred in excluding as illegal all ballots not signed by the presiding officer of election. This recent decision of the Supreme Court was doubtless overlooked, and the following cases, which it in effect overruled, followed: *Arnold v. Anderson* (Tex. Civ. App.) 93 S. W. 692; *Brigance v. Horlock*, 97 S. W. 1060, 17 Tex. Ct. Rep. 62. In *Walker v. Mobley* it was held that the ticket to be used in local option elections was intended to be a substitute for the official ballot, as provided for in the general election law, and the reasoning which led to this conclusion necessitates a like holding in elections for the removal of county seats. The statute providing for such removals, like the local option statute, prescribes the form of the ticket, thus, as held by the Supreme Court in the case cited, dispensing with the official ballot for such elections, including the mandatory requirement that the official ballot should bear the signature of the presiding officer. This conclusion leads to a reversal and rendition of the judgment in favor of Wheeler as the county seat of Wheeler county.

As to the contention of appellant that the appellees are not entitled to this relief on their cross-assignments of error without perfecting an appeal, we need only cite the case of *Duren v. H. & T. C. Ry. Co.*, 86 Tex. 287, 24 S. W. 258, though there are several other cases in line with it.

As to the question of costs, inasmuch as

the statute provides that costs in contested election cases shall be taxed according to the laws governing costs in civil cases, except when otherwise specially provided, and further provides that in no case shall the costs of such contest be adjudged against the county judge or other officer made the contestee, or against the county, and inasmuch as the contestants were successful, we are of opinion that they should be required to pay the costs created by them, and no more.

The judgment is therefore reversed, and here rendered in accordance with the above conclusions.

#### On Motion for Rehearing.

The motion will be overruled, but in justice to the trial judge we desire to correct a slight error in the opinion heretofore filed. Instead of saying that the case of *Walker v. Mobley* (Tex. Sup.) 103 S. W. 490, which controlled our disposition of the appeal, had doubtless been overlooked by the trial court, we should have said it had not then been decided, since the judgment from which this appeal is taken was rendered about 15 days prior to the decision of the Supreme Court in *Walker v. Mobley*.

#### PETTIT et al. v. FROTHINGHAM et al.

(Court of Civil Appeals of Texas. Dec. 7, 1907.  
Rehearing Denied Jan. 18, 1908.)

#### TRESPASS—CUTTING AND REMOVAL OF TIMBER—MEASURE OF DAMAGES.

Where defendant, being informed by a reputable person that M., an old settler of good repute, was agent for sale of standing timber on plaintiff's land, bought of M., who claimed to have authority to sell such timber, paying a fair price, and cut and manufactured it into ties, the measure of plaintiff's recovery is the value of the standing timber, and not of the manufactured ties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespas, § 137.]

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by Wilhelmine E. Frothingham and others against Austin F. Pettit and another. Judgment for plaintiffs. Defendants appeal. Reversed, and remanded for new trial.

Wendell Spence, for appellants. Word & Charlton, for appellees.

CONNER, C. J. Appellant Austin F. Pettit was a tie contractor, and through his tie makers cut and made from land owned by appellees 733 oak ties and 2,394 pine ties, all of which he sold and delivered to the appellant railway company, and this suit was instituted to recover the value thereof. Pettit's defense, in substance, was that he had purchased the timber from one O. D. McMillan, who claimed to have authority as a subagent of the owners to so sell. It is agreed that the market value of the pine ties in the tree was 4 cents per tie, that the market value of the oak ties in

the tree was 5 cents per tie, and that the manufactured tie was of the market value of 20 cents per tie for the pine timber, and 28 cents per tie for the oak timber, at the time and place of delivery to the railway company. The court peremptorily instructed the jury to find for appellees the value of the ties in their manufactured condition; and the assignments of error require us to review this action of the court.

We need not set out the evidence in full, but it has been carefully considered, and we are of opinion that it raised the issue of a purchase by Pettit in good faith. He so testifies, and offered evidence tending to show that, before his purchase, he was informed by a reputable person, so far as indicated by the record, that McMillan was an agent having the timber in question for sale; that McMillan was an old settler of good repute; that Pettit sought him out, and McMillan claimed to have authority as subagent to make the sale; and that Pettit thereupon bought, paying McMillan a fair price for the timber in the tree. McMillan, however, was without any authority, and the court evidently adopted the measure of appellees' damages in accordance with the rule laid down in *Railway Co. and Carey v. Starr*, 22 Tex. Civ. App. 353, 55 S. W. 393. In that case Carey purchased certain ties that had been cut from land owned by the Starrs by persons unknown to the parties to the suit, who had no right to cut the same, and upon a review of the authorities, and following the case of *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, it was held that the owners of the land were entitled to recover the value of the ties in their manufactured condition. A writ of error was refused in that case, but it was distinguished in the later case of *Railway Co. v. Executors of Jones*, 34 Tex. Civ. App. 94, 77 S. W. 955, where it was shown that one G. A. Jones sold 150 ties in the tree to a tie contractor which in fact were on land not owned by Jones. It appeared, however, that Jones in good faith and on reasonable ground believed the land to be his at the time said timber was sold and cut, and the court there held that the proper measure of damages was the value of the timber in the tree. It will serve no useful purpose to review the many conflicting authorities on the subject, but it seems to us that the distinction pointed out in the case of *Railway v. Jones' Ex'rs*, supra, is well supported by the authorities. See *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Lewis v. Courtright*, 77 Iowa, 190, 41 N. W. 615; *Woodenware Co. v. United States*, supra. The rule of these authorities seems to be that where one in good faith cuts timber upon the land of another, believing at the time that he has right so to do, based upon reasonable grounds for such belief, he will, when sued for the timber, be required to pay the owner no more than its value at the time it was cut. The owner in such case will be allowed the actual value of the property lost, but will not be permitted to ap-

propriate an increased value added by the labor of the innocent trespasser, if such a term be permissible. Of course, care should be taken in the application of this rule. A premium to heedlessness and blunders and the temptation by false evidence to give an intentional trespass the appearance of an innocent mistake should not be afforded. The mistake, if one, should always be such as did not arise from a want of care and prudence in the observance of the rights of others. But this issue nevertheless, if raised by the evidence, is one for the jury, and not for the court.

We conclude that the court committed error in taking the case from the jury; and it is accordingly ordered that the judgment be reversed, and the cause remanded for a new trial.

### LAUGHLIN v. SCHNITZER.\*

(Court of Civil Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 22, 1908.)

#### 1. SLANDER—CONDITIONAL PRIVILEGE.

Where plaintiff, on being sent for by defendant in order to cancel a lease of defendant's house in which plaintiff was living, took C. with her, and in C.'s presence asked defendant why he sent her the message to vacate the house, defendant's answer, spoken in the presence of the three only, that plaintiff was not a decent woman, and was keeping a disorderly house, was conditionally privileged, and not actionable, unless spoken maliciously.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Label and Slander, § 132.]

#### 2. SAME—MALICE—FALSITY.

Where a finding of malice was essential to sustain a recovery for an alleged slander which was conditionally privileged, malice could not be found from the falsity of the statements alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Label and Slander, §§ 150, 278.]

#### 3. SAME—INSTRUCTIONS.

Where, in an action for slander, plaintiff's testimony showed that the statement was conditionally privileged, a charge authorizing a finding for plaintiff, if the statement was false, was erroneous, as making the case turn on the truth or falsity of the defamatory words, instead of the existence of malice.

#### 4. APPEAL—REVIEW—OBJECTIONS NOT URGED—INSTRUCTIONS.

The appellate court can consider instructions with reference only to the specific objections made thereto, not with reference to objections not urged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

#### 5. SAME—REVIEW—ESTOPPEL TO ALLEGE ERROR—ASSENT TO PROCEEDINGS.

Where plaintiff, in an action for slander, did not object to an instruction because it failed to submit the case on the issue of malice, which was the only issue on which she was entitled to recover, it would be presumed on appeal that she was satisfied to have the case submitted on an incorrect theory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1309.]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

\*Application for writ of error pending in Supreme Court.

Action by Julia Laughlin against Nathan Schnitzer. From a judgment for defendant, plaintiff appeals. Affirmed.

G. O. Brown, for appellant. Marcus W. Davis, for appellee.

JAMES, C. J. This was an action for damages for slander, alleged to have been spoken by appellee in reference to appellant. The alleged slanderous words, and which plaintiff introduced proof of as having been made in the presence of a third person, were these: "You bring the receipt back to me, and get your money, and move out of my house. You are not a decent woman, and I don't want you in my house. You were thrown out of a house, and had to pay a fine of \$17 for keeping a disorderly house, with a lot of low-down women about you." The petition alleged that the same were falsely and maliciously, and falsely and wantonly, spoken, and for the purpose of injuring plaintiff, and that all of the same was false and untrue. Plaintiff testified to their falsity. The case was submitted by a charge, which authorized the jury to find for plaintiff, if the statements were false.

Plaintiff testified that she rented a house from defendant, and on a Saturday, a few days after she moved into it, defendant's son came there and delivered her a message, saying that his father had told him to come out there and tell plaintiff to come down and get her money back that she had paid for the rent and move, as he did not want her in the house; that on Monday she went to defendant's store with a Mrs. Cuney, whom she brought along with her, and she asked defendant what he meant by sending her that message, and he replied in the language he is charged by the petition to have made. No one heard it but the three persons. Mrs. Cuney testified substantially the same, and that defendant was very angry and talked very loud and insultingly toward plaintiff; that he was very rough. Plaintiff testified that the statements were false. It is contended that, as the language used by defendant charged her with having committed an indictable offense, she could have a recovery regardless of the truth or falsity of the charge, and the charge allowing her to recover only if the charge was untrue was error. We are of opinion that the answer of defendant to plaintiff's inquiry was, under the circumstances and according to plaintiff's own proof, conditionally privileged. If it had been made to her alone, it would not have served as a basis for an action. In this case she went to defendant's store for the purpose of getting from him his reason for requiring her to quit the house, and instead of going alone took with her a third person. She asked for the reason in Mrs. Cuney's presence. If she did not know defendant's reason, she was willing for Mrs. Cuney to hear the reason, whatever it was. Upon these facts she

could not recover for the mere expression of defendant's reasons in Mrs. Cuney's presence. The facts present a qualified privilege. *Billings v. Fairbanks*, 139 Mass. 66, 20 N. E. 544. In *Newell on Libel and Slander*, § 116, the rule is stated from English cases that, if the only publication proved at the trial be one brought about by plaintiff's own contrivance, there is no sufficient evidence of publication. It is as though the only publication were to the plaintiff himself, and therefore he must be nonsuited. However, the rule, as it is now understood, is that a party may not take advantage of such a situation in order to gratify his malice, and therefore the plaintiff may recover even in such a case, upon proof of malice of defendant in making the statement, although *prima facie* the occasion made it privileged. *Railway v. Richmond* 73 Tex. 575, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; *Railway v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384; *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609. The evidence in this case was sufficient to substantiate a finding that the statement defendant made was false, also that it was maliciously uttered. It was necessary, in order for plaintiff to recover, that the jury should find that the words were spoken with some degree of express malice, but this fact they could not find from their falsity alone. *Bradstreet v. Gill*, 72 Tex. 121, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768.

The objections appellant presents to the charge are: That it was error to submit to the jury an issue not made by the pleadings and evidence. Plaintiff alleged that the statement was untrue, and testified that it was false. The contention is that it was not essential to plaintiff's case for her to allege and prove the falsity of the statement, and that the law presumed them to be false, and, as defendant did not plead or offer any proof of its truth, the issue was not in the case. Also, that the charge was erroneous for the reason that, as the only testimony concerning the truth or falsity of the statement was plaintiff's, who testified it was false, there was no conflict in the evidence on the subject, and that therefore it was improper to allow the jury to find that it was true. We have seen that the occasion, as proved by plaintiff herself, made the statement privileged, and the right of plaintiff to recover depended solely on whether or not defendant uttered the statement with malice. There is therefore no question about the incorrectness of the charge, for it failed to submit the case that way, but made it turn on the mere truth or falsity of the defamatory words.

We are, however, obliged to consider the charges only on the points of objection made to them here. If appellant had made the point in her brief that the charge was erroneous in not submitting the case on the issue of malice, we would have to give effect to it. But, as appellant does not make that criticism of it here, we cannot. We must



assume from this that appellant was and is satisfied with the charge so far as it failed to submit malice is concerned. If so, she was satisfied to have it submitted on some other and necessarily incorrect theory, and therefore ought not to be heard to complain that the court submitted it on an incorrect theory.

The first assignment of error is also overruled. There was no testimony that defendant's boy, when he was sent out by defendant to notify plaintiff to leave the house on Saturday, conveyed to plaintiff any slanderous message. The message he delivered, as detailed by plaintiff herself, contained nothing of that nature.

The fourth and fifth assignments must also be overruled. They are based on bills of exceptions, which are so qualified by the judge that nothing is left of them.

The judgment is affirmed.

### THOMPSON et al. v. GALVESTON, H. & S. A. RY. CO.\*

(Court of Civil Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 22, 1908.)

#### 1. TRIAL—INSTRUCTIONS.

Where, in an action for death of a servant, every material point indicating defendant's negligence was sharply contested, the court properly refused to charge that the "undisputed evidence" showed that the death of plaintiff's decedent was caused by defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 451.]

#### 2. SAME—QUESTION FOR COURT AND JURY.

Act 1853, providing that the court shall instruct the jury as to the law, and shall submit all controverted questions of fact to the jury, is mandatory and directory, so that the court is not justified in assuming the existence of facts, unless there is no contradictory evidence with reference thereto, or it is so clearly defective as not to raise an issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-431.]

#### 3. NEGLIGENCE—DETERMINATION—QUESTION OF LAW OR FACT.

Whether negligence exists or not is in general a question of fact for the jury, except where the law declares the doing or omission of a certain thing to be negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 277-353.]

#### 4. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—QUESTION FOR JURY.

In an action for death of a railroad engineer by derailment at a curve, alleged to have resulted from wreckers, whether defendant was negligent in inspecting the track at that point as alleged, held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1021, 1029.]

#### 5. TRIAL—INSTRUCTIONS—ASSUMED FACTS.

Where, in an action for death of a railroad engineer by derailment at a curve, plaintiff claimed that defendant failed to exercise reasonable care in inspecting the track at that point, and introduced proof requiring submission of such question to the jury, an instruction that, if trespassers released the spikes and plates at a joint of the rails, and moved the rail so that it would derail the engine of which decedent was engineer, then defendant was entitled to a ver-

dict, was erroneous, as assuming that defendant was not negligent in inspecting the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-431.]

#### 6. MASTER AND SERVANT—RAILROADS—DEATH OF ENGINEER—PETITION.

In an action for death of an engineer by derailment at a curve, an allegation that it was defendant's duty to provide track walkers and a sufficient number of employees to watch and repair the track at the place in question, which was dangerous, but that defendant negligently failed to provide a sufficient number of men to discover defects and dangers in the track, etc., sufficiently raised the issue of negligence in failing to properly inspect the track, though the wreck was the result of the intentional displacement of a rail by wreckers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 818, 829, 836.]

#### 7. SAME—DEFENSE.

It was no defense to a railroad company's liability for death of an engineer by the derailment of his engine that it was caused by the displacement of the track by wreckers, provided defendant failed to exercise reasonable care to inspect the track and discover such defect.

#### 8. SAME—ORDINARY CARE.

Ordinary care, as applied to a railroad's obligation to furnish reasonably safe appliances with which its servants are required to perform their duties, may require a very high degree of diligence in accordance with the circumstances surrounding the situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 179.]

#### 9. TRIAL—ABSTRACT INSTRUCTIONS.

Where there was no issue as to a railroad's duty to exercise the highest degree of care to furnish a perfect track, an instruction that the railroad was not bound to supply a perfectly safe track, nor to exercise the highest degree of care, which a very skillful and careful expert in the business would exercise in supplying and caring for the track, was objectionable as abstract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 582, 587-595.]

#### 10. EVIDENCE—OPINION.

In an action for death of a servant by derailment of an engine, caused by a defect in the track, evidence that witness told defendant's roadmaster that C., who was claimed to have inspected the road as he went over it in a hand car shortly before the accident, was too inexperienced to properly take care of the curve at the point in question, was objectionable as an opinion of the witness, not shown to have been accepted by the roadmaster, and not tending to prove the incompetency of the inspector.

#### 11. SAME—CHARACTER OF CURVE.

Where decedent, an engineer, was killed in a wreck at a curve, evidence of a witness, not shown to be an expert, after having testified to the sharpness of the curve, the condition of the rails, spikes, and ties, that the curve was dangerous, was objectionable as an opinion.

#### 12. SAME—PHOTOGRAPHS.

Photographs of a railroad curve at which plaintiff's decedent was killed in a wreck were admissible on proof by another witness who knew the fact that the photographs properly represented the scene.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1509, 1510, 1657.]

#### 13. APPEAL—EXCLUSION OF EVIDENCE—BILL OF EXCEPTIONS.

The exclusion of evidence cannot be reviewed, unless the bill of exceptions indicates what the excluded answer of the witness would have been.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

\*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

**14. MASTER AND SERVANT—DEATH OF SERVANT—EVIDENCE.**

In an action for death of a railroad engineer, caused by a defect in the track at a curve, evidence that while defendant's employes were working sufficiently on the curve to keep it in repair other parts of the track would become defective was immaterial.

**15. EVIDENCE—HEARSAY.**

In an action for death of a servant in a railroad wreck at a curve, evidence that a witness had heard of wrecks at that curve, was objectionable as hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by Mary E. Thompson and others against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Perry J. Lewis and H. C. Carter, for appellants. Baker, Botts, Parker & Garwood, Newton & Ward, and Teagarden & Teagarden, for appellee.

**FLY, J.** This appeal results from a verdict and judgment for appellee in a suit instituted by appellants, the mother, wife, and children of Charles E. Thompson, to recover damages resulting in his death, by the derailment of a locomotive on which he was the engineer in the service of appellee. It was alleged in the petition, among other things, that the derailment occurred at a dangerous curve known as "Baxter's Curve"; that the curve was sharp and abrupt; that it was compound and reverse, which rendered it extremely dangerous for trains; that the track was not properly aligned and had spread; that the rails were too small for the heavy trains and locomotives that ran around the curve, and the rails and spikes were old, defective, and rotten; and that no guard rails had been provided. In addition it was alleged: "That the track where the derailment took place was known to the defendant to be in a defective and dangerous condition, as aforesaid, many wrecks having heretofore occurred at this same point, and, notwithstanding it knew, or by the exercise of ordinary care could have known this, the defendant negligently failed to provide for a proper inspection and repair of said curve, track, and roadbed, but negligently permitted the same to be and remain in the condition aforesaid, in violation of its duty. That by reason of the dangerous conditions which existed at said curve, as aforesaid, it was the defendant's duty to provide track walkers and a sufficient number of competent employes to watch and repair the track, curve, and roadbed at the point where said wreck took place, but, notwithstanding such duty, the defendant negligently failed to provide track walkers for the track in question, and further negligently failed to provide a sufficient number of competent men to watch and repair the track, curve, and roadbed, but, on the con-

trary, the number of men which defendant furnished for the purpose of watching and repairing said track was grossly inadequate for the discovery of defects and danger in said track, and the men that were furnished by the defendant were inexperienced in such work, and wholly incompetent."

The first assignment of error assails the action of the court in its refusal to grant the motion for new trial, because the undisputed evidence showed that the death of Charles E. Thompson was caused by appellee's negligence. Without discussing the facts, which would be manifestly improper in view of the reversal of the judgment which herein follows, except in so far as it may be necessary to elucidate other assignments, we deem it sufficient to say that the "undisputed evidence," as claimed by appellants, did not show the negligence of appellee, but every material point was sharply contested, and the case was peculiarly one to be determined by a jury. It was not denied that Charles E. Thompson, while operating an engine as the employe of appellee, was killed at "Baxter's Curve," near Del Rio, Tex., by the derailment of his engine, and that the derailment occurred by the displacement of a rail on said curve, the contention of appellants being that the rail was displaced, and the derailment caused through the negligence of appellee, the contention of appellee being that the rail was not displaced through its negligence, but was caused by trespassers who maliciously "released the spikes and plates at a joint of the rails and moved a rail so that it would and did derail and cause the accident."

In connection with its contention appellee introduced circumstances pointing to the conclusion that wreckers displaced the rail, and to meet the allegations of negligence as to inspection of its roadbed and the keeping of competent track walkers and watchmen at the dangerous curve where the derailment occurred, introduced evidence that a train had passed over the curve at 1 o'clock p. m., that a section gang had passed over it at about 5 o'clock p. m., and the accident occurred at 8 o'clock p. m. Under this state of case, the following charge was given by the court, which is made the subject of attack in the second assignment of error: "If you believe from the evidence that some trespassers released the spikes and plates at a joint of the rails, and moved the rails so that it would and did derail the engine of which Charles E. Thompson was engineer, then, in this event, you must return a verdict for the defendant." The effect of that instruction was to withdraw the charge of improper inspection and failure to have competent track walkers from the jury, which cannot be justified, unless the trial court was authorized to hold that the passing of a train over the track safely at 1 o'clock and of a hand car at 5 o'clock, as a matter of law, constituted a complete answer to and refutation of the allegations as to inspection, and that such acts removed the

issue as to proper inspection from the jury. In 1853 a statute was passed in this state, which has never been altered or amended, in which the requisites of a judge's charge to the jury are set out, one of which was, and is, that "he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact solely to the decision of the jury," and that statute has at all times since its passage, and especially since the rendition of the opinion in *Railway v. Murphy*, 48 Tex. 356, 26 Am. Rep. 272, been held "mandatory and peremptory." It is true that, when there is no contradictory evidence, or when it is so clearly defective as to not raise an issue of fact, the judge would be justified in withdrawing the matter from the jury. Such cases, however, under the Texas system, are rare, and such action should not be taken without the most thorough and earnest scrutiny of all the facts, and just as long as the element of uncertainty enters into the case, the question should be submitted to that branch of the courts to whom the law has confided the exclusive right to weigh the evidence and pass upon the credibility of witnesses.

It is the general rule that the existence or not of negligence is a question of fact for the jury, and not one of law for the judge, and it is only in those cases where the law declares the doing or not doing of a certain thing negligence that it is a matter of law to be so declared by the court. *Railway v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499; *Railway v. Briggs*, 4 Tex. Civ. App. 515, 23 S. W. 503; *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863. The curve where Charles E. Thompson met his death was shown by appellant's testimony to be a very dangerous one, that the rails were worn, that there were no rail braces, that tie plates were broken, and that it was difficult to keep the track properly aligned at that point. There had been other accidents on the curve. When the rail became displaced was not shown. It may have occurred before the train went over the curve at 1 o'clock p. m., or it may have occurred between that hour and the time of the accident. There was testimony tending to support the theory that the damage to the joint on the track may have occurred before the train or hand car passed over it, and even if there had not been, it could not be assumed by the court that the track must have been in good condition at 1 and 5 o'clock, and that trespassers had tampered with the track after 5 o'clock. If it be conceded that the track was properly inspected at 5 o'clock, which was a fact to be determined by the jury, still the court had no right to assume that it was all that was required in order to protect appellee from liability, if wreckers displaced the rail. How often inspections of a railroad track must be made depends upon its location, the surrounding country, the character of population, and other circumstances, and,

in view of the diversified facts surrounding each case, the sufficiency of such inspections is peculiarly a question of fact for a jury. This rule would not be changed by the fact that the defect in the track was caused by criminals, because the same duty to discover the defect would prevail in that case as in case of defect from any other cause. The duty to exercise at least ordinary care in detecting the defect in the track devolved upon appellee, regardless of what may have caused the defect, and the question of whether appellee exercised such care was one of fact for a jury. We do not know when the displacement of the rail that derailed the engine took place, only that it occurred at some time prior to the death of Charles E. Thompson, and it was not for the trial judge to determine that the inspection and watch over the track was sufficient, even though the time of the displacement had been shown, unless it had been such a short interval between the displacement and the accident as to preclude the idea that it could have been discovered by appellee. Even if the displacement of the rail took place after 5 o'clock, still it was a question of fact to be determined by the jury as to whether ordinary care had been exercised to discover the defect. In a similar case, where only 4 or 5 hours had elapsed between the time when an obstruction was placed on the track and the time of the accident the Supreme Court of Illinois held that the question as to whether ordinary care had been exercised by the defendant was one of fact for a jury. *Railway v. Delaney*, 169 Ill. 581, 48 N. E. 476. In that case an instruction was asked by the defendant to the effect that if the employes had cleaned up the yard in which the obstruction was found on the day of the accident, and had left all the tracks free from obstructions, the plaintiff could not recover, and the court added, "and that reasonable care did not require of defendant any further act of inspection down to the time plaintiff was injured." The Illinois court said: "This modification was proper, and no error was committed in making it. The court had, in numerous instructions asked by defendant, explained to the jury the relative duties of the company and of appellee, its employe, as fixed by law in the matters in controversy; and the instruction as asked would have been clearly improper, as it would have taken from the jury the question whether or not, under all of the evidence, the defendant was not guilty of negligence in not inspecting its track, where it was obstructed after it was examined in the morning, and before the night crew entered upon its duties." When it was proved that Charles E. Thompson was killed through a derailment of his engine, by reason of a defect in the track of appellee's railway, appellants had made out a prima facie case of negligence on the part of appellee, and the burden rested on it to show that the defect in the track had been

caused by the unlawful acts of trespassers, and that it had not been negligent in failing to discover the same. Appellee, and not appellants, should have established the fact of such careful inspection as the place and circumstances demanded, and a failure to fix the time approximately when the trespassers did their work is chargeable to appellee and not appellants. The rule is thus stated in the case of *Marcom v. Railway*, 126 N. C. 200, 35 S. E. 423, by the Supreme Court of North Carolina, in a suit for damages accruing from the death of a fireman, which occurred through a derailment: "It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence per se. But, while the company is held to a very high degree of care, there must in all cases be some element of negligence to justify a recovery; and it cannot be held responsible for the wanton and malicious act of an outsider, unless it could by the exercise of reasonable diligence have prevented the consequences of such act. As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a positive duty imposed by law. The burden of proving such a failure of legal duty rests upon the plaintiff, but when that fact is proved or admitted the burden of proving all such facts as are relied on by the defendant to excuse its failure rests upon the defendant. \* \* \* Its contention that the accident was caused by the malicious conduct of some one for whom it was not responsible, and the consequences of whose act it could not have prevented by any reasonable degree of care, was an affirmative defense, by its very nature carrying with it the burden of proof." The following cases support the doctrine of the quotation: *Railway v. Galtner* (Tex. Civ. App.) 43 S. W. 266; *Williams v. Lumber Co.*, 114 La. 805, 38 So. 567; *Railway v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315. The rules enunciated in the foregoing cited cases are ones well settled, and the quotation from the North Carolina case has been made, not because it announced any new theory, but because it applies the rules to the facts surrounding a derailment by the interference of persons not connected with the railroad, and for the purpose of emphasizing the principle that, when a derailment is caused by a defect in the track, and an employé is killed, it would not matter how the defect occurred, the same duty would rest upon the railway company of exercising diligence in discovering the defect and in repairing it, and the burden would rest upon the railway to show that it had exercised reasonable ordinary care in making the discovery. The fact that outside malicious parties injured the track in such way as to derail the train would be no defense, unless it appears that care

had been used to discover and repair the injury. It may be true that track walkers are not employed to prevent criminals from derailing trains, but they are employed to watch the track and discover any defects therein; and it would be a strange conception of law that would render the railway liable for negligence in not discovering a defect created by any other agency, but would absolve from any duty as to the discovery of injuries designedly inflicted on the track. The law in that instance, as in others, places the duty upon railway companies of using ordinary care in discovering any defect in the track. The charge given by the court, that if the derailment was caused by wreckers, was positive error, and appellants were not called upon to ask special charges curing the vices in the charge. *Chamblee v. Tarbox*, 27 Tex. 140, 84 Am. Dec. 614; *Ford v. McBryde*, 45 Tex. 498; *Bergstroem v. State*, 58 Tex. 92; *Railway v. Rowland*, 90 Tex. 365, 38 S. W. 756.

The allegations of the petition were sufficient to raise the issue of negligence in a failure to properly inspect the track, although the rail may have been intentionally displaced by evil-minded persons not connected with appellee. The defense that the rail was displaced by trespassers could have been interposed under a general denial and the answer specially setting up that defense did not render it incumbent upon appellants to answer that special defense in a supplemental petition in order to raise the question of a lack of diligence upon the part of appellee in discovering the injury to the track. The defense itself carried with it the obligation to show the exercise of ordinary care in discovering the injury. Speaking on this subject, the Supreme Court of Georgia, in the case of *Railway v. Kane*, hereinbefore cited, said: "The plaintiff proved that the switch was misplaced, and that such misplacement was the cause of the collision. The defendant sought in reply to show that the misplacement of the switch was not due to its fault, but that the mischief was done by an evil-disposed person, not in its service. The plaintiff, in turn, endeavored to meet the defense by proving that the company was negligent in affording the evil-disposed person an opportunity to carry out his designs, and in not taking the proper steps to prevent their successful accomplishment; in other words, the plaintiff sought to break down the defense of the company by showing that the facts alleged and proved by it involved a breach of diligence on its part in a material respect. It is quite clear to our minds that the plaintiff had a right to urge such breach of diligence, not as a distinct basis of recovery, but for the purpose of defeating the defendant's justification, and this the plaintiff could do, although she had not in her pleadings made any special reference to this particular negligence on the part of the defendant." In the case now before this court, however, there were distinct allegations of negligence

in inspecting the track. It is the duty of the master to furnish the servant with reasonably safe appliances with which to perform the work of the former. The care required in furnishing such appliances is ordinary care, that is, such care as would, under like circumstances, be exercised by a reasonably prudent person; but, as has been often held, ordinary care will require the exercise of a very high degree of diligence, under certain facts and circumstances, and what might be ordinary care under one set of circumstances, might be culpable negligence under another combination of circumstances. The care to be exercised is proportional to and measured by the necessities and exigencies of the time, place, occupation, and situation. As applied to the facts of this case, the exercise of ordinary care in inspecting and keeping in repair the track on a very sharp curve, at a dangerous place, may have required more at the hands of the railway company than on a straight track in a more highly favored locality, and what was necessary to constitute ordinary care at such a curve was the peculiar prerogative of the jury to determine under such a state of facts, while it may be the absolute law that appellee was "not bound to supply them (servants) a perfectly safe track, nor is it bound to exercise the highest degree of care which a very skillful and very careful expert in the business would exercise in supplying and caring for the track," the statement of such abstract propositions did not serve to guide the jury to a proper verdict, and were calculated to mislead them as to what should have been done by appellee under the circumstances. It is better in all cases to refrain from the statement of merely abstract propositions of law, and at times it may be positive error to state them to a jury. In the case of *Hargis v. Railway*, 75 Tex. 19, 12 S. W. 953, a charge was commended because it contained no abstract propositions of law. That part of the special charge, requested by appellee and given by the court, down to where it informed the jury that the duty of appellee to its employé was discharged by the exercise of ordinary care, was purely abstract, and may have misled the jury. There was no issue as to whether it was the duty of appellee to exercise the highest degree of care, or that it was its duty to furnish a perfect track, and there was no occasion to interpolate any such abstract theories into the case. We see no other objections to the charge. The 12 miles was referred to merely because that was the limit of speed at which trains were to be run around the curve.

We are of the opinion that the evidence of Shackleford to the effect that he told the roadmaster that Calk, the man who claimed to have inspected the road as he went over it on the hand car on the day of the accident, was too inexperienced to properly take care of "Baxter's Curve," was inadmissible, be-

cause it was merely an opinion of the witness which was not accepted by the roadmaster, and it did not tend to prove the incompetency of Calk. Shackleford swore that he was incompetent. The roadmaster swore that he was competent. Appellee did not contend that if Calk was incompetent it did not know it, but the contention was that he was thoroughly competent. Knowledge of the experience of Calk was not an issue in the case. The witness Reyes stated all he knew about the sharpness of the curve, the condition of the rails, spikes, and ties, and the court properly excluded his opinion as to the curve being dangerous. The witness was not shown to be an expert in such matters, and the jury could form an opinion as to the dangerous condition of the curve as well as the witness could. If photographs of "Baxter's Curve" were properly identified, there could be no good reason for their rejection. They would tend to convey a better impression to the jury of the location than could probably be done by the descriptions of witnesses. The only identification would be that the photograph properly represented the scene, and that could be sworn to by any witness who knew the fact. *Blair v. Pelham*, 118 Mass. 421; *Turner v. Railway*, 158 Mass. 261, 33 N. E. 520; *Archer v. Railway*, 106 N. Y. 589, 18 N. E. 818; *Robinson v. City of St. Joseph*, 97 Mo. App. 508, 71 S. W. 465. "It is immaterial whose hand prepared the thing, provided it is presented to the tribunal by a competent witness as a representation of his knowledge." *Wigmore*, Ev. §§ 790, 792, and notes. There is no merit in the eighth assignment of error. There is nothing in the bill of exceptions indicating what the excluded answer of the witness Campbell would have been. This is absolutely necessary in a bill of exceptions taken to the exclusion of evidence. The court properly excluded that part of the witness Shackleford's testimony to the effect that while engaged in working on the curve sufficiently to keep it in repair other parts of the track would get in bad condition. It was immaterial, and was not responsive to the question asked. The evidence of Ellison as to his having heard of wrecks at Baxter's Curve was hearsay, and was properly excluded. It may be that the proper objection was not urged to the evidence, but it was properly excluded anyway. The twelfth assignment of error seeks to have this court review the action of the court below in admitting the opinions of certain witnesses as to whether the track had been tampered with by trespassers, when no objection was made to the admission of the evidence, and no bill of exceptions reserved thereto, merely because such evidence may be offered on another trial. This court is too busily engaged in the consideration of questions properly brought in the records of cases to permit it, if it so desired, to go outside the record and enter into the discussion of

questions that might possibly arise on another trial.

For the reasons given, the judgment is reversed, and the cause remanded.

**CITY OF TEXARKANA v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.**

(Court of Civil Appeals of Texas. Nov. 30, 1907.)

**1. MUNICIPAL CORPORATIONS—USE—REGULATION—USE OF STREETS FOR PURPOSES OTHER THAN HIGHWAYS.**

Under Sayles' Ann. Civ. St. 1897, art. 698, providing that corporations created to construct and maintain magnetic telegraph lines may set their poles, piers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of this state so as not to incommode the public, a telegraph and telephone company may maintain its wires and poles in the streets of a city subject to municipal regulation as to location of poles and height of wires and obstruction of streets as provided by articles 702 and 423 and regardless of article 419, passed subsequent to article 698, giving city councils the exclusive control over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon, since repeal by implication is not favored in law, and statutes are always so construed, if possible, that all parts may stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1481, 1482.]

**2. TELEGRAPHS AND TELEPHONES — MAINTENANCE—RIGHT TO USE STREETS.**

The power of a city council to regulate the disturbance of the surface of its streets and alleys as against telephone companies, being conferred by the Legislature, is nondelegable; and hence an ordinance requiring every person making any "improvement" \* \* \* involving a disturbance of the surface of any alley, street or sidewalk of this city," to obtain a permit therefor from the city marshal if disturbance is deemed necessary, is void at least so far as it allows the city marshal to determine when permits are necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 6.]

**3. APPEAL — HARMLESS ERROR — TRIAL TO COURT—ADMISSION OF OPINION EVIDENCE.**

In an action by a city to enjoin defendant telephone company from using and occupying its streets and alleys with poles, wires, etc., any error in allowing a witness to testify to his conclusion that the poles as placed did not interfere with public travel was harmless, where the facts were given on which the conclusion was formed; the trial having been by the court without a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153, 4185, 4186.]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Injunction by the city of Texarkana against the Southwestern Telegraph & Telephone Company. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

Appellant, a municipal corporation under the general laws of the state, as plaintiff below, sought an injunction against appellee to restrain it from using and occupying the streets and alleys of said city with poles, wires, and other appliances used by it in the operation of a local and long distance tele-

phone exchange system, alleging that the use and occupation of its said streets and alleys was without its consent and over its protest and in defiance of the authority of its city council. Appellee answered, alleging that it entered upon and occupies said streets and alleys by authority of the statute laws of the state of Texas, and had a right to so use them without the permission or consent of appellant, and prayed for an injunction restraining appellant from removing its poles, wires, etc., from said streets and alleys. Appellee also attacked the validity of a certain ordinance relating to digging in the streets which appellant was seeking to enforce against it. There was a trial before the court without the intervention of a jury and judgment rendered, refusing the relief prayed for by appellant and granting that sought by appellee.

The findings of fact filed by the trial court are as follows:

"(1) I find that the plaintiff is a city of more than 1,000 and less than 10,000 inhabitants, incorporated under the general laws of the state of Texas for the incorporation of such cities, and that it was incorporated as such city in the year 1877 and has existed as such municipal corporation since said date until this time.

"(2) That the defendant is a corporation organized under the laws of the state of New York, having been incorporated in the year 1882, and continued as such incorporation to this time, with authority to construct, maintain, and operate telegraph and telephone lines in the states of New York, Arkansas, and Texas, and that on September 16, 1899, it filed its charter in the office of the Secretary of State of Texas, and complied with the laws of the state of Texas relating to such matters, and duly obtained a permit to do business in the state of Texas for the purpose of telegraphing and telephoning, as authorized in its charter.

"(3) That the said defendant during or before the year 1887 entered upon the streets of the city of Texarkana, Tex., and constructed its poles, wires, and fixtures along and over the same and began to do a telephoning business furnishing telephones for public use in said city, and has continued to maintain and operate said telephone system in plaintiff city ever since said time, and is now so conducting the same with the knowledge and acquiescence of said city.

"(4) That in 1898 the defendant presented to said plaintiff city council a petition for permission to place its poles inside of the curb lines of the sidewalks along Broad street in plaintiff city, stating that it had been granted a franchise and privilege of erecting its poles and lines in said city, which petition was accepted and granted upon motion in the council of plaintiff city, on May 2, 1898.

"(5) That on June 6, 1898, there were no other telephone lines in plaintiff city except the telephone lines of the defendant, and that on said June 6, 1898, plaintiff city council

passed an ordinance requiring the owners of all telegraph, telephone, and electric poles and all obstructions of a similar character in and upon Broad street of plaintiff city to be removed at the expense of the owners thereof, and placed within the curb lines of the sidewalks along said street.

"(6) That on the 6th day of October, 1903, plaintiff city council passed and adopted, and put into effect, an ordinance providing that it should be unlawful for any person, firm, or corporation to disturb the surface of any street, alley, or sidewalk in said city, by digging, boring, cutting, or removing earth or other surface without the written consent of the city marshal, and providing a fine of any sum not less than \$5 nor more than \$100 for each violation of the same, and further providing that the city marshal should charge 50 cents for each such permit, and collect such sum and return the same to the city treasurer monthly.

"(7) That on the 6th day of February, 1906, the city council of plaintiff city, without notice to the defendant, duly passed and adopted a resolution ordering and directing the defendant to remove within 10 days thereafter from the streets and alleys and highways of Texarkana all of its poles, wires, and other incumbrances on said streets, except those used solely and exclusively for the purposes of long-distance traffic and business, as defined in said resolution, and authorizing and directing the city attorney and city marshal of said city to take such steps and action in or out of court to carry out and make effective such resolution, a certified copy of which resolution was thereafter, on the 10th day of February, 1906, served on the defendant.

"(8) I find as a fact that the defendant, the Southwestern Telegraph & Telephone Company, is now using and occupying the streets, alleys, and highways of the city of Texarkana, Tex., without having a franchise from the city council of said city therefor, and that it has never had such franchise from said city council, but it has occupied the streets of said city since 1887 with the knowledge and acquiescence of said city council.

"(9) I further find that the plaintiff by its officers is threatening to enforce the ordinance passed October 6, 1903, by arresting and prosecuting the agents and employes of defendant if they attempt to set poles in the streets of plaintiff.

"(10) I find that the poles of defendant are set with proper care and poles of good material, and they do not incommode the use of said streets in any manner."

F. M. Ball, City Atty., H. W. Vaughan, and Rollin W. Rodgers, for appellant. McLaurin & Wozencraft and Hart, Mahaffey & Thomas, for appellee.

SPEER, J. (after stating the facts as above). We adopt the trial court's findings of fact, and proceed to determine whether or not they authorize the judgment rendered.

A solution of the most vexed question presented on the appeal depends upon the construction of the statutes authorizing magnetic telegraph lines to occupy the public roads, streets, etc., in this state on the one hand, and that granting to the city council of incorporated cities and towns the exclusive control and power over the streets, alleys, etc., of the city, on the other hand. Article 698, Sayles' Ann. Civ. St. Tex. 1897, reads: "Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such road, streets and waters." It has been held by our Supreme Court that the term "magnetic telegraph lines" contained in the above article is broad enough to, and does, include telephone lines; the latter being but another method of accomplishing the one purpose—the transmission of messages by electricity. *S. A. & A. P. Ry. Co. v. S. W. Tel. & Tel. Co.*, 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884. This decision appears to be well sustained by the authorities elsewhere. By article 419, Sayles' Ann. Civ. St. Tex. 1897, an enactment subsequent in point of time to the article above quoted, the city council of a town or city incorporated under the general statute is declared "to have the exclusive control and power over the streets, alleys and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon. \* \* \*" It is by virtue of this article that appellant asserts its right to oust appellee from its streets and alleys. In arriving at the legislative intent, as expressed in the two articles quoted, it is well to consider one or two other articles. Article 702 provides: "The corporate authorities of any city, town or village through which the line of any telegraph corporation is to pass, may by ordinance or otherwise specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run, and such company shall be governed by the regulations thus prescribed; and after erection of said telegraph lines the corporate authorities of any city, town or village shall have power to direct any alteration in the erection or location of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration." Article 426, further defining the powers of city councils, empowers them "to prevent the incumbering of the streets, alleys, sidewalks and public grounds with carriages, wagons, carts, hacks, buggies, or any vehicle whatsoever, boxes, lumber, timber, fire wood, posts, awnings, signs, or any other substance or material whatever, or in any other manner



whatever," etc. It is a rule of construction too familiar to admit of the citation of authorities that statutes are to be so construed, if possible, as that all parts may stand. It is still another rule, equally as familiar, that repeals by implication are not favored in law. Applying those rules to the present case we have no difficulty in reaching the conclusion that the Legislature did not intend by granting to city councils the exclusive control of streets, alleys, and public grounds within their corporate limits to set at naught the authority previously given by it to telegraph and telephone lines to occupy such highways with their poles, wires, etc. The public highways of the state, including even the streets and alleys within incorporated towns and cities, belong to the state, and the supreme power to regulate and control them is lodged with the people through their representatives—the Legislature. Whatever power of control is lodged in the city council is delegated by the Legislature. When we consider the nature of the business of telegraph and telephone lines in this busy commercial age, we have a most cogent reason for the Legislature declining to commit to the arbitrary control of the municipalities throughout the state the use by such companies of the public streets and alleys. These companies are not primarily of local concern, affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted. In other words, the business is such a one as calls for the exercise of state regulation rather than the delegated power of municipal control. To interpret article 419 as appellant asks is to hold that article 698 has been repealed by implication, and that cities and towns incorporated under the general statutes of Texas, which as matter of fact would include nearly all of the cities and towns within the state, would have the power to exclude entirely telegraph and telephone companies from occupying the streets and alleys of such cities and towns. A thing so fraught with evil consequences to the public convenience at large was certainly never contemplated by the Legislature. On the other hand, to construe the article conferring "exclusive control" upon the city councils to mean that the power thus conferred is to be exercised and limited to the manner pointed out in articles 702 and 426, and subordinate to that conferred by article 698, permits every article of the statute to stand as the embodiment of legislative decree, and is we think the only correct interpretation to be indulged. *Michigan Tel. Co. v. City of Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104.

We are also of opinion that the trial court did not err in holding void the city ordinance

attacked by appellee. Section 2 of said ordinance reads: "It shall be the duty of every person, firm or corporation, when it may become necessary to any needed improvement by such person, firm or corporation, involving a disturbance of the surface of any alley, street or sidewalk of this city, to make application to the city marshal for a permit to disturb said street (stating the place or places to be disturbed by digging, cutting, removing, etc., the time required for said work, and the extent of said work), and it shall be the duty of the city marshal to issue (to such person, firm or corporation), such permit when the same is deemed necessary (charging therefor the sum of fifty cents for each permit, which shall be paid to the city marshal in cash before the permit is issued)." Conceding that the power to regulate the disturbance of the surface of streets and alleys in appellant city as against telephone companies rested in its city council, that power, as already pointed out, was a power conferred upon it by the Legislature, and one which could not be again delegated to another, as in the present instance to the city marshal. The ordinance appears to clothe the city marshal with authority to issue permits when the same were deemed necessary, and to permit that officer to determine whether or not such necessity existed. To this extent at least the ordinance was void. *G. & S. Fé Ry. Co. v. Riordan* (Tex. Civ. App.) 22 S. W. 519; *Bennison v. City of Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613. The judgment, as entered, perpetuating the injunction against the enforcement of this ordinance, however, is very broad in its terms, and possibly capable of the interpretation that it excludes appellant from exercising the rights conferred by article 702 of the statutes above set out; and to this extent the judgment will be reformed or modified.

No reversible error is shown in the court's action in permitting witnesses to testify that appellee's poles were so placed in the streets as not to interfere with the public travel; since, if this embodied a conclusion of the witnesses, as contended by appellant, yet, the trial having been before the court without a jury and the witnesses having detailed all of the facts upon which they reached such conclusion, no harm could have resulted from the ruling. From this it would also follow that the court's finding that appellee's poles and wires were so set and strung as not to incommode the public in the use of the streets, etc., is supported in the testimony. But, after all, this was not a real issue in the case, since the action by the city was not one asserting its statutory right to regulate the use and occupation of its streets, but one to oust appellee entirely because it had obtained no franchise authorizing such use and occupation.

We find no error in the judgment, and, with the modification above indicated, it is affirmed.



**WATERS-PIERCE OIL CO. v. STATE.\***

(Court of Civil Appeals of Texas. Dec. 11, 1907. Rehearing Denied Jan. 15, 1908.)

**1. MONOPOLIES—ACTION FOR PENALTIES—INSTRUCTIONS.**

In an action by the state against a Missouri corporation doing business in the state for violating the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), defining and punishing the combination of corporations effected with a view of lessening competition, etc., an instruction that, if a New Jersey corporation acquired a majority of the stock of defendant and effected a combination of the two corporations for the purpose of preventing competition in Texas, a verdict for the state was authorized for the penalty, for each day defendant remained a party to the combination, was not misleading, as leading the jury to believe that they could find against defendant, regardless of whether it had any knowledge of, participated with, or aided the New Jersey corporation in its wrongful conduct.

**2. APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where, in an action by the state against a foreign corporation for violations of the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), the jury found that the corporation had violated certain provisions of the act and imposed but one penalty for each day's violation, the error in a charge submitting an issue of another violation was not ground for reversal, since a verdict in favor of the corporation on such issue would not change the result.

**3. STATUTES—DEFINITENESS—VALIDITY.**

The anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), prohibiting any corporation becoming a party to any understanding with any other corporation to regulate the price in the state of any article of merchandise, etc., defining a trust as a combination to restrict commerce, fix the price of commodities, lessen competition, etc., and defining a monopoly as a combination of two or more corporations, with a view of stifling competition, etc., are not indefinite and uncertain, and are valid.

**4. PENALTIES—ACTIONS—FORM OF REMEDY.**

An action of debt lies for the recovery of statutory penalties, where the statute does not require a resort to criminal prosecutions for their enforcement, though it does not direct any method of enforcement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, §§ 13-15.]

**5. MONOPOLIES—ACTION FOR PENALTY—"OFFENSE"—"SUIT."**

In an action by the state for penalties imposed by the anti-trust act of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), declaring that corporations violating the act shall be guilty, and, when convicted, shall be subject to penalties recoverable by "suit" where the "offense" is committed, is not a criminal prosecution, within Code Cr. Proc. 1895, art. 219, prescribing the time for the institution of criminal prosecutions, but is a civil suit; the word "offense" having reference to violations of the acts, and not being equivalent to the words "felony" or "misdemeanor," and the word "suit" being generally used to designate a civil case, and limitation is not available as defense.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 4915-4917; vol. 7, pp. 6769-6778; vol. 8, pp. 7738, 7809.]

**6. SAME—STATUTES.**

The penalties imposed by the anti-trust act of May 25, 1899 (Laws 1899, p. 246, c. 146), providing that any corporation violating any of

its provisions shall forfeit not less than \$200 nor more than \$5,000 for every offense, and that each day such corporation continues to violate any of its provisions shall be a separate offense, are not indefinite, but are enforceable by civil action, as authorized by the act.

**7. SAME—LIMITATIONS.**

Though the anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), create misdemeanors, which must be prosecuted in two years or they will be barred, the penalties recoverable by civil action are not barred in two years. The Penal Code and the Code of Civil Procedure deal exclusively with criminal cases, and civil and criminal cases are essentially different.

**8. CRIMINAL LAW—OFFENSES—"FELONY."**

An offense punishable by imprisonment in the penitentiary, absolutely or in the alternative, is a felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 20-31.]

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662.]

**9. PENALTIES—ACTIONS—LIMITATIONS.**

A civil action by the state for the penalties imposed by the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), is not barred in three years, though a criminal prosecution for a violation thereof, punishable by imprisonment in the penitentiary as an alternative punishment, is barred in three years, under Code Cr. Proc. 1895, art. 218.

**10. LIMITATION OF ACTIONS—LIMITATIONS AS AGAINST STATE.**

Limitations do not run against the state, unless so expressly enacted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 35-39.]

**11. MONOPOLIES—PENALTIES—ACTIONS—LIMITATIONS.**

An action by the state for the penalties imposed by the anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), is brought to protect the public rights, and promote and establish public policy, and the two and four year statute of limitations, embodied in the Revised Statutes, has no application on the theory that the suit is an action of debt only.

**12. PENALTIES—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE.**

The state, in an action by it for the recovery of a statutory penalty, need prove its case only by a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, § 32.]

**13. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—CLASS LEGISLATION.**

Act May 27, 1899 (Laws 1899, p. 262, c. 153), making it lawful for persons engaged in labor to form trade unions, but declaring that the act shall not apply to combinations of capital formed to limit the production or consumption of products or in restraint of trade, etc., does not ingraft exemptions on the anti-trust act of May 25, 1899 (Laws 1899, p. 246, c. 146), and does not render the same unconstitutional.

**14. MONOPOLIES—STATUTES—REPEAL—EFFECT.**

The proviso in the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), that nothing therein shall affect any rights of the state to recover "penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in the state, for acts committed before this act took effect," preserves whatever rights the state had under the anti-trust act of May 25, 1899 (Laws 1899, p. 246, c. 146), including the right to sue for the penalties prescribed by that act and to recover the amount thereof, though the act of 1903 diminishes such penalties.

\*Application for writ of error denied by Supreme Court.

**15. STATUTES — CONSTRUCTION—LEGISLATIVE INTENT.**

In construing written laws, courts are not bound by rules of grammar, and may disregard them to give effect to manifest legislative intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 268.]

**16. PENALTIES—EXCESSIVE PENALTIES.**

A verdict against a corporation for violations of the anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), for \$1,623,900 for violations of the act of 1899 for 1,033 days and for violations of the act of 1903 for 1,488 days, is not excessive.

**17. MONOPOLIES—STATUTES—VIOLATIONS.**

A Missouri corporation, which, after obtaining a permit to do business in Texas, becomes a party to an understanding with a New Jersey corporation to create a monopoly, control the price of petroleum oil, and prevent competition in its sale in a large and specified territory, including Texas, violates the anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), so far as the agreement relates to the state, though the agreement may not have been made therein.

Key, J., dissenting in part.

Appeal from District Court, Travis County; V. L. Brooks, Judge.

Action by the state against the Waters-Pierce Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 106 S. W. 826.

This case involves alleged violations of the anti-trust laws of this state, and as the charge of the able judge who tried the case sufficiently states the nature of the suit as it was submitted to the jury, and correctly defines the provisions of the anti-trust statutes applicable to the case, and states the issues that were decided by the jury, it is deemed proper to set out the charge in full, which is as follows:

"Gentlemen of the jury, in this case the state of Texas, as plaintiff, has sued the Waters-Pierce Oil Company, a private corporation chartered under the laws of the state of Missouri and doing business in Texas by virtue of a permit issued to it by the state of Texas on May 31, 1900, as defendant, to cancel said permit and to recover penalties for violations of the anti-trust laws of Texas, which the state alleges the defendant has committed on each and every day from May 31, 1900, to April 29, 1907. The state alleges that on or about January 1, 1870, John D. Rockefeller, John D. Archbold, H. H. Rogers, Henry M. Flagler, and a number of other persons conceived the scheme of monopolizing and controlling the business of refining, transporting, and selling petroleum and the products thereof throughout the United States, including the state of Texas, and that said persons to that end and for that purpose entered into a conspiracy among themselves and with other individuals and corporations, including the defendant corporation, which conspiracy the state alleges continued in force and effect from the date of its formation until the date of the filing of the state's sec-

ond amended petition in this case; and the state further alleges that in pursuance of said alleged conspiracy the defendant has done various acts and entered into various agreements which constitute violations of the anti-trust laws of Texas. The state further alleges that the defendant's predecessor, the Waters-Pierce Oil Company, incorporated in 1878, on or about the 5th day of October, 1894, entered into a contract with the Eagle Refining Company, A. W. Clem, and certain other individuals named in its petition, by the terms of which defendant acquired the property of said Eagle Refining Company, situated in the city of Dallas, Tex., and the right to operate its business under the name of the said Eagle Refining Company. It further alleges that the defendant did, subsequent to May 31, 1900, operate said Eagle Refining Company and maintain the plant thereof at Dallas as an apparently competing concern for various purposes prohibited by the anti-trust laws. The state further alleges that in the year 1896 the defendant's said predecessor bought out the business of the Texas Oil & Gasoline Company and of one Roy Campbell, who were at that time doing business in the city of San Antonio, Tex., and elsewhere, and entered into contracts and agreements with the said Texas Oil & Gasoline Company and Roy Campbell whereby said Texas Oil & Gasoline Company was thereafter to be operated under said name by defendant as an apparently competing concern with defendant at San Antonio in the sale of the products of petroleum. It further alleges that said Texas Oil & Gasoline Company was operated by defendant as a concern apparently competing with it at San Antonio subsequent to May 31, 1900, for various purposes in violation of the anti-trust laws of the state. For full particulars of the state's allegations you are referred to its second amended original petition.

"The defendant denies all and singular the allegations of the state, and, in addition to various of her special defenses, pleads specially that, if it has entered into any of the agreements or committed any of the acts alleged by the state, none of same constitute violations of the anti-trust laws of Texas, because said agreements were made and said acts done (if at all) solely with reference to subjects of interstate commerce. For full particulars of defendant's allegations, you are referred to its third amended original answer.

"As the law of the case you are instructed as follows, viz:

"(1) The burden of proof rests upon the state to establish the affirmative of the issues which will hereafter be submitted in this charge for your consideration by a preponderance of the evidence, and you will find in favor of the defendant on each issue so submitted for your consideration, except such issue or issues, if any, as you find that the state has established by a preponderance of the evidence; and you will return a general

verdict for the defendant unless you find that the state has established by a preponderance of the evidence some combination or combinations of facts which will entitle it to recover under the law as it is given you in charge by the court.

"(2) The statute known as the anti-trust law of 1899 was in force on May 31, 1900, and thereafter remained continuously in force until March 31, 1903. For the purposes of this charge you are instructed that this act made it unlawful for any corporation transacting or conducting any kind of business in this state to enter into or become a party to any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise or to control or limit in Texas the trade in any article of manufacture or merchandise. You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this state to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade, or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated, or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited. The statute known as the anti-trust law of 1903 became effective on March 31, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes, viz: (1) To create or which may tend to create or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this state; (2) to fix, maintain, or increase the price of merchandise in Texas; (3) To prevent or lessen competition in Texas in the sale of merchandise; (4) to abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof. Said statute of 1903 further defines a monopoly to be a combination or consolidation of two or more corporations when effected in any of the following methods, viz: (1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create, a trust as above defined. (2) When any corporation ac-

quires the shares or certificates of stock, franchise, or other rights, or the physical properties or any part thereof of any other corporation, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen, competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"(3) Oil, all other products of petroleum, and goods, wares, or merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the state of Texas and caused to be transported to its agents or others within the state, are the subjects of interstate commerce when they enter this state, and so remain until such commodities are removed from the original tanks, vessels, or other packages in which they are imported into the state and become mixed with the common mass of property of similar character in this state. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, pool, or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce, can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside the state and transported into the state, and removed from the original packages or vessels in which it was brought into the state, and mingled with other property of similar character in the state, is the subject of interstate commerce, but, on the contrary, is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property, or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this state.

"(4) A corporation such as defendant can only act through its agents and servants; but such a corporation is not liable for all of the acts of its agents or servants. It is liable, however, for the acts done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform; and it is also liable for the unauthorized acts of its agents, if any, which have been knowingly acquiesced in or ratified by the governing body of said corporation.

"(5) Much evidence has been introduced before you relating to the doings and agreements of the agents of corporations other than defendant, and to the doings and agreements of defendant's predecessor's agents prior to June 1, 1900, and to the doings and agreements of defendant's agents and the agents of other corporations outside the state

of Texas, and to the doings and agreements of individuals both prior and subsequent to June 1, 1900, and both outside and within the state of Texas. None of this evidence is competent or can be considered by you against the defendant, except within the limitations and for the purposes hereinafter stated, viz.: If you find from a preponderance of the other evidence in the case, independent of all declarations or statements made by any person or persons, except their evidence given while testifying by deposition or personally as witnesses on the trial of this case, that on June 1, 1900, there was formed or existed an agreement between the governing officers of defendant and the governing officers of any of the other corporations alleged in the state's petition to be co-conspirators with defendant relating to the management of defendant's business, or between the governing officers of defendant and any of the individuals alleged in the state's petition to be co-conspirators with defendant relating to the management of defendant's business, then you may consider for what, if anything, you think it worth, such acts or declarations of all the parties to said agreement, if any, and such acts and declarations of their authorized agents, if any, as were done or made, as the case may be, during the existence of said agreement, if any, and in furtherance of its execution, for the purpose of determining the character of said agreement, and whether or not it contemplated a violation by defendant of the anti-trust laws of Texas. You may further consider for what, if anything, you think it worth as tending to show or explain the course of defendant's dealing in Texas, said evidence, if any, of what it did through its duly appointed and authorized agents, if any, outside the state. None of said evidence can be considered by you against the defendant for any other purpose whatsoever, and none of it can be so considered by you against the defendant for said purposes, except such of it, if any, as you think proper to be considered when tested by the rules above stated relating to its competency.

"(6) No agreement made by the defendant outside the state of Texas to violate the anti-trust laws of Texas, if any such there were, can be made the basis for forfeiting its permit to do business in Texas, or for imposing penalties upon it, unless such agreement was executed or attempted to be executed in Texas by the duly authorized agents of defendant; but inasmuch as the undisputed evidence in the case shows that the defendant has continuously maintained its agents in this state and prosecuted its business therein since May 31, 1900, you will be authorized to convict it of violating the anti-trust laws of Texas if you find from a preponderance of the evidence in favor of the state on the issues submitted for your consideration in paragraphs 7, 8, 9, 10, or 11 of this charge.

"(7) If you find from a preponderance of the evidence that the defendant company,

acting through its duly appointed and authorized agents, entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from petroleum, and if you further find from a preponderance of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, and if you further find from a preponderance of the evidence that the oil with reference to which said agreement or understanding, if any, was so made and carried out, was the subject of local, as distinguished from interstate, commerce, you will return a verdict for the state and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 7 of the court's charge.' You are instructed, in this connection, that if you find in favor of the state on the issue above submitted for your consideration in this paragraph of the charge, each day embraced between May 31, 1900 and March 31, 1903, during which the defendant remained a party to the agreement or understanding herein mentioned, if there were any such agreement or understanding, and if it remained a party to same on any of said days, would constitute a separate and distinct violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the defendant was on June 1, 1900, or on some date subsequent thereto and prior to March 31, 1903, through the action of its duly appointed and authorized agents, a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined from petroleum, and if you do not further find from a preponderance of the evidence that the oil with reference to which defendant entered into said agreement or understanding, if any such there were, was the subject of local, as distinguished from interstate, commerce, you will say by your verdict: 'We, the jury, find for the defendant on the issues submitted for our consideration in paragraph 7 of the court's charge.'

"(8) If you find from a preponderance of the evidence that on June 1, 1900, or on any date subsequent thereto and prior to March 31, 1903, the defendant, acting through its duly appointed and authorized agents, had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey, whereby the price in Texas oil refined from petroleum, other than oil which was the subject of interstate, as distinguished from local, commerce, was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed

or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 8 of the court's charge.' In this connection you are instructed that, if the defendant became a party to a pool of the character mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that on June 1, 1900, or that on some date subsequent thereto and prior to March 31, 1903, the defendant, acting through its duly appointed and authorized agents, had brought about or permitted a combination or union of its capital with the capital of the Standard Oil Company of New Jersey, and if you do not further find from a preponderance of the evidence that by said combination or union, if such there were, the price in Texas of oil refined from petroleum, other than oil which was the subject of interstate, as distinguished from local, commerce, was sought to be fixed or regulated, or that thereby the price in Texas of such oil was reasonably calculated to be fixed or regulated, or that thereby the trade in such oil in Texas was sought to be controlled or limited, you will say by your verdict: 'We, the jury, find for the defendant on the issues submitted for our consideration in paragraph 8 of the court's charge.'

"(9) If you find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in this state of the business of selling oil refined from petroleum, other than oil which was the subject of interstate, as distinguished from local, commerce, or to fix, maintain, or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were on March 31, 1903, or any date subsequent thereto, and prior to April 29, 1907, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 9 of the court's charge.' In this connection you are instructed that, if the defendant became a party to a trust of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to and acted under such trust, if there were any such days, would constitute a separate vio-

lation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create or carry out in Texas, restrictions in the free pursuit in this state of the business of selling said character and kind of oil, or to fix, maintain, or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were, subsequent to March 30, 1903, and prior to April 30, 1907, you will say by your verdict: 'We, the jury, find for the defendant on the issues submitted for our consideration in paragraph 9 of the court's charge.'

"(10) If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph of this charge, or to fix, maintain, or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 10 of the court's charge.' In this connection you are instructed that, if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, and that they were brought under such common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of such oil, or fix, maintain, or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will say by your verdict: 'We,

the jury, find for the defendant on the issues submitted for our consideration in paragraph 10 of the court's charge.'

"(11) If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 11 of the court's charge.' In this connection you are instructed that, if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on some date subsequent thereto, and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and if you do not further find from a preponderance of the evidence that said stock was acquired and combination effected, if it were at all, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of said character and kind of oil, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will say by your verdict: 'We, the jury, find in defendant's favor on the issues submitted for our consideration in paragraph 11 of the court's charge.'

"(12) The evidence introduced before you does not show with sufficient definiteness that the defendant has, since May 31, 1900, acted under or persisted in the performance of either the contract with Clem and the Eagle Refining Company and others or the contract with Roy Campbell and the Texas Oil & Gasoline Company in such a manner as to violate the anti-trust laws of 1899 or 1903. You are therefore instructed to find in defendant's favor on the issues pleaded by the state with reference to said contracts.

"(13) Evidence has been introduced before you tending to show that the defendant has

given rebates and discounts in the course of its dealings. Evidence has also been introduced before you tending to show that defendant has made contracts and entered into understandings other than those which have been submitted for your consideration in paragraphs 7 to 11, inclusive, of this charge. Evidence has also been introduced before you tending to show the general course of dealings of defendant in Texas and elsewhere, including some of its business methods in meeting competition. You are instructed that none of this evidence shows or tends to show any violation of the anti-trust laws of Texas, unless it tends in some degree to establish some one or more of the issues submitted for your consideration in the last above mentioned paragraph of this charge; and you are therefore instructed to acquit the defendant and return a general verdict for it notwithstanding any and all of said evidence, unless you find in favor of the state on the issues submitted for your consideration in some one or more of said paragraphs of the charge.

"(14) If you convict the defendant under the foregoing instructions of any violation or violations of the anti-trust law of 1899, you will specify in your verdict the date or days for which it is convicted of having violated said law, and will further specify in your verdict that for said violation or violations, if any you find, that its permit to do business in Texas shall be forfeited, and the amount of money which shall be adjudged against it as penalties for said violations, if any. In fixing the penalties, if any, which you assess against the defendant for any violations of which you may convict it of the anti-trust law of 1899, you will fix same at not less than \$200 or more than \$500 per day for each day you find it has so violated the law. If you convict the defendant of any violations of the anti-trust law of 1903, you will specify in your verdict the date or days for which it is so convicted, and further specify therein that as a result of said conviction its permit to do business in Texas shall be forfeited, and the sum of money that shall be adjudged against it as a penalty for such violation, fixing said sum at \$50 per day for each and every day that you convict it of having violated said law.

(15) In order to aid you in preparing your verdict in proper form, when you have reached same, the following forms of verdicts are submitted for your consideration: (1) If you find in favor of the state on all of the issues submitted to you and for the entire time for which penalties are claimed by the state against the defendant in its petition, you will say: 'We, the jury, find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1,033 days, and for the penalties at ——— dollars; and we find for the plaintiff against the defendant on each of the issues submitted for each of the days

between April 1, 1903, and April 29, 1907, being 1,488 days, and fix the penalties at \$74,400. We further find that the permit of the defendant to do business in the state of Texas should be canceled. We find for the defendant upon all the issues made by the pleadings and not submitted in the charge of the court.' (2) If you find in favor of the state on some of the issues submitted for your consideration relating to the alleged violation of the anti-trust law of 1899, and in favor of the state with reference to some of the alleged violations of the anti-trust law of 1903, you may use the following form of verdict: 'We, the jury, find in favor of the state on the issues submitted for our consideration in the following paragraphs of the court's charge: \* \* \*. We further find that the defendant violated the anti-trust laws of Texas on the following days embraced between May 31, 1900, and March 31, 1903: \* \* \*. We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of ——— dollars. We further find that the defendant violated the anti-trust laws of 1903 on the following days embraced between the 30th day of March, 1903, and the 29th day of April, 1907: \* \* \*. We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of ——— dollars. On all other issues raised by the pleadings, we find in favor of the defendant.' (3) If you find in favor of the state with reference to some or all of the alleged violations of the anti-trust law of 1899 submitted for your consideration, and if you find in favor of the defendant on other of said alleged violations, and if you find in favor of the defendant on the issue of all of the alleged violations of the anti-trust law of 1903, you may use the following form of verdict: 'We, the jury, find in favor of the state on the issues submitted for our consideration in the following paragraph of the court's charge: \* \* \*. We further find that the defendant has violated the anti-trust laws of Texas on each of the following days embraced between May 31, 1900, and March 31, 1903: \* \* \*. We further find that because of said violations the permit of the defendant to do business in Texas should be forfeited and penalties should be imposed upon it in the amount of ——— dollars. We further find in defendant's favor on all alleged violations of the anti-trust laws of 1903, and on all other issues made by the pleadings.' (4) If you find in defendant's favor on all issues submitted for your consideration relating to its alleged violation of the anti-trust laws of 1899, but find in favor of the state on all or some of the issues relating to defendant's alleged violation of the anti-

trust law of 1903, you may use the following form of verdict: 'We, the jury, find in defendant's favor on all issues submitted for our consideration relating to its alleged violation of the anti-trust laws of 1899, but find in favor of the state under the following paragraphs of the court's charge: \* \* \*— for alleged violations of the anti-trust laws of 1903. We further find that the defendant has violated said anti-trust laws on each of the following days embraced between March 30, 1903, and April 29, 1907: \* \* \*. We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the sum of ——— dollars.' (5) If you desire to return a general verdict for defendant, you may use the following form of verdict: 'We, the jury, find for the defendant.'

"(16) You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony; but you are bound to take the law as it is given you in charge by the court and to be governed thereby in arriving at your verdict."

All requested instructions were refused. The verdict of the jury reads as follows:

"We, the jury, find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1,033 days, and for penalties, \$1,549,500. And we find for the plaintiff against the defendant on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being 1,488 days, and fix the penalties at \$74,400. We further find that the permit of the defendant to do business in the state of Texas should be canceled. We find for the defendant upon all issues made by the pleadings and not submitted in the charge of the court."

The court rendered judgment for the state in accordance with the verdict for \$1,623,900 and a cancellation of the defendant's permit to do business in this state. The defendant has appealed, and presents the case in this court on 129 assignments of error. There is evidence in the record which supports the findings of the jury, and we find the facts to be as found by the verdict.

Clark & Bolinger, Cochran & Penn, D. W. Odell, N. A. Stedman, J. D. Johnson, and H. S. Priest, for appellant. Robt. V. Davidson, Atty. Gen., Jewell P. Lightfoot, Asst. Atty. Gen., John W. Brady, County Atty., Gregory & Batts, and Allen & Hart, for the State.

KEY, J. (after stating the facts as above). 1. Assisted by elaborate briefs and arguments submitted by able counsel on both sides, this court has given to this important case earnest and careful consideration. The volume of business on our docket and the great number of questions presented preclude extended



consideration in this opinion of many of the questions raised in appellant's brief. We therefore announce, in general terms, our conclusion to the effect that it is not shown that error was committed in overruling appellant's application for a change of venue, in various rulings upon exceptions to pleadings, and as to admissibility of testimony. A majority of the court also hold that no positive error has been assigned upon the charge of the court. The writer of this opinion is of a different view concerning the eleventh section of the charge, and concurs with counsel for appellant in their contention that it was calculated to mislead the jury into the belief that they could find against the defendant upon the issue therein submitted, regardless of whether it had any knowledge of, participated with, or aided or abetted the Standard Oil Company in the wrongful conduct therein referred to. The provision of the anti-trust statute of March 31, 1903, upon which the charge in question was evidently founded, seems to be addressed in the main against the corporation which acquires stock or other property of another corporation with the intention of using it for the purpose specified in the statute, and it cannot properly be construed to include the corporation whose stock or property has been acquired, and subject it to the penalties prescribed by the statute, unless that corporation is in some manner responsible for the unlawful acts of the acquiring corporation. These are my individual views, and the other members of the court do not concur in the construction placed by me upon the charge. However, we are all agreed that, if the charge in question be erroneous, it affords no ground for reversal, because the jury found that appellant had violated other provisions of the anti-trust act of 1903, and awarded only one penalty for each day's violation. Having found for the state on these other issues, if the verdict had been in appellant's favor on the issue submitted by the charge under consideration, the judgment should have been the same; and therefore, if that section of the charge was erroneous, such error is now harmless and immaterial. In reference to the assignments of error complaining of the order of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute a separate appeal from that order, and this court, in considering that appeal, has decided against appellant. It is not entitled to have the order appointing a receiver reviewed by this court twice or in two distinct proceedings.

2. The constitutionality and validity of the anti-trust acts of May 25, 1899, and March 31, 1903, have been vigorously assailed in numerous respects. We overrule these objections, and hold that these statutes authorize and sustain this suit. *State v. Laredo Ice Company*, 96 Tex. 467, 73 S. W. 951; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ.

App. 1, 44 S. W. 936. The contention that these statutes are too indefinite and uncertain in the particulars involved in this case is not regarded as tenable. The Sherman anti-trust law enacted by Congress is not more definite and specific than these statutes, and that law has stood the test against similar objections in the Supreme Court of the United States. *United States v. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 291, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

3. This suit was instituted on September 22, 1906, and the defendant interposed a special exception to the petition in so far as it sought to recover penalties for alleged violation of the anti-trust laws of this state prior to the 22d day of September, 1904, for the reason that it appeared from the face of the plaintiff's petition that the right to recover such penalties accrued more than two years before the suit was filed; and was therefore barred by the statute of limitation of two years, as prescribed in article 219 of the Code of Criminal Procedure of 1895 of this state. That exception was overruled, and the court refused to give the jury a special instruction requested by appellant, announcing and applying the same proposition of law. These rulings of the trial court are assigned as error, and present one of the most important questions in the case. Chapter 1 of title 4 of the Code of Criminal Procedure for 1895 is headed thus: "The Time within Which Criminal Actions may be Commenced." Article 219 reads as follows: "For all misdemeanors an indictment or information may be presented within two years from the commission of the offense and not afterwards." By the Penal Code offenses which are punishable by pecuniary fine only are designated misdemeanors; and appellant's contention seems to be that the things condemned by the act of May 25, 1899, upon which this suit in part is based, constitute misdemeanors, and that, although civil in form, the suit is criminal in nature and barred by article 219 of the Code of Criminal Procedure for 1895. It is also contended that the pecuniary penalties imposed by the act of March 31, 1903, constitute part of the punishment prescribed by that act, and that the suit for the penalties accruing thereunder constitutes a criminal case, and is barred by article 218 of the Code of Criminal Proce-



dures for 1895, which bars prosecutions for felonies.

The second, third, fourth, and sixth sections of the act of May 25, 1899 (Laws 1899, pp. 246-248, c. 146), declare that all persons, firms, corporations, or association of persons who violate those sections "shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act." The eleventh section states that all who do the things therein condemned shall be "adjudged a monopoly and be subject to all the pains and penalties provided in this act." The seventh section provides for the forfeiture of the charter of any domestic corporation and permit to do business granted to any foreign corporation for violations of the statute. The fifth section reads as follows: "Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than \$200, nor more than \$5,000 for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the state at the relation of the Attorney General or the district or county attorney; the moneys thus collected to go into the state treasury, and to become a part of the general fund, except as hereinafter provided." The pertinent part of the ninth section is expressed in these words: "It shall be the duty of the Attorney General and the prosecuting attorney of each district or county, respectively, to enforce the provisions of this act. The Attorney General and the prosecuting attorney shall institute and conduct all suits begun in the district courts, and upon appeal the Attorney General shall prosecute said suits in the Courts of Civil Appeals and Supreme Court."

The first section of the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), defines a trust. The second section defines a monopoly, and the third section prescribes what acts shall constitute a conspiracy in restraint of trade. The fourth section declares all trusts, monopolies and conspiracies in restraint of trade to be illegal. The fifth, sixth, and seventh sections make provision for the forfeiture of charters of domestic corporations violating that act, and the eighth section makes a similar provision in reference to the permit of foreign corporations to do business in this state. The seventh and tenth sections use the word "convicted"; but the seventh relates to the subject of the forfeiture of charter rights, and the tenth to the subject of forfeiture of a foreign corporation's right to do business in the state, which shows that the Legislature did not have in mind a proceeding by indictment or criminal information. The eleventh section reads as follows: "Each and every

firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of \$50, which may be recovered in the name of the state of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney General, or the district or county attorney, under the direction of the Attorney General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the state in proceedings under this act shall be over and above the fees allowed him under the general fee bill." The thirteenth section of that act reads as follows: "And in addition to the penalties and forfeitures herein provided for, every person violating this act may further be punished by imprisonment in the penitentiary not less than one nor more than ten years."

We agree with counsel for appellant that these statutes are penal. They were enacted for the purpose of suppressing and preventing certain things regarded by the Legislature as detrimental to the public interest. The penalties prescribed were intended as punishment; but it does not follow that this is a criminal case, within the purview of article 219 of the Code of Criminal Procedure for 1895. After a careful consideration of all their terms, we have reached the conclusion that it was the intention of the Legislature, in enacting the two statutes under consideration, to create a cause of action in behalf of the state for the pecuniary penalties therein prescribed, to be recovered in a civil suit. We reach this conclusion mainly from the language of the fifth section of the act of 1899 and the eleventh section of the act of 1903. These sections declare that those who violate any of the provisions of those acts shall forfeit and pay, in the one instance not less than \$200 nor more than \$5,000, and in the other instance \$50, to be recovered in an action in the name of the state. It is true that in some places in these laws the procedure is designated "prosecutions"; but in others they are spoken of as "actions" and "suits." In the ninth section of the act of 1899 it is declared to be the duty of the Attorney General and district and county attorneys "to institute and conduct all suits begun in the district courts, and upon appeal the Attorney General shall prosecute said suits in the Courts of Civil Appeals and Supreme Court." Section 5 of that act, construed in connection with section 9, indicates with absolute certainty a legislative purpose to authorize civil suits for the recovery of the pecuniary penalties prescribed. The two sections together indicate that it was not intended that such penalties should be enforced by a criminal proceeding, because, if that act creates a criminal offense,

such offense would be a misdemeanor, of which the district court would have no jurisdiction. The Constitution confers upon that court exclusive jurisdiction of suits by the state for forfeitures and penalties, and it must be presumed that in enacting that statute the Legislature intended to provide for such suits as were authorized by that provision of the Constitution, and not to create criminal offenses of which the county court alone would have original jurisdiction; otherwise, the Legislature would not have used the language, "shall institute and conduct all suits begun in the district courts."

It is true that both of these statutes contain some expressions common to criminal procedure, such as "offense," "guilty," and "convicted." The word "guilty," however, is frequently used in civil cases, as "guilty of fraud," "guilty of negligence"; and the word "offense," as used in these statutes, has reference to violations of their provisions, and is not equivalent to the word "felony" or "misdemeanor." However, we do not hold that it is necessary to use either of the latter terms to create a criminal offense; nor, on the other hand, do we think that the words "offense," "guilty," and "convicted" necessarily determine that these are criminal statutes to be enforced exclusively by indictment or information. The word "suit" is very generally used to designate a civil case, and seldom if ever applied to criminal cases. As these statutes do not, in terms, require a resort to criminal procedure for their enforcement, then, even if they do not direct any method of enforcement, we are of the opinion that the state had the right to proceed in a civil action for a recovery of the pecuniary penalties. In such cases it is a well-established rule that an action of debt will lie for the recovery of statutory penalties. 5 Ency. Plead. & Prac. 907, and authorities there cited. It has been so decided in this state in *Davidson v. Missouri Pacific Ry. Co.*, 3 Willson Civ. Cas. Ct. App. § 173, where it was held that a suit to recover a statutory penalty was an action of debt, and barred by our statute of limitation, which requires actions for debt, where the indebtedness is not evidenced by a contract in writing, to be commenced within two years. That the state may also bring an action for debt for the recovery of statutory penalties seems to be equally well settled. It was so held by the Supreme Court of the United States in *Stockwell v. United States*, 13 Wall. (U. S.) 531, 20 L. Ed. 491. That was an action by the government to recover double the value of certain shingles alleged to have been illegally imported into the United States. The act of Congress upon which the suit was founded reads as follows: "That if any person or persons shall receive, conceal or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such per-

son or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so received, concealed or purchased." In that case, among other things, the court said: "A verdict and judgment having been recovered against the defendants in the court below, the record has been removed into this court and four errors have been assigned. The first is that a civil action of debt will not lie, at the suit of the United States, to recover the forfeitures or penalties incurred under this act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported; for it is conceded that by the act of importing an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that, when a statute gives a private person a right to recover a penalty for a violation of law, he may maintain an action of debt; but it is insisted that, when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 (3 Stat. 781, c. 58, § 2) fixes the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts which subject the perpetrators to the liability is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action. But all doubts respecting the matter are set at rest by the fifth section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed, and accounted for in the manner prescribed by the act of March 2, 1799 (1 Stat. 627, c. 22), entitled 'An act to regulate the collection of duties on imports and tonnage.' By referring to the eighty-ninth section of that act, it will be seen that it directs all penalties accruing by any breach of the act to be sued for and recovered, with costs of suit, in the name of the United States of America in any court competent to try the same; and the collector

within whose district a forfeiture shall have been incurred is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly it has been frequently ruled that debt will lie at the suit of the United States to recover the penalties and forfeitures imposed by statutes. *U. S. v. Colt*, Pet. C. C. 145, Fed. Cas. No. 14,839; *Jacob v. U. S.*, 1 Brock. (U. S.) 520, Fed. Cas. No. 7,157; *U. S. v. Bougher*, 6 McLean (U. S.) 277, Fed. Cas. No. 14,627; *Walsh v. U. S.*, 3 Woodb. & M. (U. S.) 342, Fed. Cas. No. 17,116; *U. S. v. Lyman*, 1 Mason (U. S.) 482, Fed. Cas. No. 15,647; *U. S. v. Allen*, 4 Day, 474, Fed. Cas. No. 14,431. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed, or purchased with knowledge that they had been illegally imported, 'on conviction thereof.' It may be, therefore, that an indictment or information might be sustained. But the question now is whether a civil action can be brought, and, in view of the provision that all penalties and forfeitures incurred by force of the act shall 'be sued for and recovered' as prescribed by the act of 1799, we are of the opinion that debt is maintainable. The expression 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

As to the point made in reference to the penalties being indefinite under the act of 1899, in addition to the case just cited, we refer to *Rockwell v. State*, 11 Ohio, 130, where the law fixed the penalty at not less than \$5 nor more than \$50, and the objection referred to was overruled, and it was held that an action of debt would lie. Other courts have held that statutes somewhat similar to those under consideration confer upon the state a cause of action to be maintained in a civil suit. *Burgh v. State*, 108 Ind. 133, 9 N. E. 75; *Davis, Adm'r. v. State*, 119 Ind. 555, 22 N. E. 9; *State v. Grove*, 77 Wis. 448, 46 N. W. 532; *Territory of New Mexico v. Baca*, 2 N. M. 183. Interesting discussions of the terms "fines," "forfeitures," and "penalties," will also be found in *People v. Nedrow*, 122 Ill. 363, 13 N. E. 533; *Gosselink v. Campbell*, 4 Iowa, 300. Our conclusion is that the statutes under consideration vest in the state a civil right of action for the pecuniary penalties prescribed for violations of the provisions of those statutes. This being true, and as our statute of limitations applicable to civil cases does not include and bar the state, we hold that limitation is not available as a defense in this case. We do not rest this ruling upon the ground that the statutes under consideration do not create criminal offenses. If it be conceded that

they create such offenses, criminal prosecutions for which would be barred within two years, it does not follow that the penalties which might have been recovered by such prosecutions cannot when authorized, be recovered in a civil action. Our Penal Code and Code of Criminal Procedure deal exclusively with criminal cases, and that portion of the latter which deals with the subject of limitation only purports to fix the time within which criminal actions may be commenced; and article 219, relied on by appellant, merely forbids prosecutions by indictment or information after two years from the commission of the offense.

It is argued on behalf of appellant that, even though a statute creating an offense may confer upon the state the right to maintain a civil action to recover a pecuniary penalty for violating the statute, still that right would be barred by article 219, which would bar the right to enforce the penalty by indictment or information. If article 219, or any other statute, declared that no right of action should exist or no sort of proceeding be instituted for the collection of a penalty after two years, appellant's contention would be correct; but that article is much narrower in its scope, and merely prohibits prosecutions in the manner and by the means prescribed for the prosecution of criminal cases. It may be true that the same general result would be sought in the one case as in the other, viz., recovery of the penalty, and, if that were the only thing to be considered, there would be force in the argument that in prohibiting criminal prosecutions after a specified time the Legislature intended thereby to prevent any other character of procedure which had for its purpose the accomplishment of the same general result. If the two proceedings, civil and criminal, were not so essentially different, the contention urged might be sustained; but the statutes under consideration apply to natural persons as well as corporations, and as to such persons civil and criminal proceedings are widely different. In a civil action against an individual to recover a penalty, he is notified of the suit by delivering to him a citation. When the case is tried, if he loses, the only result is a personal judgment against him for a specified sum of money, to be collected by execution, and not otherwise. But if he is proceeded against criminally for the enforcement of a penalty, he is arrested and required to give bond or stay in jail until after the case is tried. Upon trial, if he is convicted, the judgment not only goes against him for the penalty, but, unless he pays it, he is again incarcerated in jail. Thus it will be seen that in a criminal proceeding to enforce the penalty the defendant would necessarily be subjected to the ignominy of an arrest by a public officer, and upon contingencies which often occur, would be incarcerated in jail. Now, when the Legislature prescribed a time which would prevent a prosecution fraught

with these serious consequences, does it necessarily follow that it intended to cut off any right the state might have to obtain a personal judgment for a pecuniary penalty, without resorting to a procedure that would bring about any such harsh results? We think not. In prescribing limitation for criminal proceedings, we believe the Legislature had in mind cases criminal both in substance and form, and had no intention of affecting any right the state might assert in a civil action. Chief Justice Marshall, in *Adams v. Woods*, 2 Cranch (U. S.) 337, 2 L. Ed. 297, announced that, if a law should merely declare that no indictment or information should be presented after a specified time, such law would be pleadable only in bar of indictments or informations, and would not bar a civil action for a recovery of the penalty prescribed for violating a statute.

An offense which is punishable by imprisonment in the penitentiary, absolutely or in the alternative, is a felony; and as the anti-trust act of 1908 fixes confinement in the penitentiary as an alternative punishment, appellant pleaded article 218 of the Code of Criminal Procedure of 1895 in bar of the state's right to recover part of the penalties sued for under that act. Article 218 is framed like article 219, and would apply to a criminal prosecution based upon the act of 1908, and bar such prosecution after three years. As we hold that it was the intention of the Legislature to confer upon the state the right to maintain a civil action for the pecuniary penalties therein prescribed, we hold that such right of action is not barred by article 218. In other words, while the penalties referred to were intended in a certain sense as punishment, they were not imposed as punishment to be inflicted through the onerous instrumentalities of a criminal prosecution.

Appellant also pleaded the statute of limitation of two and four years embodied in the Revised Statutes and applicable to civil cases. It is contended that the two-year statute has application upon the theory that if the state's suit is an action of debt, and not instituted for the preservation of the public rights, revenues or property, then the state should not be exempt from limitation, but should be treated as any other litigant. It is the rule of the common law of England that, unless so expressly enacted, limitation does not run against the sovereign; and that is the rule in the American states. We are not prepared to place upon that rule the restriction urged; but, if we should do so, it would not be proper to apply it to this case. In seeking to recover the penalties here involved, the state is endeavoring to enforce statutes enacted for the protection of the public interest. One of the main objects of the suit is to protect and preserve public rights and promote a well-established public policy. In view of what we have already said it is hardly neces-

sary to add that we regard the four-year statute of limitation as equally unavailing. In *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248, which holds that limitation does not apply to the state unless so expressly provided, the authorities are collated and reviewed. We also hold that no error was committed in refusing a charge to the effect that the state must prove its case beyond reasonable doubt. Being a civil case that rule does not apply.

4. It is contended on behalf of appellant that the anti-trust act of May 25, 1899, was rendered unconstitutional by the passage of another statute at the same session of the Legislature, entitled "An act to protect workmen in the right of organization and the purposes thereof," approved May 27, 1899 (Laws 1899, p. 262, c. 153), wherein it was provided that from and after its passage it should be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trade unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service in their respective pursuits and employments. By the third section it is declared that that act shall not apply to combinations of associations of capital, or capital and persons natural or artificial formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade, and that nothing therein contained shall be held to interfere with the terms and conditions of private contracts with regard to the time of service or other stipulations between employers and employes, and "that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies." In view of these limitations placed upon that act, we are of the opinion that it was not the intention of the Legislature to authorize anything to be done that was prohibited by the act of May 25, 1899. Hence we hold that this statute ingrafts no exemptions upon the anti-trust statute referred to.

5. The anti-trust statute of May 25, 1899, having been superseded and repealed by the act of March 31, 1908, which diminished the pecuniary penalties, appellant sought to have the latter statute applied to the time before as well as after it went into effect. This was refused, and we think properly so, on account of this proviso in the latter act: "Provided nothing in this act shall be held or construed to affect or destroy any rights of the state of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this state, for acts committed before this act took effect." We are of opinion that this proviso preserved whatever rights the state had under the former law, including the right to enforce the penalties prescribed by that

act. We are unable to concur in the proposition that it was merely intended to preserve the right to, but not the amount of, the penalties. Nor can we sanction the proposition that, because of the location of a comma in the proviso quoted, it was the intention of the Legislature to protect and preserve the right of the state to recover penalties from domestic corporations, and not preserve such right as against foreign corporations. No reason existing for making such a marked discrimination, we are not willing to hold that it was the intention of the Legislature to do so, merely because a comma was so used as to render that construction plausible. In construing written laws courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention.

6. It is claimed that the trial court should have granted appellant's motion for a new trial based upon the ground that the judgment imposes excessive fines and operates as a deprivation of property without due process of law. It is also contended that the act of 1899 should be declared void because it authorizes excessive fines and forfeitures. That question has already been decided against appellant's contention in *State v. Laredo Ice Co.*, 96 Tex. 467, 73 S. W. 951. The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence we have reached the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives.

7. In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged; the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this state. The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this state, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the state of Texas, and that to a large extent such object has been accomplished. In so far as that agreement related to this state, appellant, acting by its agents, performed it within this state; and such performance within the limits of the state constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been made in this state. To a large extent the case rests

upon circumstantial evidence; but we cannot say that the jury were not warranted in the conclusions drawn from it. Hence we hold that the verdict is supported by testimony, and no error was committed in overruling the motion for a new trial.

Upon the whole case our conclusion is that reversible error has not been shown, and therefore the judgment will be affirmed.

Affirmed.

GORHAM v. DALLAS, C. & S. W. RY. CO.\*  
(Court of Civil Appeals of Texas. Dec. 21, 1907. On Rehearing, Jan. 18, 1908.)

**1. SALES—CONTRACTS—REMEDIES OF SELLER—ACTION FOR PRICE—PLEADING—DEFENSES.**

In an action for the contract price of iron furnished a railroad, the contract stipulating for immediate shipment, defendant in its answer could properly aver facts and circumstances surrounding the making of the contract to show that the parties contemplated an immediate shipment, which was not made.

**2. APPEAL—REVIEW—HARMLESS ERROR—OVERRULING EXCEPTION TO ISSUE NOT SUBMITTED TO JURY.**

In an action by a seller against a railroad company for the contract price of iron, it was not reversible error to overrule an exception to an allegation in the petition of the existence of a custom to sell angle bars or joints complete at the same price as rails, and that the custom entered into the contract, where the issue presented by it was not submitted to the jury.

**3. SALES—ACTION FOR PRICE—PLEADING.**

In an action on a contract stipulating for an inspection of material sold, where the petition alleged that the material had been inspected, whether or not there had been an inspection was material in determining whether the contract had been complied with, and an allegation that the inspection had not been made was properly pleaded in defense.

**4. SAME—ADMISSIBILITY OF EVIDENCE.**

In an action by the seller on a contract to furnish iron to defendant railroad company, where the defense was that plaintiff had violated the contract to defendant's damage by not making immediate shipment, evidence of a conversation between a witness and plaintiff prior to the execution of the contract, wherein plaintiff was told of a contract between defendant and a firm of contractors which would necessitate immediate shipment of the iron, was admissible to show that plaintiff, when the contract was made, knew of the necessity for immediate shipment and of the probable loss to defendant from failure so to do.

**5. SAME.**

In an action by the seller for the contract price of iron sold defendant railroad company, where defendant contended that because of breach of the condition in the contract calling for immediate shipment a construction company employed by it had not been able to properly complete the road, the fact that, under the contract with the construction company, a chief engineer was appointed whose estimate as to the amount of work done by the construction company, its value, and the balance due the company was to be binding on the parties did not preclude another engineer from testifying as to the defective condition of the work, and that such condition was the result of plaintiff's delay in furnishing material, since plaintiff was not a party to the contract between defendant and the construction company, and the chief engineer's estimate was not conclusive evidence

\*Writ of error denied by Supreme Court.

that defendant had not suffered damage from plaintiff's delay.

#### 6. SAME.

In an action by the seller for the contract price of iron sold defendant railroad company, where the defense was plaintiff's breach of a condition in the contract calling for immediate shipment, evidence of the engineer who superintended the work of a construction company who built the railroad was competent to show that through delay in receiving the material the contractors could not complete the road, whereby defendant was damaged.

#### 7. SAME—INSPECTION OF GOODS—AGENCY OF INSPECTOR.

Where a contract of sale provides that the materials shall be inspected by a specified person at the buyer's cost, the inspector is the agent of both parties, and his inspection is conclusive on them in the absence of bad faith therein.

#### 8. SAME—BAD FAITH IN INSPECTION—EVIDENCE.

Evidence examined, and held not to support a finding that an inspection of goods under a contract of sale was made in bad faith.

#### 9. SAME—DELIVERY OF GOODS—ACCEPTING DEFECTIVE GOODS—ESTOPPEL.

If a buyer accepts materials which are openly and patently defective, it is estopped from denying that they are not of the character bargained for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 456-463.]

#### 10. SAME—ACCEPTANCE OF GOODS BY AGENT BINDING ON BUYER.

Where a buyer selects an employé to receive the materials bought, and the employé accepts some which are not of the character bargained for, the buyer is bound by his acceptance, though the employé had no knowledge of the terms of the contract.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by Walter M. Gorham against the Dallas, Cleburne & Southwestern Railway Company. From a judgment granting insufficient relief, plaintiff appeals. Reformed and affirmed.

See 95 S. W. 551.

The plaintiff, Walter M. Gorham, sued the Dallas, Cleburne & Southwestern Railway Company to recover the contract price of certain material alleged to have been delivered to said railway company in compliance with a contract therefor between the parties. The petition alleged a compliance by the plaintiff with the terms of the contract, and that defendant had failed and refused to pay for the material, and prayed judgment for \$2,565, balance due on the contract for the material, and \$109.56 alleged to have been paid out as freight by plaintiff for the benefit of defendant. The defendant answered by a general demurrer, general denial, and by special answer and cross-bill, alleging that it was induced to enter into the contract by the representations and promises of plaintiff that he would promptly deliver the material, alleging a failure to make prompt delivery, and that defendant had thereby sustained damage. The answer and cross-bill alleged that the plaintiff had knowledge at the time of the execution of the contract sued on of defend-

ant's contract with Dougherty & Davis to construct the road within 90 days, and the probable loss that defendant would sustain if the material was not promptly delivered. A trial resulted in a verdict for plaintiff, upon which a judgment was entered for plaintiff in the sum of \$479.07. The plaintiff, being dissatisfied with the amount of the judgment, perfected an appeal to this court.

#### Conclusions of Fact.

On the 22d of August, 1902, the appellant, through his agent John B. Watson, and the appellee, by its president, W. D. Myers, entered into a contract as follows: "Philadelphia, August 22, 1902. Sold to the Dallas, Cleburne & Southwestern Railway Company for the account of Messrs. Henry Levis & Co., of Philadelphia, sufficient relaying steel T rails to lay eleven (11) miles of single track, approximately nine hundred and sixty-eight (968) tons, original fifty-six (56) pounds to the yard, and the necessary accompanying angle bars—thirty-two (\$32) dollars per gross ton for rails and one (\$1) dollar per joint complete (consisting of two angle plates and bolts and nuts), both f. o. b. Kansas City, Mo.; shipment to be made immediately. Material to be subject to Hunt's inspection at buyer's cost. Terms of payment—cash against sight draft with shipping documents attached, payable in New York funds at par. This contract to be guaranteed by the endorsement of a reputable bank. Signed in duplicate. John B. Watson. Accepted: Dallas, Cleburne & Southwestern Railway Company, Per W. D. Myers, Prest." At the time of the execution of said contract the appellant had knowledge that appellee had a contract with Dougherty & Davis, whereby they were to construct appellee's railroad within 90 days, and the probable loss that appellee would sustain if the material purchased was not promptly delivered. The material was inspected by Hunt & Co., on September 22, September 26, and October 9, 1902, and was forwarded by rail to its destination and delivered to the appellee. There were 3,090 angle bars delivered and 1,000 fish plates—the fish plates were of the value of \$425.50. The plaintiff failed to comply with his contract, in that he delivered 1,000 fish plates where he should have delivered angle bars, and in failing to promptly deliver the material. By reason of the unnecessary delay in failing to promptly deliver the material the railway company, appellee, sustained damage in the sum of \$1,500. The plaintiff paid \$109.56 freight on the material which defendant was bound to pay under the terms of the contract. The plaintiff did business under the name of Henry Levis & Co.

Davis & Davis, for appellant. Ramsey & Odell, for appellee.

BOOKHOUT, J. (after stating the facts as above). There was no error in overruling the

plaintiff's demurrer to that part of the answer and cross-bill which set up that the contract for the purchase of material contemplated its immediate shipment, and alleging the facts surrounding its making, to show that an immediate shipment was contemplated by the parties at the time it was entered into. The answer distinctly averred that the plaintiff had knowledge at the time the contract was made of the contract of the railway company with Dougherty & Davis, and of the probable loss that would be sustained by it if the material was not promptly delivered.

The issue as to whether there was a custom and usage to sell the angle bars or joints complete at the same price as the rails, and that said custom entered into the contract sued upon, and that there was no occasion for defendant to pay the contract price for the same unless the same were sound and serviceable and adapted to the purposes for which they were to be used, etc., was not submitted to the jury, and, if there was error in overruling the exception to this allegation in the petition, such ruling presents no reason for reversing the judgment. The court submitted the case to the jury on special issues, and this matter was in no way submitted to or passed upon by the jury.

The court did not err in overruling the exception to that part of the answer and cross-bill alleging that there was no inspection of the material by Hunt, or any one else, and that there were 1,000 fish plates shipped, and that they were of little or no value to defendant. The contract stipulated that the material was to be subject to Hunt's inspection, and the petition alleged that it had been inspected and passed inspection by Hunt & Co. If the material had not been inspected when delivered to the defendant this fact became important in determining whether the contract had been complied with. A careful consideration of the remaining assignments which complain of the action of the court in overruling the other exceptions to the answer and cross-bill leads us to the conclusion that no reversible error is therein pointed out, and the same are overruled.

There was no error in overruling the exception to and admitting the evidence of the witness, McDonald, Sr., as to his conversation with the plaintiff, Gorham, and his agent Watson in Philadelphia, prior to the execution of the contract sued on, wherein he told them of the contract between the railway company and Dougherty & Davis, and of the necessity of immediate shipment of the material. This evidence was material to show that plaintiff had knowledge at the time of entering into the contract of the necessity of prompt shipment of the material, and of the probable loss that the company would sustain by a failure to make immediate shipment. Nor was there error in admitting the testimony of this witness tending to show the

damage sustained by the railway company by the failure to make prompt delivery of the material. The witness testified that he went over the road in December, 1902, and inspected it; that he found the embankment was of the required width, but washed away, and that the surfacing was about half down; that the cuts were filled up with ditches and such things as that. The bridges were not completed as they should have been, and the banks were not filled out. The track was not in line and could not be put in line with the material we had to do it with; that owing to the condition of the road, brought about by the failure to furnish the material promptly, it would take \$3,500 to place the road in the condition it would have been, except for these delays. The witness was shown to be familiar with railroad work and of the proper manner of railroad construction. But it is contended that by the terms of the contract between the appellee railway company and Dougherty & Davis H. A. Genung was appointed chief engineer, and that within 30 days after the work was completed he was to make a final estimate of all the work and the value of the same and the balance due the contractors, and the same was to be final and conclusive between the parties, and that the company was to pay such balance when this estimate had been furnished; that the final estimate was made December 24, 1902, and approved by the president, and thereafter paid. The objections made to the testimony of the witness was that Engineer Genung was the only person to decide whether the railroad was constructed and completed in accordance with the contract, and the testimony was the mere opinion of the witness, and was irrelevant and too remote. There was no error in overruling these objections. The plaintiff was not a party to the contract between the railway company and Dougherty & Davis, and the estimate of the engineer of the road, showing the amount of work done by Dougherty & Davis and its value and the balance due them, was not conclusive evidence that the defendant (appellee) had not sustained damage by the appellant's failure to make prompt delivery of material. This estimate was properly admitted in evidence, as tending to show such fact, but it was not conclusive, and did not render inadmissible or irrelevant the testimony of witnesses tending to show the defective condition of the railroad, and that such condition was the result of delay in furnishing the material for its construction. The witness stated that the contractors had a number of times put the road in condition in accordance with the contract, but on account of delays and wet weather it had been washed out time and again, and he found he owed the contractors the amount of money called for by the estimate.

In the nineteenth interrogatory propounded by defendant to the witness Genung, he was

asked if the contractors were at any time delayed in their work by reason of a delay in receiving material, and to state fully the cause and extent of the delay and the number of men the contractors had employed, and whether the defendant paid any sum to said contractors or any other person by reason of such delay, and how much, and why same was paid, and all he knew about the payment. The plaintiff objected to the answer to said interrogatory, because it was irrelevant and immaterial, and did not tend to prove any issues, and was but an opinion of the witness. The answer is as follows: "The contractors in charge of the construction of said line of railway were delayed in the construction of said line by reason of the delay in the receipt of said material ordered from Lewis & Co., and also by reason of the defective character of said material after same arrived. It is rather a hard matter to take into consideration all of the facts and circumstances of this transaction, and estimate it all in days, but I will attempt to give a portion of the delays in days at least. We received our first shipment of rails on October 6, 1902, and did not receive any consignment of angle bars until the 13th of October, 1902. That, of course, delayed the contractors in the construction of the railway seven days. About the next delay was in getting the hexagon nuts to replace the square nuts. This occasioned about four days' delay. The time lost in trying to make these unsuitable angle bars and splice plates and square nuts fit and make a suitable joint could well be estimated at seven days at least. The time consumed in replacing the unsuitable angle bars and nuts was at least two weeks. During all this time the contractors had a force of about eighty-five men at their camp. These eighty-five men had an average pay of about \$1.50 per day. In a settlement between the contractors and the railway company, the railway company, on account of the fact that the contractors were threatening the railway company with damage suits and other trouble on account of the delays that they had been put to on account of the failure of the company to make proper and timely delivery of the material to be used in the construction of the line, the railway company was compelled to allow to the contractors quite a sum of money to cover the time that the contractors had been delayed. I do not know now just what amount was allowed the contractors, but it was quite a sum. In addition to this settlement between the railway company and the contractors the railway company had to accept the track from the contractors in a bad and defective condition, due to the defective condition of the material so furnished it by Lewis & Co., which is set out above. In other words, the railway company was compelled to take the track in the defective condition and release the contractors on

their bond, and then place the track in a suitable condition and bear the expense of the same itself. From the knowledge I have of the condition the track was in at the time it was taken over by the railway company from the contractors, and the condition it should have been in according to the contract between the parties, I should say that the damage occasioned to the railway company by reason of the defective material furnished it by Henry Lewis & Co. at least the sum of \$3,500. In making this estimate I have taken into consideration all of the facts and circumstances surrounding the whole transaction, and I believe same to be a reasonable estimate." In our opinion there was no error in admitting the answer of the witness. The witness was the engineer in charge of the work under the contract between Dougherty & Davis and the railway company, and his answer states facts wherein the appellee was damaged by the delay in shipping the material. It shows that at the time the railway company paid the final estimate to Dougherty & Davis the road was not in a finished condition, and its defective condition was due to the delay in receiving material.

It is contended that the court erred in the seventh paragraph of the charge in instructing the jury "that the phrase in the contract, 'subject to Hunt's inspection at buyer's cost,' constituted said Hunt or Hunt & Co. agent of plaintiff and defendant." It is insisted that said phrase only constituted Hunt agent of defendant, and that bad faith on the part of Hunt in inspecting the material would not relieve the defendant from accepting the same. The effect of this phrase in the contract was to constitute Hunt or Hunt & Co., in the matter of inspecting the material, the agent of both parties, and was conclusive on them, unless there was bad faith in the matter of inspection. The charge was correct.

It is contended that the court erred in not setting aside the twelfth finding of the jury wherein they find that the inspection by McCauley for Hunt & Co. was made in bad faith. The objection made to the material as shipped was to the delivering of fish plates when the contract called for angle bars. This finding of the jury seems to be based upon the fact that it was fraudulent for the inspector to inspect fish plates as angle bars, and the fact that he did inspect and pass fish plates as angle bars seems to be the only evidence to support this finding. The inspection of, and passing of, fish plates as angle bars did not bind the defendant to pay the contract price of angle bars for fish plates, but bound defendant only to pay the reasonable value of such fish plates as it received and used, which was \$425.50. The correspondence between the parties at the time the material was being received only complains of the shipment of fish plates by plaintiff when the con-



tract called for angle bars. No complaint was made of any defect in the angle bars shipped. They were inspected by McCauley for Hunt & Co. before being shipped, and were accepted by the railway company at Eagan, Tex. We do not think the evidence supports the finding of bad faith in the inspection of the angle bars. The jury found they were to be secondhand, and they seem to have been accepted and used by the railway company. Again, if there was evidence to support the finding of the jury that there was bad faith in the inspection of these angle bars, still, they were received and accepted by an employé of defendant railway company at Eagan. If there were defects in them, such defects were open and patent, and by accepting the same defendant was estopped from denying that they were not of the character bargained for. *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104; *Gorham v. Railway Co.* (Tex. Civ. App.) 95 S. W. 556. But it is contended that the employé who received the material at Eagan did not have knowledge of the terms of the contract, and his acceptance is not binding on the company. We do not think this fact can affect the matter. He had been selected by the company and placed at Eagan to receive the material, and his acceptance was the acceptance of the railway company.

The appellant made a motion requesting the court to render judgment in his favor on the verdict and undisputed facts. The motion was overruled, and the court rendered judgment on the verdict. Appellant prepared the form of judgment which he sought to have rendered by the court, which form charged defendant the contract price, \$3,090, for the angle bars actually delivered, instead of \$2,626.50, their market value as found by the jury, and ignored the \$1,500 damages found for defendant. While he was not entitled under our conclusion of facts, to have the judgment prepared by him entered, we think, under the verdict and undisputed facts, the court should have rendered judgment giving plaintiff the full contract price of the angle bars delivered, which was \$3,090. To this should be added \$425.50, the value of the fish plates delivered, and \$109.56, freight paid by plaintiff for the benefit of defendant, making \$3,625.06, less \$1,525 admitted to have been paid on this material, leaving \$2,100.06. From this sum should be deducted \$1,500 damages found by the jury to have been sustained by the railway company because of delay in failing to promptly deliver the material for inspection and shipment, which leaves \$600.06. On this sum plaintiff is entitled to interest at the rate of 6 per cent. per annum from January 1, 1903, to November 14, 1906, the day the cause was tried in the lower court, making a total of \$739.37, with 6 per cent. per annum interest from the date of judgment in the trial court.

Reformed and affirmed.

### On Rehearing.

In his argument in support of his motion for rehearing, the appellant calls our attention to the fact that not all of the answer of the witness Genung, as copied in our opinion, was read in evidence. From a careful examination of the stenographer's notes, it would seem that part of the answer to the nineteenth interrogatory, which reads as follows: "The railway company was compelled to allow the contractors quite a sum of money to cover the time that the contractors had been delayed. I do not know now just what amount was allowed the contractors, but it was quite a sum"—was not read in evidence. The stenographer's report copies the answer in full, and we did not, in writing the opinion, discover the fact that the part quoted had been eliminated. The opinion will be corrected so as to eliminate the language quoted from the witness Genung's answer to the nineteenth interrogatory. This does not affect our ruling in the case, and the motions of appellant and appellee for rehearing are overruled.

Motions for rehearing overruled.

### SWINSON v. McKAY.

(Court of Civil Appeals of Texas. Nov. 16, 1907. Rehearing Denied Dec. 21, 1907.)

#### 1. ELECTIONS — CONTESTS — STATUTORY PROVISIONS.

Sayles' Ann. Civ. St. 1897, art. 1798, provides that a person intending to contest the election of one holding a certificate of election for any office mentioned in the act shall within 30 days after the return day of the election (the day on which the votes cast are counted, and the official result declared) give him written notice thereof, and deliver to him or his agent or attorney a written statement of his grounds of contest. Article 1801 provides that, in a contest of the election for district offices, except members of the Legislature, or for any county office, a copy of contestant's notice and statement and of the reply thereto of the contestee shall be filed with the clerk of the court having jurisdiction. Contestant was a candidate for district and county clerk at an election held May 7th, the returns were canvassed, and contestee declared elected May 8th. On June 4th contestant served written notice on contestee of his intention to contest his election, stating his grounds of contest. His petition, accompanied by a copy of the notice of contest, was filed in the district court on June 20th, and contestee filed his answer on the same day. Held that, as the limitation of time related only to the service of the notice of contest and statement of grounds thereof, and no time was prescribed within which the copies were to be filed, the court had jurisdiction.

#### 2. SAME — JURISDICTION — DISTRICT COURT — CONSTITUTIONAL PROVISIONS.

Under the express provisions of Const. art. 5, § 8, the district court has jurisdiction of election contest cases.

#### 3. COURTS — JURISDICTION — REGULATION OF PROCEDURE BY LEGISLATURE.

While it is proper for the Legislature to limit the manner in which a court of general jurisdiction shall exercise its power in cases

of a designated character, so as to render such court a special tribunal for the trial of such cases, yet a substantial compliance with such legislative requirements is all that should be required to entitle one to a hearing.

Appeal from District Court, Parmer County; J. N. Browning, Judge.

Proceeding to contest election by H. L. Swinson against J. F. McKay. From a judgment of dismissal, contestant appeals. Reversed and remanded for hearing on the merits.

Barcus & North, for appellant. Jno. P. Slaton, for appellee.

**SPEER, J.** This is a contested election case, in which the district court sustained a motion to dismiss for want of jurisdiction to hear the contest, because the notice of contest was not filed in the district court within 30 days from the return day of the election. The contestant has appealed.

On May 7, 1907, an election was held in Parmer county for the purpose of selecting a county site and electing county officers, at which election the appellant and appellee were candidates for the office of district and county clerk. On May 8, 1907, the commissioners' court of Deaf Smith county, to which county Parmer county was attached for judicial purposes, canvassed the returns, and declared appellee elected to the office. On June 4, 1907, appellant served appellee with written notice of his intention to contest his (appellee's) election, stating the grounds on which he would base such contest. On June 20, 1907, appellant's petition, accompanied by a copy of the notice of contest, was filed in the district court by D. O. Stallings, clerk pro tempore. Appellee filed his answer on the same day, and four days later, when the case was called for trial, he filed his motion to dismiss for want of jurisdiction, which, as has already been stated, the court sustained.

Whether or not the judgment of the district court in dismissing the contest for want of jurisdiction is correct depends upon the construction to be placed on articles 1798 and 1801 of Sayles' Civil Statutes of Texas of 1897, regulating the procedure in contested election cases. The first article referred to reads: "Any person intending to contest the election of any one holding a certificate of election as a member of the Legislature, or for any office mentioned in this law, shall within thirty days after the return day of election give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the 'return day' is meant the day on which the votes cast in said election are counted and the official result thereof declared." While the second provides: "If the contest be for the validity of an election for

any state office except the office of Governor and Lieutenant Governor, or for any district office except members of the Legislature, or for any county office, a copy of the notice and statement of the contestant and of the reply thereto of the contestee served on the parties, shall be filed with the clerk of the court having jurisdiction of the case." It will be observed that the only limitation as to time is that relating to the time within which the notice of contest and statement of grounds is to be served on the contestee. The article requiring copies of these papers to be filed with the clerk of the court having jurisdiction does not prescribe any time within which such copies are to be filed. We do not feel at liberty to read into the statute a requirement which the Legislature has failed to place there, and which it could so easily have done had it seen fit. It is significant that article 1804, with reference to contesting the validity of an election for members of the Legislature, does require that a copy of the notice, statement, and reply, served upon the parties, shall be filed with the district returning officer within 20 days after service. No other article of the statutes, so far as we have been able to discover, declares the time within which such copies are to be filed in the district court. We think appellant has complied literally with the statutes in his efforts to contest appellee's election, and that the trial court erred in dismissing the cause for want of jurisdiction. The cases of *Lindsey v. Luckett*, 20 Tex. 516, and *Wright v. Fawcett*, 42 Tex. 208, holding in effect that a compliance with the terms of the statute is jurisdictional, are not in conflict with our holding, since in the first case the notice of contest was not served within the time prescribed by law, and in the second, while there was an allegation that contestant had within 30 days notified the contestee that he would contest the validity of the certificate of election, there was nothing to show how said notice was served. It has been pointed out in *Messer v. Cross*, 26 Tex. Civ. App. 84, 63 S. W. 169, that, when these cases were decided, the Constitution then in force did not confer jurisdiction upon the district nor the commissioners' court to try contests of elections, while article 5, § 8, of the present Constitution, expressly gives to the district court jurisdiction in such matters, and while it is proper for the Legislature to limit the manner in which a court of general jurisdiction shall exercise its power in cases of a designated character, so as to render such court a special tribunal for the trial of such cases, yet a substantial compliance with such legislative requirements is all that should be required to entitle one to a hearing.

The judgment of the district court is therefore reversed, and the cause remanded for a hearing on the merits.

# THOMPSON v. GOOLDSBY et al.

(Court of Civil Appeals of Texas. Nov. 30, 1907. Rehearing Denied Jan. 11, 1908.)

## 1. EXECUTION—GUARDIAN AND WARD—ACTIONS—INJUNCTION.

Rev. St. 1895, art. 2731, authorizes any creditor of the estate of a ward, whose claim has been approved by the court, or established by judgment, to obtain an order from the probate court directing payment of the claim by the guardian on proof that there are funds in the hands of the guardian subject thereto, or, in the absence thereof, directing the sale of the property of the estate to pay the debt. Article 2732 provides that on failure to obey the order for payment of the claim the creditor may have an execution against the property of the guardian for the amount ordered to be paid, with costs. *Held*, that an execution running against property of the minor, which showed on its face that an order for payment had been obtained from the probate court, was void on its face, and could neither disturb the guardian's possession, or work a cloud on his title, and hence, could not be enjoined, not being within article 2989, authorizing an injunction, where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief requires restraint of some act prejudicial to the applicant, or where, pending litigation, it appears that a party was about to do some act in violation of the rights of the applicant which would tend to render judgment ineffectual, or where the applicant for such writ shows himself entitled thereto under the principles of equity.

## 2. SAME—GROUNDS.

Where, pending suit to enjoin an injunction, a levy thereunder is released, and execution is returned with the release indorsed thereon, the injunction will be denied.

Appeal from District Court, Delta County; T. D. Montrose, Judge.

Action by J. T. Thompson, guardian, against Z. T. Gooldsby and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. L. Young, for appellant. Newman Phillips, for appellees.

CONNER, O. J. This suit was instituted by appellant on the 23d day of October, 1905, as guardian of the person and estate of Eldon Thompson, a minor of about the age of seven years, to enjoin the levy and sale of 10 and a fraction acres of land belonging to said minor, under an execution issued at the instance of appellee Z. T. Gooldsby by the clerk of the county court of Delta county.

A temporary writ of injunction was issued as prayed for, but was dissolved in chambers upon motion therefor on November 27, 1905. On April 2, 1906, appellees answered by general and special demurrers, and by special answer not necessary to set out. On the next day, April 3d, appellant replied by supplemental petition, but the court sustained appellees' general demurrer, and dismissed the suit, appellant having declined to amend.

Appellant assigns error to the action of the court in dissolving the writ of injunction in limine, and in sustaining the general demurrer to his petition. The ground of appellant's action, as stated in his petition, is that the threatened sale would disturb his possession and cast a cloud upon the title of the minor. It appears, however, from the face of the execution, a copy of which is made part of the petition, that appellee was but a judgment creditor of the minor who had secured an order of the probate court for the guardian to pay the claim, as may be done under article 2731 of the Revised Statutes of 1895, and that the execution was against the property of the minor rather than against the property of appellant, his guardian, as in such case is required by article 2732. The execution, therefore, was wholly unauthorized and void, and could in no event have clouded the minor's title, nor have been made available to disturb appellant's possession. It follows that appellant failed to bring himself within Revised Statutes of 1895, art. 2989, authorizing the issuance of writs of injunction. Besides, it appears from appellee's answer, filed April 2, 1906, as also from the briefs of both parties to this appeal, that appellee in December, 1905, released the levy made upon lands of the minor, and caused the writ of execution to be so indorsed by the sheriff and returned to the county court of Delta county. The object of appellant's suit was thus brought about, and at the time of the hearing on April 3, 1906, there was left in no view of the case any actionable issue to be tried, the damages set up, attorney's fees, etc., not being recoverable. The only material question that could then have existed was the question of costs, and no error has been assigned to the judgment in this respect.

We conclude that no error appears in the proceedings below, and that the judgment should be affirmed.

## OWEN et al. v. MULKEY et al.

(Supreme Court of Arkansas. Nov. 25, 1907.)

## 1. CHATTEL MORTGAGES—REPLEVIN BY MORTGAGEE—DEFENSES.

In replevin by the payee of a note to recover personal property described in a chattel mortgage, given to secure the note, in which action another party filed as intervener, claiming to hold the note as collateral security on a debt due him from the payees, the court properly admitted evidence of fraud by the payee in procuring execution of the note and mortgage over the intervener's objection, where there was nothing to show that such payee had abandoned his claim as plaintiff.

## 2. SAME—EVIDENCE.

In replevin by a chattel mortgagee, defended on the ground that the mortgage and note secured were obtained by fraud, in which an assignee of the note intervened claiming to be a bona fide purchaser without notice of defenses, and to hold the note as collateral security for a debt due him from the mortgagee, the positive evidence of intervener that the note was assigned to him on a certain date as such collateral security was not so irreconcilable with testimony of the mortgagor and his wife of statements by intervener to them that he did not have anything to do with the note and would not have, as to be contradicted thereby, when explained by intervener as referring to his expectation that his debt from the mortgagee would be paid when the note would revert, so that his positive evidence of his interest as pledgee should not have been denied all weight by the jury.

Appeal from Circuit Court, Lafayette County; Geo. W. Hays, Judge.

Action by J. S. & M. E. Owen and Henry Moore against N. E. Mulkey and another. From a judgment for defendants, Henry Moore appeals. Reversed and remanded.

This was a suit in replevin by J. S. & M. E. Owen, payees in a certain note of \$400, executed by appellees. The note was secured by a mortgage covering certain "personal property." J. S. & M. E. Owen alleged in their complaint the execution of the note and mortgage, and that there was a default in payment. The complaint contained the allegations necessary in a suit in replevin, and prayed for the recovery of the possession of the property contained in the mortgage, etc. Defendants, appellees, in their answer denied the right of possession in plaintiff, admitted the execution of the note and mortgage, but alleged that the note and mortgage were procured by plaintiffs through fraud, deceit, and misrepresentation in the sale of certain property which was the consideration for the note. Thereafter the plaintiff Henry Moore filed his motion, duly verified by affidavit, to be made a party plaintiff in said suit because of his interest therein, setting forth that the \$400 note secured by said mortgage was transferred and delivered to him by the payees of said note for a valuable consideration long before the maturity thereof, to secure an indebtedness of said J. S. Owen, which still remained unpaid, and that said note had ever since such transfer been in his possession until same was delivered to D. L. King for purpose of instituting the present suit. Said motion was granted, and said Henry

Moore made a party plaintiff herein. On behalf of appellant, Henry Moore, the note and mortgage were introduced and read in evidence. The mortgage was executed October 30, 1903, acknowledged December 2, 1903, and filed in the recorder's office December 11, 1903. The note was dated October 20, 1903, was negotiable in form, and due six months after date. It was indorsed in blank by the payees, J. S. Owen and M. E. Owen. Appellant, Henry Moore, testified, "that the note described in the mortgage and read to the jury was by J. S. Owen and M. E. Owen indorsed and delivered to him for a valuable consideration on or about December 4, 1903, long before its maturity, and that it was in his possession ever since December 4, 1903, until sent by him to D. L. King to collect, or, failing to do so, to bring suit upon, instructing him that the proceeds were to be paid over to witness, as said note was held as collateral for indebtedness due by J. S. & M. E. Owen; that at time note was assigned to witness as collateral he advanced a large sum in cash to said J. S. & M. E. Owen, a large amount of which, more than the amount of the said note is still due and unpaid; that nothing had ever been paid on said \$400 note. Appellees introduced evidence bearing on the issue raised by their answer of the fraud, deceit, and misrepresentation of J. S. & M. E. Owen in the procurement of the note and mortgage. Appellant, Henry Moore, objected to defendant testifying to any facts attempting to prove fraud practiced by J. S. Owen in sale of property for a part of purchase money of which the \$400 note was given, without connecting or attempting to connect said plaintiff with such alleged fraud. The verdict and judgment on the issue of the fraud of J. S. & M. E. Owen was in favor of appellees as against J. S. Owen & M. E. Owen. They have not appealed, and in the view we have of the case it is unnecessary to state what this testimony proved. Appellee N. E. Mulkey among other things testified that, "at the time this suit was filed, Mr. Moore had never called on him for the \$400 note, or claimed to own same. Witness tried to get the \$400 to meet the \$400 note; went to Mr. Moore, and tried to get the money to meet the \$400 note but could not. He said he had the \$400 in notes against the property, but did not have anything to do with the \$400 note, and would not." Appellee Mrs. Mollie Mulkey testified that she was present when Mr. Moore and Mr. Mulkey were discussing the \$400 note, and heard Mr. Moore say he had nothing to do with it; that Mr. Moore and Mr. Mulkey were on the gallery and she in the house by the window when she heard conversation about the note, and Mr. Moore say he had nothing to do with it. She could have touched them with her hand. She heard Mr. Moore disclaim having any interest in the note. He emphatically and repeatedly said he would have noth-

ing to do with said note. Appellant, Moore, in rebuttal denied that he told Mulkey "that he did not have any interest in the note and would not," because he could not have truthfully done so, as the note was held by him from December 4, 1903, till it was sent to his attorney for collection. Appellant explained that he did not claim to be the owner of the note as it was only held as collateral, and he expected the payee and owner of the note to meet his own note to appellant, when the note held as collateral would go back to the payee and owner thereof. There was a verdict and judgment in favor of appellees, and appellant Moore prosecutes this appeal.

Moore & Moore and D. L. King, for appellant. Searcy & Parks, for appellees.

WOOD, J. (after stating the facts as above). First. The court did not err in admitting evidence as to the issue of fraud alleged on the part of J. S. Owen in procuring the note and mortgage. For, at the time objection was made to this testimony by appellant Henry Moore, J. S. Owen was a party plaintiff, and the cause was progressing on the issue raised by the answer setting up fraud, deceit, and misrepresentation on his part. There was nothing to show that J. S. Owen, at the time the objection to this testimony was made, had abandoned his claim, and the testimony was relevant and competent as to him. Second. The court sent the questions of whether or not there was fraud in the procurement of the note and mortgage by J. S. Owen and M. E. Owen, and whether or not appellant Moore was an innocent holder for value, to the jury upon instructions to which no objection was made, and no exception saved. Therefore the only question raised by the appeal of Henry Moore is as to the sufficiency of the evidence to support the verdict.

Appellant's testimony is clear and positive that the note was transferred and delivered to him on the 4th of December, 1903, and that he held same as collateral security for a large sum which he had advanced to the payees at the time of the transfer of the note to him. Testimony of appellees to the effect that at the time the suit was filed appellant, Moore, had not called upon appellee for the \$400 or claimed to own same, that he did not have anything to do with the \$400 note, and would not have, did not have any interest in it, etc., is consistent and reconcilable with the idea that appellant was not the owner of the note, as appellant explains in his testimony he did not claim to own the note, because he only held same as collateral security, and when the debt was paid for which the note was transferred as collateral the note would go back to the owner. So there was no real contradiction of his testimony. Certainly there was nothing in this to warrant the jury in ignoring the testimony of appellant showing that he was the holder

of the note before maturity, for value, without notice of any infirmities in it.

In our opinion the verdict of the jury against appellant, Moore, was without evidence to support it, and for that reason the judgment should be reversed, and the cause remanded for new trial.

#### ROBERTS v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### HIGHWAYS—OBSTRUCTION—OFFENSES.

That defendant obstructed the mouth of a slough was insufficient to sustain a conviction for obstructing a public road because in times of high water the road would be washed out by reason of such obstruction prior to an actual occurrence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417-422.]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

A. Roberts was convicted of obstructing a public road, and he appeals. Reversed and remanded.

Troy Pace, for appellant. William F. Kirby, Atty. Gen., and Dan. Taylor, for the State.

HILL, C. J. Roberts was indicted for obstructing a public road which ran along Keel's creek, in Winona township, Carroll county, and was convicted, and has appealed.

The state's evidence tended to prove that he obstructed the mouth of a slough which would stop the flow through the slough when the creek is up, and thus force more water into the main channel, tending to wash away the banks of the creek, and cut into the road when it rains and the creek rises. The strength of the state's case is presented in the testimony of Mr. Clark, one of the witnesses for the state, as follows: "I have seen the obstruction in the mouth of the slough placed there by the defendant. It will keep the water from going around through the slough if the creek gets up high, and in my opinion will cause more water to run through the main channel of the creek, and will some day wash away the road. I know it will wash away the road for it has done it before. The last time was about a year ago. It has not washed the road away since the obstruction was put in the slough, but it will take less rainfall now to make it do so." Concede that the obstruction to the highway caused by this obstruction to the flow of the slough would be an obstruction within the statute, yet this evidence is insufficient to sustain a conviction. The obstruction to the highway has not occurred; and whether it will occur from the act in question depends on the concurrence of several natural causes, such as the amount of rainfall, the unchanged drainage outlets, the extent of this obstruction, the resisting power of the intervening soil, and other natural forces. A material diminution of the rainfall alone would upset the entire prophetic obstruction of this road.

This evidence leaves the obstruction of the highway to be problematic, uncertain, and conjectural. It may, and very likely will, occur. But that is insufficient to sustain a conviction.

Reversed and remanded.

### CAGLE v. GRAY.

(Supreme Court of Arkansas. Dec. 16, 1907.)

#### APPEAL—RECORD—CLERK'S CERTIFICATE.

It being no part of the duty of the clerk to certify to oral testimony, such portion of his certificate to a transcript on appeal is surplusage, and may be disregarded without recommitting the transcript for a proper certificate.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action between George R. Cagle and James B. Gray as trustee, etc. From a judgment in favor of the latter, the former appeals. On motion to strike a portion of the clerk's certificate to the transcript. Denied.

PER CURIAM. The clerk's certificate is as follows: "I, F. A. Garrett, clerk of the Pulaski chancery court, do hereby certify that the annexed and foregoing 34 pages of within written matter contains a true, accurate and complete transcript of all the pleadings, papers, files, and entries of proceedings in the action named in the caption (except certain testimony which is not on file in my office in said cause), and which by consent of counsel is omitted from this record, as hath appeared by comparing the same with the originals thereof now on file and of record in my office. \* \* \* F. A. Garrett, Clerk." In *Beecher v. Beecher*, 104 S. W. 156, it was said: "It is no part of the clerk's duty to certify to oral testimony, and his certificate to it necessarily goes for naught." This certificate in a negative way reaches the same end sought to be reached by the clerk's certificate in the *Beecher* Case, and is equally ineffectual. The appellee files a motion to strike out so much of the clerk's certificate as goes beyond his province, but the court does not in that way exercise authority over the clerk's certificates.

The objectionable part is surplusage, and neither adds to nor takes from his certificate what is proper to be certified, and it is unnecessary to recommit it to him for a proper certificate; and the motion is overruled.

### ELLIS et al. v. CAMPBELL et al.

(Supreme Court of Arkansas. Dec. 16, 1907.)

#### PARTITION—PAROL AGREEMENT—ESTOPPEL—STATUTE OF FRAUDS.

Where decedent's widow consented to a parol partition of the homestead by her children, decedent's heirs at law, who took possession of their several portions of the land, making valuable and permanent improvements thereon, the

children and their successors were estopped to repudiate the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Partition, §§ 13-17.]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Action by Robert H. Ellis and another against J. H. Campbell and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Appellants, father and son, brought this action September 6, 1905, against appellee J. H. Campbell and wife for the partition of 200 acres of land in Clay county. Appellee answered with a cross-bill for the confirmation of a prior parol partition between him and his sister, Nannie, in her lifetime, she having been the wife of one of the appellants, the mother of the other. Certain facts are undisputed. James Campbell died in 1876, the owner of the premises, which constituted his homestead. He left him surviving E. M. Campbell, his widow, and the appellee J. H. Campbell, a son, and Nannie Campbell, a daughter. These latter were his only heirs at law. The daughter subsequently married Henry Mack, by whom she had no children. After his death she married the appellant, Robert S. Ellis, and the appellant Robert H. Ellis was the only issue of their marriage, and consequently the sole heir of his mother. Mrs. Ellis died intestate in September, 1903, and her mother, the widow of James Campbell, about a month previous. No allotment of the widow's dower was ever made. During all the time of her widowhood from 1876 to the time of her death, August, 1903, the widow, E. M. Campbell, continued to reside on said land a part of the time with appellee J. H. Campbell, and a part of the time with her daughter, Nannie Campbell. Appellee contended that there had been a parol partition between him and his sister. Appellants denied this, and contended that, even if such partition had been made, it was not binding in law. The court upon the testimony adduced made the following findings and decree: "That in 1888 the brother and sister, in conjunction with the mother, and with her consent, had divided these lands in accordance with the contention of appellee, and that after the same had been made the parties each took possession of the respective portions of the premises so assigned to them, and since that time have been in actual, open, visible, adverse possession of their respective tracts, claiming the title, and had made valuable and lasting improvements thereon, and decreed a confirmation of the oral partition, and vested and divested title accordingly.

Moore, Spence & Dudley, for appellants. J. D. Block (F. H. Sullivan, of counsel), for appellees.

WOOD, J. (after stating the facts as above). The findings of fact by the chancery court are in accord with the decided preponderance

of the evidence. Mr. Freeman lays down the rule that, "whatever effect may be conceded at law to parol partitions, it is quite certain that, when executed by taking possession thereunder, they will be recognized and enforced in equity particularly when such partition and the possession based upon it have been mutually acquiesced in by the parties for a considerable period." Freeman, Co-tenancy & Partition, § 402; 21 A. & E. Encyc. Law (2d Ed.) 1139. But in this case there was not only possession taken by the brother and sister, as the court found, but each made lasting and permanent improvements, and the making of improvements of that character is in and of itself such performance as takes a contract out of the statute of frauds. *Mooney v. Rowland*, 64 Ark. 19, 40 S. W. 259. Upon the facts of this case it certainly does not lie in the mouth of either of the children of Mrs. Campbell or those succeeding to their rights, to repudiate the contract they had made and executed with each other.

We need not inquire whether the brother and sister had the technical right to give each other pedal possession. They made the agreement with each other concerning their reversionary interest in the property. The mother was consenting, and they each acted upon the agreement for partition by taking possession and making valuable improvements. The mother is dead, and her life estate of dower and the homestead right passed out with her death. The brother and sister, and those claiming under the latter appellants, are plainly estopped by their conduct. See *Foltz v. West*, 103 Ind. 410, 2 N. E. 950.

Affirmed.

#### W. T. ADAMS MACH. CO. v. CASTLEBERRY.

(Supreme Court of Arkansas. Dec. 23, 1907.)

##### 1. CORPORATIONS — FOREIGN CORPORATIONS — SERVICE ON AGENT.

A foreign corporation having an agent in the state on whom service should be had, service on its traveling salesman, having no control over its business, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2607.]

##### 2. APPEARANCE — SPECIAL APPEARANCE — WAIVER OF OBJECTION BY ANSWER.

Defendant by answering, maintaining in the answer its objection to the service of summons, after its motion, on special appearance, to quash the service, had been overruled, does not waive its objection.

Appeal from Circuit Court, Scott County; Jephtha H. Evans, Judge.

Action by R. A. Castleberry against the W. T. Adams Machine Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Suit was brought by appellee against appellant in the Scott circuit court to recover damages for misrepresentations made by an agent of appellant in the sale of a sawmill to appellee. A summons was duly issued

and made returnable at the next term of the court. On the 2d day of the August, 1906, term of court, to which the summons was returnable, the defendant obtained permission to appear specially for the purpose of filing a motion to quash service of summons. The order of the court (omitting the caption) is as follows: "Comes the defendant, W. T. Adams Machine Company, by its attorney, T. N. Sanford, and asks to be permitted to appear specially for the purpose of filing motion to quash the service of the summons herein, which is by the court granted. Whereupon defendant files motion to quash service of summons herein. Motion overruled, and defendant excepts." The grounds of the motion are as follows: (1) Because said W. T. Adams Machine Company is a foreign corporation, and has an agent at Plummerville, Ark., upon whom service should be had. (2) Because T. W. Barnes is not such an agent as service of summons can be properly had on. The return indorsed on summons is as follows: "State of Arkansas, County of Scott. I have this 14th day of April, 1906, duly served the within by delivering a copy and stating the substance thereof to the within named T. W. Barnes, agent, of the said within named machine company, as herein commanded. [Signed] G. W. Grandstaff, Sheriff." Appellant then, without waiving its rights under its motion to quash service of summons, answered, denying the allegations of the complaint. There was a jury trial and a verdict for appellee in the sum of \$200. Appellant filed a motion for a new trial, and one of the grounds therefor was that the court erred in overruling its motion to quash service of summons. The motion for a new trial was overruled, and the case is brought here by appeal.

T. B. Pryor, for appellant.

HART, J. (after stating the facts as above). We are met at the threshold of this case by the contention that the return of service on the summons shows no sufficient service. There is no allegation in the complaint as to whether appellant is a partnership, a foreign or domestic. There is an averment in the motion to quash service of summons that appellant is a foreign corporation, and has an agent at Plummerville, Ark., upon whom service should be had, and this allegation is nowhere denied in the record. The summons was served, as shown by the return, upon "T. W. Barnes, agent." Barnes was only a traveling salesman. He had no control over the business of the corporation, and service upon him was not sufficient. *Arkansas Construction Company v. Mullins*, 69 Ark. 429, 64 S. W. 225; *Lesser Cotton Company v. Yates*, 69 Ark. 396, 63 S. W. 997. The answer of the defendant in the form and manner in which it was made was not a waiver of the service of summons upon it. *Spratley v. La. & Ark. Ry. Co.*, 77 Ark. 412, 95 S.

W. 776; Union Guaranty & Trust Co. v. Craddock, 59 Ark. 593, 28 S. W. 424; Baskins v. Wylds, Adm'r, 89 Ark. 347.

This view of the case renders it unnecessary to notice the other contentions made by appellant.

Judgment reversed and cause remanded, with directions to proceed in the cause; the appellant having entered his appearance by appealing in this cause.

#### STATE v. EARLES.

(Supreme Court of Arkansas. Dec. 9, 1907.)

##### INTOXICATING LIQUORS—WRONGFUL SALE.

Acts 1907, p. 327, prohibits the sale of intoxicating liquor in prohibition territory, and section 2 declares that the presence of any liquor dealer, firm, or corporation, through agents or otherwise, in such prohibition territory soliciting orders, shall constitute a violation of the act, and that the term "agent" shall mean any person receiving an order from another for intoxicating liquor in prohibition territory and transmitting it to some liquor dealer who fills it. *Held*, that where defendant solicited orders for whisky in prohibition territory, and himself bought the whisky from a distiller and delivered it to his purchasers, and the distiller knew no one in the transaction but defendant, the latter could not be convicted of soliciting orders as an "agent" in prohibition territory.

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Walter Earles was indicted for soliciting and receiving an order for intoxicating liquor in prohibition territory as an agent. From a judgment of acquittal, the state appeals. Affirmed.

William F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State. McCaleb & Reeder and Morris M. Cohn, for appellee.

MCCULLOCH, J. Appellee, Walter Earles, was indicted for soliciting and receiving an order for intoxicating liquor in prohibition territory, in violation of Act April 1, 1907 (Acts 1907, p. 327), which declares it to be "unlawful for any liquor dealer, firm or corporation, engaged in the sale of intoxicating liquors in this state, to in any manner, through agents, circulars, posters, or newspaper advertisements, solicit orders for such sales of intoxicating liquors in any territory of this state wherein it would be unlawful to grant a license to make such sales." Section 2 of this statute is as follows: "Sec. 2. The presence of any such liquor dealer, firm or corporation, through agents or otherwise, in such prohibition territory, soliciting or receiving orders from any person therein shall constitute a violation of this act, and on conviction thereof shall be fined not less than \$200.00 nor more than \$500.00 for each such offense. Provided, that the term 'agent' under this section shall mean any person who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter,

telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors, who accepts and fills the same." Acts 1907, p. 327. The indictment charges that the defendant did unlawfully solicit and receive an order from W. W. McSpaddin for intoxicating liquor, and transmit the same in person to R. W. Earnheart, a wholesale liquor dealer, who accepted and filled said order. The case was tried, by consent, before the court, a verdict of not guilty was rendered, and the state appealed.

It is shown by undisputed testimony that the defendant solicited orders for whisky in prohibition territory, and on the same day procured the whisky from R. W. Earnheart, a distiller in Batesville, Ark., and delivered it in the prohibited territory to the purchaser. It was agreed at the trial, as a part of the evidence, that Earnheart was a distiller and only sold whisky in original packages of five gallons duly stamped as required by law; that in this instance he sold the whisky to the defendant Walter Earles, and knew no one else in the transaction. The prosecuting attorney asked the court to declare the law to be as follows: "(4) Under the term 'agent' of the act of April 1, 1907, it is not necessary to show that defendant transmitted the order to some liquor dealer who accepted and filled the same. It is sufficient to show that defendant solicited or received such order for whisky in a prohibition district, as alleged in the indictment, and afterwards delivered to the person the whisky so ordered." We think that the court properly refused to make the declaration, and reached the correct conclusion in the case. The defendant was indicted, not as a liquor dealer soliciting orders in prohibition territory, but as an agent soliciting and taking orders for intoxicating liquors in prohibition territory, and transmitting the same to a dealer. The proof, in order to sustain a conviction, must, of course, conform to the allegations of the indictment.

The undisputed evidence shows that the defendant was not acting as agent for the dealer, but that, after having solicited orders, he purchased from the dealer sufficient quantity of the liquor to fill the orders, and then delivered it to the purchasers. He is clearly guilty of unlawfully selling liquor without license, and may also be guilty as a dealer himself of soliciting and receiving orders for intoxicating liquors in prohibition territory, but he cannot under this testimony be convicted of soliciting orders as an agent. The statute in question makes both the liquor dealer and his agent who solicits orders in prohibition territory guilty of an offense, and it defines an "agent" to be one "who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors who accepts and fills the same." It is not intend-



ed by this statute to punish a licensed dealer for merely selling liquor directly to a person who has solicited orders in prohibition territory; but it is unlawful for a licensed dealer to accept and fill an order which has been solicited and received by another person in prohibition territory and transmitted to him. Such an acceptance of the order is, under the statute, tantamount to soliciting the order in prohibition territory.

Judgment affirmed.

#### BOYD et al. v. GARDNER.

(Supreme Court of Arkansas. Dec. 23, 1907.)

#### TAXATION—TAX SALE—VALIDITY—DELINQUENT LIST—FILING.

A tax sale is void where the record does not disclose that the delinquent list was filed by the collector, or that it was authenticated by him, as expressly required by Kirby's Dig. § 7083, and where the list was not filed within the time prescribed by such section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1282.]

Appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor.

Suit to quiet title by A. Boyd and others against T. L. Gardner. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

The complaint in this case alleges that the lands involved in this suit were purchased by appellee at a void tax sale. Appellants ask that the tax deed issued to defendant be canceled as a cloud upon their title. The facts sufficiently appear in the opinion.

J. F. Summers, for appellants. P. R. Andrews and H. M. Woods, for appellee.

HART, J. (after stating the facts as above). This cause was tried upon an agreed statement of facts. It shows that there was filed with the clerk what purported to be a list of lands returned delinquent; but it nowhere appears in the record that such list was filed by the collector, or that it was authenticated by him as required by section 7083 of Kirby's Digest. The purported list was not even filed within the time prescribed by section 7083. In the case of *Quertermous v. Walls*, 70 Ark. 326, 67 S. W. 1014, the court said: "The delinquent list was filed by the deputy sheriff. The law does not authorize him to file such list. The filing of the delinquent list as the law prescribes is a prerequisite to a valid forfeiture to the state for the nonpayment of taxes. Without such list no notice could be published, and no sale could be had." In the present case there was no affidavit to the purported list of delinquent real estate. The record does not disclose by whom it was filed. We have no means of knowing whether or not it was the list prepared by the collector.

This renders the sale void; and, as the

case must be reversed for that reason, it is unnecessary to decide the other objections urged by appellants.

Reversed and remanded, with directions to render a decree not inconsistent with this opinion.

#### BURTON v. STATE.

(Supreme Court of Arkansas. Dec. 23, 1907.)

#### 1. HOMICIDE—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

An instruction that if decedent assaulted accused with a gun, and accused succeeded in getting hold of it before decedent had an opportunity to discharge it, and accused had reason to believe that he might take the gun from decedent, it was his duty to do all that was reasonably in his power to prevent decedent from shooting him, and, if accused failed to do so and killed deceased, he was guilty of murder in the second degree if he acted with malice, or voluntary manslaughter if he acted without malice, was erroneous because it made the guilt of accused dependent on the existence of reasonable grounds to believe that he might take away the gun from decedent, regardless of how it appeared to accused or his belief of his power to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

#### 2. SAME.

Where the court charged that, where one is threatened with loss of life, he is compelled to act on appearances, and determine from the circumstances the course to pursue to protect himself, and apparent danger is as effectual for his justification as real danger, an instruction making the guilt or innocence of accused dependent on the existence of reasonable grounds to believe that he might do a certain act to protect himself from decedent, regardless of how it appeared to accused, or his belief of his power to protect himself, was contradictory of the first instruction, and misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

Appeal from Circuit Court, Clark County; J. M. Carter, Judge.

Tom Burton was convicted of manslaughter, and he appeals. Reversed and remanded. See 102 S. W. 362.

Hardage & Wilson and Murphy, Coleman & Lewis, for appellant. Wm. F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State.

BATTLE, J. Tom Burton was indicted at the August, 1906, term of the Clark circuit court for murder in the second degree, committed in Clark county, Ark., on the 17th day of February, 1905, by unlawfully, willfully, and with malice aforethought killing and murdering L. D. Crews by cutting and stabbing him with a knife. He was tried before a jury, convicted of manslaughter, and sentenced to imprisonment for two years in the penitentiary, the time fixed by the verdict of the jury. He appealed to this court.

No person was present when and where the killing occurred, except the defendant and deceased. For the purpose of this appeal, it will be sufficient to state the testimony of the defendant as to the occurrence.

The defendant testified as follows: "I then went back home, stayed there a little while, and then went over to my pear orchard, about a mile distant, and walked around among the trees to see if the rabbits had been gnawing them. It was then getting late, and I started back home. On the way I saw Crews turn the corner of the lane, about 25 yards from me, and called him and told him I wanted to pay him that dollar, or that I had the dollar for him—something of the kind—I don't recollect the exact words. He stopped, and I went on, intending to pay him. When I got about 8 or 10 feet of him, he ordered me to stop, which I did. He then immediately said, 'You are the d——d lying son of a bitch that has caused all this trouble,' and threw his gun down upon me, pointing at me as if to shoot me, and I thought he was going to shoot me. So I jumped towards him and grabbed at the gun, but missed it, and he struck me a heavy blow on the head with it, and I grabbed him about his body. Then I grabbed again for the gun, and got hold of it, and we scuffled there for some little time. I was trying to take the gun away from him. After a while he got my left thumb in his mouth, biting me, and I saw he was about to get the best of me. I found that I could not take the gun away from him, found it impossible to get it away from him. Then I turned it loose, jerked my thumb out of his mouth, grabbed him around the waist, then with my left arm around his waist, ran my other hand in my pocket, got out my pocket-knife, opened it, and went to cutting him with it. I did this to protect myself, to keep him from killing me, which I was satisfied he would do, if he could. I don't know how many times I cut him, nor where I cut him first. The last time I struck him was in the breast. Then he hollowed, dropped the gun, sank down, immediately got up to his knees, and was reaching for the gun—appeared to be trying to get it again—and I grabbed it, and at first thought I would unbreech it, and take the loads out, so that he could not shoot me with it; but as it didn't unbreech like my gun, and I saw no way to unbreech it, I thought I would get it out of his way, and started away with it and I saw him fall back, down, and thought from that that I might have killed him. I then went to the fence, sat the gun up against it, and started on home. I didn't know that he was killed, but thought he was badly hurt, and that, if I could get the gun away from him, then he could not shoot me. I did not strike him after he hollowed, nor after he dropped the gun. I was badly hurt. He struck me a heavy lick with the gun just before I got to him—touched him."

Among the instructions given to the jury by the court the following was given, over the objections of the defendant:

"If the jury believe from the evidence beyond a reasonable doubt that L. D. Crews

made an assault upon the defendant with the gun, and that the defendant got hold of the same before Crews had an opportunity to discharge it, and that under all the circumstances then and there existing, as the same appears from the evidence, the defendant had reasonable grounds to believe that he might take away the gun from the hands of the said L. D. Crews, and thereby prevent him, the said L. D. Crews, from using it to do him, the defendant, great bodily injury, or take his life, then it was the duty of the defendant to have done all that was reasonably in his power to prevent the said L. D. Crews from shooting him, or doing him great bodily injury, and avert the necessity of taking the life of the said L. D. Crews; and, if he failed to do this, he is guilty of murder in the second degree, if he acted with malice, or voluntary manslaughter, if he acted without malice."

And the court gave the following at the instance of the defendant: "When a man is threatened with loss of life or great bodily injury, he is compelled to act upon appearances, and to determine from the circumstances surrounding him at the time as to the course he shall pursue to protect himself. In such a case apparent danger is as effectual for his justification as real danger; and, when he is brought to trial for a homicide committed under such circumstances, the question for the jury is not, 'Was the danger real, or did the necessity for the killing in order to avert it actually exist?' but, 'Were the appearances such as to reasonably impress him honestly with the belief that the danger and necessity did exist, did they so impress him, and did he act under their influence?' The jury are to judge of the reasonableness and honesty of his conduct from all the circumstances surrounding him at the time—from his standpoint, not from theirs."

The court erred in giving the instruction objected to by the appellant. It told the jury, in effect, that if deceased assaulted the appellant with a gun, and appellant succeeded in getting hold of it before Crews, the deceased, had an opportunity to discharge it, and that the defendant had reasons to believe that he might take the gun from the deceased, then it was the duty of the defendant to have done all that was reasonably in his power to prevent Crews from shooting him, or doing him great bodily injury; and, if he failed to do this, he was guilty of murder in the second degree, if he acted with malice, or voluntary manslaughter, if he acted without malice. It made the guilt or innocence of the defendant dependent upon the existence of reasonable grounds to believe that he might take away the gun from the deceased, regardless of how it appeared to the defendant or his belief of his power to do so. This is not the law. *Smith v. State*, 59 Ark. 132, 28 S. W. 712, 43 Am. St. Rep. 20; *Magness v. State*, 67 Ark. 599-603, 50

S. W. 554, 59 S. W. 529; Hoard v. State, 80 Ark. 87, 95 S. W. 1002.

The instruction objected to is inconsistent with and contradictory to the instruction given at the instance of the defendant, and misleading, and should not have been given. Pleasant v. State, 13 Ark. 360; Bolling v. State, 54 Ark. 588-802, 16 S. W. 658; Selden v. State, 55 Ark. 397, 18 S. W. 459.

Appellee insists that the instruction objected to is a copy of the one sustained in Thomas v. State, 74 Ark. 431, 88 S. W. 404; but this statement is not correct. In that case the court instructed the jury that if they believed "that George Thomas made an assault upon the defendant with the gun, and that defendant got hold of the same before Thomas had an opportunity to discharge it, and that by reason of the difference in their ages and physical strength, under all the circumstances then and there existing as the same appear from the evidence, the defendant had reasonable grounds for believing that he might take away the gun from the hand of George Thomas," etc. We held that this instruction did not instruct the jury upon the weight of evidence, and that the instructions construed together were not prejudicial. All the instructions given in the case were not copied in the opinion, and the only objection to the instruction was it instructed the jury upon the weight of the evidence, and that was the only objection noticed in the opinion. It was not held that it was correct. In connection with other instructions, we held it was not prejudicial. The evidence showed that the defendant held the gun off from him with his left hand while he drew his pistol with his right, thereby showing no necessity for killing the deceased to protect himself, and a reason why the instruction, construed in connection with others, was not prejudicial.

As to the duty to retreat, see Carpenter v. State, 62 Ark. 286, 36 S. W. 900.

For the error indicated, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

#### LATCH v. STATE

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### INTOXICATING LIQUORS—GIFT ON ELECTION DAY—EVIDENCE—DIRECTING VERDICT.

Evidence on a trial for giving away whisky on election day examined, and held error to direct a verdict of guilty; defendant's guilt being for the jury.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

G. C. Latch was convicted of giving away whisky on election day, and he appeals. Reversed and remanded.

Pale McPhetridge, for appellant. William F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State.

HART, J. The appellant was convicted under an indictment charging him with giving away whisky on election day. The evidence adduced at the trial is as follows: J. J. Turner, for the state, testified that on the general election day of 1906 the defendant gave him a drink of whisky in the back end of Dr. Johnson's office, in the town of Hatfield. On cross-examination he was asked: "Q. Where was it (meaning the whisky) when you got it? A. In the back end of Dr. Johnson's office. Q. Did you look there for it? A. Yes; looked up and about there, and we did not find it when we first looked, and Dr. Johnson came and pointed out where it was. Q. Then what did Mr. Latch do? A. He took the bottle down out of the shelf, and told me to drink, and Mr. Latch drank, and Dr. Johnson took one, too. Q. What was done with the bottle? A. Mr. Latch set it back on the shelf." Turner further stated: That he did not know as he spoke directly about whisky. "Me and him were talkin' as we generally do when we get together"—this talk being at Dover's store, or Wayland's, and he said: "Let's go down there together, and see what we can find." Dr. Johnson testified as follows: "Something like a week or ten days before Mr. Hasher came to me to fix up some medicine for his wife. I told him I would have to have some whisky or alcohol before I could fix it, and he said he would get some. On the afternoon of the election day he came and said that he had some whisky. He had something across his shoulder, I didn't know what, but, of course, I had an idea, and I went in there and set down to the table and commenced writing, and George (meaning defendant) and Mr. Turner came, and George made the remark: 'Here or there is a bottle that George Hasher left here.' I taken it out, and George went out in the meantime, and directly he came back with Turner, and George said: 'Doc, where is that bottle?' And I said, 'I set it on the shelf.' I can't say who got it down. I went ahead with my work. This is the only time I remember of George getting any whisky, and I couldn't say for sure whether either of them taken a drink." The defendant testified as follows: "On the day of the election I saw kind of a suspicious transaction by Mr. Hasher having what I thought was some whisky. 'I didn't know whether it was or not. I went down there to see if I could find out anything. I didn't know whether they had anything or not. Mr. Turner and I were talking about the sawmill business, and I remarked to him, 'Let's go, and see if we can find anything.' When we first went in, Dr. Johnson was in the front room, doing some work. I made some remark about where it was, and he told me. I went and got it, and me and Mr. Turner took a drink of it. It wasn't mine. After we had taken a drink, I put it back where I found it." The court instructed the jury to return a verdict of guilty. The jury returned a verdict

of guilty, and assessed the punishment at a fine of \$200.

The court erred in directing a peremptory verdict of guilty. Under the testimony adduced at the trial the jury could have found that the whisky was given away by Dr. Johnson. At least, the testimony was not undisputed, and it was for the jury to say whether or not the defendant was guilty. *State v. Caldwell*, 70 Ark. 74, 66 S. W. 150.

Reversed and remanded.

### REEVES v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. CRIMINAL LAW — JURY — SEPARATION — COURT'S DISCRETION.

Under the express terms of Kirby's Dig. § 2390, a trial court in a criminal case may permit the jurors to separate or may keep them together before the case is submitted, though if he orders them kept together, and there is evidence that they have been exposed to improper influence, the burden is upon the state to show that they were not in any way influenced thereby; and, in the absence of such showing, a verdict of conviction will be set aside. Where the court permits a separation, the burden is upon defendant to show that they were improperly influenced; and one accused of murder may not complain that before the completion of the jury the first nine jurors selected were permitted to separate where there was no testimony that they heard any conversation prejudicial to accused, though they may have done so, and where accused, without objecting, proceeded with the selection of other jurors who presumably were subject to the same influence as the nine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2039-2047.]

#### 2. HOMICIDE — MURDER — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of murder in the second degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 523-532.]

Appeal from Circuit Court, Woodruff County; Hance N. Hutton, Judge.

Bud Reeves was convicted of murder in the second degree, and he appeals. Affirmed.

Bud Reeves was indicted for murder in the first degree for the alleged killing of one Edmond Brattan. The trial was commenced on the 24th day of August, 1907, nine jurors having been accepted, when at the noon hour a recess was taken. Defendant at the time requested that the jurors selected be kept together under charge of an officer, but his request was denied by the court, and exceptions were saved. Lula Poindexter, for the state, testified: "I was standing at a refreshment bar at a picnic at Pilgrim's Rest, talking to Edmond Brattan, my brother-in-law, when Bud Reeves looked and saw what I was doing, and said 'Howdy.' I said, 'Howdy.' He said, 'He got to kiss me.' I said, 'No.' He then took my hand. I grabbed it loose, and stepped back from him towards Edmond Brattan. Edmond said to me, 'Leave him. He is nothing.' Bud Reeves stepped up to Edmond, and said, 'Don't you like it?' and Edmond said 'No,' and he replied to Edmond, 'Help

yourself, you s—— of a b——,' and Edmond hit him. Bud Reeves had his knife open in his hand when he stepped up to Edmond. When Edmond hit him, he cut at him. Edmond dodged, and the next time he stabbed him in the neck, and I turned away. Edmond had no weapon of any kind. The knife Reeves had was a large pocketknife. This occurred in Woodruff county, Ark." The other witnesses for the state testified to substantially the same state of facts. Some of them did not see and hear what took place when the parties first met, but all agree that Edmond said something to defendant about his conduct with the woman, and that defendant approached him with an open knife, and that, upon Edmond striking him with his fist, defendant began cutting him with the knife, and death ensued from the wounds; that deceased was unarmed, and defendant cut him with a large pocketknife; that defendant stabbed him on the head, in the back, on the shoulders, and on the neck. No evidence was introduced in behalf of the defendant. The jury returned a verdict of murder in the second degree, and fixed his punishment at 21 years in the penitentiary.

O. N. Killough and J. F. Summers, for appellant. William F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above). The appellant asks for a reversal upon two grounds, which are set up in his motion for a new trial.

First. He insists that the court erred in not keeping together in charge of an officer at the noon recess the nine jurors already selected to try the case, and that the jurors were subjected to improper influences. In support of that part of his motion, he filed the affidavits of witnesses, to the effect that the general topic of conversation on the street was the trial of Bud Reeves, and that the prevalent opinion was that he ought to be hanged. There was also filed the affidavit of the proprietor of a restaurant, to the effect that the jurors took dinner in his house; that his house was filled with customers; that the general topic of conversation was the trial of Bud Reeves; and that the sentiment against him was freely expressed. The cases of *Frame v. State*, 73 Ark. 501, 84 S. W. 711, and *Vaughan v. State*, 57 Ark. 9, 20 S. W. 588, relied upon by appellant to support his contention, are not applicable to the state of facts presented in this record. It is within the discretion of the trial court to permit the jurors to separate, or to keep them together in charge of proper officers. Kirby's Dig. § 2390. The rule announced in the cases above referred to are cases where the court has ordered the jury kept together, and is that in criminal cases, where evidence is adduced tending to show that the jurors have been exposed to improper influences, the burden is upon the state to show that they were not in any way influenced, biased, or prejudiced

by such exposure, and that, in the absence of such showing by the state, the verdict will be set aside. The rule is otherwise where the court exercises its discretion in permitting the jurors to separate. In such cases the burden is upon the defendant to show that they were improperly influenced by the exposure. In the case under consideration the court permitted the jurors to separate, and there was no testimony adduced to show that any conversation prejudicial to the appellant was heard by the jurors. It is not sufficient to show in such a case that they might have heard remarks prejudicial to appellant. Here the matters complained of occurred before the completion of the jury, and the appellant, without objection on his part proceeded with the selection of other jurors, who presumably were subjected to the same influences as those complained of in the case of the jurors already chosen.

The second error complained of is that the punishment is not warranted by the testimony, and is excessive. There was but little conflict in the evidence. The jury evidently found that appellant was the aggressor, and that the killing was the result of a vicious and depraved disposition.

**Affirmed.**

#### FOO LUN v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

PHYSICIANS AND SURGEONS — "PRACTICING MEDICINE"—WHAT CONSTITUTES.

The prescribing of a remedy, in a single instance, for another, is not practicing medicine within Kirby's Dig. § 5243, providing that any person shall be regarded as practicing medicine who shall repeatedly prescribe for the use of any person or persons any medicine for the cure or relief of any bodily disease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 89, Physicians and Surgeons, § 6.]

Appeal from Circuit Court, Garland County; S. W. Leslie, Special Judge.

Foo Lun was convicted under Kirby's Dig. §§ 5239, 5241, regulating the practice of medicine, and he appeals. Reversed and remanded.

The appellant was indicted in the Garland circuit court for practicing medicine without first having procured a certificate and license as prescribed by the statutes. John Montgomery testified for the state: "I went up and got some medicine from defendant, paid him, and he gave me a receipt. I was requested by the medical board to go there to get evidence to see whether or not he was practicing medicine. He asked me my symptoms. He has an office something like a doctor's room. This was in Garland county, Ark., April 8th, 1907." Cross-examination: "I answered the questions he asked me. He felt my pulse, and asked me if I had pains; I did not ask him to feel my pulse or tell him I had stomach trouble. I acted as a detect-

ive. He didn't tell me he only sold medicines, but told me to take this until Wednesday. I saw other persons in the waiting room." The state then introduced G. J. Erickson, who testified that he was the county clerk of Garland county, and that there was no certificate of the state board allowing appellant to practice medicine. This was all the evidence. There was a jury trial and a verdict of guilty. Appellant filed a motion for a new trial, and, upon its being overruled, appealed.

C. V. Teague, for appellant. William F. Kirby, Atty. Gen., and Dan. Taylor, for the State.

HART, J. (after stating the facts as above). Appellant asks for a reversal of this case because the court erred in giving to the jury over his objections instruction No. 3, as follows: "(3) You are further instructed by the term of 'practicing medicine' it is meant to charge a person who undertakes to consider the nature of the ailment of a patient and to prescribe for him a remedy therefor; and if you find from the evidence in this case that defendant examined into or in any manner considered the physical ailments as represented to him by the witness Montgomery, and prescribed or attempted to prescribe a remedy therefor, you will find him guilty." Appellant was indicted and convicted under sections 5239 and 5241 of Kirby's Digest, regulating the practice of medicine.

A number of the states have passed statutes regulating the practice of medicine. In some instances the Legislatures have undertaken to define what is meant by the phrase "practice of medicine." In others they have not. In cases where the Legislatures have not undertaken to define the meaning of the phrase, it has been construed to be used in its ordinary and popular sense. In cases where the words "practice of medicine" have been defined by the Legislatures, the definition has been followed by the courts. Section 5243 of Kirby's Digest provides that "any person shall be regarded as practicing medicine, in any of its departments, within the meaning of this act, who shall append M. D. or M. B. to his name; or repeatedly prescribe or direct, for the use of any person or persons, any drug or medicine or other agency for the treatment, cure or relief of any bodily injury, deformity or disease." We think it was the intention of the Legislature to define the crime by the use of the language quoted. The statute defines practicing medicine as repeatedly prescribing or directing, etc. The court erred in giving its own meaning to these words in instruction No. 3, and in not defining them in the meaning of the statute. It was the duty of the court to give effect to the intention of the lawmakers as embodied in the statute.

Reversed and remanded.

## GATES v. GRAY et al.

(Supreme Court of Arkansas. Dec. 16, 1907.)

## 1. EJECTMENT — DEFENSES — POSSESSION UNDER EQUITABLE TITLE.

One cannot be ejected from land of which he holds possession under an equitable title thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 107-113.]

## 2. SAME.

Kirby's Dig. § 6321, provides that a conveyance made under a judicial sale shall pass the title of all the parties to the action or proceeding. Section 6324 provides that a conveyance by a commissioner need be signed by the commissioner only, but that the names of the parties whose title is conveyed shall be recited in the body of the conveyance. In ejectment, defendant set up that on foreclosure, wherein plaintiffs and others were defendants, the land was purchased by defendant, but that by mistake the commissioner's deed failed to recite plaintiffs' names. *Held*, that the answer tendered a good defense, since defendant was entitled to have the deed corrected, and all the parties in interest being before the court, the case should have been transferred for that purpose to the chancery court.

Appeal from Circuit Court, Lonoke County; George M. Chapline, Judge.

Action by Ollie Lillie and Charles Gray against F. Gates. Judgment for plaintiffs, and defendant appeals. Reversed.

Lehman, Gates & Lehman, for appellant.

MCCULLOCH, J. The plaintiffs as heirs at law of their deceased mother, M. G. Gray, instituted this action in the circuit court of Lonoke county against the defendant, F. Gates, to recover possession of a tract of land in that county, of which the defendant is alleged to be in unlawful possession. They allege in their complaint that said M. G. Gray was at the time of her death the owner of said land under a deed from the state of Arkansas. The defendant filed his answer and cross-complaint, admitting that M. G. Gray owned the land in controversy, but claiming title thereto under a mortgage or trust deed executed by said M. G. Gray and a foreclosure sale decreed by the chancery court of Lonoke county. It is alleged in apt terms that said M. G. Gray and her husband, T. G. Gray, executed said trust deed to one Lamm, as trustee, to secure the payment of certain indebtedness to defendant; that after the death of M. G. Gray this defendant instituted in the chancery court of Lonoke county a suit against F. G. Gray and these plaintiffs as heirs of M. G. Gray to foreclose said trust deed; that all of said parties were duly served with process, and that said chancery court duly rendered a decree for the foreclosure of said deed; that the commissioner of said court sold said land at public outcry, pursuant to said decree, and this defendant became the purchaser of the same; that said sale was reported to and duly confirmed by said court; that said commissioner executed and delivered to the defendant a deed, which was approved by said chancery court, con-

veying said land to him; and that he took and now holds possession of the land thereunder. The answer and cross-complaint also state that said deed of the commissioner, after reciting the pendency of said suit in chancery, the decree and other proceedings therein, and sale and confirmation, purports to convey to defendant as such purchaser "all right, title, interest, or claim, at law or in equity, of T. G. Gray and M. G. Gray, said defendants in chancery," instead of purporting to convey the title of the plaintiffs herein, who were defendants in said chancery suit. It is stated that this alleged error in the deed occurred on account of the death of this defendant's counsel in the chancery suit. The defendant also moved the court to transfer the case to the chancery court of Lonoke county for further proceedings. The court denied the motion to transfer the case, and sustained a demurrer to the answer and cross-complaint. Defendant declined to further plead, judgment final was rendered against him for the possession of the land, and he appealed to this court.

The court erred in sustaining the demurrer, as the answer tendered a good defense. Even if the commissioner's deed under which defendant held possession was defective, still the answer was sufficient to show the equitable title to the land in controversy to be in the defendant and he could not be ejected. *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063. The defendant was entitled, however, to have his deed from the commissioner corrected, and as all the parties in interest were before the court the cause should, on his motion, have been transferred to the chancery court for that purpose. The defect was one of form, in that it failed to recite the names of the plaintiffs who were parties defendant to the cause, and can and should be reformed by a court of chancery upon the facts set forth in the answer. The statute provides that a conveyance, made in pursuance to a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding (Kirby's Dig. § 6321), but that "the names of such parties shall be recited in the body of the conveyance" (Kirby's Dig. § 6324).

Reversed and remanded, with directions to overrule the demurrer, and grant the motion to transfer to equity.

## WATERS-PIERCE OIL CO. v. VAN ELDEREN et al.

(Supreme Court of Arkansas. Dec. 2, 1907.)

## 1. EXCEPTIONS, BILL OF CONSOLIDATION OF ACTIONS—JOINDER OF PARTIES.

Where causes of action are consolidated, as authorized by Act May 11, 1905 (Acts 1905, pp. 798, 799), and are tried on the same evidence, and separate verdicts and judgments are rendered in favor of each plaintiff, one motion for a new trial and one bill of exceptions in the cases as consolidated in which each plaintiff

is named as plaintiff are sufficient to authorize a separate appeal from each judgment.

## 2. APPEAL—DISPOSITION OF CAUSE ON APPEAL.

Where the physical facts show that the evidence for plaintiff was irrational and against all human experience, the court on appeal will reverse the judgment for plaintiff, and dismiss the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4577.]

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Separate actions by Johan Van Elderen and others against the Waters-Pierce Oil Company. From separate judgments for each plaintiff, defendant appeals. Reversed and dismissed.

Mehaffy & Armstead and Rose, Hemingway, Cantrell & Loughborough (J. D. Johnson, of counsel), for appellant. Wood & Henderson and R. G. Davies, for appellees.

FLETCHER, Special Judge. This case embraces a number of causes of action on behalf of different parties arising out of an explosion at the Turf Exchange in the city of Hot Springs on the 24th day of December, 1902. The various parties plaintiff brought separate actions against the oil company, and these actions were by the court, and against the objection of the oil company, consolidated as authorized by the act of the Legislature approved May 11, 1905, and were tried before a jury upon the same evidence. Separate verdicts were rendered and separate judgments were entered against the oil company in favor of each plaintiff. One motion for new trial and one bill of exceptions were filed in the cases as consolidated, in which each plaintiff was named as a plaintiff against the oil company. A separate appeal was taken to this court from each judgment.

The appellees have filed in this court a motion to dismiss the appeals or affirm the judgments, on the ground that the appeals were not properly taken, and separate motions for new trial and separate bills of exceptions were not filed as to each of the plaintiffs. The express purpose of the statute was to authorize the court to "make such orders and rules concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice." St. 1905, pp. 798, 799; Acts 1905, pp. 798, 799. No possible good could have been accomplished either to the plaintiffs or other parties to the suit by filing separate motions for new trial or separate bills of exception. On the contrary, the record would have been unnecessarily incumbered, and the appellant put to unnecessary cost and delay.

Counsel for appellees rely upon the case of Louisville & Nashville R. Co. v. Summers, 125 Fed. 719, 60 C. C. A. 487, where it was held under an act of Congress the

same as this that: "When two separate actions depending on the same facts were consolidated and tried together for convenience only, but the verdicts and judgments were separate, it was improper to include both in a single writ of error." If it be admitted that this rule is applicable to the practice in the courts of this state, its requirements are not in this case by separate appeal from each judgment. The motion is overruled. In the case of Waters-Pierce Oil Company v. Burrows, 77 Ark. 74, 96 S. W. 336, this court sustained a verdict against the oil company arising out of this same explosion. Subsequently, in the case of Waters-Pierce Oil Company v. Knisel, 79 Ark. 608, 96 S. W. 342, where the facts were more fully developed than in the Burrow's Case, the court reversed a judgment against the oil company arising out of the same accident, on the ground that the physical facts as shown by the undisputed evidence in the case demonstrated that the evidence upon which the plaintiff based his claim for recovery against the oil company was not only highly improbable, but irrational, at war with the physical facts, and contrary to all human experience and common information, and therefore without probative force.

There is no material difference in the evidence in that case and this. There is nothing which calls for a different conclusion in this case than that reached by the court in the Knisel Case, and as the facts seem to have been fully developed, it is ordered that this case be reversed, and dismissed.

WOOD, J., disqualified, and not participating.

## WATERS-PIERCE OIL CO. v. EGGNER et al.

(Supreme Court of Arkansas. Dec. 2, 1907.)

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by J. W. Eggner and others against the Waters-Pierce Oil Company. From a judgment for plaintiffs, defendant appeals. Reversed and dismissed.

Mehaffy & Armstead and Rose, Hemingway, Cantrell & Loughborough (J. D. Johnson, of counsel), for appellant. R. G. Davies and Wood & Henderson, for appellees.

FLETCHER, Special Judge. The facts in this case are the same as the facts in the case of the Waters-Pierce Oil Company v. Van Elderen et al. (just decided) 106 S. W. 947. It was argued and submitted with and is controlled by the decision in that case.

Reversed and dismissed.

WOOD, J., disqualified, and not participating.

**FLOWERS v. FLOWERS et al.**

(Supreme Court of Arkansas. Nov. 25, 1907.)

**1. DOWER—ALIENATION—VALIDITY IN EQUITY.**

A widow's dower in the property of her deceased husband, pending assignment thereof, while alienable in equity, is not so at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, §§ 209-217.]

**2. ADMINISTRATORS—RELATION BETWEEN ADMINISTRATOR AND BENEFICIARIES.**

An administrator stands in a trust relation toward those interested in the estate of the intestate, including the widow and heirs, as far as contracts between himself and them are concerned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 467, 468.]

**3. TRUSTS—PURCHASE OF TRUST PROPERTY BY TRUSTEE—VALIDITY.**

A trustee may buy from the cestui que trust, and the transaction is valid, where there is a fair consideration and no concealment, and the trustee takes no advantage of information acquired by him in the character of trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 404.]

**4. DOWER—CONVEYANCE BY WIDOW—VALIDITY.**

A conveyance by a widow of her dower interest to the administrator of the estate held, under the evidence, valid as against the objection that the consideration therefor was inadequate, and that it was procured by the fraud of the administrator.

**5. EXECUTORS AND ADMINISTRATORS—OCCUPATION OF MANSION PENDING ASSIGNMENT OF DOWER—RIGHT OF WIDOW—ALIENATION BY WIDOW—VALIDITY.**

A widow's right to hold the dwelling house and farm attached of the deceased husband until assignment of dower is a personal privilege, and is not transferable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 655.]

**6. APPEAL—ERRONEOUS DECREE—HARMLESS ERROR.**

In a suit by a purchaser of the dower interest of the widow for the assignment to him of the dower interest and for an accounting for the rents since the owner's death, the error in the decree awarding to the purchaser the rents accrued under the quarantine rights of the widow until dower was assigned was harmless, where the court made no finding of the rents nor directed an accounting to ascertain the amount thereof, and the decree so far as it adjudges the right of the purchaser to recover rents will be set aside.

Appeal from Garland Chancery Court; Alphonz Curl, Chancellor.

Suit by Henry Flowers against Josephine Flowers and others. From a decree for plaintiff, defendants appeal. Modified and affirmed.

R. G. Davies, for appellants. G. G. Latta, for appellee.

MCCULLOCH, J. Appellee, Henry Flowers, instituted this suit in equity against Josephine Flowers, the only child, Linnie Simons, the widow, and John H. Reece, the administrator of the estate, of King B. Flowers, deceased, to recover and have assigned to him the dower interest of said widow in said es-

tate which he alleged had been conveyed to him by her. He set forth in and exhibited with his complaint deeds executed to him by said widow purporting to convey her dower interest in the real estate and personal property of said decedent in consideration of the sum of \$1,200. The defendants answered, denying the execution of said conveyances, and also alleging that the consideration for said deed was grossly inadequate, and that the execution of said conveyance was procured by fraud, threats, misrepresentation, and concealment of material facts concerning the value of decedent's estate and the interest therein on the widow. The chancellor granted the prayer of the complaint for an allotment of dower, and the defendants appealed.

It has been settled by a decision of this court that a widow's right of dower in the property of her deceased husband cannot, before assignment in the manner provided by law, be the subject of a conveyance by her to a stranger so as to confer on him any rights capable of assertion in a court of law, but that such conveyance is valid and enforceable in equity. *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256. See, also, 2 *Scribner on Dower*, § 33 et seq. At the time of the execution of the conveyance in question by the widow appellee was administrator of the deceased husband's estate. He therefore stood in a trust relation toward those interested in the estate, including the widow and heirs. *Reeder v. Meredith*, 73 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22, and cases cited.

This court in the case just cited quoted with approval the following rule laid down in *Perry on Trusts* (section 195) with reference to transactions between such trustees and the cestui que trust: "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract ascertained after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the action of every shadow of suspicion. \* \* \* Any withholding of information, or ignorance of the facts or of his rights on the part of the cestui que trust, or any inadequacy of price, will make such purchaser a constructive trustee." Bearing in mind this stringent rule imposed upon a trustee who purchases from his cestui que trust, we do not find in this case any of the elements which would require that the conveyance be set aside. The evidence does not sustain the charge of threats, fraudulent misrepresentation, or concealment of facts. The consideration for the conveyance was \$1,200, of which the sum of \$600 was paid in cash, and a note for the balance was executed to the widow, and she afterward transferred the note to another person, and appellee paid it. The price paid appears to have been fairly adequate at the time, though the



interest in the property was worth much more at the time of the decree.

The plaintiff asked in his complaint that he be also decreed the rents and profits of the lands since the death of King B. Flowers, and that an accounting thereof be had; and the court in the final decree awarded to plaintiff all of the right and interest of the widow "in all the rents and profits of said real estate that have accrued since the death of King B. Flowers, to the extent authorized by law." The court made no finding as to amount of such rents and profits, nor did it order an accounting to ascertain the amount thereof. We are left to conjecture, to some extent, as to what the chancellor meant by the expression "to the extent authorized by law"; but we assume that he meant to hold that the plaintiff succeeded, by virtue of said conveyances, to the quarantine rights of the widow until dower should be assigned, and was therefore entitled to recover the amount of rents and profits of the dwelling house and lands thereto attached. In this view the learned chancellor erred. We held in *Griffin v. Dunn*, 79 Ark. 408, 98 S. W. 190, that the widow's right to hold the dwelling house and farm attached until assignment of dower is a personal privilege, and not an estate in the land, and cannot be transferred to another.

Inasmuch, however, as the court rendered no decree for any specific amount of rents, there is no prejudice in the erroneous ruling, but the decree in so far as it adjudges, in general terms, the right of the plaintiff to recover rents and profits before the assignment of dower, is disapproved, and the decree to that extent is modified. In all other respects the decree will be affirmed, and it is so ordered.

#### FILES et al. v. JACKSON et al.

(Supreme Court of Arkansas. Nov. 18, 1907.)

##### 1. EVIDENCE—JUDICIAL NOTICE.

The Supreme Court takes notice that tax sales for nonpayment of taxes of 1872 made in 1873 are invalid, having been so declared by it.

##### 2. DEEDS — EXECUTION — EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that the deed relied upon by defendants was a forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 647.]

##### 3. ADVERSE POSSESSION—ELEMENTS OF POSSESSION.

That the purchaser of land at a void tax sale soon after his purchase began cutting trees for fuel and poles for gardening purposes thereon, and openly claimed title to the land, and knew of no one disputing his ownership until defendants asserted their claim, that he lived near the land for seven years, and that, on his removal from the neighborhood, he asked others to prevent trespass, is insufficient to show adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

##### 4. TAXATION — VOID SALE — RIGHT OF PURCHASER—REIMBURSEMENT FOR TAXES PAID.

A purchaser of land at a void tax sale is entitled to a lien thereon for all taxes paid by him.

Appeal from Ashley Chancery Court; James C. Norman, Chancellor.

Ejectment by A. W. Files against T. A. Jackson, A. H. Wilson, and Emma Dorman; defendant Wilson's heirs being substituted on his death, and defendant Dorman filing a cross-bill against defendant Jackson and such heirs. From a decree for defendant Jackson and the heirs, plaintiff and defendant Dorman appeal. Reversed and remanded, with directions.

This is a contest in which the three contestants claim the ownership of the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 23, township 17 S., range 7 W. Appellant Files claims under a purchase from the state November 17, 1875. Appellees claim under what is claimed to be a deed from appellant Dorman, with an assignment of dower by Mrs. Johnson, mother of Mrs. Dorman, dated November 10, 1888, and filed for record in recorder's office, Ashley county, January 31, 1889, and appellant Dorman, denying the execution of the deed to appellees, claims under an inheritance from her father, H. D. Lowe. The facts are that H. D. Lowe died May 4, 1863, seized and possessed of the land involved in this controversy; that he made a will, which was duly probated and recorded. Under said will there were but two devisees, to wit, Emaline T., widow, and Emma H. Lowe, daughter. The testator bequeathed to E. T. Lowe, widow, one-third, and to Emma H. Lowe, daughter, two-thirds. The widow was married to A. L. Johnson July 4, 1864. Johnson is dead. The daughter was married to A. N. Moss January 9, 1881, at the age of 19 years, and was divorced from Moss May 10, 1892. About six months after her divorce from Moss in 1892, she married Levi Dorman, and is still the wife of Dorman. The land had been forfeited for nonpayment of taxes, and on November 17, 1875, appellant Files bought it from the state, and the state land commissioner made him a deed. This deed was destroyed by fire, and appellant made proof of loss, and applied to Auditor of State and State Treasurer, and obtained proof of purchase. Appellees' deed was filed in court, and a copy will be found. Appellant Files brought suit in ejectment against appellees Jackson and A. H. Wilson on January 2, 1896. Jackson and Wilson filed answer January 23, 1896. Case was continued. Before the next term of court (August, 1896) Wilson died. At the August term, 1896, Wilson's death was suggested, and his heirs were made defendants. Divers and sundry pleadings were had in the circuit court, as shown by the record, until August 20, 1901, when appellant Files filed a petition asking that Mrs. Dorman be made a party, and that the cause be transferred to Ashley chancery court, which was done. At the May term of the chancery court, May 23, 1903, Mrs. Dorman entered her appearance and filed her separate answer. At May term, 1904, May 18th,

Mrs. Dorman filed amendment to her answer, and made it a cross-bill against appellees. Thus the complaint of appellants, the answer of appellees, and the answer and amendment and cross-bill bring before the court the contentions of the litigants. Appellant Files claims that under his deed from the commissioner of state lands he took peaceable and quiet possession of the land, exercised ownership over it for a period of 19 years, and paid taxes on it for the years 1876 to 1888, inclusive, 12 years, and also for several subsequent years, without notice of any claimant, or protest, or claim of ownership from any one; nor was he aware of any claim by any one adversely to his until latter part of year 1895, when he was informed that appellant Jackson was having a fence erected along the north line of the tract; and, having learned that Jackson and Wilson were claiming the land, and claiming to be in possession, he commenced suit January 2, 1896. In their answer Jackson and Wilson claimed to be owners and in possession, and set up the statute bar of seven years. The relative contentions and claims of the parties will appear by other facts and statements in the opinion. There was a decree for appellees.

T. M. Hooker, for appellants. Geo. W. Norman, for appellees.

HART, J. (after stating the facts as above). Appellant Files bases his claim of title upon three grounds:

First. The land had been forfeited for non-payment of taxes, and on November 17, 1875, appellant Files purchased from the state, and the state land commissioner made him a deed. This deed was destroyed by fire. Appellant introduced a certificate from commissioner of state lands, upon which he relies for title, which recites: "At the Auditor's sale of land forfeited for taxes on the 9th day of June, 1873, the following tract of land, situated in Ashley county, remained forfeited to the state"—the land in controversy. The obvious and natural meaning of this certificate is that the land was offered for sale by the collector in 1873 for the taxes of 1872 pursuant to section 5188 of Gantt's Digest, and was forfeited to the state, and that, pursuant to section 5218 of Gantt's Digest, the land was offered for sale by the Auditor and remained forfeited to the state. The Auditor, as directed by the statute, forwarded a description of the lands to the commissioner of state lands, who caused the same to be placed on the books of his office as vacant land. "The court takes knowledge of the fact that all tax sales for the nonpayment of the taxes of 1872, if the same were made in 1873, are invalid, having been so declared by this court." *Allen v. Swoope*, 64 Ark. 579, 44 S. W. 78; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731. Hence Files' tax deed is clearly void.

Second. Appellant Files claims by deed from Mrs. Emma Dorman and Mrs. Emma

T. Johnson executed since the institution of this suit. It appears that on the 10th day of November, 1888, Mrs. Emma T. Johnson and Mrs. Emma Dorman, who was then Emma Moss, conveyed this land by deed to appellee T. A. Jackson and A. H. Wilson, and that the same was duly acknowledged and was filed for record on the 31st day of January, 1889. It is claimed that the last-mentioned deed is a forgery. Mrs. Dorman says she was sick with the measles at the time it purports to have been executed, was incapable of executing it, and did not execute it. A number of expert witnesses were introduced who testified that the signatures to the deed, viz., Emma Moss and A. N. Moss, were written by the same person. A. N. Moss testified that Emma Moss was sick at the time the deed was executed, and that the deed was signed in her presence by J. R. Bingham, who attested the deed. Bingham testified that the deed was signed by Emma Moss in his presence, that she was not well, but that her mind was normal, and that no undue influence was used to influence her to sign the deed. On cross-examination, in response to the question, "There seems to be quite a similarity in the handwriting of Emma Moss and A. H. Moss. Is it not possible that one person affixed both signatures to this deed?" he answered, "I think not; I hardly know how to answer. The parties signed this deed is my recollection." B. B. Station, the justice of the peace before whom the acknowledgment was taken, testified that he was present and saw Mrs. Emma Moss sign the deed. Although she resided in the county a number of years after this time, Emma Moss never exercised any control over the land, nor has she paid or attempted to pay the taxes on it. The chancellor found that the deed was not a forgery. The persuasive force of the chancellor's finding is not overcome by the testimony.

Third. Appellant Files claims title by adverse possession. He says that soon after his purchase of the land from the state in 1875 he began cutting and using stove wood, and poles for gardening purposes, from the land, and openly claimed title to it, and knew of no one that disputed his ownership until appellees set up claim of ownership; that he lived near the land until latter part of 1882, when he moved to Little Rock; that he asked his brother and some of the neighbors to prevent any one from trespassing upon the land. This was not sufficient to constitute adverse possession. In the case of *Driver v. Martin*, 68 Ark. 551, 60 S. W. 651, it was held: "Prior to the act of March 18, 1899 (Laws 1899, p. 117), payment of taxes on wild and unimproved lands, in connection with fitful acts of ownership, such as cutting trees for fuel and rails, did not constitute such adverse possession as would set the statute of limitations in motion." See *Earle Improvement Company v. Chatfield* (Ark.) 99 S. W. 84, and Arkansas cases cit-

ed therein. In the event of an adverse decision on his main contentions in the case, appellant Files claims that he is entitled to a lien for all taxes paid by him. In this he is correct. In construing the act of March 14, 1879 (Acts 1879, p. 69), "to provide for the redemption of delinquent lands," the court held the act void, but said: "The court is of the opinion, however, that under the circumstances of the case the petitioner Bagley would have an equity to be reimbursed the amounts paid out to relieve the land from taxes. The act was short lived and has been since repealed. Doubtless many purchases from the state have been made under it in good faith; and, as they have inured to the benefit of the owners, it would be inequitable that the owners should be thus relieved at the expense of those who had relied upon what they had good reason to believe was a valid act of the sovereign power. For the equitable adjustment of all such cases growing up whilst the law was supposed to be in existence, it is reasonable that those who have paid the taxes should have a lien upon the lands for the burdens discharged, not only by original purchase, but by the payment of the taxes of subsequent years." *Bagley v. Castile*, 42 Ark. 91; *Lester v. Richardson*, 69 Ark. 201, 62 S. W. 62. This principle applies with peculiar force here. The original purchase of Files was under section 3914, Gantt's Dig., which provides that "at any time after the close of the Auditor's sale, the commissioner of immigration and state lands shall sell any of the lands and town lots offered for sale by the Auditor, and not sold for want of bidders, to any person wishing to purchase the same, who shall pay the state and county tax, together with the interest, penalties and expenses due thereon." Files only paid the state what the owner would have paid had he redeemed the lands. This and the subsequent payment of taxes inured to the owner's benefit. The chancellor should have rendered a decree in favor of appellant Files for the \$24.46, shown to have been paid by him to the state for the purchase of the land, being the state and county tax, with interest, penalties, and expenses, and also for the amount of taxes paid by him for subsequent years, with interest on same and on the amount of the original purchase at the rate of 6 per cent., and declare the same a lien on the land.

For this error, the cause is reversed and remanded, with directions to enter a decree in accordance with this opinion.

WOOD, J., not participating.

#### ROBERTS v. STATE.

(Supreme Court of Arkansas. Dec. 16, 1907.)

#### 1. CRIMINAL LAW—TRIAL—PROVINCE OF COURT—DIRECTION OF VERDICT.

In a misdemeanor case, where the punishment is by fine only, the judge having power

to set aside a verdict of acquittal has also the power to direct a verdict of guilty, where the facts are undisputed, and where guilt from all the evidence is the only inference that can be drawn.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1727-1729.]

#### 2. SAME.

In a trial for an offense punishable either by fine or imprisonment, the trial judge has no power to direct a verdict, and hence in a prosecution for practicing medicine without a license, in violation of Kirby's Dig. § 5241, providing for punishment by fine or by imprisonment, or both, the court erred in instructing the jury to return a verdict of guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1727-1729.]

Wood, J., dissenting in part.

Appeal from Circuit Court, Sebastian County; Daniel How, Judge.

P. F. Roberts was convicted of practicing medicine without a license, and he appeals. Reversed and remanded.

The only question to be determined by this appeal is whether the court, in a criminal case, where a part of the penalty is, or may be, imprisonment, can instruct the jury to return a verdict of guilty. The evidence was undisputed, and, if true, showed that appellant had practiced medicine without a license. Appellant was indicted for this offense under section 5241, Kirby's Dig., which fixes the punishment at "a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than ten days nor more than ninety days; or by both fine and imprisonment." The judge instructed the jury to return a verdict of guilty, which was done, and the punishment assessed at a fine of \$100.

P. E. Rowe and T. B. Pryor, for appellant. William F. Kirby, Atty. Gen., and Dan'l Taylor, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). This court in *Jones v. State*, 15 Ark. 262, held that a defendant who has been tried by a jury and acquitted of an offense punishable by fine only could, upon a reversal and remand of the cause by the Supreme Court, again be put upon trial for the same offense, without violating the constitutional provision "that no person shall for the same offense be twice put in jeopardy of life or limb." Section 8, art. 2, Const. In *Taylor v. State*, 36 Ark. 84, this court held that, where a defendant was tried by jury and acquitted of a misdemeanor punishable by fine only, the trial court could set aside the verdict of the jury, and again put the defendant on trial, without violating the constitutional provision above mentioned. Thus this court has recognized the power of the circuit court to set aside verdicts of acquittal in misdemeanor cases punishable by fine only. In civil cases this court holds that where the evidence is undisputed and unimpeached, and there is no circumstance shown from which

an inference against the facts testified to can be drawn, the facts may be taken as established, and a verdict directed accordingly. *Skillern v. Baker*, 82 Ark. 86, 100 S. W. 764; *American Central Ins. Co. v. Noe*, 75 Ark. 406, 88 S. W. 572; *Catlett v. Ry. Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254. Such direction according to the doctrine of the above cases is not contrary to the provisions of the Constitution, giving the parties in law cases the right to trial by jury (section 7, art. 2, Const.), and prohibiting judges from charging the juries with regard to matters of fact (section 23, art. 7, Const.). For when the conditions exist as announced in *Skillern v. Baker*, *supra*, it then becomes a question of law, and the trial court has power to direct a verdict in accordance with the law, which is, but in fact, declaring the law that the jury must obey. A majority of the court is of the opinion that it follows logically from these decisions that, in a misdemeanor case where the punishment is by fine only, the judge having power to set aside a verdict of acquittal would also have power to direct a verdict of guilty where the facts were undisputed, and where guilt from all the evidence was the only inference that could be drawn. This court, in the case of *Steele v. State*, 77 Ark. 441, 92 S. W. 530, where the punishment was by fine only, sustained a judgment of conviction where the trial judge directed the verdict. But the question now under consideration was not raised or discussed in that case.

In this case, however, while the verdict rendered was for fine only, the appellant was tried for an offense punishable either by fine or imprisonment. Section 5241, Kirby's Dig. We are all of the opinion that in such cases the trial judge has no power to direct a verdict. Says Mr. Bishop: "The judge is incompetent to convict one of crime, even though he acknowledge it, except on a plea of guilty; the evidence is exclusively for the jury. However conclusive of guilt it may be, he can only tell them that if they believe such and such to be the facts, the law demands a verdict of guilty; he cannot otherwise direct such verdict." Authorities to sustain the text are cited in note. See, also, 12 Cyc. 595, note 15. The authorities are all practically one way—supporting the doctrine announced by Mr. Bishop; and they make no exception in cases of misdemeanor punishable by fine only.

The majority of the court are of the opinion, however, that our own court is already in line with the doctrine announced in *United States v. Susan B. Anthony*, 11 Blatch. (U. S.) 200, Fed. Cas. No. 14,459, and the Michigan cases holding to the same doctrine. *People v. Elmer*, 109 Mich. 493, 67 N. W. 550; *People v. Neumann*, 85 Mich. 98, 48 N. W. 290, and cases cited. And that the doctrine of these cases is founded upon the sound legal principle that where the facts are

undisputed, and only one inference can be drawn from them, the question is then one of law for the court, and not of fact for the jury. But the doctrine cannot apply in a case where jeopardy attaches, for the reason that, in such cases as before stated, the court is without power to set aside a verdict of acquittal or to direct a verdict either way.

Inasmuch as there might have been imprisonment in this case, it follows that the court erred in directing the verdict; and that the judgment should be reversed, and the cause remanded for new trial.

So ordered.

The writer is of the opinion that a verdict of guilty cannot be directed in any criminal case.

### ATWOOD v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### MALICIOUS MISCHIEF — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to sustain a conviction of malicious mischief by shooting stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Mischief, § 15.]

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

T. E. Atwood was convicted of malicious mischief committed by shooting stock, and he appeals. Affirmed.

Sam R. Chew, for appellant. William F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State.

MCCULLOCH, J. Appellant, T. E. Atwood, was convicted of the offense of malicious mischief, alleged to have been committed by shooting a cow belonging to one Lawrence Shipley. His contention here is that the evidence was not sufficient to sustain the verdict.

The appellant and Shipley were neighbors, residing on adjoining farms in Franklin county, and on the 5th day of April, 1907, Shipley's cow was shot by some one in appellant's field. Numerous witnesses heard the shot fired in the field, and saw the cow "jump and buck," as they expressed it, showing that she had been hurt, and that she immediately came out of the field, and went home, where she was found to be badly wounded. None of the witnesses were able to say who did the shooting; but some of them explained that there was a clump of trees, or thicket, in the field near where the cow was shot. None of them saw any one near the scene of the shooting at the time, nor the smoke from the gun; the inference being that the person who fired the shot stood in the thicket. There was also evidence to the effect that the cow had frequently depredated upon appellant's inclosure, and that he had on several occasions threatened to shoot her, unless she was kept out of the field. Mrs. Shipley testified that on Thanksgiving day preceding the appellant had

made such a threat, and had spoken to her in a very angry way about keeping the cow. Appellant and his son were seen at work in the field about 10 o'clock in the forenoon, and the cow was shot about 2 o'clock in the afternoon. Other witnesses testified that the appellant's son was not in the field at the time the shooting was done, and that he was at the house of a neighbor, playing marbles, when the gun was heard in appellant's field. Appellant himself testified that he did not shoot the cow, and he denied ever having threatened to shoot her. It is argued very strenuously by appellant's counsel that the evidence does not sustain the verdict, because no witness testified to having seen appellant shoot the cow. It is true there is no witness who testifies to that fact. But the circumstances were very strong, and we think the jury were warranted in attributing the shooting of the cow to the appellant. She was shot in his inclosure, where she was then depredating. He had very strong provocation for committing such an act; and there is no proof that any one else had any motive in doing so. He had threatened on numerous occasions to shoot her. He denied positively that he did so; but the jury evidently rejected his statement, and they could well do so, as he was contradicted upon a material point in the case by other witnesses. It is hardly probable that any one else intentionally shot the cow; and there is nothing to indicate that it was accidentally done by some one else in the fields. Appellant's son was not there at the time. That is conclusively proved; and this leaves the case without any motive whatever shown on the part of anybody else to do the shooting.

We cannot say that it was unreasonable for the jury to draw from this evidence the inference that the appellant shot the cow. Hence we do not feel warranted in disturbing the verdict. It was a case of circumstantial evidence only; but the circumstances were sufficient to warrant the inference which the jury drew; and the judgment is affirmed.

#### HOT SPRINGS SCHOOL DIST. v. SISTERS OF MERCY OF FEMALE ACADEMY OF LITTLE ROCK, ARK.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### TAXATION—EXEMPTIONS—PROPERTY USED FOR PUBLIC CHARITY.

Buildings and grounds used by a sisterhood solely as a public hospital, the members receiving no compensation, and their earnings and lives being devoted to charity, are exempt from taxation under the constitutional provision exempting buildings and grounds and materials used exclusively for public charity, though pay patients are received; the proceeds being used to maintain the institution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 389-400.]

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Petition by Sisters of Mercy of the Female Academy of Little Rock, Ark., to declare

property exempt from taxation. The circuit court, on petitioners' appeal from a judgment of the county court denying the petition, granted the petition; and ordered the property stricken from the tax books, and Hot Springs School District appeals. Affirmed.

This is an appeal from a judgment of the circuit court of Garland county, which held that the hospital buildings and grounds upon which it is situate, in the city of Hot Springs, come within the exemption of the Constitution, and was not subject to taxation. Among the exemptions from taxation contained in the Constitution are: "Buildings and grounds and materials used exclusively for public charity." The evidence shows that in the hospital there is one large room with 10 or 12 beds, and 4 rooms with 3 beds in each especially for charity patients; that there are other rooms for patients who pay; that the institution is open to any worthy sick person, not afflicted with a contagious or infectious disease, no one being refused on account of religious belief or inability to pay. A drug store is maintained in which prescriptions are filled and medicine furnished for those in the house. Those who are able pay for articles gotten at the drug store. Those who are not able are furnished free. None are ever refused, whether they have money or not. A free operating room and a free clinic are maintained in the hospital, and the drug store furnishes bandages, and anæsthetics, and fills prescriptions for them. The institution also maintains a school for nurses. It employs, at a salary, an educated nurse and instructor in nursing from Chicago, and also employs a number of girls who are instructed in nursing by her and by the doctors at the clinic, and who assist in nursing the patients. At the time of the trial there were eight girls in the training school, besides the teachers. None of the sisters receive any compensation. All money received from any source goes to maintain the institution. They had originally a small frame hospital, a gift to the order about 20 years ago, and they have recently erected a large and expensive building, partly through donations and partly through borrowed money, and whatever surplus money might arise from any source would go to pay this loan. No funds are diverted from that institution, and it in no sense involves an idea of profit to any one. Whatever profit is realized from those who pay goes to the benefit of those who cannot pay, and to extend and enlarge the charity done there. The articles of association or incorporation are not in the transcript, but it is a matter of general information, and the evidence shows, that the Sisters of Mercy are a benevolent and charitable organization, to teach the young, to nurse the sick and take care of the indigent and poor. It has no aim of gain or profit, and whatever it receives from any source is expended in promoting its primary objects.

Wood & Henderson, for appellant. Greaves & Martin and Rose, Hemingway, Cantrell & Loughborough, for appellees.

HART, J. (after stating the facts as above). The judgment appealed from exempts only the ground upon which the hospital building is situate and the building thereon; and the sole question in the case is whether or not they are used exclusively for public charity.

Appellant contends that the question is answered in its favor by the rule announced in *Brodie v. Fitzgerald*, 57 Ark. 445, 22 S. W. 29. That was a case where the rents and revenues and the property itself was used for public charity. The theory upon which framers of Constitutions and law makers act in exempting from taxation property used purely for public charity is that the unfortunates, who are the recipients of the bounty of these public charities, would become a charge upon the state, and that by alleviating their suffering and relieving their distress, the institutions or other agencies organized for the purpose of public charity in a manner assume part of the public burdens. It is well settled that no one can exempt his property from taxation simply by the exclusive use of the income for public charity, for that is a matter which appeals to his own individual spirit of benevolence. It may be given to-day and withheld to-morrow. But a different rule prevails where the property is directly and exclusively used for that purpose. It is not denied that the whole object of the institution of appellee is one of public charity, but appellant claims that it is not exclusively so used because pay patients are received and because those able to pay are charged for prescriptions.

In discussing a similar case in *State ex rel. Alexian Bros. Hospital v. Powers*, 10 Mo. App. 263, the court said: "Does the fact that this institution derives some part of its revenue from paying patients exclude it from the benefits of the constitutional exemption from taxation? We do not see upon what reasonable grounds this can be said. Suppose that the community in charge of the hospital devoted themselves partly to some kind of manual labor, shoemaking for instance, in order to raise money for the purpose of furnishing medicine and necessities and comforts to their patients, would not this be a charitable act? If they devote themselves partly to the care of paying patients to defray the expenses of attendance upon the poorer patients who cannot pay, this is surely an act of charity. Must we hold that, if the community raise money purely by begging, their purposes are purely charitable; but, if they work to support themselves whilst ministering to the sick, and to support the sick to whom they administer, the character of the charity is impaired? The fact of receiving money from some of the patients does not we think at all impair the character of the charity, so long as the

money thus received is devoted altogether to the charitable object which the institution is intended to further." In the case of *County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298, the court said: "A hospital, with the necessary grounds, free to all who are not peculiarly able, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely public charity." In the case of *Penn. Hospital v. Delaware Co.*, 169 Pa. 305, 32 Atl. 456, the court said: "Property which is used directly for the purpose, and in the operation of the charity, is exempt, though it may also be used in a manner to yield some return and thereby reduce the expenses." To the same effect, see *Sisters of Charity v. Township of Chatham*, 52 N. J. Law, 373, 20 Atl. 292, 9 L. R. A. 198; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, 13 N. E. 854; *Episcopal Academy v. Philadelphia*, 150 Pa. 574, 25 Atl. 55. One of the witnesses here said that she had been a member of the Sisters of Mercy for 40 years, that the whole object of the order was charity, and that their whole life was devoted to it. On response to the question, "This order, the Sisters of Mercy, what is the general work of the order and to what do your vows pertain?" she answered, "To the poor and sick and educational." In this case the buildings were constructed and fitted for use solely as a public hospital. The members of the order receive no compensation for themselves. Their earnings and their lives are devoted to charity.

We think the property meets the constitutional requirement of being "buildings and grounds and materials used exclusively for public charity."

Judgment affirmed.

## WEST v. WHITTLE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

### 1. DEEDS—CAPACITY OF GRANTOR—UNDUE INFLUENCE.

Whenever a person, through age, decrepitude, affliction, or disease, becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 149, 151, 153, 198.]

### 2. SAME—EVIDENCE.

Evidence examined, and held to support a finding that the grantor of a deed was mentally incapable of executing it, and that it was the result of the grantee's undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638, 641.]

Appeal from Circuit Court, Johnson County; Jeremia G. Wallace, Judge.

Action by William Whittle, Sr., by William Whittle, Jr., his next friend, against W. H. West. Judgment for plaintiff, and defendant appeals. Affirmed.

Cravens & Covington and J. D. Hunt, for appellant. Winchester & Martin, for appellee.

HART, J. This suit was instituted by William Whittle, Jr., as next friend of William Whittle, Sr., his father, against W. H. West to cancel a deed executed by his father to West conveying certain mineral rights to lands situated in Johnson county, Ark. The tract contained 80 acres, and the consideration was \$666 $\frac{2}{3}$ . The chancellor found in favor of the plaintiff, canceling the deed, and ordered the consideration restored to the defendant, and a decree was entered accordingly. Defendant has appealed.

It was alleged that Whittle, Sr., had been for many years a confirmed drunkard; that he was drunk on the day the deed was executed; that West was his intimate friend and confidential adviser, and that the price paid was wholly inadequate; and that plaintiff was mentally incapacitated to make a deed. The undisputed testimony shows that Mr. Whittle, Sr., is 62 years old; that he has been a whisky drinker all his life; that for the past 20 years he has been a hard drinker; that for the last 10 or 15 years he has been an habitual drunkard; that W. H. West was his confidential friend, and for many years had collected his rents for him. Most of the witnesses agree that Whittle was a man of little education, but was possessed of average intelligence, and that he was honest. All agree that his intellect had been impaired by the excessive use of whisky, but the testimony is conflicting as to the extent his mental faculties had been weakened. There is an irreconcilable conflict in the testimony of the witnesses as to whether or not at the time he executed the deed Wm. Whittle, Sr., was competent to bind himself by deed. There were a large number of witnesses who testified on this point. It would serve no useful purpose to abstract their testimony here. Suffice it to say that the witnesses for the plaintiff testified that he was incompetent, and the witnesses for the defendant were equally positive that he was competent, to execute the deed and transact business in general. The witnesses were equally credible, and no doubt equally honest in their belief, and detailed the facts and circumstances upon which their opinion was based as they presented themselves to their minds.

This is not a case where the fact of drunkenness at the time of the execution of the deed alone is relied upon to establish the mental incapacity; but it is rather one where the party, by reason of long and continued use of intoxicating liquors to excess, has become incapable of managing his business, and mentally incompetent to dispose of his property. The rule in this class of cases is laid down in the case of *Kelley's Heirs v. McGuire*, 15 Ark. 535, to be that, "while the solemn contracts between men should never be disturbed on slight grounds, yet it may

perhaps be assumed as a safe general rule that whenever a person, through age, decrepitude, affliction, or disease, becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside in a court of chancery." This rule has been repeatedly followed ever since by this court, being applied in each case as the facts warranted. *Oxford v. Hopson*, 73 Ark. 170, 83 S. W. 942; *Boggiana v. Anderson*, 78 Ark. 420, 94 S. W. 51. In this case the testimony adduced shows that West possessed the confidence of Whittle. He collected his rents, lent him money to buy whisky with, and settlements were never had between them oftener than once a year. West knew that there was no financial necessity to cause Whittle to dispose of his land. He knew that Whittle's whole family was opposed to him disposing of either the land or the mineral rights. In this particular transaction he was careful to have not only Whittle count the money, but to have him count it in the presence of a third person. Whittle's wife had heard of the proposed trade, and came to his store the day before the deed was executed, and remonstrated with him (West) about it. West walked away from her. He paid no attention to the repeated requests of Whittle's daughter not to lend her father money; that he was drinking it up and neglecting his family. There was no relinquishment of dower on the part of the wife.

The testimony shows that mineral rights when prospected were worth from \$50 to \$100 per acre. The lands contiguous to the land in controversy had been prospected for coal, and a vein of over four feet had been located. Its general direction had been ascertained and was known to extend through the land in controversy. A proposed spur or branch track from the railroad had been located, and the agent of the railroad company a short time before had come to see Whittle about securing a right of way through his land, and, finding him intoxicated, talked of leaving and returning again to see him. West, with a smile, remarked that he might as well trade with him; that he was always drunk. The deed was executed on the 2d day of August, and it is undisputed that on the 8th day of the month Whittle was suffering from delirium tremens to the extent he would see rats, mice, and four-legged chickens on the clock, and feared that he would die. He was put under treatment for the liquor habit, and so continued for more than a year, when his deposition was taken by the defendant. He remembered making the deed, but said that he only sold a two-thirds interest. He denied that there was any clause in the deed giving the defendant right of way for switches to any mine that might be opened up, or the right to sink air shafts. In the case of *Hightower v. Nuber*, 26 Ark. 611, the court said: "And in a court of equity, where bad faith and unconscionable acts can have

no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And, when it is discovered that the party in whose favor the conveyance is made, possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity." The chancellor found that the whole substance of this transaction shows a want of capacity or undue influence, and, as said in the case of *Boggianna v. Anderson*, supra, this kind of case is one where the chancellor's finding has persuasive authority, and is entitled to weight and consideration. Affirmed.

### WESTERN UNION TELEGRAPH CO. v. GULLEDGE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

#### 1. TELEGRAPHS — MESSAGES — MENTAL ANGUISH—CONSTRUCTIVE NOTICE.

A telegram reading, "E. very sick wants you, come immediately wind up his business"—suggested on its face the near relationship of the parties, and constructively notified the telegraph company that the addressee would probably suffer mental anguish if it were not promptly delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 69, 70.]

#### 2. SAME—ADDRESSEE'S NEGLIGENCE.

The addressee of a telegram stating that his brother was seriously ill and wanted him, and directing him to come immediately, cannot recover from a telegraph company for mental anguish alleged to have been caused by his failure to receive the telegram to reach his brother before his death, where he saw a message received by another stating that his brother was very low, and could have reached his bedside several hours before he became unconscious, and yet, either through indisposition or lack of ordinary diligence, failed to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 35.]

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Action by R. E. Gullledge against the Western Union Telegraph Company for failure to deliver a telegram. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Geo. H. Fearons and Rose, Hemingway, Cantrell & Loughborough, for appellant. George & Butler, for appellee.

HART, J. The complaint in this case alleges: That the defendant accepted for transmission the following telegram: "Hamburg, Arkansas, April, 13, 1905. R. E. Gullledge, White, Ark. Eugene very sick wants you, come immediately wind up his business. [Signed] Mrs. W. T. Gullledge." This was to be sent collect. That plaintiff's brother lay dying at his home in Drew county, Ark., and

said brother was possessed of large business interests, and wished plaintiff, in whom he had special confidence, to come and be intrusted with private details, and also to console him in his last illness. That through defendant's neglect said message was never delivered, and his brother was dead and buried before plaintiff knew that he was sick. He asked for \$1,000 damages. Defendant answered, denying in detail all the allegations of the complaint, and averring that plaintiff knew of the critical illness of his brother on the 15th day of April, and that the brother did not die until the 17th of said month, so that plaintiff had ample time to reach his brother's bedside had he so desired, and that plaintiff's brother was in practically the same condition as he was the 13th of April until within a few hours before his death. It was admitted on the trial that the telegram in suit was delivered to defendant's agent at 12:55 p. m. on April 13, 1905, and accepted for delivery by the defendant's agent at Hamburg, Ark., but was never delivered to plaintiff.

At the trial the following evidence was introduced: Mrs. Annie Gullledge testified: "I am the widow of Eugene Gullledge, who died on April 17, 1905, at Luella, Ark., about 9 miles from Monticello, of pneumonia. He was sick one week. He was 38 years old. He had an older brother, W. T. Gullledge, and two younger than R. E. Gullledge, and a sister, Mrs. Morbin, living at Monticello. He rented 20 or 25 acres and also hauled staves. We lived on the old home place which had been bought by W. T. and R. E. Gullledge, and had lived there three years and a half up to the time of Eugene's death. For two years previous to that he had worked for wages for his brothers, W. T. and R. E. Gullledge, at a sawmill. They paid him \$40 or \$50 a month. He was not able to do heavy work steadily; but when he worked he would earn from \$1.50 to \$2 a day. All the land he owned was 120 acres, which his father had given him adjoining the old home place, on which he had cleared 15 acres. He had mortgaged this land for \$250, which was owing at the time of his death. Since his death \$150.25 has been paid by a sale of his horses, cattle, and farm implements. I kept the household goods, two cows, four hogs, and one horse. The administrator has sold all of his personal property except what I kept. W. T. Gullledge was the only one of plaintiff's brothers who was present when Eugene died. R. E. and John came after his death, but before the funeral. Mrs. Morbin was present when he died. He died about 1 o'clock Sunday night." Dr. W. T. Stanley testified: "I was called to see Eugene Gullledge on April 15, 1905. He was very sick with pneumonia, and grew steadily worse, and on Sunday morning I told him he was going to die, and that, if he had any business to attend to, he had better attend to it. He did not regain consciousness after 11 o'clock Sunday



morning. He had been unconscious at intervals before that. W. T. Gullledge arrived about 2 o'clock Sunday afternoon." R. E. Gullledge testified: "I am the plaintiff in this action, and a brother of Eugene Gullledge. I lived seven miles from him and our relations were very close. Whenever he wanted anything he came to me. There never had been any unkind feelings or ill will between us. I never got the telegram in the suit. The first I knew of my brother's illness was on Saturday afternoon about 2 o'clock of the 15th inst. It was at White, where we, W. T. Gullledge and I, were building a house. My brother, W. T. Gullledge, was there in his buggy. Had been out to Mr. Ralls, and stayed all night. We were talking business when the man came up with the telegram. It was such a surprise we didn't have time to talk the matter over any. He got into his buggy and pulled out for Hamburg, said he could send me a message when he got there. Q. What was the next information you had? A. I received a message Monday morning, between 8 and 9 o'clock, that was sent from Monticello by telephone, and then telegraphed to White. Q. What did you do then? A. Hitched up and drove through the country out to Monticello. Got there at 6 o'clock. I learned when I got there he was dead. Q. You have stated in your complaint if that telegram was sent on the 13th at 12:25, and had been delivered to you, you would have had time to go to your brother. State what your action would have been had this telegram been sent you and delivered on the 13th or the morning of the 14th? A. Well, if it had been delivered on the 13th, I could have got to my brother, could have gone to Colliston and up to Tillar. Q. The 14th? A. I could have gone in my buggy, if it had been delivered in the morning, and could have seen him that night. I was very much grieved on account of my brother's death. I was also very much grieved not to get the telegram, for it showed that he wanted to see me about his business before he died. It was about some business that nobody else could attend. If the message had been delivered, I could have been at his bedside 36 hours before he died, which would have been a consolation to me. Not getting there caused me mental anguish. If I had seen the message, I would have gone to him. My inability to see my brother for the purpose of business matters was not my greatest grief; that was on account of his death. When the message was delivered to W. T. Gullledge on April 15th, I did not go to my brother's bedside. The message to W. T. Gullledge ran: 'Eugene very low come immediately [Signed] Mrs. W. T. Gullledge.' It was marked delivered at 10:50 a. m. of April 15th, but I think it was about 2 o'clock when it was delivered. White is a town of about 200 or 300 population." This

was all the evidence. There was a jury trial and a verdict for the plaintiff.

Appellant contends that the court erred in refusing to give instructions Nos. 1, 2, and 3 asked by it as follows: "(1) You are instructed to find for the defendant. (2) Before the plaintiff will be entitled to recover in this action any more than merely nominal damages, he must show that the defendant, or its agents, knew when the message was received for transmission, or immediately thereafter, that mental suffering would probably result from a failure to send and deliver the message, and, since the message did not on its face impart such information, you will find for the plaintiff merely nominal damages, unless the evidence shows that such information was given defendant, or its agent, in some other way. (3) You are instructed that the telegram upon which this action is based is a business telegram, and upon its face gave no notice to defendant that any of the parties would probably suffer mental anguish if it was not promptly sent and promptly delivered, and the plaintiff is entitled to recover merely nominal damage, and you will bring in your verdict for the plaintiff for one dollar." There was no error in refusing to give instructions Nos. 2 and 3. The telegram on its face suggested the near relationship of the parties, and gave notice that plaintiff would probably suffer mental anguish if it was not promptly sent and delivered. *Western Union Telegraph Company v. Blackmer* (Ark.) 102 S. W. 366. Ought the court to have directed a verdict for the defendant? In this case evidence was introduced in behalf of the defendant. The testimony for the plaintiff is undisputed. Plaintiff admits that the message sent to his brother W. T. Gullledge was delivered at two o'clock in the afternoon of Saturday the 15th inst., and that he read it at the time. This message apprised him of the fact that his brother was very low. No reason is given why he did not leave at once for his brother's bedside. He knew that he could have gone by train that night, or that he could drive there in ten or twelve hours. His brother did not become unconscious until 11 o'clock the next day, after plaintiff received notice of his condition from reading the telegram to W. T. Gullledge. Had he left at once after receiving notice of his brother's condition, he would have reached his bedside several hours before he became unconscious. His failure to do so was the result of his own indisposition, or lack of ordinary diligence on his part. *Western Union Tel. Co. v. Baker*, 140 Fed. 318, 72 C. C. A. 87; *Western Union Tel. Co. v. Matthews*, 113 Ky. 188, 67 S. W. 849; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 28 Am. St. Rep. 759. Reversed and remanded.

**GARDEN CITY STAVE & HEADING CO.  
v. SIMS.**

(Supreme Court of Arkansas. Nov. 18, 1907.)

**1. LOGS AND LOGGING—CONVEYANCES OF  
STANDING TIMBER—CONSTRUCTION.**

A deed of standing merchantable timber, specifying no time for its removal, conveys, in the absence of proof to the contrary, an estate in the timber, terminable after a reasonable time for the removal thereof, dependent on the circumstances of the parties and the conditions of the land and timber.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 6-12.]

**2. SAME.**

A purchaser of standing timber, under a conveyance executed in 1899 without specifying the time for the removal thereof, continuously cut timber until Christmas of that year, when, on account of the condition of the land, the work ceased. He began cutting again the following year, but was unable to cut as much as the previous year, on account of trouble in procuring men. In 1901 he commenced again as soon as the land got dry enough. The owner of the land was an employé of the purchaser, knew the facts, and made no objection that the time for the removal was not reasonable. *Held*, that a reasonable time for the removal of the timber had not expired in August, 1901.

**3. ESTOPPEL — EQUITABLE ESTOPPEL —  
GROUNDS—REPRESENTATIONS.**

A company purchased standing timber, and the conveyance which fixed no time for the removal thereof was recorded in August 1899. An employé of the company, without authority to bind it, stated to a prospective purchaser of the land that 12 months was a reasonable time for the removal of the timber. One not connected with the company made similar statements, and a director advised the prospective purchaser to purchase without saying anything as to the time in which to remove the timber. *Held*, that the company was not estopped to claim the timber as against the prospective purchaser completing the purchase in January, 1901, it being under no duty to disclose to him what additional time was required to remove the timber.

Appeal from Monroe Chancery Court; John M. Elliott, Judge.

Suit by W. K. Sims against the Garden City Stave & Heading Company. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss the complaint.

This is a suit by appellee to restrain appellant from removing timber from a tract of land in Monroe county, described in the complaint. Appellant and appellee claim from a common source of title. On the 9th day of August, 1899, William Montgomery, by warranty deed, conveyed to appellant the timber of all kinds on the land mentioned in the complaint. The deed was duly acknowledged, and filed for record on the 10th day of August, 1899. On the 16th day of January, 1901, the said William Montgomery conveyed said lands to appellee. This suit was commenced on the 17th day of August, 1901. No time was specified in the deed from Montgomery to appellant in which this timber was to be removed. The court granted a temporary injunction. After all the testimony had been taken, on the 4th day of October, 1905,

the court permitted appellee to file an amendment to his complaint, alleging that appellant, a corporation, had ceased to transact business in the state of Arkansas, and was insolvent, and further alleging that appellant by its conduct and representations was estopped from claiming title to the timber on the lands mentioned in the original complaint. At the October term, 1906, the court entered its final decree restraining the appellant from cutting or removing any timber from the said lands. The other facts are sufficiently referred to in the opinion.

C. F. Greenlee, for appellant. Manning & Emerson, for appellee.

HART, J. (after stating the facts as above). In the case of Liston v. Chapman & Dewey Land Company, 77 Ark. 116, 91 S. W. 27, it was held that "in the absence of something in the instrument itself, or in the proof all-unde showing a contrary intention, a deed to standing merchantable timber, which specifies no time for its removal, conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber, after the execution of the deed, has expired." In that case, the court said: "What is a reasonable time is generally a mixed question of law and fact. The facts are to be ascertained by an inquiry into the conditions of the land and timber, the obstacles opposing, and the facilities favoring, and the conditions surrounding the parties at the time the contract was made."

The testimony shows that appellant's timber cutters commenced work in June, 1899, and cut continuously until about Christmas. That the land was wet and slashy, and that on account of the rains the land became so wet they had to cease work until the following June. In June, 1900, they commenced cutting again, but were not able to cut as much timber as had been cut the previous year, on account of the trouble they had in getting hands. In 1901 they commenced again as soon as it got dry enough, and worked until the injunction was issued. During this time Montgomery was an employé of appellant. He knew the condition of the roads, and that the timber could only be removed with profit during certain seasons of the year. He made no objection that the time was not reasonable. Considering the obstacles in the way, and the conditions surrounding the parties, we do not think a reasonable time had elapsed in which to remove the timber.

Appellee claims that appellant is estopped to claim title in the timber on account of its representations and conduct, and bases his contention on statements made to him by Vantrain, Hooker, and W. C. Fiddymont one of the directors of the appellant company. He says that Hooker and Vantrain told him that appellant was only to have 12 months in which to remove the timber, and that W. C. Fiddymont advised him to purchase the

land, stating that it was a bargain, and did not tell him that appellant claimed more time in which to remove the timber. Hooker says he was only the bookkeeper of appellant, and had no authority to bind it in regard to timber deals, and that he only expressed the opinion to appellee that 12 months was a reasonable time within which to remove the timber. Vantrain was not even an employé of the appellant. He had no connection in any way with the company except to contract with it in regard to cutting timber. The timber deed to appellant was on record at the time of the purchase of the land by appellee, and appellee had constructive notice of its terms. Appellant owed appellee no duty to disclose to him what additional time, if any, it would require to remove the timber.

The chancellor should have dismissed the complaint for want of equity. Reversed and remanded, with direction to dismiss the complaint for want of equity.

### LOUISIANA & A. RY. CO. v. STATE.

(Supreme Court of Arkansas. Dec. 23, 1907.)

#### 1. CONSTITUTIONAL LAW—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATION—STATUTES—REASONABLENESS.

A special act requiring a railroad company to construct and maintain a station at a certain point may be reviewed by the courts as to its reasonableness and whether there is a real public necessity, the determination of the Legislature being conclusive, unless its power has been exercised arbitrarily and without reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 130, 131.]

#### 2. CRIMINAL LAW—PLEA IN ABATEMENT—REASONABLENESS—STATUTES.

A special plea to an indictment against a railroad company for failing to comply with a statute requiring it to construct and maintain a station at a certain point, raising the question of the reasonableness and necessity of the requirement, should be treated as a preliminary plea addressed to the court, raising the question of the validity or invalidity of the statute, and bringing to the attention of the court the facts calling for an investigation of the question.

#### 3. SAME—EVIDENCE.

Evidence tending to show that there was no public necessity for the station, and in connection therewith evidence that it would be maintained at a loss, should be received, under a special plea going to the invalidity of the statute because unreasonable, on a prosecution of a railroad company for failure to comply with a statute requiring it to construct and maintain a station at a certain point.

#### 4. RAILROADS—OFFENSES INCIDENT TO CONSTRUCTION.

Whether the statute requiring a railroad company to construct and maintain a station at a certain point is invalid as an unreasonable and arbitrary exercise of power is a preliminary question for the court, on all the information it can obtain, on a prosecution of the company for failure to comply with the statute.

#### 5. SAME—PLEA OF MISNOMER—DISPOSAL.

An indictment being returned against the L. & A. "Railroad" Company, under the act of 1905, requiring it to construct and maintain a station at S. crossing, the court on finding that the indictment was directed against the L. & A. "Railway" Company, the only company owning or operating a railroad at that point, properly

ly made an order, under Kirby's Dig. § 2232, that the subsequent proceedings under the indictment be in its name.

#### 6. SAME—OFFENSES—PROSECUTION BY INDICTMENT.

It being expressly stated by the act of 1905 (Laws 1905, p. 285), requiring a railroad company to construct and maintain a station at a certain point, that failure of the company to comply with its terms shall subject it to indictment and fine, the prosecution of it by indictment is proper.

#### 7. CRIMINAL LAW—VENUE.

The offense of a railroad company in failing to comply with an act requiring it to construct and maintain a station at a certain point on its line is committed in the county where such place is situate, and not in another county where the executive officers of the company transacted its business.

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

The Louisiana & Arkansas Railway Company was convicted of an offense, and appeals. Reversed and remanded for further proceeding.

The General Assembly of this state in 1905 (Laws 1905, p. 285) passed an act entitled "An act locating and establishing a regular station and requiring the building and construction of a depot, and the maintaining thereof, at Snow Crossing, in Columbia county, Arkansas, by the Louisiana & Arkansas Railroad Company, and requiring trains of cars, passenger and local freight on said railroad, to stop there and receive passengers and freight, and prescribing penalties and damages for violations" of the act. The act, in addition to requiring the construction and maintenance of the depot at Snow Crossing, provided that a failure on the part of the company to comply with the provisions of the act should constitute a misdemeanor, and be punishable by fine. The company failed to construct a station or depot, as required by the act in question, and the grand jury of Columbia county in 1906 returned an indictment against it, alleging in substance that the defendant company failed to maintain a regular station of any kind at Snow Crossing. The indictment named the Louisiana & Arkansas Railroad as defendant. Summons was served in Columbia county on a station agent of appellant, Louisiana & Arkansas Railway Company, and appellant appeared and filed a special plea in abatement and motion to quash the indictment on the ground that the charter of the Louisiana & Arkansas Railroad had expired, and that appellant company was not amenable to the indictment against that company. The court overruled the plea and motion, and ordered that subsequent proceedings under the indictment be in the name of the Louisiana & Arkansas Railway Company. Appellant also demurred to the indictment, and the same was overruled. It thereupon filed a general plea of not guilty, and in addition a special plea containing the following statements: "It states that the company around Snow Cross-

ing is principally wild and uncultivated and sparsely inhabited; that the cleared land is devoted principally to the raising of cotton, which cotton is hauled to the neighboring towns of Magnolia and Lewisville, where the farmers purchase their supplies; that the station of Experiment is situate about  $2\frac{1}{2}$  miles north of Snow Crossing, and that passengers and freight are received and discharged at such station; that the station of Taylor is situate  $4\frac{1}{2}$  miles south of Snow Crossing on the line of said railway company; that there is a depot building and telegraph operator with passenger and freight agent employed at said station; that the two stations of Experiment and Taylor furnish to the inhabitants contiguous to Snow Crossing ample facilities to board the trains as passengers or to ship their freight, and that to force the railroad to maintain a regular station at Snow Crossing would require three stations maintained by said railway company within seven miles in a sparsely settled region; that to erect a station at Snow Crossing would cost approximately \$1,000; that to maintain same would cost \$75 to \$100 per month, and that the receipts from freight and passengers at such station would meet only a small proportion of the cost of maintenance, and that such station would have to be operated at a monthly loss to the railway company; \* \* \* that Snow Crossing is located at the foot of a very heavy grade on the line of said Louisiana & Arkansas Railway Company—the heaviest grade at any point on said line; that because of the topography of the country it would be impracticable, with very great expense, to provide side tracks and passing tracks at said point, as required by said Act No. 105; and that to attempt to comply with said act by stopping all freight and passenger trains would, by reason of said hill and steep grade, add greatly to the danger of accidents to passengers and employes upon said railway.” The special plea was stricken out by the court on motion of the state. The case was tried before the court sitting as a jury, and the state introduced proof establishing the fact that appellant had not complied with the requirements of the statute. Appellant offered to introduce evidence to sustain the allegations of its special plea, but the court refused to hear the evidence. The court then made a finding that the defendant was guilty as charged in the indictment, and assessed a fine of \$25 against it, and the defendant appealed. The Attorney General confessed error of the trial court in refusing to consider the appellant's special plea.

Moore & Moore, for appellant. S. H. West and Bridges, Wooldridge & Gantt, amicus curiæ. Wm. F. Kirby, Atty. Gen., and Danl. Taylor, Asst. Atty. Gen., for the State.

McCULLOCH, J. (after stating the facts as above). The principal question involved in

this appeal is whether or not a special act of the Legislature requiring a railroad company to construct and maintain a station at a given point on its line is subject to review by the courts; whether the reasonableness or unreasonableness of such legislation may be presented to the courts for review as a judicial question; or whether the courts are bound to accept as final the determination by the Legislature that there is a public necessity for a station at the place named in the act, and that the requirement upon the railroad company to construct and maintain one there is reasonable. Upon this precise question there is scarcely a precedent in the adjudged cases, and it is well nigh a question of first impression. It is well settled that the legislative exercise of the police power, including the regulation and control of railroads and other public-service corporations, must be reasonable, and whether or not such legislation is reasonable is a question for the courts to determine. *Wisconsin, etc., R. R. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *St. L. & S. R. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Minn. & St. L. Ry. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Atl. C. L. Ry. Co. v. North Carolina Corp. Com.*, 27 Sup. Ct. 585, 52 L. Ed. —. An interesting and instructive discussion on the subject is found in the opinion of Mr. Justice White in the recent case of *Atl. C. L. Ry. Co. v. North Carolina Corp. Com.*, *supra*, which perhaps contains the latest utterances of that court on the subject. That case involved the action of a commission and not a regulation by direct legislation. It is there said: “As the public power to regulate railways and private right of ownership of such property coexist, and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and therefore whenever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such as exertion of power is void because repugnant to the due process and equal protection clause of the fourteenth amendment. \* \* \* In coming to consider the question just stated, it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws.” Mr. Tiedeman,

in his work on State and Federal Control of Persons and Property (volume 2, p. 987), sums up the established doctrine as follows: "It is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the Legislature; but whether a given regulation is a reasonable restriction upon personal rights is a judicial question." The authorities cited above deal with the question of judicial review, either of general statutes passed in the exercise of the public power, or of the exercise by boards or commissions of the powers delegated to them by such general statutes. They do not reach to the question of judicial review as to the reasonableness of a special statute passed by the Legislature in the exercise of its control over public-service corporations, requiring the corporation to do a certain thing, such as the construction and maintenance of a station at a particular place on its line.

That the Legislature has the general power of supervision of railroads, and the power to require them to establish and maintain stations at points designated by the Legislature, cannot be doubted. It is equally true, however, that such power must be exercised reasonably, and with due regard to the rights of the corporations, for they have rights which Legislatures as well as courts must respect. But who is to be the judge whether or not the power has been reasonably exercised by the Legislature? Is the Legislature to be the sole judge of the propriety of its action in the matter, or can the courts review the action and decide whether the power was exercised reasonably or unreasonably and arbitrarily? If the Legislature determines that the public convenience or necessity reasonably demands the maintenance of a station at a given place, and passes an act requiring the railroad company to establish and maintain one there, is that determination conclusive of the necessity for a station at that place, or can the courts review that determination? We think that the power of the Legislature in this respect, and the degree of conclusiveness to be accorded to its determination of the necessity and propriety of its action, is the same as in other instances where the Legislature is to determine the facts which call for direct legislation. The greatest latitude should be given to the lawmaking body in determining the necessity for its action, but that power must not be exercised arbitrarily and without reason. The power of the Legislature over the subject of special taxation for local improvements is unquestioned. The Legislature has the power to determine for itself the boundaries of a locality to be benefited, the extent of the benefits, and the amount of tax to be levied on each piece of property; but this court holds that that power, when arbitrarily and unreasonably exercised, is not beyond judicial control. *Coff-*

*man v. St. Francis Drainage Dist.*, 108 S. W. 179. We approve the doctrine stated by the Supreme Court of the United States in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443: "But the power of the Legislature in these matters is not unrestricted. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go inconsistently with the citizen's right of property." That principle is applicable here. Where the Legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for legislative determination, and that determination should not be disturbed by the court, unless the power has been exercised arbitrarily and without reason. In other words, the legislative determination should be and is conclusive, unless it is arbitrary and without any foundation in reason and justice. There may be cases where the power is exercised so arbitrarily and unreasonably that the court should declare, as a matter of law, that the Legislature exceeded its power, and that the legislative determination should be disregarded. This principle is, we think, clearly recognized by the decisions of the Supreme Court of the United States in the cases involving the validity of legislation directly fixing rates for transportation of passengers and freight. *Dow v. Beldelman*, 125 U. S. 680, 8 Sup. Ct. 1023, 31 L. Ed. 841; *St. L. & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Chicago Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Smyth v. Ames*, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819; *Covington, etc., Turnpike v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560. The application of the principle is necessarily somewhat different in the case of a general rate-making statute from a statute imposing duties like that imposed in this case, but the principle is the same.

This brings us to a consideration of the questions whether or not the appellant in this case offered to bring to the attention of the court facts sufficient to show that there is no public necessity for a station at Snow Crossing, and that the requirements of the legislation in that respect are so arbitrary and unreasonable as to demand a judicial review so as to relieve the railroad company from compliance therewith. The rejected evidence tended in substance to show that there was no public necessity at all for the maintenance of a station at Snow Crossing; that the land around that place, which is not a point of intersection of two railroads, but is only the crossing of a country road over the railroad, is principally wild, uncultivated, and sparsely settled; that

there is such a heavy natural grade at that point on the road as would render it, not only very expensive to build side tracks, but would add greatly to the danger of accidents in stopping trains; that there is now a flag station on appellant's line  $2\frac{1}{2}$  miles north of Snow Crossing, and also a regular station  $4\frac{1}{2}$  miles south of Snow Crossing, where there is a depot building, and where a telegraph operator and passenger and freight agent is kept; that these two stations provide suitable, convenient, and ample transportation facilities to the people near Snow Crossing; and that the cost of erecting and maintaining a station at that place would be greatly in excess and out of proportion to the revenues which could possibly accrue from the business at that place, and that the station would have to be operated at a monthly loss to the company. Now this evidence tended to show that there is no public necessity for a station at the place named, and the court should have heard and considered it for the purpose of determining whether or not the statute was a valid exercise of power by the Legislature. As we have already stated, the authority of the Legislature to regulate railroad companies, and to compel them to establish stations and build depots whenever the public necessity and convenience requires, is not disputed; and, as the Legislature has that right and power, the presumption is that it exercised it in a proper case, and that the public convenience required the station at that place. But that presumption was not conclusive. The burden to show that there was no necessity for a station at that place was on the company, and it had the right to be heard on the question whether the act of the Legislature was an arbitrary and unreasonable exercise of the legislative power, which would result in putting the company to useless expense. As the Legislature had no power to confiscate or deprive the company of its property, where no public necessity requires it, it is plain both from reason and authority that it had no right to arbitrarily require a railway company to establish stations at places not required by public convenience or necessity. So if, after considering all the facts and circumstances, giving due consideration to the determination of the Legislature, and resolving every doubt in its favor, the court should be convinced that there was no public necessity for a station there, and that the result of enforcing the act would be to put the defendant to large expense without any corresponding benefit either to it or the public, then the Legislature had no right to make such requirement, and the court should so declare as a matter of law.

The utmost force must be given to the legislative determination of the necessity for a station, and the reasonableness of requiring the company to erect and maintain one;

but appellant presented a question for judicial review, and for the court to refuse a consideration would be to deny it the equal protection of the law, and would, in effect, be depriving it of its property without due process of law. The fact, if proved, that the cost of erecting and maintaining the station would be greatly in excess of and out of proportion to the revenues to be possibly derived from the business at that place, does not of itself render the requirement unenforceable. That fact, however, would be important for the court to consider in determining whether or not the requirement was arbitrary and unreasonable, and whether or not there is any corresponding necessity for a station. The Supreme Court of the United States in the case of *Atl. C. L. Ry. Co. v. North Carolina Corp. Com.*, supra, said of this particular question: "As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case when the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames*, supra, or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criterion to be taken into view in determining the reasonableness of the order, but it is not the only one."

But how, it may be asked, is the question to be presented and determined whether the statute is a proper exercise of legislative powers and valid? Is the validity of the statute a question of law or one of fact? We answer that it is a question of law for the determination of the court. The court may, however, and should, call to its aid all the available facts and information concerning the public necessity for the maintenance of a station at that place, the cost of erecting and maintaining it, as well as any other facts tending to show whether there is a necessity for a station, and whether the requirement placed upon the company to build and maintain it is a reasonable one. But when the court becomes convinced upon the question whether the legislative power has or has not been reasonably exercised, then it should declare whether or not the statute is valid. This should be done by the court as a preliminary question, before submitting to the jury the question of fact whether or not the terms of the statute had been complied with. The special plea offered by appellant should not have been stricken out, but should have been treated as a preliminary plea addressed to the court, rais-

ing the question of the validity or invalidity of the statute, and bringing to the attention of the court the facts calling for an investigation. The court is not bound by the facts presented by appellant in its attack upon the validity of the statute. It should possess itself of all the information obtainable before it undertakes to set aside the enactment of the Legislature, for the public is interested in the question of validity of statutes, and the court should not confine itself in its investigation to the facts presented or agreed upon by the parties to the particular litigation in which the validity of the statute is called in question. *Chicago, etc., Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176. A number of other points are discussed, but we find no other error in the rulings of the court.

The act required the "Louisiana & Arkansas Railroad Company" to establish the station, while the correct name of the defendant is the "Arkansas & Louisiana Railway Company." But as Snow Crossing is a point where defendant's railroad passes over a public highway, and as no other railroad company owns or operates a railroad at that point, it is evident that the defendant is the company referred to in the act. The indictment was returned against the Louisiana & Arkansas Railroad, but the court found that the indictment was directed against appellant, and made an order that the subsequent proceedings under the indictment should be in the true name of appellant. This course is expressly authorized by statute, where an error occurs in stating, in an indictment, the name of the party accused. *Kirby's Dig.* § 2232. The act expressly states that a failure of the company to comply with its terms shall subject it to indictment and fine, and we think that the procedure by indictment was proper.

It is contended that appellant had its domicile in another county, where the executive officers transacted the business of the company; that, as a corporation can act only through its officers, the omission to comply with the terms of the statute occurred in the county of the domicile of the corporation, and not in Columbia county. We think, however, that as appellant was operating its line of railroad through Columbia county, and the Legislature required it to build the station at a point in that county, the offense, if any, was committed in that county. Any other view would obstruct, and perhaps in some cases entirely prevent, the enforcement of legislative enactments exercising the police power in the regulation of public-service corporation. It is contended that under the peculiar language of the statute the defendant cannot be punished by more than one fine for the failure to establish the station; but that point is not before us in this case.

Reversed and remanded for further proceedings.

## PINDALL v. WATERMAN.

SAME v. SCHMIDT et al.

(Supreme Court of Arkansas. Dec. 16, 1907.)

PAYMENT—RECOVERY—DURESS—RIGHT OF ACTION—HARDSHIP.

An industrious penurious man about 60 years of age, who had accumulated an estate of about \$8,000, committed murder and was charged therefor. Mob violence was threatened, wherefore the murderer was imprisoned. He grew haggard, and at times seemed unconscious of what he was doing. In this condition, defendants visited him, and received from him about \$7,000 in notes and mortgages and stocks, as fees for legal services to be rendered in his defense. Defendants sued out a writ of habeas corpus, and secured their client's discharge on bail, shortly after which he committed suicide. No effort to show that the fees were reasonable was made, defendants contending that they made the contracts, and have at all times been ready to perform the services. *Held*, that the notes and securities should be canceled, and defendants paid only reasonable amounts for the services actually rendered, since, in the absence of explanation, the fees and promises were unreasonable and oppressive.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 39, Payment, §§ 283-286.]

Appeal from Desha Chancery Court; J. C. Norman, Chancellor.

Actions by H. J. Schmidt and Gus Waterman, administrators, against E. S. Pindall and X. O. Pindall. From decrees in favor of plaintiffs in each case, defendants appeal. Affirmed.

H. M. Armistead, for appellants. F. M. Rogers, for appellees.

BATTLE, J. The above suits grew out of the same facts, and involved the same principles of law and equity, and have been submitted for our consideration upon the same briefs.

The facts as shown by the evidence adduced in these causes are substantially as follows: J. J. Schmidt resided in Desha county, in this state. He was about 60 years old; was industrious and penurious, and acquired an estate of about the value of \$8,000. He killed R. H. Willis, another citizen of Desha; he was arrested, charged with murder in the first degree. "Excitement was very high immediately after the killing. Mob violence was threatened and feared." He was hurried away to Arkansas City to avoid the mob. He underwent a great change on account of the trouble and excitement following the killing. Witnesses say he seemed to be dazed and stunned, and not the same man he had been. He looked haggard and broken. His voice did not sound natural. He appeared to be in great trouble. He was nervous and excited. One witness says he impressed him as a man who did not know exactly what he was doing. He says: "After having been carried to dinner and then back to the courthouse for supper he turned and went in the wrong direction. He didn't seem to know the way to the hotel." Wit-

nesses differed as to his sanity, but the majority thought he was sane. He was imprisoned in jail. While incarcerated, E. S. Pindall and X. O. Pindall, two attorneys, presumably at his request, had an interview with him, while in the condition before stated. The result was he executed a note to E. S. Pindall for \$5,000 for a fee for services to be rendered in defending Schmidt against the charge of killing Willis, and a mortgage on lot 6 in block 7 in Evan's addition to the town of Dumas, and the southwest quarter of section 34 in township 9 south, and range 4 west, of the value of \$5,000, which constituted all the real estate owned by Schmidt; and X. O. Pindall, associated with E. S., received for services to be rendered in the same behalf the promissory note of the Dumas Mercantile Company for \$500, and 40 shares in the stock of the Bank of Dumas, of the par value of \$25 each, and \$500 in money, and a draft on the Dumas Mercantile Company for \$500, leaving Schmidt, out of an estate of \$8,089.60, \$1,089.60, represented by a small amount of cash, some rent notes not due, two mares, some farming implements, a lot of household furniture, two mule colts, and a saddle. For the fees so secured the Pindalls, in part performance of their contract, sued out a writ of habeas corpus, and caused Schmidt to be admitted to bail in the sum of \$5,000, and his discharge from imprisonment. In two days thereafter Schmidt was found dead, hanging by the neck in his barn. He died intestate, leaving H. J. Schmidt his only son and heir surviving. Gus Waterman was appointed the administrator of his estate.

H. J. Schmidt, heir, Gus Waterman, as administrator of J. J. Schmidt, deceased, brought suit in the Desha chancery court against E. S. Pindall and X. O. Pindall to set aside the note and mortgage executed to E. S. Pindall, and, among other things, state as follows:

"Plaintiffs say at the time the defendants procured said Schmidt's signature to said note and mortgage said Schmidt was not indebted to said E. S. Pindall in any sum.

"Plaintiffs say that at the time defendants procured the signature of said Schmidt to said note and mortgage said Schmidt was insane, and by reason of his insanity was incapable of entering into a valid and binding contract.

"Plaintiffs say that plaintiff H. J. Schmidt is the owner in fee simple of said land, subject to such interest as his coplaintiffs may have therein for the purpose of administration.

"Plaintiffs say that defendant E. S. Pindall is a practicing attorney at law; that at the time defendant procured said note and mortgage from said Schmidt the latter was confined in the jail of Desha county, upon a charge of murder in the first degree; that defendant claims that he was employed by

said Schmidt to defend him upon said charge in all the courts to which same might be carried; and that property was delivered to him in payment for services to be rendered. Plaintiffs say that the only service which defendant rendered said Schmidt was in appearing before the county judge of Desha county in habeas corpus proceedings, by which Schmidt was granted bail in the sum of \$5,000; that within two days after executing said bail and being released from jail said Schmidt died, committing suicide by hanging himself.

"Plaintiffs say that by reason of the death of said Schmidt the service to be rendered which defendant claims is the consideration for which said note and mortgage was delivered to him cannot be performed; that said consideration has failed, and that defendant has not given nor can he give any consideration for said sum; that if defendant claims said note and mortgage was delivered to him under contract to be true defendant is not entitled to retain nor enforce same because said contract is now impossible of performance.

"Plaintiffs further say that at the time at which defendant claims to have entered into said contract with said Schmidt the latter was insane, and by reason of his insanity could not make a valid and binding contract, it is null, and that defendant acquired no lien on said property thereby."

The defendant E. S. Pindall answered in part as follows:

"The defendant denies that the note and mortgage to him was without consideration, and says that at the time it was made the defendant Schmidt employed said E. S. Pindall and X. O. Pindall to defend him on the charge of murder in the first degree, and states that this defendant, and X. O. Pindall, his codefendant, are attorneys at law, practicing in the courts of Desha county, and in other counties of the state, and in the Supreme Court of the state of Arkansas.

"Defendant denies that the said Schmidt at the time of executing the note and mortgage was insane, and therefore incapable of entering into a valid and binding contract.

"Defendant, further answering, pleads the truth of this matter to be as follows: Said Schmidt being charged with the crime of murder in the first degree and arrested on said charge employed this defendant, who is an attorney at law, as stated, as one of his attorneys to defend him; that it was expressly agreed between this defendant and the said Schmidt that this defendant's retainer should be \$5,000, and said Schmidt executed the note and mortgage in question as payment and security for payment of said sum; the contract being thereupon consummated, this defendant entered into the discharge of his employment, and has performed all the services required of him under



said employment; that the note and mortgage belong to this defendant."

In this case the court found that the allegation of insanity was not sustained; that by the death of Schmidt the consideration of the note and mortgage had failed, but that E. S. Pindall had received no compensation for his services in the habeas corpus proceedings, and that such services were reasonably worth \$500; that E. S. Pindall was indebted to the estate of Schmidt for the occupation of the residence of the deceased in the sum of \$72, and ordered and decreed that plaintiff pay to him (E. S. Pindall) the sum of \$428, and upon payment thereof that E. S. Pindall cancel the mortgage on record, and deliver the same and the note to plaintiffs.

Gus Waterman, as administrator of the estate of J. J. Schmidt, deceased, also brought a suit in the Desha chancery court against X. O. Pindall to enjoin him from assigning and disposing of the property delivered to him by Schmidt, and the Bank of Dumas from entering upon its books any assignment of the stock transfer to the defendant, and the Dumas Mercantile Company from paying its said note, and, upon final hearing, to require the defendant to deliver to plaintiff said note, stock certificate, and \$500 delivered to him by Schmidt; and, for reasons for so asking, made substantially the same allegations as are contained in the complaint in the suit brought by H. J. Schmidt, heir, and Gus Waterman, as administrator.

The defendant X. O. Pindall, answering, denied "that he has in his custody money and chattels belonging to the estate of J. J. Schmidt, the deceased, as alleged; denies that the title to said property was in J. J. Schmidt at the time of his death; denies that at the time the defendant procured possession of said property from the said Schmidt that the said Schmidt was insane, and therefore incapable of making a valid and legal contract; admits that defendant is a practicing attorney at law, and that at the time he procured said property from said Schmidt the latter was confined in the Desha county jail on charge of murder in the first degree.

"This defendant says that he is a lawyer practicing at the bar of Desha county and other counties in the state of Arkansas, and the Supreme Court of the state of Arkansas; that the said Schmidt was charged with the commission of the crime of murder in the first degree, and arrested on said charge and incarcerated in jail; that he employed this defendant as one of his attorneys to defend him upon said charge upon an express consideration expressed in the contract at the time it was made and paid at the time, said consideration being a promissory note for \$500, a certificate for 40 shares in the Bank of Dumas, and \$500 in money, and a draft on the Dumas Mercantile

Company for \$500; that this defendant has duly performed said contract upon his part, and holds nothing belonging to the estate of the said J. J. Schmidt in his hands."

In this case the court found that J. J. Schmidt, prior to his death, paid X. O. Pindall \$500 in cash, and delivered to him the promissory notes and bank stock described in the complaint for services to be rendered in defending him against charges for killing Willis; that the allegation as to the insanity was not sustained by the evidence; that the performance of the contract of Schmidt and Pindall "had become impossible of performance"; and that the \$500 paid Pindall in cash was full and adequate compensation for all services rendered Schmidt by him; and ordered and decreed that defendant Pindall deliver to plaintiff the notes of the Dumas Mercantile Company for \$500, the certificate for 40 shares in the Bank of Dumas, and the note executed by Schmidt to Pindall for \$500; and ordered and decreed that the Dumas Mercantile Company and the Bank of Dumas be restrained and enjoined as the plaintiff prayed for in his complaint.

Professor Page says: "Inadequacy of consideration may be found in connection with circumstances of oppression which do not amount to technical duress; and the combination may justify a finding of undue influence. Thus, a transaction entered into under great mental distress, caused by domestic calamity \* \* \* will be relieved against in equity. The propriety of relief is especially clear if, under great mental distress due to the death of her husband, the person seeking relief is induced by threats of violence to relinquish a legacy given her by her husband's will for an inadequate and nominal consideration. So, a transaction entered into for an inadequate consideration, by taking advantage of the financial necessities of the party seeking relief, will be relieved against in equity." 1 Page on Contracts, § 228, and cases cited.

Mr. Freeman, in his notes to Hough's Administrators v. Hunt, 2 Ohio, 495, 15 Am. Dec. 572, says: "There is a large class of cases in which courts of equity will rescind contracts which are against some public policy, where an unconscientious advantage has been taken, by one of the parties, of the condition or circumstances of the other party, when there is gross inadequacy of consideration, or when there has been imposition or oppression practiced upon a person who had reposed confidence in the party who had abused it. The ground on which a court of equity affords relief in such cases is that while there may not have been any actual fraud practiced by either party to such contract, yet there has been a constructive fraud perpetrated upon the party to the contract who, from any cause, may not have stood upon an equal footing with the person with whom he has contracted."

In *Robinson v. Sharp*, 201 Ill. 86, 92, 66 N. E. 299, 302, while the relation of attorney and client existed, the court did not place its judgment entirely upon that ground. The court said: "That the appellees, in entering into the agreement to pay one-half of the insurance money to the appellant, were actuated by serious apprehensions as to the possibility or probability of collecting anything thereon must be admitted. The chancellor believed, from the proof, that such apprehensions were aroused by the appellant. That there was ground for such fear is beyond question, and there is nothing in the evidence to show that appellant had any reason to believe or did believe that any litigation or contention would arise to prevent, or even delay, the collection of the policies. The amount contracted was clearly oppressive and unjust, and the chancellor correctly ruled that appellees should be relieved from the obligation of the contract, and that appellant was entitled to a reasonable compensation for the service performed."

In *Kelley v. Caplice*, 23 Kan. 474, 33 Am. Rep. 179, the syllabus is as follows: "On June 11, 1875, C. was indebted to K. & M. in the sum of \$800; at the time C. had in his possession an indorsement policy issued by an insurance company, insuring his life in favor of his wife. In consideration of the satisfaction of this indebtedness and \$275, C. and his wife executed a written assignment of the policy to M., and delivered the policy and assignment to him, and thereby transferred all their right, title, and interest in the policy. Afterward M. paid to the company all subsequent premiums and premium notes. The policy matured May 12, 1878. The amount due thereon was \$1,477.73. K. & M. demanded this sum of the insurance company, but it refused to pay without Mrs. C.'s receipt on the back of the policy. Mrs. C. refused to sign her name, unless she was paid \$477.73, when the policy was collected. In compliance with this extortionate demand, K. executed to Mrs. C. his written promise to pay to her this sum on the payment of the policy, and M. guaranteed the payment of the money within 10 days after the policy was paid. When the policy was paid, K. & M. refused to comply with their written promise. Mrs. C. brought her action thereon, and the court gave her judgment for the full amount, interest and costs. Held, that Mrs. C. availed herself of the situation in which K. & M. were placed to exact an unreasonable sum—an unconscionable bargain. She cannot enforce their written promise, but may recover what is fairly due her for the inconvenience or service in writing her signature."

The court said: "The mind revolts at the enforcement of such a promise, and as the courts as a rule, under such circumstances, seize upon the slightest act of oppression or advantage to set at naught a promise thus

obtained, we are of opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement."

In this case Schmidt was a man about 60 years of age. He was sober, industrious, and penurious, and accumulated an estate of the value of about \$8,089.60. He killed a man; was charged with murder in the first degree. The excitement caused by it was very high, and mob violence was threatened and feared. He was arrested and imprisoned. On account of the excitement and trouble experienced by him he grew haggard, worn, and, at times, looked dazed and unconscious of what he was doing. In this condition E. S. and X. O. Pindall, two lawyers, together visited him, presumably at his invitation, and received from him as security and payment for fees property worth about \$7,000, and his note for \$500, leaving property worth only \$1,089.69. In a few days thereafter, to relieve himself of the troubles and excitement then torturing him, he ended his life by suicide. Property and life ceased to have any value with him, although before that time he had been penurious. While in this condition, the Pindalls received of him what, in the absence of an explanation, seems to be unreasonable, oppressive, and exorbitant fees and promises to pay fees, which come within that class of transactions against which equity will relieve. No effort to explain or show that the fees were fair and reasonable was made. They alleged that they made the contracts, and have at all times been ready to perform the service they contracted to render. This is their defense. It is not sufficient.

Decrees in both cases affirmed.

#### SHERRILL v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1907.)

##### 1. FISH—WRONGFUL TAKING OF FISH—STATUTES—REFEAL.

Act June 26, 1897 (Kirby's Dig. § 3600), prohibits the placing of fish traps in waters of the state, except in unnavigable streams where such traps do not obstruct the free passage of fish up and down the streams. Act May 23, 1901 (Kirby's Dig. § 3602), prohibits the ownership, control, use, or construction of fish traps in any river or creek of the state, making no exceptions. Held, that the latter statute repealed the former so far as the placing of fish traps was concerned.

##### 2. INDICTMENT AND INFORMATION—SUFFICIENCY—WORDS OF STATUTE.

An indictment need not use the precise words of the statute, if words of like import are used, and all the facts constituting the offense are stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 289-294.]

##### 3. FISH—WRONGFUL TAKING OF FISH—CRIMINAL PROSECUTIONS—INDICTMENT—SUFFICIENCY.

Act May 23, 1901 (Kirby's Dig. § 3602), makes it unlawful for any person to own, con-

trol, use, or construct in any river or creek of the state, a fish trap for the purpose of catching fish therewith. *Held*, that an indictment charging that defendant unlawfully placed a fish trap in a certain river and caught fish with it was sufficient, though not alleging that the trap was placed in the river for the purpose of catching fish therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, § 28.]

#### 4. SAME — STATUTES — CONSTITUTIONALITY — POWER TO PROTECT AND REGULATE.

Act May 23, 1901 (Kirby's Dig. § 3602), prohibiting the using of fish traps in any waters of the state, except in certain counties, is not unconstitutional, because granting to the citizens of such counties privileges and immunities not extended equally to all other citizens, since the Legislature may, in the exercise of the police power, put into operation game and fish laws in localities where they are needed, and such laws apply in such localities to all persons equally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, § 16.]

Appeal from Circuit Court, Garland County; S. W. Leslie, Special Judge.

Frank Sherrill was convicted of illegally catching fish in a trap in the public waters of the state, and appeals. Affirmed.

C. V. Trague, for appellant. William F. Kirby, Atty. Gen., and Danl. Taylor, Asst. Atty. Gen., for the State.

McCULLOCH, J. Appellant was tried and convicted under the following indictment: "The grand jury of Garland county in the name and by the authority of the state of Arkansas accuse Frank Sherrill of the crime of placing a fish trap in the Ouachita river, committed as follows, to wit: The said Frank Sherrill, in the county and state aforesaid, on the 27th day of November, A. D. 1906, did unlawfully place and erect and cause to be placed and erected in the waters of the state of Arkansas, to wit: Ouachita river, and then and there unlawfully did catch fish with said trap as aforesaid, said fish not then and there being caught for family use, nor for a picnic, against the peace and dignity of the state of Arkansas." A demurrer to this indictment was overruled, and appellant excepted.

One of the statutes on this subject reads as follows: "No person shall be allowed to place, erect or cause to be placed or erected in any waters of this state, or in front of the mouth of any stream, slough or bayou, any semi-net, gill-net, trammel-net, set-net, bag-weir, bush-drag, any fish-trap or dam, or any other device or obstruction, or by any such means to take or catch any fish in the waters of this state. Provided, the prohibition of this section shall not apply to waters wholly on the premises belonging to such person or persons using such device or devices. \* \* \* Nor shall it be unlawful for any person or persons to place traps in the unnavigable streams in this state, provided such traps do not obstruct the free passage of fish in ascending and descending such streams." Act June 26, 1897 (Kirby's Dig. § 3600).

Subsequently the Legislature enacted the following statute, viz.: "It shall be unlawful for any person, persons, or corporation, to own, control, use or construct, in any river or creek of this state, any fish-trap for the purpose of catching fish therewith. Every person or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars, nor more than fifty dollars, and that each violation of this act shall constitute a separate offense. Provided, that this act does not apply to the counties of Conway, Arkansas, Saline, Clay, Madison, Little River, Yell, Poinsett, Lincoln, Cleveland, Lawrence, Union, Carroll, Grant, Pike, Izard, White, Randolph, Calhoun, Bradley, Fulton, Marion, Phillips, Dallas, Baxter, Chicot, Lonoke, Johnson, Ouachita, Independence, Sharp, Miller, Pope, Newton, Cleburne, Van Buren, Searcy, Hot Spring and Stone." Act May 23, 1901 (Kirby's Dig. § 3602).

It is evident from a perusal of the indictment that it was framed to meet the provisions of the first-named statute just quoted, and to charge a violation of that statute. It will be seen, however, that the statute subsequently enacted is inconsistent with the terms of the prior one, so far as it prohibits the placing and maintenance of fish traps is concerned, hence the prior one is to that extent repealed thereby. The last statute makes it unlawful to "own, control, use or construct, in any river or creek of this state, any fish-trap for the purpose of catching fish," whether such stream be navigable or unnavigable, and whether such traps obstruct the free passage of fish or not. The indictment cannot, therefore, be sustained under the statute with reference to which it seems to have been framed. If, however, the allegations thereof are sufficient to charge a violation of the last-named statute, which we hold was the only one in force in Garland county, there is no reason why it should not be upheld. The essential elements of an offense under the statute are that the person accused in the indictment did "own, control, use, or construct, in any river or creek of this state, a fish-trap for the purpose of catching fish therewith." The indictment charges in apt words that appellant unlawfully placed and erected in the waters of Ouachita river a fish-trap, and unlawfully caught fish with said trap. The precise words of the statute need not be used, if words of like import are used, and all the facts which constitute the offense are stated. *Richardson v. State*, 77 Ark. 321, 91 S. W. 758. It is not alleged in the indictment in so many words that the trap was placed in the stream "for the purpose of catching fish therewith," but it is alleged that defendant placed the trap in the river and caught fish therewith. It would be putting form of expression over substance to say that such an allegation is not equivalent to charging that the trap was placed in the stream for the purpose of catch-

ing fish. Taking the whole language of the indictment together, it is alleged with reasonable certainty that the defendant placed a fish trap in the waters of Ouachita river for the purpose of catching fish. The allegations to the effect that the fish were not caught for family use, nor for a picnic, are wholly foreign to the charge, and must be rejected as surplusage. We think that the indictment charged an offense, and that the demurrer was properly overruled. It is conceded that the evidence was sufficient to sustain a conviction under section 8602, Kirby's Dig., and that the court submitted this case to the jury under that statute.

Counsel for appellant contend that the statute in question is void because of the exemption in favor of the counties named therein. They argue that the exemption operates in favor of the citizens of those counties, and is in violation of the Constitution, a grant to them of privileges and immunities not extended equally to all other citizens. We do not think the statute has that effect. The Legislature may, in the exercise of the police power, put into operation game and fish laws in localities where they are needed or applicable, and such laws apply in such localities to all persons equally. In counties or localities where the law does not extend all persons alike may enjoy the exemption. In other words, all persons are forbidden the use of fish traps in the counties named, and all persons may use them in the exempted counties.

**Affirmed.**

#### STATE v. SCOGGIN.

(Supreme Court of Arkansas. Dec. 23, 1907.)

#### EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—CAPACITY IN WHICH PROPERTY WAS RECEIVED OR HELD.

Kirby's Dig. § 1837, provides that, if any agent of any incorporated company shall embezzle any money which shall have come to his possession or custody by virtue of such agency, he shall be deemed guilty of larceny. Section 2241 provides that the words used in a statute to define an offense need not be strictly pursued in an indictment. Section 2242 provides that words used in an indictment must be construed according to their usual acceptation. *Held*, that an indictment for embezzlement alleging that defendant was the agent of a railway company, and that, "having then and there in his custody and possession as such agent" certain money, did embezzle the same, etc., sufficiently charged that the funds came into defendant's possession and custody by virtue of his agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, §§ 47-50.]

Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

J. H. Scoggin was indicted for embezzlement. A demurrer to the indictment was sustained, and the state appeals. Reversed.

The appellee was indicted in the Conway circuit court for embezzlement. Omitting the formal parts, the indictment is as follows:

"The said J. H. Scoggin, in the county and state aforesaid, on the first day of August, 1906, then and there being over the age of sixteen years, and being the agent of the Missouri Pacific Railway Company, an incorporated company, and having then and there in his custody and possession as such agent, as aforesaid, eighteen hundred dollars, gold, silver and paper money, lawful money of the United States of America, and the property of the Missouri Pacific Railway Company aforesaid, did unlawfully, fraudulently and feloniously make away with and embezzle and convert to his own use said sum of eighteen hundred dollars, as aforesaid, without the consent of the aforesaid Missouri Pacific Railway Company, against the peace and dignity of the state of Arkansas. And the grand jury aforesaid, in the name and by the authority aforesaid, further accuses the said J. H. Scoggin of the crime of embezzlement, committed as follows, to wit: The said J. H. Scoggin, in the county and state aforesaid, on the first day of August, 1906, then and there being over the age of sixteen years, and being the agent of the St. Louis, Iron Mountain & Southern Railway Company, an incorporated company, and having then and there in his possession and custody as such agent, as aforesaid, eighteen hundred dollars, gold, silver and paper money, lawful money of the United States of America, and the property of the state of Arkansas." The defendant demurred, his specific grounds of objection being set out as follows: "(1) Said indictment is not direct and certain as to the circumstances of the offense charged, in this, that the facts constituting defendant an agent of the companies mentioned are not set out, nor is it stated what kind of agent defendant was, nor what his duties as such agent were, nor at what place he was agent. (2) No facts are alleged by which it is made to appear that defendant was the agent of said railway companies, or either of them. (3) Said indictment does not state that as such agent it was defendant's duty to receive or hold the money alleged to have been embezzled. (4) It is not alleged in said indictment that the money charged to have been embezzled by defendant, or any part of it, came to defendant's hands, or under his care or custody, by virtue of his agency. (5) Said indictment does not state facts sufficient to constitute the offense." The demurrer was sustained, and the state appeals.

Wm. F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for the State. Sellers & Sellers, for appellee.

WOOD, J. (after stating the facts as above). Appellee was indicted under section 1837 of Kirby's Digest, which is as follows: "If any clerk, apprentice, servant, employé, agent or attorney of any private person, or of any co-partnership, except clerks, apprentices, serv-

ants and employes within the age of sixteen years, or any officer, clerk, servant, employé, agent or attorney of any incorporated company, or any person employed in any such capacity, shall embezzle, or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or convert to his own use, without the consent of his master or employer, any money, goods or rights in action, or any valuable security or effects whatsoever, belonging to any other person, which shall have come to his possession or under his care or custody by virtue of such employment, office, agency or attorneyship, shall be deemed guilty of larceny, and on conviction shall be punished as in case of larceny." Appellee contends here that the indictment is insufficient, because it does not allege that the funds came to the possession or were under the care or custody of the agent by virtue of the employment, or agency. This, of course, is necessary; but the pleader need not use the exact words of the statute, provided other words conveying the same meaning are employed. Section 2241, Kirby's Dig.; Wood v. State, 47 Ark. 488, 1 S. W. 709; Richardson v. State, 77 Ark. 321, 91 S. W. 758; Sherrill v. State, 106 S. W. 967. The indictment, after alleging the relation of appellee to the railway company as that of "agent," says: "And having then and there in his custody and possession as such agent as aforesaid." These words are equivalent to charging that the funds alleged to have been embezzled came into the custody and possession of appellee by virtue of such employment as agent, or by virtue of his agency. Words used in an indictment must be construed according to their usual acceptance in common language. Section 2242, Kirby's Dig. When we speak of one holding funds "as agent," every one understands that the words "as agent" describe the relation in which, or by which, the funds are held. When these words, "as agent," are used in this connection, they are not descriptive personæ, at all, but they tell how the funds are held. In the usual acceptance the meaning can be nothing else than that appellee was in possession

of the funds, and that such funds had come into "his possession or under his care or custody by virtue of his employment as agent." In *United States v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, the twelfth count of the indictment charges that the defendant with proper allegations of time and place, "was then and there president and agent of a certain national banking association, \* \* \* and the said Stephen A. Northway, as such president and agent, then and there had and received in and into his possession certain of the moneys and funds of said banking association, \* \* \* and then and there being in the possession of said Stephen A. Northway, as such president and agent aforesaid, he, the said Northway, then and there," etc. The statute upon which the prosecution was grounded was as follows: "Every president, director, cashier, teller, clerk, or agent, of any association, who embezzles, etc., any of the money, funds, credits of the association," etc. The court said: "In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds the charge against him is that he embezzled them by converting them to his own use. This, we think, fully and exactly describes the offense of embezzlement under the act by an officer and agent of the association."

We are of the opinion that the indictment clearly sets forth the fiduciary relation or capacity of appellee to the railway company as that of "agent," and alleges that he embezzled funds which he received and held by virtue of that agency. See *Ritter v. State*, 70 Ark. 472, 69 S. W. 262, and *Fleener v. State*, 58 Ark. 98, 23 S. W. 1, where indictments very similar were held good on demurrer.

The indictment is sufficient. Reversed and remanded, with directions to overrule the demurrer.

**COLLIER et al. v. CATHERINE LEAD CO.  
et al.**

(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

**1. APPEAL—RESERVATION OF OBJECTIONS IN  
LOWER COURT—MOTIONS FOR NEW TRIAL—  
SAVING EXCEPTIONS.**

A motion for a new trial on the grounds that the finding is unsupported by the evidence, and that the court erred in admitting, over plaintiffs' objection, illegal, incompetent, and improper evidence, is sufficient to save their exceptions; a general assignment on such a motion being sufficient where proper objections were made and exceptions saved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1744.]

**2. SAME—BRIEFS—SUFFICIENCY—ASSIGNMENT  
OF ERRORS.**

Supreme Court Rule 15 (73 S. W. vi), requiring appellant's brief to distinctly and separately allege the errors relied upon, is sufficiently complied with where the errors are pointed out under the head "Points and Authorities."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3003, 3006.]

**3. SAME—ABSTRACT OF RECORD—SUFFICIENCY  
—TRIAL BY SUBSTITUTE JUDGE.**

Though an abstract of record, reciting that the case was "tried before D., judge of the Fifteenth district, A., judge of the trial district, being disqualified from sitting," failed to show any record entry showing the substitute judge's authority to act required by Rev. St. 1890, §§ 819, 1685 [Ann. St. 1906, pp. 791, 1222], the defect was cured by an excerpt from the record embodied in the abstract showing that a bill of exceptions was signed by "D., judge of the Fifteenth judicial circuit, the trial judge in this case," since it thus appears he acted as trial judge, and the record disclosing no objection to his doing so, it must be presumed he qualified.

**4. SAME—EQUITY APPEALS—EVIDENCE.**

On equity appeals the abstract of the record should contain all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2609.]

**5. PROCESS—SERVICE—SUFFICIENCY—STAT-  
UTORY PROVISIONS.**

Rev. St. 1879, § 3489, as amended by Sess. Laws 1881, p. 174 (Rev. St. 1890, § 570 [Ann. St. 1906, p. 597]), providing for the service of summons on several defendants, by delivering to the one first summoned a copy of the petition and writ, and to those subsequently served a copy of the writ, etc., does not require a copy of the petition to be delivered to the first defendant served in each county, where the defendants are in several counties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 49, 53, 68.]

**6. EXCEPTIONS, BILL OF—INCORPORATION OF  
DOCUMENTS—SUFFICIENCY.**

Under Sess. Laws 1903, p. 105 [Ann. St. 1906, § 866], where a bill of exceptions describes documents offered in evidence and in the clerk's possession, and directs him to copy them, they become as much a part of the bill as if fully copied therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 15.]

**7. PROCESS—SERVICE—COLLATERAL ATTACK—  
BURDEN OF PROOF.**

Under Rev. St. 1879, § 3489, as amended by Sess. Laws 1881, p. 174 (Rev. St. 1890, § 570 [Ann. St. 1906, p. 597]), providing for the service of summons on several defendants by delivering to the one first summoned a copy of the petition and the writ, and to those subsequently served a copy of the writ, where plaintiffs attacked the validity of the service of summons in

a former suit on the ground that no copy of the petition was served upon one of the several defendants, the burden was upon them to prove such defendant was the first one served.

**8. COURTS—RECORDS—NUNC PRO TUNC EN-  
TRIES—NOTICE.**

Where defendants have been properly summoned in a partition suit, it is not necessary to notify them of an application for nunc pro tunc record entries after final judgment; such entries being made only from written memoranda upon the records or files in the case.

**9. SAME.**

Where a report of sale in a partition action was filed, and the cause continued for distribution, the action was still pending, and the defendants, having been properly summoned and being before the court for all purposes until final judgment, were not entitled to notice of an application for nunc pro tunc record entries.

**10. PARTITION—ORDER OF SALE—NECESSITY  
FOR RECORDING.**

A certified copy of an order of sale in a partition suit is not invalid as the sheriff's authority to sell the land, making the sale void, because the order has not been recorded.

**11. JUDGMENT—COLLATERAL ATTACK—NUNC  
PRO TUNC ENTRIES.**

Where the court had jurisdiction of the subject-matter and of the parties, a judgment, reciting that nunc pro tunc entries were made upon proof from the minutes and records of the court and proper record evidence, may not be attached collaterally on the ground that there was no evidence to support it.

**12. PARTITION—FINAL JUDGMENT—WHAT IS.**

A judgment of partition and order of sale is but an interlocutory judgment; the order of distribution being the final judgment.

**13. JUDGMENT—COLLATERAL ATTACK—NUNC  
PRO TUNC ENTRIES—PARTITION.**

While a partition suit is pending it is proper for the court to amend its records and judgments to conform to the facts, and when it does so, and no appeal is taken therefrom, the judgment is not subject to collateral attack.

Appeal from Circuit Court, Madison County; Samuel Davis, Special Judge.

Action by George B. Collier and others against the Catherine Lead Company and another. From a judgment for defendants, plaintiffs appeal, and defendants move to dismiss the appeal. Motion overruled, and judgment affirmed.

John C. Brown and John H. Chitwood, for appellants. Edward D'Arcy and W. T. Hughes, for respondents.

**GRAVES, J.** Action in the circuit court of Madison county. The first count of the petition filed by the plaintiffs is an ordinary action, to ascertain, define, and quiet title under section 650, Rev. St. 1890 [Ann. St. 1906, p. 667]. By the second count of the petition plaintiffs aver that they own the land therein described, and described in the first count; that for farming purposes the land is not worth more than \$1,000, but that it is underlaid with different minerals of the aggregate value of \$1,000,000; that defendants are mining and removing the said minerals and converting the same to their own use, and threaten to continue so to do; that by reason thereof plaintiffs' land will be rendered valueless; that said trespasses will

necessitate a multiplicity of suits to collect damages; that said trespasses, if continued, will render ineffectual the suit to quiet title, as stated in the first count, and will cause plaintiffs irreparable injury. The prayer was for an injunction or restraining order as to defendants' acts in removing and mining ore from the land in question.

The answer in the first count admits the possession of the land in question to be in defendants, admits that for grazing and agricultural purposes it is of but little value, not exceeding \$1,000, and denies each and every allegation of the petition. By the second count the 10-year statute to limitations is pleaded. By the third count it is pleaded that defendants obtained possession in good faith in 1891, from the owner of the record title, who was in the open, notorious, and peaceable possession thereof, and that without any notice of the pretended claim of the plaintiffs, and relying upon their said title, and in absence of any notice of the claim of plaintiffs, have made valuable improvements thereon to the extent of \$150,000, which said improvements were made with the knowledge of plaintiffs and all others in the vicinity, and that plaintiffs by their silence acquiesced therein, and are and should be now estopped from claiming any title or interest in the said lands. By a fourth clause in the answer it is pleaded that the alleged claim of plaintiff Chitwood came to him by a deed for an inconsiderable consideration from one Samuel E. Hoffman; that one Firmin Desloge, one of the then owners of said land, in July, 1887, instituted suit for the partition of said lands against all of the parties having an interest therein, including the said Hoffman; that said lands were duly partitioned and sold by the sheriff under a decree in said cause; that one Frank Schulte, relying upon said proceedings and upon the sheriff's deed and upon the knowledge of Hoffman in regard thereto, purchased said lands at such partition sale, and received and accepted the sheriff's deed thereto, and immediately after such sale, September 25, 1888, went into the open, exclusive, and notorious possession of said land; that such possession continued in such Schulte and his grantees and successors to the time of the suit, the last of such successors to the Schulte interest and title being the defendants; that all these things were of common knowledge; that neither said Hoffman nor any of the plaintiffs herein made any claim to said land for 16 years; that plaintiff, Chitwood, had knowledge of all these facts when he purchased of Hoffman for the trivial sum of \$50, well knowing that Hoffman had no claim to said land and made no claim to said land; and that the deed from Hoffman to Chitwood is champertous and void. The prayer is that such deed be declared void; that the title to said land in dispute be declared to be in the defendants, and for such other and proper equitable relief.

The reply admits that Hoffman owned an

interest in the land in July, 1887, avers his sale thereof to Chitwood for a valuable consideration, and then denies all other new matter pleaded in the answer. Trial was had before Hon. Samuel Davis, as special judge, and judgment for defendants, from which the plaintiffs appeal.

Defendants have filed a motion to dismiss this appeal, which motion was by this court taken with the case, and is therefore for disposition before we reach the merits of this matter. Counsel for defendants, in their brief on the motion to dismiss appeal, summarize their reason thus: "(1) For failure of appellants to save their exceptions by a proper motion for a new trial in the trial court. (2) For failure of appellants to save their exceptions by an assignment of errors in this court. (3) For failure of appellants' abstract to show that the proceedings in the court below were coram judice. (4) For failure of appellants' abstract to set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision."

#### Opinion on Motion to Dismiss Appeal.

1. Considering the first objection hereinabove stated: The motion for new trial is general in its terms. It is short, and we will quote it. The grounds assigned therein are as follows: "That the findings should be for plaintiffs, instead of defendants. That the finding is unsupported by the evidence. That the verdict is for the wrong party. That the court erred in admitting, over plaintiffs' objection, illegal, incompetent, and improper evidence on the part of the defendants. That under the law and the evidence the findings should have been for the plaintiffs." It is not necessary to review the many cases cited from other jurisdictions. The practice in this state has never, of recent years, required the motion for new trial to point out specifically the evidence excluded or evidence admitted, alleged to have been erroneously excluded or admitted. Under our practice it is sufficient if, at the time of the exclusion or admission of such evidence, proper objections were made and exceptions saved, and this, followed by a general assignment of error in this regard in the motion for new trial. Such have been the last expressions of this court, and we see no good reason for a further review of the question. In *State v. Barrington*, 95 S. W., loc. cit. 252, 198 Mo. 23, this court, in banc, adopted the opinion of Fox, J., in division, and in doing so we there said: "Upon this complaint the Attorney General insists that the ground of defendants' motion for new trial—that is, that 'the court erred in admitting illegal, irrelevant, incompetent, and immaterial testimony'—does not cover or exclude the point of improper cross-examination of defendants. Upon this proposition, we will say that, if the objections at the trial were sufficiently specific to notify the trial

court at the time of the nature and character of the objections and the reason for them, the general assignment in the motion for new trial that the court improperly admitted illegal, incompetent, and irrelevant testimony would properly preserve the point of improper cross-examination for review in this court." Again, in *State v. Noland*, 111 Mo., loc. cit. 492, 19 S. W. 715, this court said: "The motion for a new trial does not specify the exclusion of this particular evidence, but assigns generally as error that 'the court excluded from the jury proper, competent, and relevant testimony offered by the defendant.' This was sufficient. It has been the practice of this court from its organization. Nothing more definite has ever been required. A different ruling would unsettle the practice and work great injustice. The objections to testimony must be specific to be available in the appellate courts. These exceptions thus made are saved at the time, and the trial court's attention specifically called to its rulings, and no injustice is done the opposite side or the court by not incumbering the motion for new trial with these matters a second time. We adhere strictly to the rule requiring specific objections to testimony to be made at the time it is offered, but we do not think any good would be subserved by requiring the specific objections to be again repeated in the motion for a new trial." There may be cases where the language used, taken apart from the real situation presented by the case, might indicate a different rule; but, when we read these cases thoroughly, the language indulged in by the court will find justification in the particular record, without infringing upon the rule announced in the *Noland* Case, *supra*. We announce again that, if objections are made and exceptions saved to the action of the trial court in the admission or exclusion of testimony, then the general assignment in the motion is sufficient. The motion before us, however, challenges the sufficiency of the whole testimony to sustain the decree. The language used is: "That the finding is unsupported by the evidence." This, of itself, is sufficient. *McCloskey v. Pulitzer Publishing Co.*, 163 Mo., loc. cit. 31, 63 S. W. 99. There the language was: "The verdict was wholly unwarranted by the testimony." There is nothing in this contention of the defendants, and this point will be ruled against them.

2. The next point made by this motion is that there are no assignments of errors in the brief as required by our rule 15 (73 S. W. vi). There is no separate assignment of errors, but under the head of "Points and Authorities" we have the following: "The court erred in admitting in evidence the sheriff's deed in partition to Firmin Desloge, through whom defendants claim title. \* \* \* The court erred in finding that plaintiffs have no title to the property in controversy. The finding and judgment of the court are not supported by the evidence. \* \* \* The plaintiffs are

not barred by the statute of limitations. \* \* \* The appellants are not estopped from maintaining this action." Following each of the above is a long list of cases cited as the ones relied upon to sustain the point. Then follows that portion of the brief, under the heading "Argument," in which the authorities cited under the previous points are discussed and reviewed and applied to the case at bar. This we think a sufficient compliance with the rule. Many lawyers do, and it is the better practice to, make an "Assignment of Errors" separate and apart from their "Points and Authorities" and their "Argument," thus making four subdivisions of their briefs, i. e., statement, assignment of errors, points and authorities, and argument. The brief attacked in this instance omits the second subdivision last above given, but has the other three. We think this is sufficient, and this point must be ruled against the defendants.

3. We come now to the third assignment in this motion, which is in this language: "(3) For failure of appellants' abstract to show that the proceedings in the court below were coram iudice." The contention here is that the abstract of record does not show any reason for the trial of this cause by Judge Davis, instead of the regular judge of that court. Upon this point, the abstract before us says: "This action was brought on August 19, 1903, by plaintiffs against defendants to quiet title to and restrain defendants from trespassing upon lot 4 of northwest quarter of section 1, township 33, range 6 east. The case was returnable to the September term, 1903, of the Madison circuit court, and was tried on October 9, 1903, before Hon. Samuel Davis, judge of the Fifteenth district; the Honorable R. A. Anthony, judge of the Twenty-Seventh district, being disqualified from sitting. A finding was made, and a judgment was rendered in favor of defendants, and plaintiffs bring the case to this court by appeal." The point made here is couched in this language by counsel for defendants: "There is a statement of fact by the appellants, but no statement as to whether the record does or does not show this transfer or jurisdiction from Judge Anthony to Judge Davis." This is one thing which distinguished counsel have couched in plain English. In our youth we studied Latin, but always enjoyed a proposition when stated in short, concise terms in our mother tongue. Defendant's brief has been a little prolix in the many foreign phrases used largely by the old law-writers, but discarded very largely by the scholars and writers of the present, even in the lawbooks. The point made here is that this language quoted from the abstract of record does not show or recite that the record in the lower court shows a change from Judge Anthony to Judge Davis. That is not an abstract of the record, but a mere statement of what the plaintiffs (appellants) conceive to be a fact. Does this abstract show such facts as should be shown,



In order to show the right of Judge Davis to try this cause? An answer to this question disposes of this contention. In this abstract of record we find the following: "On the 13th day of January, 1904, before the first day of the regular March term, 1904, of this court, and within the time granted, allowed, and extended by this court to them to prepare, have signed, and file their bill of exceptions, herein, comes the plaintiffs and file their said bill of exceptions, the order noting and recording the filing thereof being in words and figures, as follows: 'Circuit Court of Madison County, Mo., In Vacation, January 13, 1904. G. B. Collier et al. v. Catherine Lead Company. Now at this time in vacation comes plaintiffs and file their bill of exceptions in the above cause duly signed by Hon. Sam Davis, judge of the Fifteenth judicial circuit, the trial judge in this case. Geo. B. Cook, Clerk Circuit Court.'" The two excerpts given are all that appear tending to show the right of Judge Davis to try this cause, or that he in fact did try it. The sufficiency of these therefore become the material question upon this issue.

The right of Judge Davis to try this cause must appear from the record proper, and not from a mere recital thereof in a bill of exceptions. This record proper should be abstracted. As to what is meant by an abstract of the record we have recently gone over in the case of *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638. We there said that it was not necessary to set out a copy of the record, but that it was sufficient to recite the facts that were shown by the record, stating that such facts were shown in the record by proper entries. Judge Davis could not have been there save and except through the provisions of our statute contained in sections 1678 to 1685 [Ann. St. 1903, pp. 1219-1222], both inclusive, or by virtue of sections 818 and 819, Rev. St. 1899 [Ann. St. 1903, pp. 789, 791]. Section 1685 provides: "Whenever under the provisions of this article, a judge of another circuit may preside, or temporary judge be elected, an entry thereof shall be made on the records of the court, together with the reasons therefor; and, in case of a temporary judge being elected, the facts that the requisite oath has been taken and filed." Section 819, under the change of venue statute, is as follows: "If the judge is interested or related to either party, or shall have been of counsel in the cause, the court or judge shall award such change of venue without any application from either party, unless all the parties in the cause consent that such judge may sit on the trial thereof, or a special judge for the trial thereof be agreed upon by the parties, or elected in the manner provided by law." Under either section a record entry is required. This record entry should be properly abstracted. Does the recitation first quoted from this abstract purport to abstract a record of the circuit court of Madison county? We think

not. This excerpt from the abstract does not say that the records of the circuit court of Madison county show anything in this regard. It does not say that Judge Anthony made any record prior to the appearance of Judge Davis upon the scene of action. If Judge Anthony was disqualified by interest, or otherwise, as suggested by section 819, supra, there is or should be a record of such action upon the part of Judge Anthony, and that record should have been abstracted, as indicated by us in *Harding v. Bedoll*, supra. If, on the other hand, Judge Davis, as judge of another circuit, was called in to hold a term or part of term of court, by Judge Anthony, as contemplated by section 1678, Rev. St. 1899, then an entry of record should have been made as required by section 1685, supra, and this entry should have been abstracted, as we have undertaken to set out in detail in *Harding v. Bedoll*, supra. This abstract does not aver that such entries, or either of them, were made in the circuit court of Madison county, but simply avers as a substantive fact that the case was "tried before Hon. Samuel Davis, judge of the Fifteenth district, the Honorable R. A. Anthony, judge of the Twenty-Seventh district, being disqualified from sitting." This statement of counsel in the abstract does not even say that the record of the circuit court shows the disqualifications of Judge Anthony. In fact, counsel do not aver that there is such a record and undertake to abstract such record. In this there is a fatal defect in the abstract before us, unless it is cured by the excerpt last quoted. By this statement from the vacation record, it appears that a bill of exceptions in this cause was filed, and that such bill of exceptions was "duly signed by Hon. Sam. Davis, judge of the Fifteenth judicial circuit, the trial judge in this cause." Here is a recitation from a vacation order that Judge Davis was the trial judge of said cause, or at least acted as trial judge. The same question was up in the case of *Green v. Walker*, 99 Mo. 68, 12 S. W. 353. In that case, we said: "The bill of exceptions filed during the February term, 1886 (at which the final judgment was rendered), is part of that record. It is signed by John E. Wait as special judge, and recites that the cause was tried before him in that capacity. How he came to be special judge, or whether he ever was sworn, generally, or in that case, does not affirmatively appear. His actions as special judge are part of the records of this court, however, and, in the absence of any showing to the contrary, will be presumed to have been correctly taken." In the *Green Case*, we had before us the bill of exceptions as signed in the manner indicated in the above excerpt. In the case at bar we have the full copy of the vacation entry made by the clerk, reciting the facts. In *Nickerson v. Leader Mercantile Co.*, 90 Mo. App. 338, it is said: "That since the cause was tried by a special judge, and nothing appearing

on the face of the record to show why he had tried it instead of Judge Hazell, who was the regular judge, that such special judge was without jurisdiction. There is no abstract in the case of the record proper, or, if there is, then there is no statement as required by the statute (section 863 [Ann. St. 1906, p. 807]). That which the defendant entitled an 'Abstract' does not purport to be more than an epitome of a part of the record. Blended with it are statements of many conclusions, but these, when taken with the part of the record which is abstracted, do not complete a complete abridgement or abstract of the entire record. But, waiving any objection that might be taken to the sufficiency of the abstract presented, still can we say that the special judge had no jurisdiction because the record does not disclose how it came about that the cause was tried by him? The action of the special judge trying the case is a part of the record of the court, and, in the absence, as here, of any showing to the contrary, it will be presumed to have been correctly taken. The same presumption of jurisdiction attaches to the record of proceedings in circuit courts before special judges as before the regular judge. *Green v. Walker*, 99 Mo. 68, 12 S. W. 353. The abstract of the bill of exceptions does not anywhere disclose that objections of any kind were taken by defendant in the circuit court to the qualifications or authority of the special judge to act. No reason is seen why the jurisdiction of the special judge who tried the case should be seriously doubted." The record before us is very similar. It nowhere shows any objections to the trial of the cause before Judge Davis. So that, while the first part of this record, by proper abstract thereof, shows no record entry by which Judge Davis was authorized to act, yet the later entry, which appears in the abstract in full, does show that, as a matter of fact, he did act as special judge, and, so far as the record before us is concerned, without objection. This we think sufficient, and, such being our judgment, this contention of defendant is overruled.

4. Lastly, it is urged that the appeal should be dismissed because the printed abstract fails to set out so much of the record as is necessary for a full and complete understanding of all questions presented to this court for decision. We have examined the printed abstract with care in view of this contention, and, while we are constrained to say that the abstract is not up to the full measure, we hardly feel that it is so defective as to authorize a summary disposal of the case upon this motion. The plaintiffs concede that the pleadings make the case one of equitable cognizance. In such case it is the duty of the appellant to bring to this court all of the evidence. There are evidently some omissions in this regard in the abstract before us, but they are hardly such as would justify the harsh action call-

ed for in the motion to dismiss. This point will therefore be ruled against the defendant. It therefore follows that the motion to dismiss this appeal should be, and is, overruled.

#### Opinion on the Merits.

Going to the merits of this case, an additional statement of facts is required. The land in dispute here is lot 4 of the northwest quarter of section 1, in township 33 north of range 6 east, in Madison county. In 1850, this property was owned by James Hill, John Hill, and Henry Janis, all of Madison county, Mo. They each had an undivided one-third interest therein, and were tenants in common. These same parties likewise had and held in the same manner lot 8, and the west half of lots 1 and 2, of the same quarter section. These two tracts of land whilst held by the three parties in the same manner came to them through different deeds and different chains of title. In 1887, one Firmin Desloge, as plaintiff, instituted a suit in the circuit court of Madison county against Odile Janis et al., defendants, the object of which was to partition all of the lands above described. All the plaintiffs in this suit were made parties defendant by the petition in that case. It is claimed that at the March term, 1888, of that court, an order of sale was made in this partition suit, and that in pursuance of said order the sheriff of said county at the September term of the court sold the lands above described; the said Firmin Desloge being the purchaser of the said lot 4, and one Frank Schulte the purchaser of the remainder of said lands. The defendant herein holds by mesne conveyances from these two purchasers at said sale. Report of sale was made and deeds made to the purchasers at that time. In 1901, it seems to have been discovered that no record entry of the decree of partition and order of sale had been made, nor had there been record entries of the succeeding steps in said case, except a record entry showing the filing of the report of sale and one showing the allowance of an attorney's fee to be taxed as costs, and thereupon the plaintiff in said cause filed a lengthy petition or motion reciting all the facts and steps taken, and asked that all the necessary decrees, entries, and orders be made nunc pro tunc, and that an additional order of distribution be made. This was done without further notice to the parties defendant. After hearing this application, the court made six orders, decrees, and judgments nunc pro tunc, as follows: No. 1. Order showing proof of publication on certain nonresident defendants. This order was made as of the March term, 1888. No. 2. Decree of partition and order of sale as of March term, 1888. No. 3. Record showing the filing of reports of sale, showing payment of purchase price, approval of the reports, and ordering deeds made to the purchasers. This order is as of the

September term, 1888, and on September 26, 1888. No. 4. Record entry, showing acknowledgment of the deed by the sheriff to Schulte. This order as of date September term, 1888, and on October 2, 1888. No. 5. Same record as to deed to Desloge, except that it is of date October 8, 1888, instead of October 2d. No. 6. Order of distribution as of September term, 1888. The case is therefore nunc pro tunc at wholesale, as well as retail. In the judgment for these six entries nunc pro tunc, among other things, it is recited that these said orders, decrees, judgments, and entries nunc pro tunc are made upon a showing to the court by the plaintiff that such entries nunc pro tunc should be made, because the plaintiff has shown, "to the satisfaction of the court, from the minutes and records of this court and by other proper record evidence made at the time," that such orders, decrees, judgments, and entries nunc pro tunc should be made, and reciting therein all the facts so made to appear to the court. The two record entries hereinabove mentioned are: "Wednesday, September 26, 1888. Second Day of September Term. *Firman Desloge v. Odill M. Janies et al.* Report of Sale. Now at this time comes Henry S. Spiva, sheriff of Madison county, Missouri, and files his report of sale of the real estate ordered to be sold, and this cause continued for distribution." "September 29, 1888. Sixth Day of — Term. *Firman Desloge v. Mary A. Gregoire et al.*, Petition for Partition. Now at this day comes Benjamin B. Cahoon and presents his account for services rendered herein for the sum of eighty-five dollars, which was by the court examined and allowed to be taxed as other costs in said suit." There was also a record entry showing the appointment of a guardian ad litem for the minor defendants of date October 5, 1887, at September term. The next record entry after the allowance of the attorney's fee is one showing the filing of the application for the nunc pro tunc entries. It was shown by parol that an examination of the records and files shows no entries, records, or files made at the March term, 1888. On this state of the record the plaintiffs claim: (1) That there was no authority to make the nunc pro tunc entries; (2) that, there being no order of sale of record, the clerk could not deliver a certified copy of said order to the sheriff as his authority to sell, and therefore his sale was void and his deeds thereunder were void; (3) that there was admittedly no notice of the application for nunc pro tunc entries, and therefore such orders were void; (4) that there had been no proper service of process upon plaintiff Collier in Pettis county, as shown by the return of the sheriff. Of these in their reverse order.

1. By a return of the sheriff of Pettis county, it appears that in the partition suit the defendants, Allison Collier, Frederick Collier, Annie Collier, Dora Collier, and George B.

Collier, the present plaintiff, were each served with a copy of the summons in said cause on the 25th day of August, 1887. These were all of the defendants served in Pettis county. The return shows service by delivery of a copy of the writ of summons to each, but does not show that a copy of the petition was delivered to Allison Collier or either of the others named. However, the record shows that the first party defendant served in the case was John Hill, who was served in Madison county by the sheriff of said county, on the 18th day of August, 1887, by delivery to him of a copy of the petition and a copy of the writ of summons on said date. On the same date, Virginia Smith was likewise served by said sheriff by delivery of a copy of the writ of summons. This all occurred seven days prior to the service of defendant Collier. The law then in force was the amendatory act of 1881. Sess. Laws 1881, p. 174. This act amended in an immaterial matter section 3489, Rev. St. 1879. The fifth clause of the amended section reads: "Or, fifth, where there are several defendants, by delivering to the defendant who shall be first summoned, a copy of the petition and writ, and to such as shall be subsequently summoned a copy of the writ, or by leaving such copy at the usual place of abode of the defendant with some person of his family over the age of fifteen years." This clause is not the portion amended, and it has not been since amended, but is now the fifth clause of section 570, Rev. St. 1899 [Ann. St. 1906, p. 597]. The contention of the plaintiff is that a copy of the petition must be delivered to the first defendant served in each county, where the defendants are in several counties. The act does not so say. The act says: "By delivering to the defendant who shall be first summoned, a copy of the petition and writ, and to such as shall be subsequently summoned, a copy of the writ." This statute simply says that, where there are several defendants, the one first served shall receive copy of the petition and writ, "and to such as shall be subsequently served, a copy of the writ." Plaintiff would have us read into this statute the words, "in each county, where they reside in several counties," so that it would thus read: "By delivering to the defendant who shall be first summoned, in each county, where they reside in several counties, a copy of the petition and writ," etc. We do not feel called upon to so rewrite the statute. There was another statute in force at the time, i. e., section 3493, Rev. St. 1879, which may throw some light upon the proper construction of the clause under consideration. This section, which is now section 574, Rev. St. 1899 [Ann. St. 1906, p. 601], reads: "When there are several defendants residing in different counties, the plaintiff may, at his option, have a summons directed to 'any sheriff in the state of Missouri,' or have a separate summons directed to the sheriff of any county, in which one or more defendants may

be found." By this section, plaintiff had his option to have one summons issued directed to any sheriff in the state of Missouri, or to have several writs of summons issued directed to the sheriff of any county wherein defendants resided. Now, suppose the plaintiff in this case had exercised his option and had a summons issued to any sheriff in the state, and, armed with this summons, he had gone to the sheriff of Madison county, and had service made there upon one defendant by delivery of copy of petition and writ, and had return made to that effect, and had then sent the same summons to Pettis county, and there had it served by delivery of copy of the writ to George B. Collier—would there be any question of the service? The writ was directed to any sheriff, and could be executed as above indicated, for in that case the statute contemplates but the writ. But the statute goes further, and says that the plaintiff may, in the exercise of his judgment, have several writs, instead of the one; but to our mind it does not change the method of service. The first writ mentioned clearly shows that no service of the petition was contemplated as to any other defendant than the one first summoned. So that when we read the act of 1881 with the section above quoted, it is clear that there was proper service on the plaintiff, George B. Collier, in the partition suit. We fail to find the question discussed in any of our cases, and counsel, although extremely diligent, have failed to find any case wherein the point was raised. We cannot sustain the contention of plaintiff without rewriting the statute, and this we must decline to do.

But it is urged by plaintiffs that the bill of exceptions on file in the case does not show that the summons and return thereon, showing previous service on John Hill, was introduced in evidence, and to this extent they challenge the additional abstract of record filed by defendant. Defendant says that said bill of exceptions shows that all the files in the partition case was offered in evidence and is called for in the bill of exceptions, and file their motion asking that this court order up the transcript to verify this statement. This we have not done for the reason that even if defendant's contention is wrong, it was the duty of the plaintiffs, if they desired to show that there was no valid service on George B. Collier, in addition to showing, as they did, that he was served with no copy of the petition, they should have shown further that he was the first defendant served. They are the parties attacking the validity of the service, and the whole record shows a number of parties to the suit and only a few brought in by publication. They have failed to show an invalid service until they further show that the parties served in Pettis county were the first parties served with summons. This they did not undertake to do, but place their reliance in the argument here that the statute means that a copy of the

petition must be delivered to the first defendant served in each county. By their course of argument they practically admit that there was a previous service in Madison county. But the entry in the bill of exceptions as set out in the additional abstract of the defendant is in this language: "The defendants offer the original petition in the case of *Firmin Desloge v. Janis* and others, and all the files thereto attached, described in the caption as *Firmin Desloge v. Odile M. Janies, Mary A. Gregoire, and Charles Gregoire*, and a number of other defendants, which are in the words and figures following: (Clerk will here copy)." It is not specifically denied that this entry is not in the bill of exceptions. If so, the call for the clerk to copy is sufficient so that the summons and return would be as much in the bill of exceptions as if copied therein bodily. These were not only documents called for, but they are documents in the possession of the clerk. *Myers v. Myers*, 98 Mo. 262, 11 S. W. 617; *State ex rel. Harber v. Wear*, 101 Mo. 414, 14 S. W. 115; *Tipton v. Renner*, 105 Mo. 1, 16 S. W. 668; *Sess. Laws 1903*, p. 105 [Ann. St. 1906, § 866]. However, as stated above, this is really immaterial, for, inasmuch as plaintiffs were attacking collaterally a judgment which recited due service upon Collier, the burden was upon them to show an invalid service, and this was not done until they made some proof that the Pettis county parties were the ones which were first served.

2. Was notice of the application for the nunc pro tunc entries required? This is the next question for consideration. Having determined that George B. Collier was properly served, the record before us shows proper service in the partition suit upon all parties whose interests are involved in the present action. Now, if these parties were properly before the court in the partition proceeding, was notice to them of the application for nunc pro tunc entries required? We think not. We so think for two reasons:

First, under the rule in this state these entries, if made after final judgment, must be made from evidence appearing from the records or files in the case, and not from parol evidence. The rule is succinctly stated by Burgess, J., in *Ross v. Railway Co.*, 141 Mo., loc. cit. 395, 38 S. W. 926, 42 S. W. 957, thus: "The question of the power and authority of a circuit court to correct its record by nunc pro tunc proceedings has been many times before this court, and the rule announced seems to be that, in order to justify it in so doing, the record must in some way show, either from the judge's minutes, the clerk's entries, or some paper in the cause, the facts authorizing such entries. No such entries can be made from the memory of the judge, nor on parol proof derived from other sources. *State v. Jeffors*, 64 Me. 378; *Bank v. Allen*, 68 Mo. 476; *Belkin v. Rhodes*, 70 Mo. 650; *Saxton v. Smith*, 50 Mo. 490; *Fletcher v. Coombs*, 58 Mo. 434;

Wooldridge v. Quinn, 70 Mo. 370; Blize v. Castillo, 8 Mo. App. 294; Evans v. Fisher, 26 Mo. App. 546." Where the proof is limited, as by the rule in Missouri, then there is no necessity for notice, and none is required. In Black on Judgments, § 134, the rule is stated in the following language: "In general, we may say that the necessity for notice of such an application must depend upon the sources which are to furnish the evidence of the judgment to be entered. If the examination is to be confined to the records, the presence of the defendant could not affect the result, nor would he have room to contest it. But if it is to be based upon extraneous proof, it is but just that he should have the opportunity to prepare countervailing testimony." And to the same effect is Freeman on Judgments, § 64, where it is said: "The proceedings on application to enter judgment nunc pro tunc are summary, and not required to be supported by pleadings. The practice in some courts seems to require the moving party to give notice of his motion to his adversary, and certainly this is very proper when the entry is not required to be made as a matter of course, and where the motion is supported by other evidence than the records of quasi records of the court. If the moving party wishes to use the entry, when procured, to affect the rights of one not a party to the action, he should be notified of the motion. If he does not appear to have notice of the rendition of the judgment, nor of the motion to enter it nunc pro tunc, he may sometimes escape the effect of the entry. The more usual practice is to proceed ex parte to order entries required to complete the record, especially where the court acts solely upon matters of record." The cases cited by the two learned authors are to the effect that wherever the rule prevails, as in this state, that no nunc pro tunc entry can be made except from some written memoranda upon the records or files in the case, notice of the application is not required. These remarks are applicable to cases where nunc pro tunc entries are made after the term of final judgment.

But, secondly, the record entry at the September term, 1868, of the Madison circuit court, shows that the report of sale was filed and the cause continued for distribution. No final judgment had therefore been rendered in the case. The case was still pending before the court, and the parties, having been theretofore duly summoned and brought in to court, are there for all purposes until final judgment. That such an action is still pending and undetermined after a decree of partition and order of sale has been made was conclusively announced by this court, through Macfarlane, J., in case of Aull v. Day, 133 Mo., loc. cit. 347, 34 S. W. 578, wherein was said: "That the first judgment in partition proceedings is merely interlocutory has often been declared by this court, and is so well settled that a citation of the cases is deem-

ed unnecessary. But see Murray v. Yates, 73 Mo. 15. That such interlocutory judgments, made in the progress of a cause, are always under the control of the court until a final decision is reached, and may be modified at any time to meet the exigencies that may arise, is equally well settled. Bobb v. Graham, supra (89 Mo. 200, 1 S. W. 90). The uniform holding of this court, before the statute allowing an appeal, that an appeal, or writ of error, from such interlocutory judgment, would not lie, rests upon the theory that such judgment continues under the control of the court and is subject to corrections and modifications. The right to correct and modify its own orders 'springs from the court's power to control its own action in pending proceedings, so as to subserve the ends of justice.' Bryant v. Russell, 127 Mo. 433, 30 S. W. 107. Courts should not leave the matter of controversy 'in such a condition that its final administration may be wholly inconsistent with equity and good conscience.' Shields v. Barrow, 17 How. (U. S.) 130, 15 L. Ed. 158. See, also, Hiles v. Rule, 121 Mo. 256, 25 S. W. 959. Elliott says: 'Until there is an ultimate judgment, the case is not finally disposed of, inasmuch as the trial court may change its rulings, award a venire de novo, grant a new trial, or make some such order, notwithstanding the fact that in other rulings it may have clearly manifested a purpose to carry its rulings into the ultimate judgment or decree.' Elliott, App. Proc. § 83. Black, in his work on Judgments (section 308), says: 'An interlocutory judgment or decree, made in the progress of a cause, is always under the control of the court until the final decision of the suit, and it may be modified or rescinded, upon sufficient grounds shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given.' See, also, Clark v. Sires, 193 Mo., loc. cit. 516, 92 S. W. 224. With the exception of an allowance of an attorney's fee, the last record entry in the partition case, prior to the application for the nunc pro tunc entries, was the record entry showing the filing of the report of sale and continuing the cause for distribution. There was no order approving the sale and no final judgment in the case. Up to a final judgment, parties who have been properly brought before the court must take cognizance of the different steps and proceedings in the cause. This proposition requires no citation of authority.

3. Nor are we impressed with the suggestion of counsel to the effect that, because the order of sale had not been spread of record, there could be no certified copy thereof, and hence no authority to sell. The judge of the court might have prepared his decree and order of sale and handed it to the clerk to be spread of record, and the clerk might have made a certified copy thereof, which would have been sufficient, even before the clerk had actually spread it of record. Or

counsel might have prepared such decree and order and submitted it to the court, and had the court approve the same and directed the clerk to spread it of record, which is usually done, and the clerk, having the decree and order thus prepared and on file in the cause, might have made a certified copy thereof and given it to the sheriff. Or the clerk himself might have written up the decree and order, and, before spreading it upon the record, given a certified copy thereof to the sheriff. In either of these cases, had such order and decree been afterwards spread of record, there would be no question. We do not think this point tenable. But further reasons will follow in the succeeding discussion of other questions.

4. We reach now the contention of the plaintiff that there was no authority of law under the facts shown in the record before us to authorize the trial court to have made these nunc pro tunc entries in 1891. This cause was tried at the September term, 1903, more than 12 years after the hearing upon the application for nunc pro tunc entries. Nor is it shown in this record what evidence was before the court at the hearing of said application, but defendants argue that, because the record books, and files, as such files were found 12 years after the hearing, fail to show any entries or papers on file upon which a nunc pro tunc order could be based, therefore there is no foundation in law or fact for such nunc pro tunc entries. We cannot sustain plaintiff's contention for several reasons: This judgment nunc pro tunc is being attacked collaterally. The judgment upon its face recites that the nunc pro tunc entries were made upon the proof made by plaintiffs, "from the minutes and records of this court and by proper record evidence," and excludes the idea of being made except upon the records, minutes, and files in the case. What files in the cause and what minutes in the records the trial judge had before him in 1891 does not appear in the present record. Nor does it appear that the files found in 1903, when this case was tried, were all the files which were in existence in 1891. The judgment recites that the clerk from the records and files made out a certified copy of the order of sale. Can these recitations in the judgment nunc pro tunc be attacked in the present collateral proceedings? We think not. The judgment upon its face recites facts sufficient to authorize it. In *McClanahan v. Smith*, 76 Mo., loc. cit. 430, where the exact question was in issue, we said: "The validity of the nunc pro tunc judgment cannot be assailed in this proceeding, as it recites on its face facts sufficient to authorize it; but it is well settled that such a judgment cannot be made to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment nunc pro tunc." In that case a third party, one not a party to the record, had acquired rights, between the date of the orig-

inal judgment, and the corrected judgment entered nunc pro tunc, and it was properly held that he could not be affected by the subsequent order. Again, in *Harlan v. Moore*, 132 Mo., loc. cit. 491, 34 S. W. 71, we said: "But it is insisted that there was no record or memoranda from which the amendments could have been made. A sufficient answer to this contention is that the proceedings under which the amendments were allowed were not preserved, and do not appear from the record. In such case we must presume that the court had before it all evidence necessary to justify the amendment." So that we say that, if it appears that the court has jurisdiction of the subject-matter and of the parties, as shown in this case, a nunc pro tunc judgment cannot be attacked in a collateral proceeding on the ground that there was no evidence to support it. This is the ground of attack here.

5. But beyond what we have said in the preceding paragraph is another question, i. e., that no final judgment had been entered in this partition suit up to the time the application was made for entries nunc pro tunc. *Aull v. Day*, supra. In the *Aull Case*, and by the way a *Collier* was a party to that record, the judgment of partition and order of sale were entered April 22, 1893. The land was sold, and report of sale made at December term, 1893. The report of sale was approved, and deeds ordered at said term. Motion was also filed to modify and correct the judgment entered at the previous term on April 22d. This motion was sustained by the trial court, and its action affirmed by this court. In addition to what we have already quoted from the *Aull Case*, we add the following: "But the complaint of appellants is, not that the amended judgment does not correctly declare the rights of the parties, but that the first judgment is a final and conclusive adjudication of such rights, which the courts had no power to change at a subsequent term. We do not take that view of a judgment in a partition suit which declares the rights of the parties and orders partition. Such judgments are interlocutory only, and are under the control of the court so long as the proceeding remains undisposed of. It was said in an early case by Judge Scott: 'In proceedings in partition, both at law and in equity, there are two judgments and decrees; the one interlocutory and the other final.' The latter was held to be the principal judgment, and until it was rendered no partition was made. The former judgment only required the partition to be made. *Gudgell v. Mead*, 8 Mo. 54, 40 Am. Dec. 120. In another case, after an interlocutory judgment for partition and an order of sale had been made, a party was permitted to come in and file an answer, setting up an interest in the property. *Parkinson v. Caplinger*, 65 Mo. 293. It is true, in that case the application to be made a party was at the same term at which the judgment was rendered, but the court said: 'There is no prescribed

stage of the proceeding in which this application is to be made. If presented during the pendency of the litigation, we think it is timely and within the power of the court to pass upon it.' See, also, *Bobb v. Graham*, 89 Mo. 207, 1 S. W. 90, and cases cited. In a subsequent case it was held that a failure to find the respective interests of the parties by an interlocutory decree was not fatal to the proceedings where the interests were declared in the final judgment. *Akers v. Hobbs*, 105 Mo. 132, 16 S. W. 682. \* \* \* We are of the opinion that the court had the power to correct its erroneous ruling at any time before the final order of distribution, which in such case is the final judgment. *Hart v. Steedman*, 98 Mo. 457, 11 S. W. 993; *Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536. The judgment is affirmed. All the judges of this division concur."

There is no doctrine better settled than the one last announced by Judge Macfarlane, i. e., that the judgment of partition and order of sale is but an interlocutory judgment, and that the order of distribution is the final judgment. Until the final judgment is entered, the case is still pending, and both the subject-matter and the parties are before the court. The court has the control of its records and judgments until final judgment is entered, and even then until the close of the term at which final judgment was entered. So that, barring all other matters, with this cause yet pending, the trial court had the right within itself and without suggestion of either party to make its record speak the truth. This is one of the inherent rights of a court. Not only is it a right, but a duty, when attention is directed to error either of commission or omission. *Mead v. Brown*, 65 Mo. 552; *Dawson v. Waldhelm*, 89 Mo. App. 245; *Saxton v. Smith*, 50 Mo., loc. cit. 491, 23 Cyc. 861. In the *Saxton Case*, supra, it is said: "During the progress of a cause, and before final judgment, or after final judgment, during the same term, nunc pro tunc entries may be made in furtherance of justice to conform the entries to the truth; but, after the end of the term at which a final judgment is rendered, no entry can be made altering the form of the judgment, unless the facts appear of record, on the minutes or dockets of the court, or from papers on file to authorize such change." In 23 Cyc. p. 861, the rule is thus quoted: "After the expiration of the term at which a judgment or decree was rendered, it is out of the power of the court, except as allowed by statutes, to amend or correct it in any manner affecting the merits, although mere clerical mistakes may be corrected, especially if apparent on the face of the record. But the rule against amendment after the term does not apply to interlocutory judgments or such as remain in fieri, or to an action in that behalf taken with the consent of the parties concerned or at their request, or where the judgment is carried over the term by a motion to amend or correct it or a petition for a rehearing." So

that we say that during the pendency of the suit it was proper for the court to amend its records and judgments to conform to the facts, and, when it does so, and no appeal is taken therefrom, such judgment is impregnable in a collateral proceeding.

These conclusions render it unnecessary to go into the questions of adverse possession, estoppel in pais, etc.

The judgment is right, and should be, and is, affirmed. All concur.

#### BAIRD v. GRANNISS.

(Supreme Court of Missouri, Division No. 1. Dec. 24, 1907.)

##### 1. FRAUD—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence examined, and held not to show that defendant was guilty of deceit, misrepresentation, or concealment in the sale of corporate stock to him by plaintiff.

##### 2. APPEAL—REVIEW—HARMLESS ERROR—RULING ON PLEADING.

Under Rev. St. 1899, § 865 [Ann. St. 1906, p. 812], providing that the Supreme Court shall not reverse except for material error affecting the merits, any error in ruling that a petition stated a cause in equity rather than at law is not ground for reversal, where the evidence did not sustain the petition on either theory, and the case was disposed of on demurrer to plaintiff's evidence.

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Charles O. Baird against Charles E. Granniss. Judgment for defendant, and plaintiff appeals. Affirmed.

J. J. McClintock, Jr., and Braley & Simpson, for appellant.

Haff & Michaels and W. M. Walker, for respondent, cited *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426; Board of Com'rs of Tippecanoe Co. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Gillett v. Bowen (C. C.) 23 Fed. 625; Deaderick v. Wilson, 67 Tenn. 108; Percival v. Wright (1902) L. R. 2 Chan. 421, 71 L. J. Ch. 846, 51 W. Rep. 241, 1 Manson, 17; Hooker v. Steel Company et al., 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; Haarstick v. Fox, 9 Utah, 110, 33 Pac. 251; Walsh v. Goulden, 130 Mich. 531, 90 N. W. 406; Krumbhaar v. Griffiths, 151 Pa. 223, 25 Atl. 64; Fisher v. Budlong, 10 R. I. 525; O'Neil v. Ternes et al., 32 Wash. 528, 73 Pac. 692; Bloom v. Loan Company, 152 N. Y. 114, 46 N. E. 166; Johnson v. Laflin, 103 U. S. 300, 26 L. Ed. 532; Mulvane v. O'Brien, 58 Kan. 468, 49 Pac. 607; Perry v. Pearson, 133 Ill. 218, 25 N. E. 636; Smith v. Hurd, 12 Metc. 371, 46 Am. Dec. 690; Sperring's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Slee v. Bloom, 20 Johns. 669; Gilbert's Case, L. R. 5 Ch. App. 559; Grant v. Attrill (C. C.) 11 Fed. 469; Trisconl v. Winship, 43 La. Ann. 45, 48, 9 South. 29, 26 Am. St. Rep. 175; Converse v. United Shoe Mach. Co., 185 Mass. 422, 70 N. E. 444; Strong v. Gutierrez, 5 Official Gazette, 72 (Sup. Ct. Phil. Is., 1907);

Cook on Corporations (4th Ed.) §§ 320, 350 (1898); Clark on Corporations, § 218; Taylor on Private Corporations (5th Ed.) § 695; Morawetz on Private Corporations, pp. 565, 587; Elliott on Private Corporations (3d Ed.) § 5027; 21 A. & E. Encyc. of Law (2d Ed.) 898; 10 Cyc. 796; Helliwell on Stocks and Stockholders, § 184; Beach on Private Corporations, §§ 614, 646; Wilgus, Corporation Cases, pp. 1706, 1707, 1791; State ex rel. Doyle v. Laughlin, 53 Mo. App. 542; Rev. St. Mo. 1899, § 906 [Ann. St. 1906, p. 862]; Bank v. Lanier, 11 Wall. 369, 20 L. Ed. 172.

VALLIANT, P. J. Defendant, through a broker in Kansas City, purchased of plaintiff 170 shares of stock in a corporation called the "Missouri & Louisiana Yellow Pine Company" for which he paid \$125 a share. The plaintiff now claims that he was overreached in the transaction; that the stock was at that time really worth \$187 a share, and that the defendant's relation to the plaintiff and to the corporation was such that he owed the duty to plaintiff to inform him of the facts that influenced the value; that the difference between the price paid and the real value of the stock was \$10,591, for which with interest and costs the petition prays judgment. The statements in the petition, as constituting the plaintiff's complaint, leave it in some doubt as to whether this is a suit in equity to charge the defendant as an officer of the corporation for a breach of his trust, or an action at law for deceit and misrepresentation. The petition states that the defendant was the president and general manager of the corporation, and for that reason was the "trustee and agent" of the plaintiff in relation to his stock, yet in violation of that duty bought the stock for less than it was worth, without giving plaintiff information of certain material facts that defendant as president and general manager knew. The petition also alleged that defendant had in conversation promised that he would give the plaintiff all news and information relative to the Pine Company affecting the value of the stock; that plaintiff "was relying entirely upon said promise made to him by defendant and the information which he was to receive from said defendant, and which by reason of the facts aforesaid the defendant owed this plaintiff." The plaintiff resided in Philadelphia; defendant, in Kansas City, where the corporation was domiciled. Whilst the terms wrongfully and fraudulently are applied to defendant's acts, and "deceit, concealments, and misrepresentations" are charged in an abstract way, yet the only allegation as of a misrepresentation of a fact is that in the first letter of the broker opening the negotiations that ended in a sale of the stock it was said the stock was "slow sale." The gravamen of the complaint is that defendant failed to communicate to plaintiff material facts affecting the value of the stock. The sum of

the whole case made by the petition is that the defendant, being the president and general manager of the corporation, well knowing that negotiations were on foot which were likely to lead to an advantageous sale of the corporation's property, without communicating that fact to the plaintiff, employed a broker to open negotiations with him for the purchase of his stock, which negotiations ended in a sale by plaintiff to defendant for \$125 a share, plaintiff not then knowing for whom the broker was acting, when in fact the stock at the date of the sale was really worth \$187 a share. In addition to the above is the allegation that the defendant promised the plaintiff to keep him informed of everything affecting the value of the stock. The answer was a general denial. When the cause was ready for trial, there was a difference of opinion between the counsel as to whether it was an action at law or a suit in equity, the counsel for plaintiff contending that it was an action at law, and demanded a jury trial, counsel for defendant that it was a suit in equity. The court construed it to be a suit in equity, and tried it as such. At the close of the plaintiff's case the defendant demurred to the evidence, which demurrer the court sustained, and rendered judgment for defendant, from which judgment the plaintiff has appealed.

1. As the plaintiff in his petition has mixed his facts on which he seems to have predicated a claim against the defendant on the theory that he was a trustee who had been unfaithful to his trust with facts on which he seems to base a cause of action for fraud and deceit, it will be necessary for us to separate the two classes of facts, and see if the plaintiff has a just cause of complaint on both or either ground. In so far as the plaintiff's claim rests on the theory that the defendant has been unfaithful to his trust as an officer of the corporation, it is upon the allegation that the defendant was the president and general manager of the corporation, that as such he knew its affairs, that he bought the stock through a broker without disclosing to the plaintiff who the purchaser was and without giving him information that negotiations were on foot which it was expected would result in an advantageous sale of the property of the corporation. Assuming those allegations to be true, do they make out a case of betrayal of trust for which the defendant can be held to account? We are leaving for the present out of view whatever there may be in the case to support the charge of fraud and deceit, and are viewing the defendant's acts as an officer of the corporation in relation to his dealings with an individual stockholder for the purchase of his stock. If the president of a corporation is a trustee for each individual stockholder in the sense and to the extent that he is bound to keep each stockholder informed of everything in existence or in prospect that would affect the market val-



ue of his stock or influence the stockholder in negotiating a sale of his individual holding, then this petition states a cause against the defendant as an unfaithful trustee. There is no question but what the officer of a corporation is a trustee for the corporation in the management of its affairs, and in that sense he is indirectly a trustee for the stockholders in general, but that is not the point in this case. Was the defendant, because he was president and general manager, in such a trust relation to the plaintiff that he could not buy the stock without first giving him all the information he had that would influence its market value? If there has been any direct decision of this question in this state, it has not been brought to our notice, and, in view of the research and industry shown in the briefs, we are satisfied that if any such decision existed it would have been found by the counsel. That no such trust relation exists has been often declared in the courts of other states, as by reference to the list of cases cited in the brief for respondent, which will be printed with this report, will appear. But interesting as that question is, do we not feel justified in deciding it in this case, because on a review of all the evidence bearing on this as well as on the question of fraud and deceit, which evidence will be summarized in the next succeeding paragraph, we are satisfied that, if the allegations of the petition aiming to charge the defendant with a breach of his duty as officer of the corporation to a stockholder are sufficient to call him to account, the proof does not sustain the allegations.

2. We come now to the charge that the defendant was guilty of fraud and deceit. The petition alleges that the plaintiff, because of his residence in Philadelphia, had no personal knowledge of the pine lands owned by the corporation in Louisiana, "but being acquainted with defendant, obtained all his information as to the value of the stock from time to time from the defendant." Then the petition states: "Plaintiff further states that as such president and general manager the defendant had always led the plaintiff to believe in his personal conversations with plaintiff, and promised that he, the defendant, would afford and give the plaintiff any and all news and information relative to said Pine Company, and the value of its stock and assets, and that this plaintiff, relying upon said promises and the previous course of the relations and negotiations which he had had with the defendant, and relying upon the fact that the defendant was both president and general manager of said company, was led to believe that when anything occurred which would likely increase the value of plaintiff's stock, or the value of the assets of the company, that he would be promptly informed of such fact by the defendant herein. And plaintiff further alleges that by reason of said promises and the previous negotiations and understandings be-

tween the plaintiff and defendant, and by reason of the aforesaid facts and said official positions which the defendant had in said company, that said defendant became a trustee and agent and owed the duty of trustee and agent toward this plaintiff in relation to said stock." Then after stating that negotiations were pending for the sale of the company's property, which ended in the sale on April 25, 1902, the petition says: "All of which facts were known to the defendant, and were unknown to the plaintiff, as the plaintiff was relying entirely upon the said promise made to him by defendant and the information which he was to receive from the said defendant, and which by reason of the facts aforesaid the defendant owed this plaintiff." The substance of these allegations is that the defendant from his position as president and general manager knew these facts, and it became his duty to inform the plaintiff because he promised to do so. The petition refers in general terms to "personal conversations" and "the previous course of the relations and negotiations," but specifies nothing under those heads.

The evidence for the plaintiff tended to prove as follows: The Missouri & Louisiana Yellow Pine Company was incorporated in this state in 1893, with an authorized capital stock of \$160,000, the par value of the stock was \$100 per share, and it was all issued except \$15,000. The plaintiff was one of the original subscribers, and he owned 170 shares. The property of the company consisted of 28,330 acres of yellow pine land in Louisiana. In 1897 the corporation made a contract with the Central Coal & Coke Company, by which the latter was to cut timber off this land, paying therefor \$1.50 per 1000 feet. That rate was to last for two years, and at the end of every two years the parties were to agree on a price for the next ensuing two years, and if they could not agree they were to arbitrate. The company paid dividends at the rate of \$1.50 to \$2 per share per month. Plaintiff up to the time he sold his stock had received 58 per cent. dividends on it. It was after the original contract with the Coal & Coke Company that the defendant became the president and general manager. He held those positions during the time covered by this controversy. Plaintiff had been in Kansas City several times, had attended two of the stockholders' annual meetings, and had been acquainted with the defendant several years. Letters running over a period from November 20, 1901, to January 30, 1902, passed between plaintiff and defendant. November 20, 1901, plaintiff wrote to defendant referring to the diminution of dividends lately, and asking why. Defendant answered November 22d, explaining the cause. January 20, 1902, plaintiff wrote suggesting that it was defendant's duty to insist on a higher price from the Coal & Coke Company when the time came to fix the price for another two years, and asking defendant why a million

feet of lumber had been given free to the Coal & Coke Company. To this defendant replied that the gift of the million feet was before defendant's connection with the company, but that it was given as bonus to induce the Coal & Coke Company to locate its plant on the Pine Company's property. Then, as to the increased price to be demanded of the Coal & Coke Company, defendant wrote: "The subject of increasing the rate of stumpage with the Central Coal & Coke Company, has never been lost sight of, and if you will read the contract carefully, of which you have a copy, you will see that in case the price of stumpage should go down we might have, if we raise the question, to accept a reduced, instead of an increased, price. These conditions prevailed up to six months ago. We are now, however, negotiating for a change of price, and same will, without question, be a substantial increase. In connection with the whole matter it should be borne in mind that timber land in our vicinity, which was selling at the time these contracts were made for \$5 and \$6 an acre, are now worth anywhere from \$12 to \$15. The sale of this stumpage is like the sale of any other property (real estate, for instance) and if the sale was made half a dozen years ago at \$6 we could not reasonably expect, because there has been increase in values, that the purchasers would voluntarily come forward and pay twice what they agreed to. I am very anxious at all times to answer any questions you propound, and shall be glad also to act upon suggestions." January 29, 1902, defendant wrote to plaintiff a long letter, full of detail and very encouraging as to the prospect of getting a better price from the Coal & Coke Company. He said: "I believe we will be able to secure from the Central Coal & Coke Company a substantial increase for stumpage during the next two years." On January 30th he wrote again, in which he said: "We will not have to wait until the June period in order to readjust the price of stumpage for the coming two years. Mr. Keith is now East, but is expected to return in a week or ten days, and I fully expect on his arrival to consummate a contract which has already been commenced, which will give us an increase of price. At present I cannot state just the amount but hope it will be a very considerable amount."

Plaintiff was in correspondence with a firm of brokers in Kansas City as early as June, 1901, with reference to the sale of his stock at \$125 a share. These brokers had tried to sell it at that price, but had no offer. April 8, 1902, the brokers through whom the defendant purchased wrote to plaintiff, telling him they had a customer who wished to buy some stock of this company, offering him \$115 per share for his stock. April 10th plaintiff replied that he would sell at \$125, not less. April 16th brokers wrote that, "subject to filling your order," would take the stock at price offered. April 19th plaintiff telegraphed

broker: "Accept your offer of \$125 for 170 shares Missouri and Louisiana Yellow Pine. Wire instructions as to the shipment." On same day brokers answered by telegraph: "Cannot give definite answer about using stock until next week." April 21st broker telegraphed plaintiff: "Ship us Missouri and Louisiana Yellow Pine Co. stock with draft attached as per your telegram of nineteenth." April 22d plaintiff telegraphed brokers that he had forwarded the stock with draft attached. The stock arrived in Kansas City, and was delivered to the brokers, who paid the drafts attached April 25th. All the negotiations between the defendant as president and general manager of the Missouri & Louisiana Yellow Pine Company and the president of the Coal & Coke Company up to April 22d had been in reference to an increased stumpage contract, but on that day defendant received a letter from the president of the Coal & Coke Company, offering to buy the land of defendant's corporation for \$15 per acre. Because of the difficulty in getting the directors together in a meeting, this offer was not acted on until May 5th, when the board met and accepted it. The sale of the land at that price made the stock worth \$178 a share.

There was no evidence to sustain the statement in the petition that the defendant promised that he would "give the plaintiff any and all news and information relative to said Pine Company, and the value of its stock and assets," on which promise the petition says the plaintiff "relied entirely" in this business. Appellant in his brief says: "The whole tenor of Mr. Granniss' letters, as printed in the abstract of the record on pages 22 to 25, inclusive, is to the effect that if anything occurred to affect the company, Mr. Granniss would be only too glad to advise the plaintiff." Those letters were written in answer to letters from the plaintiff, and were straightforward answers to his questions. The only words in any of them that could be construed into a promise were in the closing sentence of the letter of January 23d—"I am very anxious at all times to answer any questions you propound, and shall be glad also to act upon suggestions." That was no promise to volunteer information, but only to answer his questions. Besides, nothing definite had occurred between the date of the last letter and April 22d, when the written proposal of the Coal & Coke Company was received. There was testimony to the effect that in a conversation held a short time before April 22d between the defendant, representing the Pine Company, and Mr. Keith and Mr. Perry, representing the Coal Company, in which the defendant was insisting on a stumpage price of \$2.25 per 1,000 which the others would not agree to, an oral offer was made to buy the land at \$15 an acre, or pay \$1.75 per 1,000 stumpage, but nothing was agreed on. No written offer was made until April 22d, and that was not accepted until the meeting of

the board of directors May 5th. Defendant being called as a witness for plaintiff testified that as soon as he received the written proposal he notified the directors of its receipt, but did not notify any of the other stockholders. When asked why he did not notify the plaintiff, he said plaintiff had then ceased to be a stockholder.

It is argued for plaintiff that defendant maneuvered to delay the closing of the sale of the stock until the letter of April 22d had been received. But the evidence does not bear out that argument. The plaintiff's telegram to defendant's brokers accepting their offer of \$125 a share, "subject to filling your order," was April 19th, and on the same day the brokers replied by telegram, "Cannot give definite answer about using stock until next week." In explanation of this, one of the brokers, a witness for plaintiff, testified that the 19th was Saturday, Mr. Granniss was out of the city, did not return until Monday, which was as soon as they could learn definitely whether he was willing to pay that price. As soon as they saw him, they sent the telegram of April 21st, which closed the trade. We do not find any evidence that tends to show that the defendant ever misrepresented any fact, or even withheld information of any material fact. The conversations he held with Mr. Keith or Mr. Perry were only proposals pro and con, binding on neither until agreed to in legal form. The proposal even in the letter of April 22d could have been withdrawn at any time before it was accepted by the board of directors. Whether he was under obligation or not to give the plaintiff information he did, in answer to every letter, give information of every material thing that had occurred, and had even gone farther and given his opinion that the negotiations looked very favorable to a considerable advance in the price they would get for their timber. The contract for the sale of the stock was concluded April 21st, when the brokers telegraphed the plaintiff to ship the stock with draft attached, which he promptly did. If the draft had been dishonored, the brokers or the defendant, their undisclosed principal, would have been liable for a breach of the contract. The evidence does not sustain the plaintiff in his statement that he relied entirely on the promise of the defendant to give him information. He had been in correspondence with a firm of brokers in Kansas City, with whom the defendant had no connection, and had authorized them to sell this stock for him at the very price he sold it to defendant, and those brokers had been trying in vain for months to sell it. Reference is made to the statement in the broker's letter of April 8th, in relation to the stock, "there has not been much trading in it and it is rather a slow matter," as if that was a misrepresentation; but the evidence shows it was true, there had been no recent sales, and the plaintiff himself knew by his correspondence with his brokers that it was

a slow matter to sell the stock. There is nothing in the evidence to sustain the charge of deceit and misrepresentation.

3. Whether the plaintiff's petition states a cause in equity or at law it is immaterial under the evidence adduced, because since the case was disposed of on demurrer to the plaintiff's evidence the result is the same as if a jury had been impaneled. The evidence did not sustain the plaintiff's case on either theory. We should not reverse a judgment, unless error was committed materially affecting the merits of the action. Section 865, Rev. St. 1899 [Ann. St. 1906, p. 812]; *Ward v. Quinlvin*, 65 Mo. 453; *Redman v. Adams*, 165 Mo. 71, 65 S. W. 300.

The judgment is affirmed. All concur.

STATE ex rel. WAYLAND v. HERRING.  
(Supreme Court of Missouri, Division No. 2  
Dec. 24, 1907.)

1. STATUTES—TITLE—EXPRESSION OF SUBJECT OF ACT.

Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], relating to filling by gubernatorial appointment vacancies occurring in elective offices, which was originally a portion of the bill entitled "An act to amend and revise chapter 2, title 2, of the General Statutes of Missouri concerning popular elections," is not unconstitutional on the ground that the subject of the bill is not clearly expressed in its title, since there is an obvious connection and congruity between the idea expressed in the title and the subject of the amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 188, 189.]

2. SAME—ENACTMENT—PART OF REVISED BILL.

Though the section made a radical change, it is not unconstitutional as being first enacted as a part of a revised bill covering the whole subject of popular elections and filling vacancies, notwithstanding Const. art. 4, § 41 [Ann. St. 1906, p. 192], requiring all statute laws of a general nature to be revised, digested, and promulgated every 10 years, since a revised bill is passed with all the formality of any other bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 216.]

3. SAME—METHOD OF AMENDMENT.

That section, and section 9267 [Ann. St. 1906, p. 4258], relating to the term of office of collectors of revenue, are not unconstitutional, because the acts in which those amendments appeared for the first time merely set forth the statute as amended without also setting out the words stricken out and the new words inserted, notwithstanding Const. art. 4, § 34 [Ann. St. 1906, p. 189], relating to amendment of acts, which provides that the words stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth as amended, since the object of the constitutional provision was merely to require the act or section as amended to be set forth in full, to prevent inconvenience and confusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 206.]

4. WORDS AND PHRASES—"VACANCY."

The word "vacancy" has no technical meaning, but must be understood with reference to the context in which it is found.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7254-7264, 7826.]

# 5. OFFICERS—VACANCIES—TERM—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. art. 5, § 11 [Ann. St. 1906, p. 208], providing that when any office becomes vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor has been elected or appointed and qualified, means that the appointee shall hold the office until the end of the term in which the vacancy occurs, and thereafter until everything required by law to give title to the office to another person has been done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 88.]

# 6. TAXATION—COLLECTOR OF REVENUE—VACANCIES—TERM OF OFFICE—CONSTITUTIONALITY OF STATUTORY PROVISIONS.

The Constitution makes no provision for a collector of revenue, but article 9, § 14 [Ann. St. 1906, p. 264], provides that, except as otherwise directed, the General Assembly shall provide for such additional county officers as may be required, and that their terms of office shall be prescribed by law, but not to exceed four years. Rev. St. 1899, § 9203, as amended by Laws 1905, p. 272 [Ann. St. 1906, p. 4236], provides for the election of a county collector of revenue in 1896, and every four years thereafter, to hold office for four years, and until his successor is duly elected and qualified. Section 7028 [page 3418] provides that any vacancy in offices originally filled by election, with certain irrelevant exceptions, shall be filled by appointment by the Governor, the appointee to continue in office until the first Monday in January following the first ensuing general election at which a person shall be elected for the unexpired portion of the term, or for the ensuing regular term, as the case may be, and shall enter upon his duties on the first Monday in January following the election; provided that when the term to be filled begins on any other day the appointee shall hold office until such other date. *Held*, that section 7028 [page 3418] is not unconstitutional, but its enactment was authorized by Const. art. 9, § 14 [page 264].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1018.]

# 7. SAME—TERM—STATUTORY PROVISIONS.

There is no other provision authorizing the election of a collector of revenue to fill an unexpired term. Rev. St. 1899, § 9267 [Ann. St. 1906, p. 4258], provides that the collector's office shall expire on the first Monday in March of the year in which he must make his final settlement for the tax book to be collected by him. Section 9247 [page 4249] requires him to return his delinquent list and back-tax book and settle his accounts at a term of the county court to be held on the first Monday in March. *Held*, that the term of a collector appointed by the Governor in April, 1906, to fill a vacancy would expire on the first Monday in March, 1907, the year following his successor's election, and the successor, whether elected for an unexpired or a full term, could not claim the office until that time, for otherwise his term would exceed four years and would constitute a violation of the express provision of Const. art. 9, § 14 [page 264].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1032.]

# 8. OFFICERS—FILLING VACANCIES IN OFFICE—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. art. 5, § 11 [Ann. St. 1906, p. 208], providing that when an office becomes vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill the vacancy, who shall continue in office until a successor has been elected or appointed and has legally qualified, was intended merely to prevent vacancies in office, and to provide a method for filling them when no other provision is made by law;

hence it does not prevent the Legislature from declaring, when a vacancy exists, how it shall be filled, or the term of the person who shall fill it, and it is not violated by Rev. St. 1899, §§ 7028, 9267 [Ann. St. 1906, pp. 3418, 4258].

# 9. SAME—TERM—LEGISLATIVE CONSTRUCTION.

By legislative construction, the constitutional provision has been construed to permit the Legislature to prescribe the term of persons appointed to fill vacancies, as well as to determine the method of appointment.

# 10. STATUTES—CONSTRUCTION—LEGISLATIVE CONSTRUCTION.

Though courts are not bound to follow legislative construction, if the construction has been contemporaneous and long continued, it is entitled to great weight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 298.]

# 11. OFFICERS—FILLING VACANCIES—TERM—COMMENCEMENT OF SUCCESSOR'S TERM.

Const. art. 14, § 5 [Ann. St. 1906, p. 313], provides that, in the absence of any contrary provision, all officers now or hereafter elected or appointed shall hold office, subject to right of resignation, during their official terms, and until their successors shall be duly elected and qualified. Rev. St. 1899, § 8847 [page 4112], makes a similar provision as to the length of term. *Held* that, where one is appointed to fill a vacancy, another who is elected for a succeeding term, which has a definite and certain date of commencement, is not entitled to the office before that date.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 88.]

Appeal from Circuit, Court Chariton County.

Quo warranto by the state on the information of Herbert S. Hadley, Attorney General, at the relation of Cecil Wayland, against Edward Walter Herring, to determine the right to the office of collector of revenue. From a judgment for respondent, relator appeals. *Affirmed*.

The Attorney General, J. A. Collet, and Perry S. Rader, for appellant. H. J. West, for respondent.

GANTT, J. This is a proceeding instituted in the circuit court of Chariton county by the Attorney General of Missouri, at the relation of Cecil Wayland, against Edward Walter Herring, to determine the respective rights and claims of said Wayland and Herring to the office of collector of revenue of said county. Herring's claim to the office is by appointment made by the Governor on the 6th day of April, 1906, to fill a vacancy. Wayland was elected to the office at the general election on the 6th day of November, 1906, and thereafter qualified, and on the 11th day of December, 1906, demanded the office of Herring, who refused to turn it over. The pleadings consist of the information of the Attorney General in the nature of a writ of quo warranto, setting out Herring's appointment by the Governor to fill the vacancy on April 6, 1906, his qualification for and incumbency of the office, the election of Wayland at the general election on November 6, 1906, his qualification and demand for the office on December 11, 1906, and Herring's refusal to turn it over, together with a charge that Herring had in-

truded into, usurped, and unlawfully exercised the functions of the office, and a prayer that he be ousted therefrom, and a demurrer thereto filed by the respondent. The trial court sustained the demurrer; and, the relator declining to plead further, rendered judgment for the respondent, and from this judgment relator has appealed to this court.

The question at issue is: Who is entitled to the office from the time of Wayland's qualification until the first Monday in March, 1907? Respondent claims that he is entitled to hold by virtue of the appointment of the Governor until the first Monday in March, 1907, basing his claim upon a number of constitutional provisions. The collector's office is of statutory, not constitutional, origin. No such office is mentioned in the Constitution. It was created by the Legislature by authority of section 14, art. 9, of the Constitution [Ann. St. 1906, p. 264], which is as follows: "Sec. 14. Extra Officers, Duties and Terms. Except as otherwise directed by the Constitution, the General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require; and their terms of office and duties shall be prescribed by law; but no term of office shall exceed four years."

Deriving its authority from this provision of the Constitution, the Legislature has created the office of collector of revenue, provided what the term of office shall be, and how the officer shall be chosen. By the amendment by the session of 1905 the term is four years. Session Acts 1905, p. 272. This section as amended, reads as follows: "Sec. 9203. The Collector and His Term of Office. The office of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified; provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector." [Ann. St. 1906, p. 4236.]

Also deriving its authority from the above provision of the Constitution, the Legislature has provided that the collector's office shall expire on the first Monday in March of the year in which he is required to make his final settlement for the tax book which was to be collected by him. Section 9267, Rev. St. 1899 [Ann. St. 1906, p. 4258]. This would necessarily mean the first Monday in March succeeding the election for the office of collector. If a collector were elected at the general election in November, 1906, as the above statute provides for, the last tax book to be collected by the old collector would be the tax book for the year 1906, and he would be required to make his last final settlement at a term of

the county court to be held on the first Monday in March, 1907. Section 9247, Rev. St. 1899 [Ann. St. 1906, p. 4249].

Also deriving its authority from the above provision of the Constitution, the Legislature has provided that when a vacancy occurs in the office of collector it shall be filled by the appointment by the Governor, and that the person appointed shall hold the office until the beginning of the succeeding term. Section 7028, Rev. St. 1899 [Ann. St. 1906, p. 3418]. This section is as follows: "Sec. 7028. Vacancies, How Filled. Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of Lieutenant Governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the Governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election—at which general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties as such officer the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the Governor shall be entitled to hold such office until such other date."

Relator claims that these enactments of the Legislature are in conflict with section 11, art. 5, of the Constitution [Ann. St. 1906, p. 208], which is as follows: "Sec. 11. Vacancy in Office. Governor May Fill. When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law"—and that sections 7028 and 9267 were not enacted as required by the Constitution. He claims that just as soon as he was elected and qualified for the office respondent's term was ended, and he was entitled to assume the office.

1. There is no dispute that there was a vacancy in the office at the time the Governor appointed Herring thereto. The demurrer admits that Wayland, the relator, was elected at the November election in 1906, that he possessed all the qualifications required by the statutes and the Constitution to be possessed by a collector of the revenue of the county, and that in due time he qualified in the manner required by law. Addressing ourselves to the contention of the relator that section 7028, Rev. St. 1899 [Ann. St. 1906, p. 3418], is unconstitutional and in conflict with section 11 of article 5 of the Constitution [Ann. St. 1906, p. 208], we find that the first

ground of this contention is that the subject of the bill of which section 7028 constitutes a part is not clearly expressed in its title. The title to that bill is, "An act to amend and revise chapter 2, title 2, of the General Statutes of Missouri concerning popular elections." This identical objection to this section was made in Mead's Case, 71 Mo. 286. At that time it was No. 5527, Rev. St. 1879. In that case it was said that the section was in entire harmony with the title, because there was an obvious connection and congruity between the idea expressed in the title "concerning popular elections" and that of providing for filling, by gubernatorial appointment, vacancies temporarily occurring in offices filled in the first instance by an election, and to be so filled again when the temporary exigency ceased to exist. That case has so often met the unqualified approval of this court on the subject of sufficiency of titles to legislative enactments within the meaning of section 28 of article 4 of the Constitution of this state [Ann. St. 1906, p. 185] that we forbear further discussion. We think the objection is untenable.

It is also urged that said section is unconstitutional, because it was first enacted as a part of a revised bill. This insistence seems to be predicated upon section 41 of article 4 of the Constitution [Ann. St. 1906, p. 192], which says: "All the statute laws of a general nature shall be revised, digested and promulgated," every 10 years, and that therefore the Legislature could not make so radical a change of the law in a revised bill as was made by section 7028. When it is considered that a revised bill is passed with all the formality required for the enactment of any other law, is required to be read just as many times, authenticated in the same way and receive the Governor's approval in the same manner as any other bill, we are not impressed with the strength of this objection. Having reached the conclusion that the title to this bill was entirely sufficient under section 28 of article 4 to support section 7028, the fact that it was passed in a revised bill covering the whole subject of popular elections and the filling of vacancies, in our opinion, in no manner impairs its validity as a constitutional law. Again, it is urged that both sections 7028 and 9267 are unconstitutional, because each of said sections was enacted as an amendment to the previous law on that subject, in that the act in which said amendments appear for the first time did not comply with the constitutional provision found in section 34 of article 4 [Ann. St. 1906, p. 189] by setting forth the words stricken out of the old statute, or the words inserted in lieu thereof in the new, but in each instance the statute as amended was set forth in full. Section 34 of article 4 provides: "No act shall be amended by providing the designated words thereof, be stricken out, or that designated words be inserted, or that designated words be stricken out and others

inserted in lieu thereof; but the words to be stricken out and those inserted in lieu thereof together with the act or section amended, shall be set forth as amended." This section of the Constitution has been before this court for consideration on a number of occasions, and the objection now made to these sections has often been made. In *State v. Chambers*, 70 Mo. 625, it was said: "The object of the prohibition from making amendments in such a way was to prevent the laws from becoming involved in the confusion, which would necessarily result from such legislation, and to prevent the inconvenience it would occasion of hunting through various books to find the act amended, and then apply to it the amendatory act to ascertain what the law as amended was. To prevent this it requires the entire act, when the amendment relates to the entire act, to be set forth in full, or when the amendment relates only to certain sections of an act to be amended, that only the sections as amended should be fully set out." That ruling was followed in *Morrison v. Ry.*, 96 Mo. 602, 9 S. W. 627, where it was said: "Section 34 of article 4 of the Constitution of 1875 does not require that an amendatory act should state that certain words of a specific section are stricken out and others inserted, and then set out in full the section as amended. It is sufficient if the section as amended is set out in full." In *Cox v. Railway Co.*, 174 Mo. 601, 74 S. W. 854, this same question was again before this court, and the construction given in the foregoing cases was adhered to and declared to be the settled law of this state. Accordingly this point also must be ruled against the relator.

We are thus brought to the main proposition urged by the learned counsel for the relator namely, that section 7028 is invalid for the reason that it is in conflict with section 11 of article 5 of the Constitution, which ordains: "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law." Relator's contention is that the respondent Herring, the Governor's appointee, under section 11 of article 5 could hold the office of collector of Chariton county until relator Wayland was elected at the general election in 1906, and qualified according to law, and no longer, and that the Legislature had no power by section 7028, Rev. St. 1899 [Ann. St. 1906, p. 3418], or any other statute, to extend the tenure of respondent to said office beyond the time of the election and qualification of his successor, because to do so would be an enlargement of the constitutional limitation. The respondent does not controvert the proposition that a statute can neither lengthen nor shorten the tenure of an office when it is fixed by the Constitution; but he says that section 7028 and 9267 are perfectly constitu-

tional enactments, and by virtue of 7028 respondent was entitled to hold the office under his appointment until the first Monday in March, 1907, and that section 7028 does not contravene the constitutional provision in section 11, art. 5, when properly construed.

The framers of our Constitution, when they drew section 11, art. 5, thereof, were considering vacancies in public offices. They foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for these vacancies as far as possible, in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law. When this vacancy occurred in the office of collector of the revenue in Charlton county, the condition existed which authorized the Governor to fill it by appointment. Whether we look to section 11 of article 5 of the Constitution, or to section 7028, Rev. St. 1899 [Ann. St. 1906, p. 3418], for authority to fill the vacancy, we find that it is vested in the Governor. The obvious purpose in conferring this authority upon the Governor was to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. The language of the Constitution is: "He shall appoint a person to fill such vacancy." Giving these words their natural significance, and it has often been held that the word "vacancy" has no technical meaning, but must be understood with reference to the context in which it is found, they import that the appointee of the Governor would be entitled to hold the office until the end of the term in which the vacancy occurs, and with the additional words of the section, to wit, "Shall continue in office until a successor shall have been duly elected or appointed and qualified according to law," we think the obvious purpose was to extend the appointee's tenure after the end of the term in which the vacancy occurred until everything has been done which is required by law to give title to the office to another person.

The office of collector of the revenue is a statutory office, an office which the Legislature under the express language of section 14 of article 9 of the Constitution was authorized to create, and to prescribe the term of the incumbent thereof, which should not exceed four years, and how the officer should be chosen. As said by Judge Scott, in *State v. Lusk*, 18 Mo. 333, the General Assembly "may take the appointing power from the Governor, and the power of filling vacancies in such cases may be conferred on others than the executive. In the exercise of the power to create offices, they may declare when they are vacant and who shall fill the vacancies." As the Constitution does not forbid, but expressly authorizes, the Legislature to create the office of collector of revenue, it may prescribe how it shall be filled. By section 9203, as amended by the act of 1905, the

Legislature provided for the election of a collector of the revenue in all the counties of the state at the general election in 1906, and every four years thereafter, and by section 7028 it provided for the filling of a vacancy in said office by appointment by the Governor, and provided further "that the person so appointed shall after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election, provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the Governor shall be entitled to hold such office until such other date." Now it is alleged in the petition that on Tuesday, the 6th day of November, in the year 1906, the relator, Wayland, was elected to the office of collector of the revenue of Charlton county, received a certificate of his election thereto, in proper and due time executed and filed his bond in the amount fixed by the statute, which was approved by the county court of Charlton county and by the State Auditor, and took the oath prescribed by law to be taken by collectors of the revenue, and on the 19th day of November, 1906, a commission was issued to him by the Governor, by which he was commissioned collector of the revenue of said county. Now by virtue of the amendment of 1905 to section 9203 the term of his office was four years, and by section 9267 the collector's office expires on the first Monday in March of the year in which he is required to make his last final settlement for the tax book, which was to be collected by him, necessarily meaning the first Monday in March succeeding the election for the office of collector, consequently under these various legislative enactments relator's term of office would begin on the first Monday in March, 1907, and the respondent's right to hold the office by his appointment from the Governor would cease on that day.

But it is said by relator that respondent has no right to assume that relator was elected for the term beginning on the first Monday in March, 1907, and for no other term. It is plain that he was elected either for the full term or the unexpired term. He could not have been elected to two terms. As we have already seen, the regular term had a day certain of beginning, and a day certain for ending. It began on the first Monday in March, 1907, and ended four years later. It is not alleged in the information that relator was elected for an unexpired term, and section 9203 makes no provision for the election of a collector for an unexpired term. The



only authority for electing a collector for an unexpired term is found in section 7028; but by the express provision of that section it would make no difference whether relator was elected for an unexpired term, or for a regular term, as in either event, his term has a definite and certain date of beginning, to wit, the first Monday in March, 1907, and until that date arrived he was not entitled to assume the duties of the office. But we take it any way that a fair construction of the relator's petition means that he was elected for the regular term at the general election in 1906, and not for any unexpired term. Certain it is that the statute did not provide for the election of two officers for the same office, one for the unexpired and one for the ensuing regular term, and we can hardly think that relator desires us to hold that he was elected for a term ending March 1, 1907. Moreover, if relator's contention is correct, that he was entitled to this office as soon as he was elected, and that it continued for four years from the first Monday in March, 1907, his term would be longer than four years, which is expressly prohibited by section 14 of article 9 of the Constitution [Ann. St. 1906, p. 264]. As the Legislature was given the power by section 14 of article 9 to create this office and prescribe the length of the term thereof and the duties of the incumbent, as said by Judge Scott, they had the power to deprive the Governor of the appointing power, and could have conferred the power of filling vacancies on others than the executive. In the exercise of the power to create the office they could declare when it was vacant, and who should fill the vacancy, and by the provisions, which we have cited, they have created the office of collector of the revenue and prescribed the term and the duties thereof, and have provided for the filling of vacancies, all within the constitutional power of the General Assembly, and this being so, they have provided by law for all the contingencies that have arisen in this case within the meaning of section 11, art. 5, and that when the Governor made his appointment of the respondent in this case he was acting under and by virtue of the provisions of section 7028, and that that section did not impinge upon his constitutional authority. There has been a uniform legislative construction of section 11 of article 5 of the Constitution since its adoption. That construction has been that the Legislature could not only provide who should make appointments to fill vacancies in office, but might also prescribe the term of the persons so appointed to fill vacancies, whether made by the Governor or some other officer or body. While courts are not bound to follow legislative construction, yet when such construction has been contemporaneous and long continued, it is entitled to great weight. *Ry. v. Brick Co.*, 85 Mo., loc. cit. 332; *State ex rel. v. Stonestreet*, 99 Mo. 361, 12 S. W. 895; *Amer. & Eng. Enc. of Law*, vol. 6, p. 931.

In *State ex rel. v. McGovney*, 92 Mo. 428, 3 S. W. 867, there was a contest between Prewitt and McGovney over the office of treasurer of Vernon county. McGovney was elected at the November election, 1884, and Prewitt in 1886. At the same election at which Prewitt was elected the county adopted the township organization law. During McGovney's term (Acts 1885, p. 106) the statute fixing the treasurer's office at two years was amended by adding the proviso: "That in counties having adopted, or which may hereafter adopt, township organization, the term of office of said treasurer shall be extended to the 1st day of April next after the election of his successor." The question was whether McGovney had a right to hold over until the first Tuesday in April, 1887, it being contended by Prewitt that this amendment was in conflict with section 8 of article 14 of the Constitution [Ann. St. 1906, p. 314], which provides that the term of no office shall be extended for a longer period than that for which such officer was elected or appointed. It was held that the statute was not in conflict with the Constitution, and that Prewitt was not entitled to the office until the first Tuesday in April. On the question of when Prewitt would be entitled to the office, the court said: "Mr. Prewitt's term does not begin until April, and by express provision of the Constitution and the statute McGovney holds until that time." The provision of the Constitution here referred to is section 5 of article 14 of the Constitution [Ann. St. 1906, p. 313] which reads: "In the absence of any contrary provision all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified." The statutory provision in section 8847, Rev. St. 1890 [Ann. St. 1906, p. 4112], is to the same effect.

The reasoning in that case would seem to control in this. Learned counsel for the relator have with great industry collected cases from the courts of last resort in a number of the states in the Union, but the length of this opinion forbids that we shall review them seriatim. The brief indicates great research and discrimination in the selection of these cases, and we have read them with much interest; but a critical examination of the statutes themselves, and of the Constitutions under which they were drawn will, we think, demonstrate that there is a difference in the language of the constitutional provision upon which the cases are decided. In a number of them the law provides for the election of a successor for the unexpired term, or the office is one, the beginning of the term of which is not definitely fixed by law, and one which the officer elected or appointed to is entitled to assume immediately upon his election or appointment and qualification. But we find no case which holds that where an officer, as the relator in this case, has been



elected to a term of office which had a definite and certain date of commencement has been adjudged to be entitled to that office before that date. And we find no case which under a constitutional provision like our section 14 of article 9 conferring express power upon the Legislature to create statutory offices has denied the Legislature the right to provide for the filling of the vacancies in such offices as has been done in this state by section 7028, Rev. St. 1899 [Ann. St. 1906, p. 3418].

Our conclusion is that section 7028 does not contravene the Constitution of this state, but finds ample support in section 14 of article 9 thereof [Ann. St. 1906, p. 284], and that it in no manner conflicts with section 11 of article 5 [page 208], which provides only for the filling of vacancies when no other provision is made by law.

The judgment of the circuit court is affirmed.

FOX, P. J., and BURGESS, J., concur.

#### Ex parte CLARK.

(Supreme Court of Missouri. Dec. 24, 1907.)

#### 1. HABEAS CORPUS—PROCEEDINGS—WAIVER OF TAKING OF TESTIMONY—SCOPE OF INQUIRY.

In habeas corpus, where petitioner waives the appointment of a commissioner to take testimony on controverted facts, the case is submitted on the narrations of the judgment and commitment, and the truth of the recitals therein cannot be controverted, nor can facts dehors the record be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 81.]

#### 2. COURTS—JURISDICTION—DIVISION OF CIRCUIT COURT.

The mere fact that a division of the circuit court is assigned criminal cases, which occupy its whole time, does not change its character as a constitutional court, under Const. art. 6, § 1 [Ann. St. 1906, p. 212], nor its jurisdiction as a circuit court proceeding according to the common law as prescribed by section 22 et seq. [page 234].

#### 3. HABEAS CORPUS—DETERMINATION—REMAND—OPERATION AND EFFECT.

Though the plea of *res judicata* is good on the same facts where a prisoner has been discharged on habeas corpus it does not apply where he has been remanded; hence the discretion of one judge in remanding a prisoner does not bar the discretion of another in discharging him, except that under the express provisions of Rev. St. 1899, § 3546 [Ann. St. 1906, p. 2017], the petition must show that application has not been made to or refused by any court, officer, etc., superior to the one to whom the petition is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 98, 100.]

#### 4. CONTEMPT—"CRIMINAL CONTEMPT."

Criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 4.]

For other definitions, see Words and Phrases, vol. 2, pp. 1194, 1195.]

#### 5. SAME—"CIVIL CONTEMPT."

A person who falls or refuses to do something which he has been ordered to do, or does something that he has been ordered not to do, for the benefit of the opposite party to a cause, is guilty of a civil contempt, and the object of the punishment is to coerce the performance of an act remedial in its nature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 4.]

For other definitions, see Words and Phrases, vol. 2, pp. 1747, 1748.]

#### 6. SAME—"DIRECT CONTEMPT."

A direct contempt is a contempt committed in the face of the court, and may consist of noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings, or an open defiance of its just powers or authority, or in disrespectful behavior or language to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 9-13.]

For other definitions, see Words and Phrases, vol. 3, pp. 2071, 2072.]

#### 7. SAME—"INDIRECT" OR "CONSTRUCTIVE CONTEMPT."

An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due administration of justice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1468, 1469; vol. 4, p. 3558.]

#### 8. SAME—ACTS CONSTITUTING CRIMINAL CONTEMPT.

An attorney is guilty of criminal contempt if he willfully and intentionally delays the proceedings of the court by failing to appear at the time set for the trial of a case which he has had laid over, and by obtaining permission of court to leave the courtroom for a few minutes during the trial of the case, to have an action pending in another court passed or continued, and absenting himself for nearly an hour without valid excuse.

#### 9. SAME—CRIMINAL CONTEMPT—PROCEEDINGS TO PUNISH—REVIEW.

The adjudged punishment of a criminal contempt is a judgment in a criminal case from which no appeal or writ of error will lie, but the proceedings may be reviewed on certiorari or habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 214, 221, 228-228.]

#### 10. SAME—PROCEEDINGS TO PUNISH—DIRECT AND INDIRECT CONTEMPT.

Under the express provisions of Rev. St. 1899, § 1618 [Ann. St. 1906, p. 1200], as well as at common law, direct contempts may be punished summarily without notice or hearing, while in proceedings to punish for an indirect or constructive contempt the contemner is entitled to notice, reasonable time, and a hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 140-142.]

#### 11. SAME—CONTEMPT IN ABSENCE OF COURT.

The absence from the courtroom of an attorney, to the delay and embarrassment of a trial, if it amounts to a contempt is an indirect and not a direct contempt.

#### 12. SAME—INDIRECT CONTEMPT—PROCEEDINGS TO PUNISH—NOTICE.

The fact that a contemner was in court, and had actual notice of what was going on, when he was adjudged guilty of an indirect contempt, does not give him the notice expressly required by Rev. St. 1899, § 1618 [Ann. St. 1906, p. 1200], relating to the procedure in punishing contempts, nor that required at common law,

since notice in contemplation of law means a reasonable notice sufficient to prepare and make a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 150, 151.]

### 13. SAME—JUDGMENT ENTRY.

The judgment entry in a contempt proceeding against an attorney, reciting that the court "was of the opinion that said delay [in attending court] on the part of said C. was intentional," and that the court "doth find as a fact that said failure . . . was willful," etc., does not sufficiently show service of notice and a hearing of evidence, especially where the finding of the court was based upon the erroneous theory that the contempt was committed in his presence, thereby excluding the necessity of citation and evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 198-200.]

### 14. WORDS AND PHRASES—"OPINIONS."

While the word "opinion," in a close and strict sense, means a court's decision upon pleadings and the facts duly presented in a cause, yet in a broader sense it means one's "notion," "idea," "view," or even one's "sentiments."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 4995-4998.]

In Banc. Original application, under the habeas corpus act, in the Supreme Court, by Willis H. Clark against Louis Nolte, sheriff of St. Louis. Petitioner discharged.

T. J. Rowe and Hiram N. Moore, for petitioner. Arthur N. Sager and Grant Gillespie, for respondent.

LAMM, J. Willis H. Clark, a member of the St. Louis bar, was fined for two separate contempts by the judge presiding in division 11 of the circuit court of that city. His person being seized under one mittimus issued on an omnibus judgment covering both fines, he sued out a writ of habeas corpus from this court. Such writ went, directed to Louis Nolte, sheriff of the city of St. Louis, commanding him to produce the body of said Clark before this court in banc at a date named.

### Statement of the Case.

Attached to the petition and return of the sheriff are certified copies of the commitment on which petitioner is held (Exhibit A), and of the judgment on which it issued (Exhibit B). As will hereafter appear, the cause is taken as submitted on the pleadings. This being so, it will be well to set forth the judgment, the petition, and the return in full, giving the pith of the commitment and the reply to the return to round out the statement of the case.

The commitment follows closely the recitals and narrations of the judgment. If it vary at all, it is by way of condensation. Therefore, it need not be set forth. The curious may find it in full in *Re Clark*, 103 S. W. 1105.

The judgment, on which the commitment issued as an execution, follows:

### "Exhibit B.

"State of Missouri, Plaintiff, vs. August Wilkins, Defendant. Willis H. Clark (Attor-

ney for Defendant), Respondent. No. 44 to the April Term, 1907. Whereas, the above cause wherein the state of Missouri is plaintiff and August Wilkins is defendant, pending in division No. 11 of the circuit court of the city of St. Louis, was set for trial in said court on Monday, May 6, 1907, the respondent, Willis H. Clark, a member of the bar of the city of St. Louis, and an attorney at law practicing in said court, appearing for the defendant, and thereupon, said cause being called for trial, the defendant, by his said attorney, announced that the defendant was not ready for trial, and thereupon the court granted said defendant and his said attorney until 2 o'clock p. m. of day to prepare and present his application for a continuance under the statute in such cases made and provided; and whereas, thereafter, at 2 o'clock p. m. on said 6th day of May, 1907, said Willis H. Clark, as attorney for the defendant in said cause, presented his duly verified application for a continuance, which application, after due consideration by the court, was overruled, and thereupon the said Willis H. Clark, as attorney for said defendant, August Wilkins, requested the court for a short time to enable the defendant to secure the presence of certain witnesses, and in pursuance of such request the court thereupon granted the defendant until Thursday, May 9, 1907, at ten (10) o'clock a. m., and thereupon the cause was laid over until said last-mentioned day; and whereas, on Thursday, May 9, 1907, at ten (10) o'clock a. m., said cause being called again for trial, it was made to appear to the court that said Willis H. Clark was engaged in the trial of a case in division No. 12 of said circuit court of the city of St. Louis, and thereupon the above cause of the State of Missouri v. August Wilkins was laid over until five (5) o'clock p. m. of said date, and notice thereof was given to the respondent, Willis H. Clark, of such setting; and whereas, said Willis H. Clark appeared in this court at five (5) o'clock p. m., the court then being in session, and requested that the above cause be laid over until nine (9) o'clock a. m., Friday, May 10, 1907; and thereupon, at the request of said Willis H. Clark, the above cause was laid over until Friday, May 10, at nine (9) o'clock a. m.; and whereas, the above court duly convened and was duly opened for business at nine (9) o'clock a. m.; and whereas, said court was compelled to wait and did wait until nine-fifteen (9:15) a. m. because of the absence of said Willis H. Clark, and because of his failure to attend court at nine (9) o'clock a. m.; and whereas, said Willis H. Clark, by reason of his failure to be present at nine (9) o'clock a. m. on said tenth (10th) day of May, 1907, delayed the court and interfered with the proceedings of said court by his failure to be so present; and whereas, the court was of the opinion that said delay on the part of said Willis H. Clark was intentional: It is therefore ad-

judged by the court that said Willis H. Clark was and 's guilty of contempt of this court by reason of his willful failure to be present in court on the calling of said case. It is therefore ordered and adjudged by this court that said Willis H. Clark, by reason of his said conduct, was guilty of contempt of the authority of this court, committed in its presence on this 10th day of May, 1907. And whereas, after the jurors (to the number of 34) were duly examined on their voir dire in the above-entitled cause, wherein the state of Missouri is plaintiff and August Wilkins is defendant, said defendant being represented by said Willis H. Clark as his attorney, and while the court was in session, waiting upon counsel acting in behalf of the state and in behalf of the defendant to make their challenges, the said Willis H. Clark asked leave of court to leave the courtroom for not to exceed ten (10) minutes, until he could get a case, in which he was counsel, then pending in the St. Louis court of criminal correction, passed or continued; and thereupon the court granted said Willis H. Clark leave to absent himself for a few minutes for the purpose of having the case pending in said St. Louis court of criminal correction passed or continued; and whereas, the court did excuse said Willis H. Clark for the purpose aforesaid at ten-forty (10:40) o'clock a. m.; and whereas, said Willis H. Clark did not return into this court until eleven-thirty-five (11:35) a. m., and then announced to this court that he had been engaged in trying a cause in the St. Louis court of criminal correction; and, whereas, said Willis H. Clark delayed the trial of said cause of the State of Missouri v. August Wilkins for the space of fifty-five (55) minutes without just reason or excuse; and whereas, this court doth find as a fact that said failure on the part of said Clark to promptly return into court and continue the trial of the above cause, which was then on trial, was willful and in utter disregard of the authority of this court; and whereas, said Willis H. Clark was, by reason of his conduct aforesaid, guilty of contempt of this court by such misconduct in its presence: It is therefore ordered and adjudged that said Willis H. Clark, by reason of his said conduct, was and is guilty of contempt of the authority of this court, committed in its presence on this tenth (10th) day of May, 1907; and it is further ordered that said Willis H. Clark for the first offense above mentioned be fined, and he is hereby fined, the sum of ten dollars (\$10); and it is further ordered that said Willis H. Clark be fined, and he is hereby fined, for the second offense or contempt above mentioned the sum of twenty dollars (\$20). And it is further ordered and adjudged that the said Willis H. Clark for his said contempts of court, as aforesaid, shall pay to the state of Missouri, for the use of the city of St. Louis, the fines above mentioned, aggregating the sum of thirty dollars (\$30),

on or before the 14th day of May, 1907, and in default of the payment of said sum that he be committed to the jail of the city of St. Louis until said sum shall have been paid. And it is further ordered that a certified copy of this order under the seal of the court be process and warrant for executing this order."

The petition for the writ follows:

"To the Honorable Judges of the Supreme Court of Missouri: The petition of Willis H. Clark respectfully shows that he is wrongfully imprisoned, detained, and restrained of his liberty by Louis Nolte, sheriff of the city of St. Louis, at the city of St. Louis, Mo.; that said imprisonment, detention, confinement, and restraint are illegal, and the illegality thereof consists in this, to wit, that the only pretext or cause of such arrest and detention is by virtue of a judgment and order made by the Hon. Moses N. Sale, judge of division 11 of the circuit court of the city of St. Louis, state of Missouri, on the 10th day of May, 1907, in a certain cause then pending in said circuit court of the city of St. Louis, wherein the state of Missouri was plaintiff and August Wilkins was defendant, and a commitment issued thereon by the clerk of said circuit court on the 14th day of May, 1907, upon said judgment, and directed to said Louis Nolte, sheriff of the city of St. Louis, a copy of which said judgment and commitment are hereto annexed and made a part of this petition; that said commitment was delivered to said Louis Nolte, sheriff of said city, and that on the 14th day of May, 1907, he executed the same by arresting this petitioner, and he by virtue of the same, and not otherwise, arrested this petitioner and yet holds him in custody thereunder; that said order, judgment, and commitment were illegally and improperly made, in this: that said order, judgment, and commitment were made by the said Moses N. Sale, judge of said circuit court, without a notice to petitioner of the accusation against him, and without a hearing, and that the order, judgment, and commitment are null and void because the same were made without notice to petitioner of the accusation against him, and without a hearing, and that the said circuit judge was without authority and jurisdiction to render said judgment, and said judgment and commitment is in violation of section 1, article XIV, of the Constitution of the United States, and section 30, article II, of the Constitution of Missouri, because they deprive petitioner of his liberty without due process of law; that said judgment and commitment are illegal because your petitioner, immediately after he had been adjudged guilty of contempt of court without a notice or hearing, on May 10, 1907, as aforesaid, requested the court to grant him a hearing, and his said request was denied, which said fact he is ready to verify. Your petitioner says that said judgment and commitment are illegal, null, and void because petitioner was guilty

of no misconduct in the presence of the court, and the recital in the said judgment and commitment that petitioner was guilty of misconduct in the presence of the court is false, and by reason of said fact the circuit judge had no power, authority, or jurisdiction to punish him for a criminal contempt without a notice and hearing; that said judgment and commitment are illegal, null, and void because said judgment was rendered in the case of State of Missouri v. August Wilkins; that said judgment is illegal, null, and void because petitioner is, in one judgment, adjudged to be guilty of two separate and distinct criminal contempts committed at different times; that said judgment and commitment are null and void because your petitioner was not guilty of a criminal contempt of said circuit court or the judge thereof, and that the matters and things as recited in said judgment do not in law constitute a criminal contempt of said circuit court or the judge thereof. Your petitioner says that the recital in said judgment, 'whereas, the court was of the opinion that said delay on the part of said Willis H. Clark was intentional,' was not supported by any evidence, and the court had no evidence upon which to base same, and there was nothing that occurred during the trial of said case of State v. Wilkins to authorize such finding of fact, and that said finding that the absence of the petitioner was intentional is false—all of which your petitioner is ready to verify. Your petitioner says that he was attorney for August Wilkins, and that said August Wilkins was on trial on May 10, 1907, for the alleged offense of sodomy, and that under the law he had twelve hours to make his peremptory challenges, and that said defendant did not waive his said right, and that petitioner as attorney for said Wilkins did not receive the peremptory challenges made by the state until about eleven-twenty-five a. m. on May 10, 1907, and that ten minutes thereafter he made his peremptory challenges, and that the finding of fact in said judgment that petitioner delayed the trial of said cause of State of Missouri v. Wilkins fifty-five minutes without just reason or excuse is false; and that the finding of fact in said judgment that the failure on the part of petitioner to continue the trial of said cause was willful, and in utter disregard of the authority of the court, was made without a hearing and without evidence to support same, and is false—all of which said facts petitioner is ready to verify.

"That as to the first of said alleged contempts petitioner states the facts to be as follows: 'That on May 8 and 9, 1907, petitioner was actually in attendance and engaged as counsel for defendants in the case of the State of Missouri v. Harry Lipschitz and Max Shapiro, then on trial in division No. 12 of said circuit court; that said case continued so to be on trial and was not concluded until 10:30 p. m. on said May 9th; that consequent upon the physical and mental strain

of said trial, and his mental stress over the adverse result thereof, and his contemplation of unfavorable conditions in said case of State of Missouri v. August Wilkins, to be placed on trial in said division No. 11 of said circuit court on said May 10, 1907, petitioner, on the night of said May 9, 1907, having retired about 11:30 p. m., became afflicted with insomnia and was unable to sleep until nearly daylight of said May 10th, but finally fell into an unrefreshing slumber, from which he awakened at 8:20 a. m. on said May 10, 1907; that then having about three miles travel to reach division No. 11, petitioner arose and dressed hurriedly, and without taking breakfast or even a swallow of coffee, rushed to the street car in order to be present in said division No. 11 at 9 o'clock a. m.; that petitioner arrived at his transfer point, about one mile from the court, at 8:53 a. m., but the connecting car was delayed; that, after waiting several minutes for said connecting car, petitioner started to walk to the court, and got within four blocks, or about a quarter of a mile, thereof, when overtaken by said connecting car, which he then boarded and proceeded to the courtroom of division No. 11, after stopping less than one minute to leave word as to his whereabouts at his office, directly across the street from said courtroom; that according to petitioner's watch—which he afterward found to be correct within thirty seconds—it was 9:09 a. m. when petitioner entered the courtroom, and according to the clock in said courtroom it was 9:13 a. m., said clock being between three and four minutes fast, as afterwards verified by petitioner.'

"That as to the second of said alleged contempts petitioner states the facts to be as follows: 'That on May 6, 1907, petitioner was counsel in cases pending and for trial in two different courts of record in said city of St. Louis, to wit, the St. Louis court of criminal correction and said division No. 11 of said circuit court; that, anticipating a conflict in the requirements for his presence in said different courts, petitioner secured a continuance of the case in which he was counsel in said St. Louis court of criminal correction, in order that he might be free to attend to said cases of August Wilkins in said division No. 11, and said case in said St. Louis court of criminal correction was then reset for May 10, 1907, at 10 o'clock a. m., upon the express understanding and agreement of counsel that said case would be called and tried on said day; that thereupon petitioner appeared in said division No. 11 and answered in said case of August Wilkins, and was compelled to ask a continuance thereof because of the absence of several material witnesses for defendant; that the court denied said application for continuance, but reset said cause for May 9, 1907, at 10 o'clock a. m., to afford defendant further opportunity to secure his witnesses; that on said May 9th, throughout the entire day, and until 10:30 at night, except for two short recesses for meals, pe-

itioner was actually engaged in the trial of said case begun in said division No. 12 on May 8th; that upon arriving in said division No. 11 as before stated, on said May 10th, petitioner proceeded to examine for the defendant thirty-four jurors presented for voir dire examination in said case of August Wilkins, charged with the offense of sodomy, and such examination was concluded on both sides about 10:15 a. m.; that thereupon petitioner informed the court as to the pendency of said cause in said St. Louis court of criminal correction, and as to the need of petitioner's presence in said court, and left said division No. 11, with the full knowledge and consent of the judge thereof, for the purpose of attending to said case in said St. Louis court of criminal correction, then sitting less than one hundred feet from the courtroom of said division No. 11; that at said time the challenges for the state in said case of August Wilkins had not been announced or notice thereof given to either petitioner or the defendant, and said challenges for the state were never communicated to petitioner in any way until after his return to said division No. 11, about forty minutes later, although it was known to the court and to counsel for the state that petitioner during such interval was within one hundred feet of said division No. 11, and the defendant, as petitioner then knew, was then entitled, under the provisions of section 2623 of the Revised Statutes of 1899 of Missouri, to an interval, upon his demand, of twelve hours in which to determine upon his challenges; that it had been previously agreed between counsel in said case in said St. Louis court of criminal correction that said case, upon petitioner's appearance in said court, should be called out of regular order, with the consent of the court, and thereupon disposed of by a summary trial, as provided in the act creating said court, which proceeding would reasonably require from fifteen to twenty-five minutes; that, when petitioner did so arrive, another case was on trial, and counsel in petitioner's case were delayed about twenty minutes before they could get said case called; that thereupon petitioner proceeded with said case, and, after bringing it to a point where he could be spared, petitioner left before said trial was completed, and immediately returned to said division No. 11, where he resumed his labors in said case of August Wilkins. Petitioner states that his aforesaid absence from said division No. 11 was solely under conditions as aforesaid, and that he had no intention or desire whatever to exhibit disrespect or want of regard for the court or to hinder or delay its proceedings. Petitioner further states that no judicial notice of either of said alleged contempts was taken by the court at the time of the occurrence thereof, and not thereafter until 9 p. m. of said May 10th, and that meanwhile three adjournments or recesses of said court were had; that no notice whatever of any proceeding against him for any

alleged contempt was given petitioner; that at said hour of 9 p. m. petitioner was called before the bar of said court, without previous notice of any kind and without being accorded a hearing of any kind, was declared by the judge of said court to be in contempt and said fines assessed against him; that petitioner then and there requested and demanded that he be given a hearing and an opportunity for explanation, and to purge himself of contempt, if any contempt appeared, but that such request and demand was denied him, and he was told that he might go ahead and say what he wanted to, but it would make no difference, as the fines would stand just the same; that no application for the relief sought has been made to or refused by any court officer or officers superior to this honorable judge.

"Your petitioner says that the judgment and commitment aforesaid are illegal, null, and void because, firstly, the judgment was rendered in the case of State v. Wilkins, and covers two distinct offenses; secondly, petitioner was convicted without notice, trial, and hearing; thirdly, the recitals and findings of fact upon which the judgment is bottomed are false; fourthly, because the matters recited in the judgment do not authorize a conviction; and, fifthly, because upon all the facts petitioner was not guilty of any contempt of court. Wherefore, your petitioner prays that a writ of habeas corpus be granted directed to Louis Nolte, sheriff of the city of St. Louis, commanding him to have the body of petitioner before the honorable Supreme Court at a time and place therein to be specified, to do and receive what shall then and there be considered by your honors concerning him, together with the time and cause of his detention and said writ, and that petitioner may be restored to his liberty.

"Willis H. Clark, Petitioner."

This petition was verified by affidavit.

The writ was in conventional form, and need not be set forth.

The return thereto follows:

"I, Louis Nolte, sheriff of the city of St. Louis, Missouri, for my return to the writ of habeas corpus issued in the above cause, state that the petitioner, Willis H. Clark, the person named in said writ, was committed to my custody by virtue of a certain warrant of commitment, duly issued out of the circuit court of the city of St. Louis, state of Missouri, on the 15th day of May, 1907, under the hand of Adolph Nast, clerk of the circuit court for criminal causes, and under the seal of said circuit court, city of St. Louis, state of Missouri, a certified copy of which warrant of commitment is hereto attached, marked 'Exhibit A,' and made a part of this return. And this respondent further shows to this honorable court that the said warrant of commitment, under which this respondent now holds in custody the said Willis H. Clark, was issued in pursuance of and based upon an order and judgment of said circuit court of the

city of St. Louis (division No. 11 thereof) against said Willis H. Clark, for contempts committed in the immediate view and presence of said circuit court, city of St. Louis (division No. 11 thereof), as set forth in said order and judgment of said circuit court, a duly certified copy of which order and judgment is herewith filed as part of this return, and marked 'Exhibit B.' Nevertheless, in obedience to the writ of habeas corpus issued herein, I, the said sheriff of the city of St. Louis, now produce the body of the said Willis H. Clark before this honorable court, to be dealt with according to law, this the 1st day of July, 1907.

Louis Nolte,

"Sheriff of the City of St. Louis, Mo."

To the return petitioner replied denying that the judgment was for contempts "committed in the immediate view and presence of the judge of division 11 of the circuit court of the city of St. Louis," and amplified the foregoing denial by restating the gist of his petition in that behalf. Petitioner then asked that a commissioner be appointed by this court to take testimony on the controverted questions of fact. The circuit attorney of the city of St. Louis, on behalf of the sheriff, thereupon filed a certified copy of a decision rendered in the St. Louis Court of Appeals on petitioner's earlier application to that court for a writ of habeas corpus on the same facts; and further suggested that division 11 of the circuit court of the city of St. Louis was a court of general jurisdiction, that its judgment and commitment could not be attacked collaterally on application for a writ of habeas corpus, and therefore no order appointing a commissioner to take evidence should go. The cause being set for hearing, petitioner appeared by counsel and submitted it here on brief and oral argument. Neither in the one or the other was the appointment of a commissioner to take testimony pressed. To the contrary, the cause was submitted, by necessary implication, on the theory that the facts essential to determine the issues are disclosed by the judgment and commitment, and that the crucial question for our determination resolved itself into a matter of law. This being so, we shall treat the case as though the application for the appointment of a commissioner was withdrawn or waived, and as if the case stood on a motion for judgment on the pleadings.

#### Opinion.

1. It is well to fetch a compass and eliminate certain questions injected into the case, but not deemed germane to it in the form submitted. For instance:

(a) A portion of the brief of petitioner's counsel formulates and supports, by argument and authority, the proposition that in a proceeding by habeas corpus, seeking the discharge of a person held under a judgment and commitment for contempt, the jurisdiction of the committing court or magistrate cannot be sustained by false recitals of the

existence of the facts upon which jurisdiction depends; that is, that, in such case as this, no court or officer can acquire jurisdiction by mere ipse dixit—the bare and bald assertion of it. We are cited to *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 158, as sustaining that proposition. It is obvious, however, that when petitioner waived the appointment of a commissioner to take testimony on controverted facts the case at once took the form of a submission on facts no longer controverted, to wit, the narrations of the judgment and commitment. Hence it is that the contention in hand, whether sound or unsound, well or ill, in a proper case, is out of the case.

(b) Somewhat akin to said contention is another, viz., that we should look into facts dehors the record, because (it is said) division 11 of the circuit court of the city of St. Louis is not a court of general jurisdiction proceeding according to the course of the common law, and therefore not entitled to the presumptions attending the proceedings of all such courts. This contention must also be put to one side, because (1) in the first place, as said, there are no facts here dehors the record. Petitioner, by waiving an order for the appointment of a commissioner to take testimony to establish such facts, if any, thereby elected to go on without them, i. e., he elected to stand on the record facts, if stand he can at all. Having made that election, he must abide it. He must stand there—he cannot leap over and stand elsewhere. (2) In the second place, division 11 is in very fact, as its name indicates, but a division of the circuit court of that city, and hence, to all intents and purposes, a court of general jurisdiction. The mere fact that in matter of detail in the administration of justice certain criminal cases are assigned to it, and that such assignment is heavy enough to occupy, peradventure, its whole time, does not lop off or dim its power as a constitutional court—a circuit court, proceeding according to the course of the common law. Const. art. 6, § 1; *Id.* § 22 et seq. [Ann. St. 1906, pp. 212, 234]; Ann. St. 1906, pp. 4904, 4905; Laws 1903, p. 142; Laws 1905, p. 127. The petitioner relies on decisions relating to judgments of the court of criminal correction, a court of limited statutory jurisdiction, and therefore not in point.

(c) The circuit attorney brings to our attention the decision of the St. Louis Court of Appeals denying petitioner his discharge from the same judgment and commitment challenged here. In re Clark (Mo. App.) 108 S. W. 1106 (not yet officially reported). It goes without saying that, with this court, a decision bearing the hallmark of a court of so high authority as the St. Louis Court of Appeals passes current as persuasive and instructive. We do not understand the circuit attorney to make the out and out contention that the decision in question rises to the plane

of *res adjudicata*; but if such be his position, impliedly or by indirection, it is not sound. A plea of estoppel by record in a habeas corpus case is good on the same facts where the prisoner has been discharged, but is bad where the prisoner has been remanded, as here. This is so because judges may be likened unto priests attending between the horns of the altar in the Temple of Justice. So attending, they stand solemnly charged with keeping the lamp of personal liberty in oil, well trimmed and brightly burning. It is so because the liberty of the citizen is an immediate jewel of the law, to be sacredly cherished and hedged about withal. Therefore, no mere legal fictions, good for use in matters of less moment, or matter of punctilio, or comity between courts, may shield any one restraining an American citizen of his liberty from having the why and wherefore of that restraint summarily looked into by any court of competent jurisdiction in the land. The discretion of one judge in remanding the prisoner does not bar the discretion of another in discharging the prisoner on habeas corpus. Wherefore, when the great writ goes down—a writ whose origin is lost in the dawn of English history, whose final and triumphant establishment was a landmark in the evolution of civil liberty, making the hearts of its lovers leap for joy—to the prisoner, the doors of jails open; he comes into court with his shackles dropped; and the cause of his imprisonment, the very marrow of it, is laid bare to the utmost verge and minutiae permitted by written law. And this, too, no matter what court has theretofore denied relief, unless it be a court of superior jurisdiction. *Rev. St. 1899, § 3546 [Ann. St. 1906, p. 2017]. In Weir v. Marley, 99 Mo., loc. cit. 488, 12 S. W. 798, 6 L. R. A. 672, et seq., Brace, J., speaking, said: "That the doctrine of res adjudicata is not applicable to the case of a refusal to discharge, and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is conceded, and is not limited in this state by statutory enactment, except in the one particular that the applicant for the writ in his petition must state 'that no application has been made or refused by any court officer or officer superior to the one to whom the petition is presented.' Subject to this limitation, one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint, 'and from such refusal no appeal will lie,' as was held in Howe v. State, 9 Mo. 690; the reason assigned in that case being that 'the refusal to grant a discharge is not a final judgment from which an appeal will lie to this court.'* \* \* \* From these cases may be deduced the doctrine that the principle of *res adjudicata*

does not apply in cases of habeas corpus to judgments remanding the prisoner, or to judgments discharging the prisoner, where a new state of facts, warranting his restraint, is shown to exist different from that which existed at the time the first judgment was rendered. That it does apply to a judgment discharging a prisoner, where no such new state of facts is shown, may be readily deduced from the case *Ex parte Jilk, 64 Mo. 205, 27 Am. Rep. 218*. The distinction thus made between judgments remanding and those discharging the prisoner grows out of the nature of the writ whose *raison d'être* is the protection of personal liberty." See, also, *In re Boutelle, 124 Mo. App. 450, 101 S. W. 1096*.

With the foregoing matters eliminated, the case may proceed on the theory that the allegations of the petition are taken as true only so far as sustained by the recitals in the judgment and the commitment, but without any bar arising from the adverse decision of the Court of Appeals.

2. Contempts logically arrange and divide themselves into four classes, viz., direct and indirect, civil and criminal. It has been said, generally, that criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority. See authorities *infra*. On the other hand, a civil contempt is where a person fails or refuses to do something which he has been ordered to do, or has done something he has been ordered not to do, for the benefit of the opposite party to a cause. In civil contempts the object of the punishment is for the purpose of coercing the performance of an act remedial in its nature. See authorities *infra*. A direct contempt has been defined as a contempt *in facie curiæ*, i. e., literally, in the face of the court. It may consist in "noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings, or an open defiance to its just powers or authority, or in disrespectful behavior or language to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice." 7 *Am. & Eng. Ency. of Law (2d Ed.)* tit. "Contempt," pp. 27-29; *State ex rel. v. Bland, 189 Mo., loc. cit. 206, 88 S. W. 28 et seq.* Circumspection should be used to seek and apply proper limitations upon that class of cases covered by the last clause of the definition of direct contempt. Examples will show the restrictions. For instance, under that clause, as pointed out by the learned authors of the foregoing treatise, it has been held that attempting in the witness room to deter a witness from testifying by offering him money is a contempt in the presence of the court (*Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 600, 33 L. Ed. 150*); and held that approaching a juror in the presence of the court with the view of improperly influencing his action in the event he should be sworn in

the case is a contempt in the presence of the court (Cuddy, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154); and held that a newspaper reporter who conceals himself in the jury room for the purpose of taking notes of the proceedings of the jury is a contempt committed in the immediate presence of the court (Matter of Choate, 24 Abb. N. C. 430, 9 N. Y. Supp. 321). An indirect or constructive contempt is defined as "one offered elsewhere than in the presence of the court, and which tends by its operation to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the due administration of justice." See authorities first above.

The contempts outlined in the judgment in the case at bar are plainly criminal contempts under the foregoing definitions. Being criminal contempts, the adjudged punishment is a judgment in a criminal case, and no appeal lies and no writ of error may go. *State ex rel. v. Bland*, supra. Absent such remedy, what was said in that case (page 207 of 189 Mo., page 30 of 88 S. W.) is applicable here, to wit, that where no statutory right of appeal exists or writ of error lies courts having superintending control have been astute and diligent in granting relief by inspecting records under writs of certiorari or habeas corpus. *Ex parte O'Brien*, supra; *State v. Leftwich*, 41 Minn. 42, 42 N. W. 598; *In re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933.

The next question is, are the contempts charged in the case at bar direct or indirect? Observe, vital matter is involved in a correct answer to that question; for if they be direct contempts, they may be punished at common law, as well as under our statutes (section 1618 [Ann. St. 1906, p. 1200]), on view, instant, without notice or hearing. In such case there is no prosecution, no plea, nor issue upon which there can be a trial. *Ex parte Terry*, 128 U. S., loc. cit. 308, 9 Sup. Ct. 77, 32 L. Ed. 405, citing *State v. Woodfin*, 5 Ind. Law (N. C.) 199, 42 Am. Dec. 161; *Whitem v. State*, 36 Ind. 196; 4 Stephens' Com., Bk. 6, c. 15; *Tidd's Prac.* (9th Ed. London, 1828) 479, 480; *Ex parte Hamilton & Smith*, 51 Ala. 66; *People v. Turner*, 1 Cal. 152. In such cases, the court having hearing ears and seeing eyes, its personal knowledge takes the place of evidence and makes a trial an idle ceremony. The violence offered may be stopped violently, as fire stops fire, or "like cures like." If, on the other hand, the contempts charged in the judgment at bar be indirect or constructive contempts, the contemner, under our statutes (section 1618, supra) and under the common law, as will presently be pointed out, is entitled to notice, reasonable time, and a hearing, or else he is condemned without due process of law as defined in the books. See *Womack v. St. Joseph*, 201 Mo., loc. cit. 482, 100 S. W. 443, 10 L. R. A. (N. S.) 140 et seq. As will be seen, also, our statutes are but declarative of the common law in

the foregoing respects as in many others. Being so declarative (in all respects pertinent here), we need pay little attention to questions relating to their constitutionality, suggested by the circuit attorney.

We may digress far enough to point out that it is insisted by him that the scope, effect, and purpose of *State ex inf. v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624, was to strike down as unconstitutional the whole body of the written law on the subject of contempts. Rev. St. 1899, § 1616 et seq. [Ann. St. 1906, p. 1199]. But we do not so read that case. The statute (section 1616) enumerates certain forms of contempt, and provides that in their punishment courts have power to punish the acts enumerated, "and no other." The contempt charged in the *Shepherd* Case did not come within those enumerated by that statute. The precise question held in judgment in that case, therefore, was this: Was that statute preclusive, or had this court, as a creation of the Constitution, the inherent power at common law, of which it may not be shorn by statute, to punish, as at common law, for contempts known to the common law, but on which the statute is silent? The broad language used in the case, measured by recognized canons of construction, must be read in the light of the case and facts held in judgment. This court, in effect, ruled that a constitutional court may go to the common law for its inherent power to punish all contempts, recognized as such at the common law, and to the extent that the statute clipped such power it was unconstitutional. That holding was right; but that case did not hold in judgment, and hence is no authority for the proposition that those parts of the statute declarative of the common law were invalid as unconstitutional.

Recurring now to the question, are the offenses recited in the judgment direct or indirect contempts? The complaint made and recited of the petitioner was his intentional absence from the courtroom to the delay and embarrassment of a trial in which the petitioner was engaged as counsel, 15 minutes at one time and 55 at another. The petitioner himself was absent. His acts ad interim were likewise absent. His doings went with him. It would seem like an exquisite and palpable contradiction of terms to complain in one breath that the petitioner and his acts were absent, and in the next breath to say that such absence constituted a presence; that is, a contempt committed in the presence of the court. The absence of an attorney, a jurymen, a witness, an officer (including even a member of the bench himself), from the courtroom at the precise time due there may be susceptible of many innocent explanations. Each and every of these absences are of a kind and, hence on a level, and none of these explanations are within the mere eyesight or earshot of any court of ordinary mortal endowments. These explanations can only come



to the court by evidence alunde his eye or ear, so that it would seem that absence ought not to be dealt with as essentially in the same class as things that happen in the view or hearing of the court. We think that is the more gracious and the better view, comporting with the good sense of the thing, comes well within the quoted definition of an indirect contempt, and is sustained by the reasoning of well-considered cases. For example: *Ex parte O'Brien*, supra; *In re Dill*, Petitioner, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505; *In re Wood*, 82 Mich. 75, 45 N. W. 1113; *Gordon v. State* (Neb.) 102 N. W. 458; *Indianapolis Water Co. v. Amer. Starboard Co.* (C. C.) 75 Fed., loc. cit. 975; *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205; *Ex parte Terry*, supra. We hold, then, that the contempts charged against petitioner Clark are indirect contempts, if any.

3. The next question is, was petitioner condemned without notice, without a hearing, and therefore denied due process of law? If it be assumed, in the absence of specific narration, that Mr. Clark was present in court when adjudged guilty of two several contempts, and had actual notice then and there of what was going on, yet such notice is not the notice contemplated by general law. Notice, in contemplation of law, means a reasonable notice, one fairly sufficient to prepare and make a defense; any other is but sounding brass and tinkling cymbal—is form, not substance. *State ex rel. Tedford v. Knott et al.*, 105 S. W. 1040 (just handed down in banc and not yet officially reported), and cases cited; *State ex rel. v. Maroney*, 191 Mo. 531, 90 S. W. 141. Nor is it the notice contemplated by statute law. *Rev. St. 1899*, § 1618 [Ann. St. 1906, p. 1200].

It will be observed from the sundry whereases and recitals in the judgment that the learned judge spreading it of record was in a mood to say what he had to say, every jot and tittle, in writing. His mind ran strongly to that course. Nor, apparently, was he in aught awed from the "career of his humor." In the actual presence of all that is set down, the presumption ought to be indulged (nothing appearing to prevent) that all the facts appear in black on white. By necessary inference, then, it appears by indirection there was no notice, no formulated charges, no hearing, as those terms are known to the law. Certainly a judgment that took note of 15 minutes' delay at the morning sitting of the court would not neglect to note things of such pith and gravity as the formulation of charges, the service of notice, and a hearing of evidence, if such things were in esse. True it is the court used a terminology that, absent other controlling reasons, might faintly indicate a hearing. It says: "Whereas, the court was of the opinion that said delay on the part of said Willis H. Clark was intentional." It says: "Whereas, this court doth find as a fact that said failure on the part of said Clark to promptly return in-

to court and continue the trial of the above cause, which was then on trial, was willful and in utter disregard of the authority of this court." But it must be remembered that the finding of the court was based on its theory that the contempt was committed in its immediate presence, thereby excluding the idea of citation and evidence; and it must not be forgotten that while the word "opinion," in a close and strict sense, is used as a term indicating a decision of a court upon pleadings and facts duly presented in a cause, yet it is a word of so flexible meaning as to indicate "notion," "idea," "view," and, broadly, one's opinions may mean one's "sentiments." In the absence of the usual narrations of notice and hearing (commonly appearing in all judgments), it is sticking in the bark to say that such matter of substance may be inferred by saying the "court doth find," or by the use of the word "opinion." It is allowable to a drowning man, but not to a court of justice, to grasp at straws. A judgment in contempt, like a pyramid, should stand broadly on a base, not on a small point or apex.

It only remains to say that in indirect contempts the alleged contemner is entitled by statute to notice of the accusation and a reasonable time to make his defense. *Section 1618, Rev. St. 1899* [Ann. St. 1906, p. 1200]. Precisely so, also, runs the common law. Drawing from the undefiled well of the common law, we find it said by Blackstone (4 Bl. \*286): "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court, and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days," etc. See, also, *Brown on Jurisdiction* (2d Ed.) p. 402, and cases cited in footnotes. So that, if the statute be looked to, the judgment, viewed from its four corners, is irregular and void for lack of due process of law and re-

sulting lack of jurisdiction; if the common law be looked to, the same conclusion must be reached. The judgment failing, the commitment falls. The one is predicated of the other.

We make no manner of doubt that a willful unexplained absence from the courtroom, to the harassment and delay of the court in the orderly administration of justice in a case on trial, on the part of an attorney at law (an officer of the court, and hence a part of it), may be found to be contempt of court, on due accusation, notice, and hearing, and nothing said herein must be taken as indicating a contrary view. But in this case, for reasons set forth, the petitioner is entitled to his discharge. Other questions discussed in briefs of counsel are reserved. His discharge is accordingly ordered. All concur.

### STATE v. VICKERS.

(Supreme Court of Missouri, Division No. 2.  
Dec. 10, 1907.)

#### 1. CRIMINAL LAW—VENUE—PREJUDICE OF INHABITANTS.

Evidence in support of an application for change of venue for prejudice of the inhabitants of the county held insufficient to establish such a prejudice as would prevent defendant from obtaining a fair trial in that county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 243.]

#### 2. SAME—EVIDENCE.

On an issue of prejudice of the inhabitants of a county against accused in support of an application for change of venue, a witness, asked to state the purport of a conversation he had heard with reference to defendant's guilt or innocence, should have been permitted to testify that "the sentiment was against the man" and that the people were highly incensed at the time.

#### 3. SAME—APPEAL—HARMLESS ERROR.

Where, on an application for a change of venue, a witness was permitted to testify that his neighbors said accused was a bad man and came from the West to the county, and was a member of a gang of desperadoes, accused was not prejudiced by the striking of other answers that the people were highly incensed at the time and that the sentiment was against him.

#### 4. SAME—OPINION.

On an application for a change of venue because of prejudice of the inhabitants, the court should not have permitted witnesses to testify that defendant could have a fair trial in the county where the offense was committed.

#### 5. SAME—APPEAL—PREJUDICE.

Accused was not prejudiced by evidence of witnesses on an application for change of venue that accused could have a fair trial in the county where the offense was committed: such evidence having been elicited only after the witnesses had stated all their knowledge of accused and of the sentiment of the people in their respective neighborhoods.

#### 6. SAME—APPEAL—REVIEW.

The trial of an issue as to prejudice of the inhabitants of the county against accused on an application for change of venue being to the judge of the court, the Supreme Court is bound by the circuit court's finding, unless manifest error occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3044.]

#### 7. SAME—DISCRETION.

The granting of an application for change of venue for prejudice of the inhabitants of the county against accused being a matter of discretion, the court's ruling will not be reversed on appeal, in the absence of a showing that the court's discretion was abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3044.]

#### 8. JURY—COMPETENCY OF JURORS—OPINIONS—NEWSPAPER REPORTS.

Rev. St. 1899, § 2616 [Ann. St. 1906, p. 1550], declares that it shall be a good cause of challenge for a juror if he has formed or delivered an opinion on the issue or any material fact to be tried; but if such opinion is founded only on rumor or newspaper reports, and is not such as to prejudice or bias the juror's mind, he may be sworn. *Held*, that where a juror, having testified that he had no acquaintance with defendant, was not related to any of the witnesses, and had no bias or prejudice against defendant, also stated that he had heard his neighbors speak of accused and had read about the alleged offense in the newspapers, from which he had derived a prejudice against accused, but that his impression or opinion was formed on rumor and newspaper reports, he never having heard any witness speak about accused, he was competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 449-457.]

#### 9. SAME—DRAWING JURY—TERRITORIAL LIMITS—JURISDICTION OF COURTS.

Laws 1897, p. 61, establishing terms of the Lewis county circuit court at Canton, in such county, did not restrict the court's jurisdiction over the entire county, nor prevent the summoning of jurors from the county at large to try accused at the county seat for an offense committed within the county outside of the Canton district.

#### 10. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

Where a witness testified to talking over the telephone with defendant after the commission of the alleged offense, and that he recognized defendant's voice and knew that it was defendant that was talking at the time, the court did not err in previously permitting another to testify to what the former witness said through the telephone in such conversation, as the order in which any testimony should be admitted rests solely in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1609, 1610.]

#### 11. WITNESSES—REDIRECT EXAMINATION.

Where, in a prosecution for rape, defendant cross-examined prosecutrix's mother at length concerning the parties to whom she had recited prosecutrix's complaint, and concerning a conversation with defendant regarding his action, and she had testified that she did not tell her husband of prosecutrix's complaint until after dusk on the day the offense was committed, she was properly allowed to testify on redirect examination that she delayed telling her husband because prosecutrix had stated that defendant would kill her husband.

#### 12. CRIMINAL LAW—APPEAL—REVIEW OF EVIDENCE—OBJECTIONS.

An objection that a question asked of a witness on redirect examination was incompetent and immaterial was insufficient to present the objection on appeal that it was not proper redirect examination.

#### 13. SAME—INSTRUCTIONS—COMMENT ON EVIDENCE.

Where, in a prosecution for rape, evidence of defendant's conduct after the offense indicated guilt, an instruction that the manner and demeanor of the defendant, when accused of crime, as well as his silence under such circumstances, might be considered together with all the other facts and circumstances in evidence, while stating a correct abstract proposition, was

objectionable as violating the rule forbidding the court to comment on the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1743.]

#### 14. SAME—DEFINITENESS—ASSUMED FACTS.

An instruction that false statements made by defendant when accused of the crime about matters which were likely to lead to his detection, might be considered by the jury in passing upon defendant's guilt or innocence was objectionable, as indefinite and as assuming that false statements had been made by accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754-1764.]

#### 15. SAME—PREJUDICE.

Where, in a prosecution for rape, the evidence left no reasonable doubt of defendant's guilt, a conviction will not be reversed because the court gave two instructions authorizing the jury to consider defendant's demeanor and false statements when accused of the crime, which were erroneous, in that one of them constituted a comment on the evidence, while the other assumed that false statements had been made.

Appeal from Circuit Court, Lewis County; Chas. D. Stewart, Judge.

James W. Vickers was convicted of rape, and he appeals. Affirmed.

Silver & Brown, for appellant. The Attorney General and N. T. Gentry, for the State.

GANTT, J. This is an appeal from the circuit court of Lewis county. On June 16, 1906, the prosecuting attorney of Lewis county filed an information, duly verified, charging the defendant with the rape of Reba Burnett, a female child under the age of 14 years, at the said county of Lewis, on or about the 7th day of June, 1906. The defendant was arrested, and at the September term, 1906, of the said court, filed an application for a change of venue from said county on the ground that he could not have a fair and impartial trial, for the reason that the minds of the inhabitants of said county of Lewis were prejudiced against him. This application was supported by two citizens of said county, and due notice of the same was served on the prosecuting attorney. Upon a hearing of the said application it was refused, and the defendant saved his exception to the action of the court in denying him a change of venue. At the same term the defendant was duly arraigned and entered a plea of not guilty. At an adjourned term of the said court in October, 1906, the defendant was put upon his trial and convicted, and his punishment assessed at 50 years in the penitentiary. In due time he filed his motions for new trial and in arrest of judgment, and the same were overruled, and exceptions duly saved, and an appeal granted to this court.

The evidence on the part of the state tended to show that the prosecutrix at the time of the alleged rape was living with her father and mother on a farm near Lewiston, in Lewis county, Mo., and was of the age of 13 years and 10 months. The defendant is a first cousin and brother-in-law of the mother of the prosecutrix. It appeared, further,

that for some time prior to the date of the alleged offense the defendant had been residing in the state of Colorado, and a few days prior to the alleged offense had come to Lewis county, and to the residence of the father of the prosecutrix on the evening of June 5, 1906, and remained all night. On the 6th he visited another relative of his in the neighborhood and returned to the Burnett home on the morning of June 7th. The state's evidence tended to show that between half-past 10 and 11 o'clock in the forenoon the defendant was in the kitchen talking to the mother of the prosecutrix, when the latter told the prosecutrix to go upstairs and clean up the bedrooms and move the defendant's grip from the west room into the east room, and prosecutrix went upstairs for that purpose; that the defendant followed her upstairs, and when prosecutrix came out into the hall he grabbed her by the arm and took her into the east room and asked her to go home with him, saying that his wife would return with her; that he then began to take privileges with the prosecutrix's person. He shut the door, laid her on the bed, and had sexual intercourse with her against her will. The prosecutrix testified that she was so frightened that she could not scream—that she was afraid to scream, as defendant had previously stated in her presence that he was hiding from the Colorado officers and that he always carried a pistol. After being released the prosecutrix went across the hall into another room and locked the door. Defendant remained in the east room upstairs and called the prosecutrix to bring him a towel. Hearing defendant calling for a towel, the mother of prosecutrix walked up the stairs a part of the way and pitched a towel to defendant. During this time there was no one upstairs except the defendant and the prosecutrix, and the mother of prosecutrix was the only other person in the house. After the defendant went down stairs prosecutrix followed and aided her mother to get dinner. She ate dinner with the balance of the family. After dinner prosecutrix called her mother into the yard and there made a complaint against the defendant. The mother then telephoned her sister, Mrs. Taylor, to come over; and in a short time Mrs. Taylor and Mrs. Nelson, a sister-in-law, came to the residence of the prosecutrix and her parents. Shortly after the arrival of these ladies the mother and Mrs. Taylor went out into the yard with prosecutrix, when the mother told Mrs. Taylor what had occurred. Seeing the three together out in the yard, the defendant came out to them and asked if they were plotting against the whites, whereupon the mother said: "Jimmie, I would not have had this happen for anything in the world. Reba has told me everything." Defendant turned white, seemed nervous, and said he had done nothing, whereupon prosecutrix confronted him and accused him in the presence of the

other two. Defendant then asked if her father knew it, and said that what he did would not hurt her any, and asked her mother not to let this go any further. Seeing that the women out in the yard were excited, the father of prosecutrix, who had been reading in the house, came out and desired to know what was the matter. Defendant left the women, walked up to Mr. Burnett, and told him that they had had a discussion about who was the mother of prosecutrix, which it seems had been the cause of some previous misunderstanding between the members of that family. The mother testified she did not tell her husband of this assault till after the defendant had left their home that afternoon, because she was afraid. After defendant had gone to the home of Mr. Nelson, a mile or two distant, to stay all night, the prosecutrix and her mother told the father. Defendant retired for the night at the Nelson home, but left some time very early the next morning, without telling any of the family he was going, and walked to the town of Tolona, which is on the railroad some three or four miles distant. When defendant reached Tolona he called Mr. Nelson over the telephone and talked with him about 7 o'clock in the morning; and this conversation was overheard by Joseph Ragan. Defendant asked Nelson if Burnett had been to Nelson's house, and if he was mad; and Nelson replied that he was right smart out of humor, and he blamed defendant. Defendant said: "He ought not to, as he has heard only one side of it. The guilt is on one as much as the other." Defendant then asked about getting a saddle horse from Charlie to ride over to George's. Two ladies testified to seeing the defendant about 6 o'clock that morning walking along the track going towards Tolona, and noticed that he was traveling very rapidly and looking back often. He especially looked toward the wagon road near the railroad track that comes in the direction of the Burnett home. A little after 7 o'clock defendant went to the boarding house of Mrs. Dance in Tolona and got breakfast. He told Mrs. Dance that he was in the business of enlarging pictures and taking orders for a firm in St. Louis; that his samples would be along the next day, and he would show her some of his work. The regular passenger train going east at that time passed Tolona between 8 and 9 o'clock in the forenoon. Between 8 and 9 o'clock that day defendant was arrested at Tolona by the sheriff of Lewis county.

On the Sunday following his arrest defendant sent for Mr. Nelson to come to the jail to see him. Nelson went, and the defendant told him he would like to have Mr. and Mrs. Burnett come and see him; that he wanted to talk with them; that if they would look at it right they would let him out; that the girl was equally guilty with him; that she had consented to it; that he would pay the expenses of sending her off to school,

and her mother could go along with her; that he was willing for his stallion to stand good for the expenses; that the girl had not been injured. He further stated that he knew he was guilty, but his passions got the best of him; that if the girl's parents came in they could get the case dismissed. In a second conversation he said the girl came and sat on his lap, and he could not control his passions. The testimony tended to show that there were three other witnesses present who heard these conversations with Mr. Nelson. The defendant testified in his own behalf, and denied having had intercourse with the prosecutrix. He detailed at great length his troubles and lawsuits in Colorado, and that in view of his trouble there he concluded that it was best for him to get out of that state and go to New York. He stated that he traveled under an assumed name, that of J. W. Camp, but earnestly denied that there was anything criminal in his conduct in Colorado. He stated that he came to Lewis county for the purpose of having a settlement with his relatives in regard to a lot of stock and horses which he had shipped there, but that a satisfactory settlement had not been made. He admitted, however, that the father of the prosecutrix did not owe him anything. He denied the conversation attributed to him by the state's witnesses. Defendant introduced several physicians, who testified that in their opinion, if defendant had sexual intercourse with a girl the size of the prosecutrix, she could not have been so badly frightened that she could not scream, and that there would have been evidence of stain upon her garments if intercourse had occurred.

1. One of the chief grounds of error relied upon by defendant is the refusal of the circuit court to grant him a change of venue from Lewis county. There was much evidence on this issue, both for the defendant and the state. Among other witnesses, Dr. Z. Knight, on behalf of the defendant, testified that he had lived in the northern portion of Lewis county for 20 years. He did not know defendant, but knew his wife. He had heard of the charge against the defendant, and nearly everybody in that neighborhood talked with reference to this charge. Asked to state the purport of the conversation he had heard in reference to defendant's guilt or innocence, he answered: "The sentiment was against the man." On motion of the state this answer was stricken out, and defendant excepted. He was then asked to state what was said, and answered: "The people were highly incensed at the time. That is the only way I can answer. The sentiment was against him." This answer also was stricken out, and defendant excepted. He was asked whether the talk was favorable or unfavorable, and an objection to this question was sustained. Subsequently this witness was permitted to state that his neighbors said: "Defendant was a bad man,

and came in from the West to this country, and was a member of a gang of desperadoes, and a great deal of stuff along that line. That was the talk at that time." On cross-examination, over the objections and exceptions of the defendant, the witness was permitted to state he had heard no one say he would not give the defendant a fair and impartial trial. George Raine testified he was the constable of Monticello township; that he was acquainted in different portions of the county, and had, since he heard of the charge against the defendant, mingled with the citizens of the township and county; had heard the case discussed, "heard it talked over a great deal," and heard lots of men say if they were on the jury they believed they would hang him, if it was proved that he was guilty; that most of the men witness talked to believed he was guilty. Witness was asked if he had not heard from reputable men that a mob was organized to take defendant out of jail and punish him, to which inquiry the state objected, and the objection was sustained and exception saved. The witness further stated there was a great deal of feeling and excitement in the part of the county where this matter occurred. He was asked if there were not threats of lynching made, and answered that he heard there were. Objections were sustained to these answers. G. H. Primrose testified he was the sheriff of the county; that parties stated to him that there was strong talk of a mob; that word came to him to that effect two or three times, perhaps more than that; that witness was informed that a party of about 20 men had started to the county seat; that 12 or 15 came, but said they did not come for violence; that one could not attend to the jail without help, and the sheriff ought to have help; that when he heard these rumors he went to the jail and put defendant in the northwest corner cell and secured it for his protection; that the crowd came to the jail and witness refused to talk to them all, and agreed to talk to one or two of them; that Glaze and Beckley were appointed to confer with witness; that these people came on Sunday morning. Thomas Beckley testified that he heard it said that defendant had committed the crime, that there had been much carrying on, that it ought to be stopped, and also that defendant had a bad reputation. J. G. Wentzell testified that he had heard some persons in a general way say that defendant was a bad character; that he heard some one say that defendant had murdered his wife. J. E. Throckmorton testified that he heard somebody say that defendant came from somewhere in the West and had been accused of some crime there—shooting some fellow; that, if guilty, he should be punished, imprisoned, or hanged; that witness lived in the extreme western part of the county, and did not hear the matter discussed very often. C. V. Primrose testified that he was deputy sheriff; that a few persons talked to him

about defendant; that one or two said he was a desperado; several said he was a mean man, and ought to be watched as he had shot a fellow; that he had heard some persons say he ought to be hung. A. W. Shouse testified he remembered the time the charge was made against the defendant in this case; that he conversed with a great many citizens of Lewis county from different points of the county in reference to defendant and the crime with which he was charged; that they said he was a bad man; that he had been in trouble out West, and some of them said he should be hung on general principles; that the case was pretty generally discussed all along the line down in Canton, on the streets, in the stores, and in the post office; that no one said anything good about the defendant. P. M. Graves testified that he heard it said, about the time defendant was arrested, that he had shot a man in Colorado, and there was a reward of \$500 for him. This was said up about Lewiston. He also heard it said that if defendant was guilty he ought to be mobbed, and this case was discussed in connection with another case that had previously occurred. Halsey White testified that he had talked with some citizens of the county, and they said defendant was a bad man and had killed two men out West. The state on its part introduced a number of witnesses. These witnesses came from different sections of the county and testified to having heard of the charge; that they were well acquainted in their respective townships; and that they had heard the case discussed very little, if at all, and generally the parties discussing it would say that if the defendant was guilty he ought to be punished. They had seen a mention of it in the newspapers, but the papers had made very little impression upon them, as they did not understand that the papers undertook to state the facts, but simply what they had heard. Among others were stockmen, physicians, bank clerks, and other business men with wide acquaintance in the county. Several of these witnesses for the state did testify that they had heard that the defendant was a fugitive from justice from Colorado.

After a careful examination of all this evidence on both sides, we think that the weight of the evidence was that in the immediate neighborhood of Lewiston near which the father of the prosecutrix lived, there was a strong sentiment against the defendant and belief in his guilt; but the great weight of the testimony as to the other portions of the county did not establish any such a prejudice as would prevent the defendant from having a fair trial in that county, and much of the testimony tended to establish that whatever opinions were expressed in regard to the defendant were conditional upon his having been proven guilty of the offense. We are of the opinion that the court should have permitted the answers of Dr. Knight, to the effect that the sentiment in his neighborhood

In Lewis county was against defendant, to stand; but when the witness was finally permitted to answer that his neighbors said that he was a bad man and came in from the West to this country, and was a member of a gang of desperadoes, and a great deal of stuff along that line, we think the defendant had the full benefit of all that this witness knew on the subject. We also think that the court, as an independent proposition, should not have permitted the witnesses to testify that the defendant could have a fair trial in Lewis county. This form of examination was condemned by this court in *State v. Burgess*, 78 Mo. 234. But in this case this evidence was only elicited after the witnesses had stated all their knowledge of the case and of the sentiment of the people in their respective neighborhoods. The trial of an issue of this character is to the judge of the court; and, unless manifest error occur on the trial of that issue, this court is bound by the finding of the circuit court. The granting of such an application is a matter resting largely in the sound discretion of the trial judge; and in view of our previous rulings we are unable to say that there was any abuse of the discretion in overruling the application in this case. *State v. McCarver*, 194 Mo., loc. cit. 734, 92 S. W. 694; *State v. Albright*, 144 Mo., loc. cit. 642, 46 S. W. 620.

2. It is next insisted that the trial court erred in overruling defendant's objection to J. M. Brown as a juror and accepting him on a panel of 40. The juror on his voir dire testified that he had no acquaintance with the defendant, was not related to any of the witnesses, had formed or expressed no opinion as to his guilt or innocence, and knew nothing to prevent him from trying the case according to the law and the evidence if he was selected as one of the jurors. He testified that he had heard his neighbors speak of the case and had read about it in the newspapers, had no bias or prejudice against the defendant, that what he had read had prejudiced him against the defendant, but that his impression or opinion was formed on rumor and what he had read in the newspapers. He had never heard any witness speak about the case. Section 2618, Rev. St. 1899 [Ann. St. 1906, p. 1550], provides: "It shall be a good cause of challenge to a juror if he has formed or delivered an opinion on the issue, or any material fact to be tried, but if it appear that such opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn." Taking the whole examination of this juror together, we think it is apparent that whatever opinion he had was based entirely upon rumor and newspaper reports, that he had no bias or prejudice against the defendant, and that he was a competent juror. In *State v. Sykes*, 191 Mo., loc. cit. 76 et seq., 89 S. W. 851, this question was carefully reviewed by this court, and the rulings in *State v. Bryant*, 93 Mo. 273, 6 S.

W. 102, and *State v. Williamson*, 106 Mo. 162, 17 S. W. 172, and *State v. Cunningham*, 100 Mo. 882, 12 S. W. 376, were adhered to. In that case the language of Judge Black in *State v. Cunningham* was approved, wherein he says: "Moreover, the question as to the qualification of the juror must be determined, not from a few catch words drawn from him by a series of questions, but from his whole examination, including his demeanor whilst on the witness stand. When he says he would have a prejudice and bias which it would take evidence to remove, and the defendant would have to prove his innocence, he is evidently speaking of the case on the supposition that the circumstances as stated in the newspaper reports should turn out to be true. His attention is called to the newspaper account, his opinion thereon, and then the direct and leading questions are asked which bring out the statements. When he is given an opportunity to make a full explanation, it appears he had no bias at all. He understood it to be his duty to disregard the newspaper reports, and this he says he could and would do. His notions of the case were nothing more than such as any one would form from reading a newspaper report, and it is but common information that such reports have little or no influence upon a fair-minded man when he is called upon to determine the fact in the light of evidence given under oath. If such a juror is to be rejected, it must be because he is an intelligent, honest, fair-minded man, and not because he has any opinion which would in the least sway his mind from an impartial consideration of the evidence."

3. It is also objected that the circuit court erred in accepting on the panel of 40 as competent jurors residents of Canton and Union townships, in Lewis county. The record discloses that Canton and Union townships, in Lewis county, lie east of the range line between ranges 6 and 7 in said county, and that the jurors Chas. M. Maze, N. D. Starr, and C. M. Little lived in one or the other of Canton and Union townships. The question as to the competency of these jurors arises under the act of the General Assembly approved March 5, 1897, establishing the terms of the Lewis circuit court at Canton, in said county. Laws 1897, p. 61. This act was before this court for consideration in *State v. Hall*, 189 Mo. 262, 87 S. W. 1181. By the first section of that act it is provided "that the judge of the First judicial circuit shall hold two terms of the Lewis county circuit court each year in the town of Canton, in said county of Lewis, at the following times, to wit, on the third Monday in March and the third Monday in September." The information in the present case was filed in the office of the clerk of the circuit court at Monticello, the county seat of said county, and was tried in said city. In *State v. Hall* the information was filed in the office of the circuit clerk at Canton, and the contention in

that case was that the circuit court in the Canton division of the court had no jurisdiction of the case, because the information did not charge the offense to have been committed within the territorial division of the court. But we held that the circuit court sitting at Canton was possessed of all the powers and jurisdiction conferred by law upon it when it held its sessions at Monticello; that it was not the purpose of the Legislature by that act to establish a new court, but simply to provide for the holding of a regular term of the circuit court at a place different from the county seat; and that the grant of jurisdiction in section 8 of the said act was a work of supererogation, which added nothing whatever to the jurisdiction of the circuit court, nor in any manner curtailed its jurisdiction. The decision in *State v. Hall*, 189 Mo. 262, 87 S. W. 1181, was reaffirmed in *State v. Sublette*, 191 Mo. 163, 90 S. W. 374. The question in this case as to these jurors is, we think, much narrower than that presented in *Hall's Case*. Here it is conceded that the offense was committed in Lewis county, and not in the Canton district, and the only proposition advanced is that it was incompetent for the circuit court, in trying this cause at the regular county seat at Monticello, to use jurors who resided in Canton township, or from that part of the county lying east of the range line between ranges 6 and 7. We think the point is not well taken. The circuit court at Monticello had jurisdiction co-ordinate with the county, and there is nothing in the act providing for a term of the circuit court at Canton which restricts the power of the circuit court at Monticello to send its venire in any part of the county for the selection of jurors for service in that court.

4. Error is predicated upon the action of the court in permitting the witness Joseph Ragan to testify on behalf of the state to a conversation he heard passing over the telephone between John Nelson and another person, on the ground that such evidence could only be competent against the defendant on the ground that he was the person talking to Nelson. Ragan testified that about 7 o'clock on the morning of June 8th he overheard a telephone conversation between John Nelson and another man; that he recognized Nelson's voice, but not the voice of the other man; that Nelson said that Burnett was mad—blamed the defendant—and the other man said Burnett only heard one side, etc. When Nelson took the stand he testified that at the same hour that morning he talked to the defendant over this telephone line, recognized defendant's voice, and knew it was the defendant that was talking to him. The order in which testimony is admitted is a matter largely resting in the discretion of a trial court. Obviously it is no objection to a witness' testimony that he cannot testify to all the facts in a case by himself. Taken in connection with Nelson's testimony identify-

ing defendant as the other party to the conversation with him on the morning of the 8th, we think it was clearly competent. *Wolfe v. Railway*, 97 Mo. 481, 482, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331. Of course, if Nelson had not identified the defendant as the other party to his conversation on that morning over the telephone, it would have amounted to nothing.

It is also assigned as error that the court permitted Mrs. Burnett to state that she delayed telling her husband because "the child said he (meaning defendant) will kill papa." This question was propounded on the re-direct examination by the counsel for the state after the defendant at great length and with great particularity had examined Mrs. Burnett as to the parties to whom she had stated the complaint of the prosecutrix and her conversations with the defendant in regard to his action, and she had stated that she did not tell her husband until about dusk that evening; and the state simply asked her to give her reason for her delay in not telling her husband sooner. We think it was perfectly competent for her to give this explanation. But this alleged error is not ground for reversal anyway, for the reason that the only objection to it was that it was incompetent and immaterial.

5. Among other instructions for the state, the court gave the following: "(4) The manner, the demeanor of the defendant when accused of the crime, as well as his silence under such circumstances, may be considered by you, together with all the other facts and circumstances introduced in the evidence. (5) The court instructs the jury that false statements, made by the defendant when accused of the crime, about the matters which are likely to lead to his detection, may be considered by you in passing upon the guilt or innocence of the defendant." These two instructions for the state are challenged by the defendant on the ground that they assume, in the fourth, that the defendant was silent when accused of the crime for which he was being tried, and for the further reason that it singles out the evidence of the prosecutrix as to the defendant's demeanor; and the fifth is assailed, also, on the ground that it assumed that the defendant had made false statements and did not restrict the false statements even to matters of evidence. We have no hesitancy in saying that in our opinion these two instructions were unnecessary. The court had already, in the third instruction for the state, fully advised the jury as to the weight to be given to any verbal statements that were proven to have been made by the defendant, and in the tenth instruction given for the defendant had further elaborated that subject. Obviously the substance of these two instructions was taken from the text of some lawbook on Evidence. The fourth in substance states a correct abstract proposition of law, but is open to the criticism

In this case that it trenches upon the rule which forbids the court to comment upon the evidence. The fifth is so general and indefinite that it could not have been any guide to the jury, but its chief vice is in the assumption that false statements had been made by defendant. Neither of them should have been given; but the serious question which confronts us is whether, conceding that they are open to the criticism made by counsel for defendant, ought the case to be reversed for this error alone? All the other instructions given on the part of the state and the defendant are free of any substantial error; and those for the defendant, some 17 in number, presented the case to the jury in the most favorable light for the defendant. Were it a close case, we can see how such instructions, particularly the fifth, might be very hurtful, and we would not hesitate to reverse the judgment. We do not approve them because we think the court should not have assumed the facts stated in them; but after an examination of both these instructions in the light of the evidence we cannot bring ourselves to the conclusion that they had any appreciable effect upon the jury. The issue was a plain and simple one; and on the question of statements and admissions of defendant the court told the jury in the tenth instruction for the defendant "that in considering the statements and admissions testified to by the different witnesses they should take into consideration the time and place when such admissions and statements were made, the circumstances surrounding the defendant at the time, his condition, his relationship, if any, to said witnesses, the manner and mode of making the same, the time elapsing between the time of making such statements and the time of the trial, the feeling of the witnesses towards defendant, the memory of the witnesses with reference to the same, and all of the facts and circumstances surrounding such witnesses and the defendant at the time of making the same." And in the fourteenth instruction for the defendant the jury were told "that extrajudicial confessions, or those which are made out of court, are not sufficient to convict those who make them, unless they are corroborated by other evidence and the crime be proven to have been committed by other evidence." When it is considered that there was absolutely no evidence tending to show any motive for the prosecutrix making a false charge against the defendant, and that she was corroborated by her mother as to the presence of the defendant in the room at the time she testified the assault was made, and the defendant's flight from the Nelson home in the early morn of the next day without any reason therefor, and his statements to Mrs. Dance at the breakfast table in Tolona to the effect that he was traveling for a St. Louis picture enlarging company, a statement which is not pretended to have been true, and

his conversation with Mr. Nelson at 7 o'clock that morning in which he desired to know how the father of the prosecutrix felt towards him, and, on learning that the father was incensed, saying to Mr. Nelson that the father "ought not to blame him, as he had only heard one side of it, and the guilt was on one as much as the other," and his statements at the jail to Mr. Nelson, in the presence of Taylor and another Mr. Nelson and the sheriff, in which he fully admitted his commission of the crime and sought to extenuate his conduct by pleading the want of control of his passions, and his damaging admissions to the mother and Mrs. Taylor on the afternoon of the day on which the offense was perpetrated, it would seem there is little doubt of the defendant's guilt. It has often been ruled by this court that, where the verdict is manifestly for the right party, errors in the giving or refusing of instructions will not work a reversal. *State v. McClure*, 25 Mo. 338; *State v. Moore*, 61 Mo. 276; *State v. Miller*, 111 Mo. 542, 20 S. W. 243; *State v. Privitt*, 175 Mo., loc. cit. 230, 75 S. W. 457; *State v. Taylor*, 134 Mo., loc. cit. 152, 35 S. W. 92.

We have carefully considered all the other assignments of error urged in the oral argument and in the brief of the counsel for defendant, and in our opinion they present no ground for a reversal of the judgment; and accordingly it must be affirmed.

FOX, P. J., and BURGESS, J., concur.

STATE ex rel. HAMMER, Revenue Collector,  
v. WIGGINS FERRY CO.

(Supreme Court of Missouri, Division No. 2.  
Dec. 24, 1907.)

# 1. STATUTES—CONSTRUCTION.

That which is within the meaning of a statute is as much a part of it as if it were written therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 261.]

# 2. TAXATION — RAILROADS — STATUTES—CONSTRUCTION.

Rev. St. 1899, c. 12, § 1163 [Ann. St. 1906, p. 983], provides that the term "railroad corporation" shall mean all corporations, companies, or individuals now owning or operating any railroad in this state. Section 9338 [Ann. St. 1906, p. 4294] provides that all railroads now constructed, or which shall hereafter be constructed, in the state, and all other property hired or leased by any railroad company in the state, shall be subject to taxation. Section 9339 [Ann. St. 1906, p. 4295] requires every railroad company to annually furnish the State Auditor a statement of the total length of its road, including branch or leased roads, the length of double or side tracks, etc., the total number of engines and cars, etc., and the actual cash value thereof. Section 9344 [Ann. St. 1906, p. 4296] directs the state board for the assessment and equalization of railroad property to assess and equalize at its annual meeting the aggregate valuation of the property of each one of the railroad companies specified in section 9339. *Held* that, construed together with section 1163, sections 9338,



9339, and 9344 are not restricted to railroads owned by railroad companies or railroad corporations, but include all corporations, companies, or individuals owning or operating a railroad, and hence a railroad composed of short tracks, and used in connection with a ferry for the purpose of hauling cars of other railroads to and from the ferry, and owned by the ferry company, was subject to assessment by the State Board of Equalization, and not by the city assessor.

### 3. RAILROADS—WHAT CONSTITUTE—LENGTH OF ROAD—OWNERSHIP OF ROLLING STOCK.

There is no legal requirement that a railroad shall be of any particular length, nor is it essential that it should own rolling stock.

### 4. TAXATION—RAILROADS—WHAT CONSTITUTES A RAILROAD.

A ferry company operated in connection therewith a number of tracks over which steam cars were drawn to and from the ferry; such tracks being the only ones over which cars could pass to the ferry and be carried over the river to other tracks. The tracks were also used for storage, for loading and unloading, and for regular traffic and switching purposes. *Held*, that the tracks constituted a railroad within Rev. St. 1899, c. 149, art. 8 [Ann. St. 1906, pp. 4293-4315], providing for the assessment and taxation of railroads.

### 5. COMMERCE—INTERSTATE COMMERCE—TAXATION—POWERS OF STATE.

Neither the Constitution nor laws of the United States prohibit a state from taxing the property of persons and corporations engaged in foreign and interstate commerce where the property is located in such state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 126.]

### 6. SAME—INTERSTATE COMMERCE.

The national government alone has power to tax and regulate foreign and interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 123-126.]

### 7. EVIDENCE—OFFICIAL ACTS—PRESUMPTIONS.

The law presumes that the State Board of Equalization properly performed its duty in assessing property for taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

### 8. SAME—METHOD OF ASSESSMENT.

A ferry company incorporated in Illinois owned all the stock of a steam railroad corporation formed in the state for carrying cars of other roads to and from the ferry, and also all the stock of a corporation organized in Missouri for similar purposes. By an agreement between the three corporations, the ferry was consolidated with the railroads into one continuous system of transportation with various railroad branches, switches, side tracks, and turnouts at each terminus thereof connecting with various railroads on each side of the river, for the purpose of receiving from and delivering cars to such roads, and for the purpose of furnishing its customers storage and side tracks for loading and unloading cars. For this service but one tariff was charged and went into one and the same treasury. *Held*, that in estimating the value of the property of the ferry company in this state it was proper to take into consideration the value such property derived from its use in a system of doing business by reason of its connection with and relation to other property of the corporation located in Illinois.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 660-666.]

### 9. SAME—COLLECTION OF TAXES—ACTIONS—EVIDENCE.

In an action by the state to collect taxes assessed by the State Board of Equalization

against the ferry company, it was error to exclude evidence offered by the state that the company owned all the stock of the two railroad companies, and that all three were working in unison as one transportation company, although those facts were established by evidence subsequently admitted.

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by the state, on the relation of Ludwig F. Hammer, Jr., collector of revenue of city of St. Louis, against the Wiggins Ferry Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action which was instituted in the circuit court of the city of St. Louis by the state, at the relation of the collector of revenue of said city, to collect certain taxes assessed by the State Board of Equalization against 3.702 miles of railroad tracks, owned and used by the Wiggins Ferry Company in the city of St. Louis. A jury was waived, and the cause was tried by the court. The finding and judgment of the court were for the defendant, and the plaintiff duly prosecuted its appeal to this court.

There is no dispute about the facts of the case, except in one particular, which will hereafter be mentioned in paragraph 2 of this opinion, and they are substantially as follows: The defendant, the Wiggins Ferry Company (which will hereafter be called the "Ferry Company"), is a corporation, and was duly incorporated under the laws of the state of Illinois on the 11th day of February, 1853, and was empowered, among other things, as follows: "(4) To survey and lay off said lands, or any part thereof, into blocks, lots, streets and alleys, and grade and pave said streets and alleys, or any part thereof, and to lay off and dedicate to public use, grounds for market places, schools, churches and parks, and to sell, lease and donate any part of said lands, in such manner and upon such terms as said company may deem proper, and execute conveyances for the same, and to subscribe for, take and buy and hold, and sell stock in any railroad or plank or turnpike road company, and issue bonds bearing such rate of interest, and payable at such times and places as the company may think proper, not exceeding one hundred thousand dollars. (5) To keep a ferry or ferries at and from any point or points on said lands, across the Mississippi river, to St. Louis, in the state of Missouri, and to remove the same from place to place on said lands as necessity or convenience may require, and use boats or other crafts propelled by steam, heat, or other power, and possess, use and enjoy all the rights, privileges, franchises and emoluments recited in the preamble of this act as having been heretofore granted to the said Samuel Wiggins, his heirs and assigns, on and from the lands to be purchased as herein provided for and generally to do and perform all things in reference to the ownership, control,

management, use and disposition of said ferry franchise, ferry and lands, and of the business carried on thereat, which a natural person might or could do." That, under the powers thus granted, the defendant, either by purchase or lease, acquired real estate on the east and west banks of the Mississippi river, at the points designated in its charges, for wharves and landing purposes. At first the ferry company, by means of boats, engaged in the carriage and transfer of freight and passengers over the Mississippi river, without the intervention of railroads and cars, and received and discharged same at the aforesaid wharves. In the course of time the public demands upon the defendant were such as to require it, in addition to the duties it was then performing, to handle and transfer freight over the river in car load lots. This new demand necessitated the construction and operation of a railroad at each end of the ferry; one in Illinois, and one in Missouri. In order to meet this new condition, the ferry company organized and incorporated, or has organized and incorporated, under the laws of Illinois, the East St. Louis Connecting Railway Company (which will hereafter be called the "Connecting Company"), and under the laws of Missouri the St. Louis Transfer Railway Company (which will hereafter be designated the "Transfer Company"); the ferry company owning all the stock of both of said railway companies. Each of these railway companies constructed tracks connecting the east and west termini of the ferry with the various railroads and other business institutions which terminate at or which are located near said termini. In addition to those tracks, the transfer company constructed a number of switch tracks, side tracks, and storage tracks on the Missouri side of the river. When this system or scheme was completed, the connecting company, by means of its engines, would receive from other railroads all cars of freight destined to St. Louis via the ferry, and would haul them over its tracks and deliver them to the ferry company, which company would receive and transfer them, in boats, across the Mississippi river to St. Louis, where they were delivered to the transfer company. The latter company would receive and deliver them to the various railroads and business institutions to which they were consigned. The car lots of freight destined from St. Louis to East St. Louis via the ferry company went through the same routine as those from East St. Louis to St. Louis, but were first received by the transfer company, and by it delivered to the ferry company, and by that company transferred across the river and delivered to the connecting company, and by it to the various railroads or to the consignees. The following extract from the testimony of Mr. A. C. Church, former vice president of the ferry company, will throw much light upon

the system under which the business of these three companies was conducted, to wit: "Mr. Johnson: I will ask you, Mr. Church, to tell us in what way the compensation from one company to the other were charged upon the books of the company. Mr. Ralston: That's objected to as incompetent and immaterial and not embraced in any issue in this case. The Court: Mr. Church, as I understand it, the Wiggins Ferry Company received pay from the St. Louis Transfer Railway Company for cars hauled over whatever tracks it owned? A. The Wiggins Ferry, Judge, would bring them across the river, and then the transfer railway company would receive pay for hauling them from the boat to the railroad, or the warehouse or destination they were to go to. The charge was the amount paid by the shipper all in a lump. As far as the Wiggins and the transfer railway company were concerned, it was out of one pocket and into the other, and it made no difference whatever as to what they charged as among each other. The Wiggins Ferry Company, the transfer railway, and the connecting railway, while three separate and distinct corporations, were one interest and owned by the same people. Q. Well, you mean that the stockholders of all three were the same? A. I mean, Judge, that originally the ferry company had no railroads at all. The East St. Louis Connecting Railway was first built on the east side of the river. It was fathered by the ferry company and built to take care of its business. Then followed a similar railroad on this side. The railroads belonged to the ferry company. It was the parent corporation, and the treasury of the three companies was one. Q. Well, were these two railroad companies incorporated under a separate and distinct charter? A. Oh, yes, sir; they are distinct organizations, separate and distinct, and they were run just as if they had no connection with the others. Each one could stand on its own bottom separately, but, of course, they were one harmonious system, and each intended to help the other."

If we correctly understand the evidence, the 3.702 miles of railroad in question is what is termed switching, loading, and storage tracks, which at one time belonged to the transfer company, and was by it conveyed to the ferry company. This was prior to the time the taxes in question were levied; but, however that may be, the ferry company owned the road in question prior to and at the time the levy was made. The road is composed of many short, standard gauge tracks, upon and over which steam engines and freight cars are constantly being operated and handled, as before stated. The ferry company owned no cars, engines, turntables, nor water tanks. It employed the transfer company to handle, switch, receive, and deliver all its freight on the west side of the river, which was done over its own tracks and those of the ferry

company. The former company has engines, but no cars, except two push cars, worth \$30; nor has it any tracks extending to the water's edge, connecting immediately with the ferry. The ferry company, working in harmony with the two railroad companies mentioned, handles and transfers across the river a large part of the interstate commerce between Missouri and Illinois, at the points named. There is no question raised as to the regularity of the assessment of the taxes in question, but the power to make the assessment is denied.

The State Board of Equalization assessed and equalized the value of the rolling stock, roadbed, and superstructure, and "all other property" mentioned in Laws 1901, p. 232, § 2 [Ann. St. 1906, § 9391-2], per mile, and the aggregate value of the buildings of the following railroad and railway companies on the 1st day of June, 1900, for the taxes of 1901, and, after having heard all the evidence in regard to the same, by unanimous vote fixed the distributable value, per mile, of the rolling stock, roadbed, and superstructure, "all other property," and the aggregate value of buildings of said railroads and railways, as follows: The valuation of the Wiggins Ferry Company's railroad tracks per mile was as follows:

Name of line.	Mileage.	Value of buildings.	Value per mile of rolling stock.	Value per mile of roadbed.	Value per mile all other property.	Total distributable value per mile.
Wiggins Ferry Co.'s railroad tracks....	2.702	.....	.....	\$5,000	\$0,000	\$5,000

The defendant introduced evidence tending to prove that the \$30,000 item appearing in the above table was assessed against the franchise of the ferry company; that is, the right to conduct a ferry across the Mississippi river between East St. Louis and the city of St. Louis. Plaintiff then introduced in evidence the record of the State Board of Equalization for 1901, showing the proceedings of the board in fixing the total valuation for purposes of assessment of the railroad tracks of the Wiggins Ferry Company. "The secretary laid before the board the tables of valuations of all railroads, bridges and telegraph companies, as apportioned to the counties and municipal divisions thereof and the city of St. Louis; which were examined, approved and adopted as the assessment of railroad, bridge and telegraph property for the taxes of 1901, as set out in the following tables, and ordered spread upon the record and proceedings of the board and made a part thereof." The following table shows the valuation and as-

essment of the Wiggins Ferry Company railroad tracks, to wit:

RAILROAD TRACKS OF THE WIGGINS FERRY CO.									
Aggregate and detail description and valuation of property in the state of Missouri, owned by the Wiggins Ferry Company on the 1st day of June, 1900, as assessed, adjusted, and equalized by the State Board of Equalization in 1901.									
County.	Township.	City and town.	Roadbed, superstructure, rolling stock and "all other property."		Buildings.		Totals.		
			No. of miles.	Valuation per mile.	Valuation in subdivision.	Valuation in county.	Value in subdivision.	Value in county.	
St. Louis City.	Old Limits	.....	2.702	\$35,000	.....	.....	.....	\$240,630 00	
Totals	.....	.....	2.702	65,000	\$240,630 00	.....	\$240,630 00	\$240,630 00	
ITEMIZED STATEMENT.									
Length of road in state of Missouri.....								2.702	
2.702 miles roadbed and superstructure at \$35,000 per mile .....								\$128,570 00	
"All other property" at \$30,000 per mile.....								111,060 00	
Total .....								\$240,630 00	

The following is a copy of the tax bill sued on, formal parts omitted, to wit:

For railroad, bridge and telegraph company taxes, for the year 1901, on property in the city of St. Louis, as assessed by the State Board of Equalization of the state of Missouri:

	Valuation.	Rate.	Taxes.
State revenue.....	\$240,630 00	25	\$ 300 35
State interest .....		10	240 63
School tax.....		65	963 53
City tax, new limits.....			
City tax, old limits.....		1 21	2,911 62
Public free library.....		04	26 25

Total tax ..... \$4,571 97

The railroad in question had been regularly assessed by the State Board of Equaliza-

tion for 10 years previous to the one in question, in the same manner and against the same party, and those taxes were regularly paid by it up to the year 1901; but it refused to pay the taxes for that year, and for a recovery of those taxes this suit was instituted.

At the close of the introduction of all the evidence, the defendant requested the court to declare the law as follows: "(1) The court declares the law to be that, under the pleadings and the evidence offered by the plaintiff, the plaintiff cannot recover, and the judgment must be rendered in favor of the defendant. (2) The court declares the law to be that under the pleadings and all the evidence in the case, the State Board of Equalization of the state of Missouri had no right, power, authority, or jurisdiction to assess, equalize, or adjust the railroad tracks in the petition described for taxation for the year 1901. (3) The court declares the law to be that under the pleadings and all the evidence in the case the State Board of Equalization of the state of Missouri had no right, power, authority, or jurisdiction, under the fourteenth amendment to the Constitution of the United States, to assess, adjust, or equalize the franchise of the Wiggins Ferry Company, or any part thereof, for taxation in the state of Missouri, or taxes for the year 1901." The court gave said instructions after striking out the words "under the fourteenth amendment to the Constitution of the United States," and the plaintiff preserved proper exceptions to the giving of said instructions. At the close of all the evidence the cause was submitted to the court sitting as a jury, and its finding, as heretofore stated, was for the defendant, and judgment in accordance with such finding was entered of record. A timely motion for new trial was filed and by the court overruled, and from the judgment rendered in this cause the plaintiff prosecuted this appeal, and the record is now before us for consideration.

Johnson, Houts, Marlatt & Hawes, for appellant. J. E. McKelghan, for respondent.

FOX, P. J. (after stating the facts as above). 1. The legal propositions presented by this record are whether or not the 3.702 miles of railroad belonging to the ferry company is a railroad within the meaning of article 8, c. 149, Rev. St. 1899 [Ann. St. 1906, pp. 4298-4315], and, if so, is it subject to taxation as therein provided? The appellant affirms both of those propositions, while the respondent denies both.

In order to properly determine those questions, we must construe and ascertain the meaning of the statutes relating to the assessment and taxation of railroads. Sections 1163, 9338, 9339, and 9344, Rev. St. 1899 [Ann. St. 1906, pp. 988, 4294-4296], are the principal statutes bearing directly upon the subject, and are as follows:

"Sec. 1163. The term 'railroad corporation' contained in this chapter shall be deemed and

taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in this state."

"Sec. 9338. All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all other property, real, personal or mixed, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation for state, county or municipal or local purposes, and taxes levied thereon shall be levied in the manner hereinafter set forth.

"Sec. 9339. On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the State Auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as complete, including branch or leased roads, the entire length in this state, and the length of double or side tracks, with depots, water tanks and turn tables, the length of such road, double or side tracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

"Sec. 9344. The state board for the assessment and equalization of railroad property shall be composed of the Governor, Secretary of State, State Auditor, State Treasurer and Attorney General, and shall meet annually at the capitol in the city of Jefferson, on the third Monday of April of each year, for the purpose of assessing, adjusting and equalizing the valuation of such railroad property. The said board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 9339. The board shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other property belonging to said railroad companies, or property belonging to any

railroad companies in this state of the kind specified in section 9339, upon which no returns have been made, which may be otherwise known to them, as they may deem just and right. In assessing, adjusting and equalizing any railroad property for any year or years, the state board may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it and shall not be governed in its findings, conclusions and judgments by the testimony which may be adduced, further than to give to it such weight as the board may think it is entitled to. Provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said board shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road owned or controlled by such company."

In order to ascertain the true intention of the Legislature, we must construe all the sections of the statute bearing upon the subject in controversy together. This is one of the elementary rules underlying the construction of statutes, and has been stated by an able text-writer in the following language: "All consistent statutes relating to the same subject, and hence briefly called statutes in *pari materia*, are treated prospectively and construed together as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day." Sutherland, Stat. Construction, § 283. And, continuing, he says: "A statute must be construed with reference to the system of which it forms a part. And statutes on cognate subjects may be referred to as though not strictly in *pari materia*." *Id.* 284. This rule of construction was quoted with approval in the case of *Sales v. Barber Asphalt Co.*, 166 Mo. 671, 68 S. W. 979, and by court in banc in the case of *State ex rel. v. Patterson* (not yet officially reported) 105 S. W. 1048. In the light of this rule of construction, we will now determine what railroads are included within the meaning of those sections of the statute. If we read sections 9338, 9339, and 9344 alone, they refer only to such railroads as are owned, hired, or leased by railroad companies or corporations, which would exclude all railroads owned, hired, or leased by all other companies, corporations, and individuals. But when we read these sections in connection with article 2, c. 12, of the Revised Statutes of 1899 [Ann. St. 1906, pp. 894-904], which is the only law in the state regarding railroads, prescribing how they shall be organized, constructed, and operated, as well as their rights, duties, and obligations, and defining the words "railroad company" and "railroad companies," quite a different conclusion might be reached.

Section 1163 of said chapter reads as follows: "The term railroad corporation contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in this state." According to the authorities before mentioned, this section must be construed with and read into sections 9338, 9339, and 9344. By doing so these sections, instead of being restricted to railroads owned by railroad companies or railroad corporations, would be extended in their operation and include "all corporations, companies, or individuals owning or operating, or which may hereafter own or operate any railroad in this state." This, we take it, is the clear meaning of the Legislature as expressed in those sections of the statutes when all are read together, as they should be. That which is within the meaning of a statute is as much a part of it as if it were written therein. Judge Scott stated the same rule in this language: "A thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter." *Riddick v. Walsh*, 15 Mo., loc. cit. 535; *Humes v. Railway Co.*, 82 Mo. 227, 52 Am. Rep. 369.

With this construction placed upon sections 9338, 9339, and 9344, they clearly include the road of respondent. But to escape that construction respondent contends that the road in question is not a railroad within the meaning of the railroad laws, but are only loading or storage tracks upon which cars are stored while being loaded and unloaded. In answer to that contention, it may be first said that the record does not bear out that contention. The evidence shows that they are used not only for those purposes, but also for regular traffic and switching purposes. In fact, the plat in evidence shows that respondent's tracks are the only ones extending to the water's edge and over which cars can pass to and from its boats and onto those of the transfer company. Besides this, it is conceded that steam engines pass over and draw or push freight cars, loaded and unloaded, over these tracks, not only for storage, loading, and unloading, but for all purposes incident to its traffic. Mr. Price, in his work on Railroads (page 2), thus defines a railroad: "A road graded and having rails of iron or other material for the wheels of carriages to run over." In *Doughty v. Fairbank*, 10 Q. B. Div. 359, a railroad is defined to be "a way upon which trains may pass by means of rails." There is nothing in these definitions nor in our statutes which excludes the idea that a railroad may not be constructed, owned, or operated by other persons than railroad corporations. Nor is there any legal requirement that a railroad shall be of any particular length. *Wiggins Ferry Co. v. East St. Louis Union Ry. Co.*, 107 Ill. 450, loc. cit. 454. Nor is it essential that a railroad should own rolling stock. 1 *Elliot on Railroads*, p. 7; *Pennsylvania Ry. Co. v. St. Louis Ry. Co.*

118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83. We entertain no doubt about the road in question being a railroad within the meaning of article 8, c. 149, of the Revised Statutes of 1899. But returning to the question of assessment: This direct question came before this court in the case of *State ex rel. v. Chicago, Rock Island & Pacific Ry. Co.*, 162 Mo. 391, 63 S. W. 495. In that case the company had owned certain lands for 12 years. A part of them was crossed by switch and side tracks, while other parts and lots were not so used. The assessor of Buchanan county assessed the vacant lots for taxation under the general revenue laws, and the question there presented was: Should such lots be assessed by the county assessor or by the State Board of Equalization? It should be added that the railroad company in that case contended that it purchased all of the land mentioned for railroad purposes and intended to so use it in the future, as soon as the business of the company demanded it. In the discussion of that case this court said: "In that case (*State ex rel. v. Hannibal & St. Joseph Railroad Company*, 135 Mo. 618, 37 S. W. 532), it was decided that the list of railroad property required by section 7718, Rev. St. 1889, now section 9339, Rev. St. 1899, to be furnished to the State Auditor as the basis of the action of the State Board of Equalization, includes not only the land covered by the right of way of the main line, depots, etc., but also land covered by side tracks used in a switchyard in connection with its traffic as a common carrier. In that case the following from the Supreme Court of Illinois was quoted with approval: 'We are therefore of the opinion that the land held in actual use by a railroad company for side tracks, switches, and turn-outs must be regarded, within the meaning of the revenue laws, as a part of the right of way of the company.' *Railroad v. People*, 98 Ill. 357. The theory of the system of taxing railroads as contained in our statute seems to be that the railroad, with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the State Board of Equalization. \* \* \* Taking the decision in *State ex rel. v. Hannibal & St. Joseph Railroad*, above cited, as the law of this case, the only question is whether these lots are to be deemed as in use by the defendant for its side tracks and a switchyard." The court then announced its conclusion in that case, which was that the vacant lots were not assessable by the county assessor, but should be assessed by the State Board of Equalization. There is nothing in the Constitution and laws of the United States which prohibits a state from taxing the property of persons and corporations engaged in foreign and interstate commerce where the property is located in such state; but, upon the contrary, the Supreme Court of the United States has repeatedly held that a state may tax all such property which is located in such state.

*Western Union Tel. Co. v. State of Missouri*, 190 U. S. 412, loc. cit. 424, 23 Sup. Ct. 730, 47 L. Ed. 1116; *State ex rel. v. Western Union Tel. Co.*, 185 Mo. 502-523, 65 S. W. 775; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, loc. cit. 210, 5 Sup. Ct. 828, 29 L. Ed. 158.

Measured by the authorities heretofore cited upon the proposition now under discussion, we see no escape from the conclusion that respondent's road was subject to assessment by the State Board of Equalization, and not by the city assessor, as contended for by learned counsel for respondent.

2. A more serious proposition is involved in respondent's second objection to the validity of a portion of the assessment in question. The contention of respondent is that the record discloses the fact that the \$30,000 item assessed against the ferry company as the value of "all other property" per mile of said road is a tax against its franchise; that is, a tax against its charter right and privilege to conduct a ferry business across the Mississippi river between East St. Louis and the city of St. Louis. There is some evidence contained in this record tending to support that proposition; and, if true, the levy would be clearly invalid, for the reason that it would be a tax imposed by a state upon interstate commerce, which is prohibited by the Constitution and laws of the United States. The national government alone is possessed of the power to tax and regulate foreign and interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *St. Clair County v. Interstate Land Co.*, 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518; *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. Ed. 192; *Morgan v. Parham*, 16 Wall. (U. S.) 471, 21 L. Ed. 303. But from an examination of the entire record, owing to the meagerness of the evidence upon that question, and the modification and giving of instructions by the trial court, it is extremely difficult for us to ascertain and determine what the finding of the court was upon that point. The evidence is not clear or satisfactory, and the instructions given do not make manifest the finding of the court or the views of the court as to the law applicable to that particular question.

The court gave for respondent the three instructions heretofore copied, the first two of which are in the nature of demurrers to the evidence, which declared appellant could not recover, while the third, as asked, declared that under the Constitution and laws of the United States the State Board of Equalization had no authority to assess the franchise of the ferry company for taxation; but before giving said instruction the court struck therefrom all that part referring to the Constitution and laws of the United States, thereby leaving the inference that the court was not satisfied that the \$30,000 item was assess-

ed against the franchise of the ferry company, but that it had been assessed against its other railroad property, which was also invalid, for the reason that none of its railroad property was assessable by the State Board of Equalization, but was assessable by the city assessor of the city of St. Louis. The appellant insists that respondent, under its charter from the state of Illinois, had power and authority to acquire and hold railroad stocks, and that, when it constructed, or had constructed, the connecting company and the transfer company, and owned all the stocks of both, and consolidated all three of the companies for traffic purposes, and charged one tariff for transportation over the combined system, for the purposes of taxation it must be considered and taken as one entire system of transportation, especially in so far as regards the property standing in the name of the ferry company, which includes the railroad in question. The appellant's oral evidence, while very meager, tends, however, to prove that "all other property as \$30,000," mentioned in the assessment, was an assessment against the railroad in question for the right and privilege of constructing, maintaining, and operating the road in this state, in connection with its right to conduct its business wherever the system of lines belonging to the three combined companies extend; all representing a unity of use in the entire corporate property of the three corporations, thereby making the same much more valuable than it otherwise would be for use separately and independently of each other. The evidence also tends to show that the State Board of Equalization, in arriving at the value of the railroad in question, after making an investigation and hearing evidence, ascertained the kind and amount as well as estimated the fair value of the tangible and intangible property of the three companies as an entire system of transportation, at a certain sum, not including, however, the value of the right of each of said companies to be corporations. The board then ascertained the value of the tangible property of all of the companies, and deducted that sum from the total value of the tangible and intangible property of the three companies, thereby fixing the value of the intangible property. It then fixed the value of the tangible property owned by the ferry company and the transfer company which was located in this state, and assessed the respective amounts thereof against each. It then divided the value of the intangible property, before mentioned, among each of the three companies in the proportion to the value of each company's tangible property as before assessed bore to the amount of the intangible property. The result of all this was the assessment of respondent's said railroad for the amounts stated in the assessment heretofore mentioned. As before stated, the oral evidence upon these questions, on both sides, is very unsatisfactory. Yet we gather from the whole record, briefs, and

arguments of counsel on file herein that the foregoing was substantially the process by which the value of the railroad was arrived at, and upon which the assessment in question was based. But, whether that be true or not, the law presumes the State Board of Equalization properly performed its duty in that regard. *State ex rel. v. Western Union Tel. Co.*, 165 Mo., loc. cit. 516, 85 S. W. 775; *State v. Lord*, 118 Mo., loc. cit. 4, 23 S. W. 764; *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757. And there is no substantial evidence preserved in this record to overthrow that presumption.

But counsel for respondent contends that, even conceding the railroad in question was regularly assessed and in the manner before stated, yet he argues that the assessment is invalid for the reason that "the franchisees of the Wiggins Ferry Company to operate a ferry across the Mississippi river cannot be attached to the tracks in question, since the ferry company is incorporated by the laws of the state of Illinois, and its franchise cannot be assessed or taxed in the state of Missouri." In other words, respondent contends that, in fixing the value of "all other property" of the railroad, the franchise of the ferry company was included in the estimation of the value of the intangible property of the three companies mentioned, and that such value was distributed between those companies in the proportion that the value of each road's tangible property bore to the value of the intangible of the three. If the facts in the case were as contended for by respondent's learned counsel, then the legal conclusions stated by him would unquestionably be sound, and the assessment would be invalid. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *Hays v. Pacific Mail Co.*, 17 How. (U. S.) 599, 15 L. Ed. 254; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. Ed. 192; *Morgan v. Parkham*, 16 Wall. (U. S.) 47, 21 L. Ed. 303; *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513. But from the record before us we are unable to concur in the views that the value of the franchise of the ferry company was included in the board's estimate of the value of the intangible property of those companies. Our understanding of the evidence is that the franchisees of all three companies—that is, the rights to be a corporation and to conduct a ferry and a railroad business—were excluded from that estimate; but the value of the rights and privileges of those companies, acting in unison as one company, to construct, maintain, and operate a system of railroad in this state in connection with and as part of a system in another state, was included in the valuation upon which the assessment was based. This question came squarely before this court in the case of *State ex rel. v. Western Union Tel. Co.*, 165 Mo. 502, 85 S. W. 775. It was there held: "First, that the Western Union Telegraph Company is, as between governmental

departments, a governmental agency, but is not so as between the company and a state or a citizen; second, that the telegraph company is an instrument of interstate commerce, and has a right to enter a state and transact business; third, that, the telegraph company being an instrument of interstate commerce and deriving its powers in this regard from the United States, no state has a right to prevent such company from doing business in the state, for that would be an interference with interstate commerce; fourth, that the tangible property of the telegraph company located in a state is subject to taxation like any other property in that state, and its franchise or right derived from the act of Congress of 1866 does not exempt such property from taxation by the state in which such property is located; fifth, that, in determining the value of the tangible property of the company located in any state, it is proper to compare the length of its lines in that state with the length of its entire lines, or to take the aggregate value of the shares of its capital stock, and deduct therefrom such portion of that valuation as is proportional to the length of its lines without the state, and also to deduct therefrom the value of its real estate and machinery subject to local taxation within the state, and that such taxes, so assessed, constitute an excise tax upon the property or capital of the corporation, and not a tax upon any franchises of the corporation." That case went to the Supreme Court of the United States, and was affirmed by that court, and is reported in 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116.

There is but one difference in the facts of that case and the one at bar. In that case there was but one corporation, which was conducting a telegraph business through the several states and territories of the Union, as well as in foreign countries; while in this case there were three corporations, the stock of all of which was owned by the ferry company, and by some agreement among themselves they consolidated the ferry with the railroads into one continuous system of transportation, with various railroad branches, switches, side tracks, and turnouts at each terminus thereof, connecting with the various railroads on each side of the river, for the purpose of receiving from and delivering cars to such roads, and for the purpose of furnishing its customers with storage and side tracks for loading and unloading cars. For this service but one tariff is charged, which includes all railroad and ferry charges, which goes into one and the same treasury. We are clearly of the opinion that the legal propositions announced in the case of *State ex rel. v. Telegraph Co.*, supra, are applicable to this case. The method adopted in estimating the value of the property is the only way in which the true and full value can be reached; that is, in estimating such value it

is proper to take into consideration, not only the rights and privileges the company is exercising in this state and the property actually located therein, but as well its connection and relation to other property which is not located in this state, but which, however, is used in the system of work with the property which is taxable in this state, thereby giving it a value which it otherwise would not have if considered abstractly and separate and distinct from any connection with the system of work to which the property in this state is connected and related. As was ruled in the *Telegraph Company Case*, the property, by reason of its relation and connection with other property which may be located in another state and used as a system in the carrying on of a business which has a much greater value than the sum of the value of the same individual thing constituting the property regarded merely as such; in other words, it is perfectly legitimate, in estimating the value of the property of the respondent in this state, to take into consideration the value such property derived from its use in a system of doing business by reason of its connection with and relation to other property of the respondent which may be located in another state.

This court, in the *Western Union Telegraph Company Case*, in discussing the subject as to the method of estimating the value of property located in this state, thus indicated the method that should be adopted in determining such value. It was there said: "In determining the value of the property of the defendant in this state, the board of equalization took into consideration 'the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stock and bonds, and the gross receipts and net earnings and franchises owned by said company, and the value thereof.' It did not and could not have included therein any franchise derived by the defendant from the government of the United States, because that government had conferred no such franchise; nor was such a valuation placed upon 'all other property' a tax upon the franchise of the defendant company. The franchise derived by the defendant from the state of New York was considered by the board in determining the value of the property of the defendant located in this state; that is, that property was valued, not as so many poles, so much wire, so many instruments, or so much 'other property,' in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation towards each other, into a system located partly in this state and partly in other states, gave each part a concrete value, which was much greater than its abstract value. The right to exist—the franchise—of the defend-



ant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this state bore to the proportion of the franchise exercised in other states, or indirectly, as was done in Massachusetts and was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system. This was expressly held to be proper in *Western Union Tel. Co. v. Mass.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790."

If those three companies were separate and distinct, with their stock belonging to different persons, quite a different question would be presented; but, under the facts of this case, we are of the opinion that it falls within the principle above indicated as announced in the case of *State ex rel. v. Western Union Tel. Co.*, supra. The conclusions reached upon the proposition now under discussion not only find support in the case of *State ex rel. v. Western Union Tel. Co.*, but as well in the cases of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and the case between the same parties in 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628. If the facts of this case are as we understand them to be, then we are clearly of the opinion that the assessment is valid, and that the taxes should be paid; but, if upon another trial it should be shown that the assessment included the value of the franchises of the ferry company or that of the connecting company, then the assessment upon which the \$30,000 item is based, if predicated upon the value of such franchises, is invalid, and the taxes based and extended upon that item cannot be collected. That question should be submitted to the jury for their determination upon the evidence and under proper instructions of the court.

3. The appellant complains of the action of the trial court in excluding evidence offered by it for the purpose of showing that the ferry company owned all the stock of the two railroad companies, and that all three were working in unison as one transportation company. While those facts were established by the evidence subsequently admitted by the court, yet it was error for the court to exclude the evidence offered upon those questions, and such evidence should have been admitted at the time it was offered.

We have indicated our views upon the legal propositions disclosed by the record before us, which results in the conclusion that the judgment of the trial court should be reversed, and the cause remanded for a new trial in accordance with the views as herein expressed, and it is so ordered. All concur.

**BLACK et al. v. EARLY, Revenue Collector, et al.**

(Supreme Court of Missouri, Division No. 1. Nov. 27, 1907.)

**1. SCHOOLS AND SCHOOL DISTRICTS—DE FACTO SCHOOL DISTRICTS—COLLATERAL ATTACK.**

The validity of a de facto school district, acting under color of law and legal right in conducting a school, cannot be attacked collaterally in a suit to restrain the collection of taxes levied by it for school purposes, and to pay interest on and to create a sinking fund for the payment of bonds, but the validity must be determined by quo warranto.

**2. SAME.**

A school district voluntarily becoming a party to a suit to restrain the collection of taxes levied by it for school purposes, and tendering the issue of its corporate existence, may avail itself of the defense that its corporate existence cannot be collaterally attacked.

**3. SAME—TAXATION—ASSESSMENT—VALIDITY.**

A school district estimate of the funds necessary to sustain its public school contained items for teachers' fund and for incidental fund, aggregating a specified sum, and recited that a levy of a specified sum on the valuation was sufficient to raise the amount. The estimate contained items for a sinking fund and for annual interest, and stated that an additional levy was necessary. Held that, though the interest and sinking fund items were erroneous, there remained a valid tax due the district for the maintenance of its schools, and a taxpayer failing to tender the amount of the tax for the latter purpose could not restrain the collection of the entire tax.

**4. SAME.**

Const. art. 10, § 12 [Ann. St. 1906, p. 287], provides that any school district incurring any indebtedness "shall before or at the time of doing so" provide for the collection of an annual tax to pay the interest thereon and to provide a sinking fund. A school district voted to issue bonds, which were not sold. The estimate of the funds necessary to be raised by taxation for a year contained items for interest on the bonds and a sinking fund. The bonds were thereafter sold. Held, that the estimate was properly made, and the taxes properly levied in accordance therewith.

**5. JUDGMENT—CONFORMITY TO PLEADINGS.**

A judgment must be responsive to the pleadings, and one not within the pleadings will not be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 34-37.]

Appeal and Cross-Appeal from Circuit Court, Marion County; D. H. Eby, Judge.

Action by John H. Black and others against Henry Early, collector of the revenue of Knox county, and others. From a judgment granting insufficient relief, both parties appeal. Reversed, with directions to dismiss.

O. D. Jones, George A. Mahan, and W. N. Doyle, for plaintiffs. L. F. Cotter, F. H. McCullough, and James C. Dorian, for defendants.

LAMM, J. Plaintiffs, Black, Buhl, and Delaney, resident taxpayers of the district, for themselves and 40 others unnamed (designated in the petition and the briefs as the "Forty"), on June 2, 1906, sued in the circuit court of Knox county to enjoin the collection of taxes levied against their properties for the year 1905, and about to be levied

for the year 1906, for the support of the public school of the school district of the town of Hurdland, and to pay the interest on certain bonds of said district, and to create a sinking fund to pay the principal. A preliminary writ went. Thereat the venue of the cause was changed to the Hannibal court of common pleas on plaintiffs' application. At a hearing there the chancellor made the preliminary writ permanent as to the taxes for the year 1905. As to the taxes of 1906 it was dissolved. The decree, having split the relief, proceeded to halve the burden of costs, taxing one modicum against plaintiffs, and the other against defendants, and from that decree the parties litigant prosecute cross-appeals.

The case was lodged in this court on the 26th day of June, 1907. On the same day defendants filed a motion to advance. There was no counter showing made on the allegations of that motion. Therefrom it appeared that a proceeding in quo warranto, involving the life of the school district of the town of Hurdland, was pending here for hearing at the October term, 1907. Therefrom it further appeared that because of the nonpayment of taxes by plaintiffs (and the "Forty"), and because one of the plaintiffs, as treasurer of the school district of the town of Hurdland, whose bond was made by his coplaintiffs as sureties, refused to turn over the money of said district then in his hands, without suit, litigation being pending on said bond (see *State ex rel. v. Delaney*, 122 Mo. App. 239, 99 S. W. 1), the public school in the school district of the town of Hurdland had been first crippled and then closed. The premises considered, the court in banc advanced this case to be heard with the quo warranto, and assigned it to Division 1 to be heard at said October term. At that term both cases were argued and submitted, and the reasons good for use in advancing the case for speedy hearing still existing, justify us in determining it speedily, in advance of the quo warranto; since, whatever may be the outcome in the latter cause, no apparent public good can be furthered by putting the public school of Hurdland in the way of sickening, languishing, and dying of starvation. Such coup de grace as death, if it come at all, should be seemly and at the hands of the law; and a prior state of suspended animation or paralysis ought not to be allowed to come about through drawn-out torture. The pleadings are long, covering 61 pages of print, and need not be reproduced. A summary thereof will be sufficient upon which to predicate and announce our views of their legal intentment, and decide the case.

Counsel are not in accord on the scope and meaning of the charging part of the petition. In its warp and woof there are interwoven, with allegations of ultimate and substantive fact, narrations of coloring matter, recitals of extraneous facts, matter of evidence, matter of inducement, matter of argument, and

conclusions of law; thereby making its analysis and a differentiation of the elements constituting the grounds upon which relief is sought to be predicated a nice, a baffling, and an anxious task. Ordinarily it would be wide of the mark to go to the evidence of a lay witness to get at the gist of a pleading. But, in the wilderness of litigation, a case may arise where light may be hailed as welcome through any window, and in this case we may borrow with profit from the testimony of Mr. Delaney, one of the plaintiffs, and a man wielding a hammer of common sense and able to hit the nail on the head. On cross-examination, he testified: "They attempted to organize under the village act." He was then asked: "What do you mean by 'attempting to organize under the village act'?" He answered: "I mean that we attempted—some of the folks attempted—to organize under the village act, and now it is in litigation to see whether they have or not. That is my idea of it." His "idea" of the issue tendered by the petition is ours. For, doing the best that in us lies, and liberally construing the pleading, it may be justly said that the gravamen of plaintiffs' complaint is that the school district of the town of Hurdland was illegally organized in 1902 out of a former common school district; that there was a common school district, known as "School District No. 2, township 15, range 13, Knox county," in existence prior to 1902 for 20 years, and it is charged it was abortively attempted to change this district, by a mere colorable following of the statutory path of evolution blazed out in the village act (article 2, c. 154, Rev. St. 1899 [Ann. St. 1906, p. 4519], entitled City, Town and Village Schools), into a village school district in said year. The bundle of things which, in detail and as a whole, go to make up the vice of alleged illegality in the organization of the new district, is charged with a wealth of detail, the pleader (passim) laying stress upon the issuing of \$5,700 in bonds by the village district to build a brick schoolhouse, and the taxation incident to that bond issue. It is plain that the taxation arising from the issuing of these bonds is where the shoe pinches. It is plain, too, that the pleader desired the court to understand that the controlling reason for declaring the taxes of 1905 and 1906 to be illegal is because of the pleaded infirmities in the corporate birth and life of the school district of the town of Hurdland, and not otherwise. To these general charges of illegality (split into sundry specifications) there is added an allegation that the levying and spreading of the taxes of 1905 were "without any estimate made or certified by the secretary of the board of directors of the school district of the town of Hurdland, and without any estimate, pretended or claimed to be made in the name or to represent the School District No. 2, township 15, range 13, being then on file in the office of the clerk of the county court of

Knox county." The tax levy struck at for 1905 was for 90 cents on the \$100 of valuation. As to the year 1906 it is alleged that the "pretended board of the district of the town of Hurdland caused to be made an estimate of taxes to sustain the public school of said pretended district of the town of Hurdland for the next school year, and have caused one G. L. Cockrum, as district clerk, to certify an estimate, and caused the same to be filed in the office of the clerk of the county court of Knox county." This estimate was 90 cents on the \$100 of valuation, and it is alleged that a levy is about to be made and spread on the taxbooks for that amount.

It is not charged in the petition or shown in the proof that plaintiffs or either of them actually offered to pay and tendered payment of any part of the 90-cent levy, which levy covered the whole school tax, including 25 cents on the \$100 for a sinking fund to pay said bonds, and 25 cents on the \$100 to pay the interest thereon. It will be observed that the former common school district is not a party to this proceeding; that the village school district is a party; that the theory of the pleader was that the new district, illegally formed, is illegally undertaking to arrogate to itself the right to run a school, borrow money, build a schoolhouse, make estimates for taxing purposes, and cause those taxes to be levied against plaintiffs' property; and that the pleader's case hinges on that usurpation of power.

Keeping the foregoing in mind, and the further fact that it is not contended or pretended that the Common School District No. 2, township 15, range 13, of Knox county, is a live, going body corporate, or has run a school for four years prior to the suit (see section 9741, Rev. St. 1899 [Ann. St. 1906, p. 4462]), we come next to a cautious and peculiar averment of tender in plaintiffs' bill, thus: "That it is a mixed question of law and fact as to whether or not in law the said School District No. 2, township 15, range 13 west, has by the high-handed proceedings aforesaid, and the nonexercise of its powers in law, lost its organization as a school district. That on the subject these plaintiffs have not knowledge and information sufficient to form a belief as to the fact in law, and whether it would be one or the other. But they now say and offer that if the court shall ascertain and determine that said school district legally exists, and that any school taxes have been legally levied in its name for the years 1905 and 1906, and at the time of trial are legally due it, from these plaintiffs and those in whose behalf they sue, then they say they are ready and willing to pay any and all such taxes thus ascertained to be legal and legally due from them." The answer of the school district of the town of Hurdland, after certain admissions, followed by a denial of all other averments, in substance avers a compliance with statutory provisions in reorganizing the former common school district into

the village school on the presentation of a proper petition and 15 days' notice at the annual school meeting in 1902, a certification of the proceedings of that meeting by its secretary and chairman, and a record of a copy thereof in the district records; that a board of six directors was elected and qualified, one of them being the plaintiff William Delaney; that the proceedings were regular, and resulted in the legal organization of a village district; that ever since that time the business of the district has been conducted by a board of six directors, as provided in the village act. In other words, it pleads a *de jure* organization. In another paragraph, as a full defense, are alleged the particulars in making estimates, employing teachers, conducting a school, receiving taxes and school moneys through the treasurer of the school board of the town of Hurdland from the county treasurer and the collector. It is alleged that the county officers and the public have recognized the school district of the town of Hurdland as a *de facto* school district, having a legal right to exist and conduct a school; that it did conduct a school, generally patronized by the public, and patronized by the plaintiffs and the "Forty" from the time of its organization down to the present moment. In other words, it pleads a *de facto* organization. Wherefore defendant says plaintiffs ought not to be permitted to maintain their suit. In another paragraph, as a further full defense, the participation of plaintiffs in the organization of the village district, their several participation as officers of the district (its directors and treasurer, respectively), from time to time since its reorganization, are set forth, together with their recognition of it by the payment of their taxes and sending their children to the school from 1902 to 1905, and until steps were taken to build a new schoolhouse in May of the latter year. Wherefore it is averred plaintiffs are guilty of laches in bringing this suit, and are estopped to maintain it or to assert that the village school district is not legally organized. Finally, in another paragraph it is alleged that plaintiffs brought a prior proceeding by *quo warranto*; that after the election voting \$5,700 of bonds to build and furnish a new schoolhouse was held the plaintiffs in this suit instituted a proceeding by *quo warranto* against the directors of the school district of the town of Hurdland, challenging the legal existence of the village school; that an answer was filed, a trial had, and it was adjudged and determined that the school district of the town of Hurdland was duly and legally organized; that the issues in the *quo warranto* proceeding and in the present proceeding are identical. Wherefore defendant pleads *res judicata*, and says that the judgment in the *quo warranto* is a bar and a record estoppel to the maintenance of this suit. The defendant Miller, county clerk, the defendants Mitchell and McCauley, as judges of the county court, and the defendant Early, as collector of Knox

county, filed separate answers, setting up in part the same matter by way of defense. Separate replies were filed to these answers. To the replication to the answer of the defendant school district there was attached an affidavit, denying that the school district of the town of Hurdland was a body corporate at the time its answer was filed, or at any time mentioned in the petition. That replication further set up matter in avoidance of the plea of *res judicata*.

The whole record of the trial, covering 500 pages, is brought here as and for an abstract. It has been submitted to a consideration line by line. In the view we take of the issues and the law applicable to those issues, it would serve no useful purpose to set forth the testimony. For our purpose, the tendency of the evidence may be summed up as follows: (a) Plaintiffs introduced evidence tending to show that the statute was not complied with in the organization of the village school district in more ways than one; and defendants introduced evidence tending to show that in its organization the steps taken were substantially the statutory steps. (b) Plaintiffs introduced evidence tending to show there was no record of the meeting of the directors of the old district at which the petition was presented asking for an order that an election be called to vote on a village organization; further, that there was no record whatever of the proceedings of the annual meeting at which the election was held; and evidence directed to showing there were no records kept after the reorganization for one or two years. Contra, defendants introduced testimony tending to show that the records were kept by the clerk or secretary on loose pages, placed for safe-keeping within the school record book, and defendants produced and identified these loose sheets at the trial; that the school record book had been largely written up under the appropriate headings of that book, and that, pending the getting of a new record, the proceedings were kept on such loose sheets to be copied into such new record, which was subsequently done; that a record was kept of the meeting of the directors of the old district at which the petition for reorganization was presented and acted upon, and notices ordered posted (and posted in due time) calling an election; that such record was lost, and the contents thereof were supplied by oral testimony, the said petition and one of the written notices being produced. It may be said that the testimony creates an unfavorable impression on our minds in that it shows inexcusable inattention and slovenly disorder in keeping the school records. (c) Plaintiffs introduced evidence tending to show that from 1902 to the beginning of 1905 the inexact terminology in the school records, in the taxbooks, in the books of the county collector and county treasurer, in the books of the treasurer of the village school district, in the estimates and enumeration lists, in contracts made and

warrants drawn, and in the oaths of the directors, would agree as well with the continued existence of the old common school district as with the existence of a village school district having a corporate statutory name. Contra, it was shown by defendants: That the school record book had blank forms and headings printed for use in a common school district, and these headings inadvertently had not been changed. That the blank forms of warrants, enumeration lists, and estimates supplied for use were of a similar character and suffered from like infirmity. For example, in the enumeration lists and in blanks for estimates there would be blanks for the township and range and number of district. Sometimes these had been filled. That the word "District Clerk" would be printed on such blank. That the secretary or clerk of the school board of the Hurdland district would sign his name over that printed designation without erasing or altering it. That the county clerk in spreading the taxes levied under the orders of the county court also used taxbooks with columns headed by the letter "T." and the letters "S. D.," the "T." standing for township, and, we suppose, the "S. D." standing for school district; and, after describing the property to be taxed, and spreading the tax, the foregoing columns would be filled by figure "15" under "T.," and the figure "2" under "S. D." Much of the mischief crept in by the use of the inappropriate blanks in papers and books without intelligent and discriminating alteration of these blanks to suit a village school district. In the treasurers' bonds of the school district, and in some of the oaths of the school directors, there are plain indications of a crude attempt to recognize the fact that the district has a new corporate name and entity. (d) It was shown, too, by defendants, by unquestioned testimony, that the village school district had for several years had a going organization. The forms of procedure in personnel of officers and method of business substantially as directed by the village act were complied with. For instance, the board had a secretary, six directors, held elections, appointed judges of election, ran the only public school in the district, hired teachers, paid them, had their own treasurer, who drew the district's money from the county treasurer, and the collector, who paid out this money on warrants drawn by the board, and made his settlements with the board and with the county clerk. In fine, it was established that the district was recognized as a village school district by the public and the county and state officers in drawing and using school money, voting and making estimates, and in subserving school purposes by running a graded school with several teachers. (e) Coming down to the taxes in dispute for 1905 and 1906, the record shows the following condition of things: The need of a new schoolhouse was recognized on all sides. Plaintiffs and the "Forty" were bent

on one to cost not more than \$3,500. The board of directors and the controlling vote of the district desired one to cost \$5,700. In this condition of things, bonds were voted in the latter amount. They were sold at a premium, and the schoolhouse was built at once, and is now in use. At the proper time in May, 1905, there was filed with the county clerk of Knox county the following estimate, based on the order of the board (said estimate being certified by one Cockrum, then secretary, but after his signature were the printed words "District Clerk"):

"Estimate: To the County Clerk, Knox county, Mo.—Dear Sir: We herein submit estimate of the amount of funds necessary to sustain the public school, amount of cash on hand, and an approximate rate to be levied on the taxable property in the school district of the town of Hurdland, in Knox county, Mo., for a period of seven months, for the year beginning July 1, 1905:

For teachers' funds, sections 9750, 9771, 9777, 9779, and 9844.....	\$600 00
For incidental fund, sections 9750, 9771, 9777, 9779, and 9844.....	280 00
For building fund .....	
For sinking fund, section 9757.....	350 00
For annual interest, section 9758.....	285 00

Total amount necessary to sustain school .....	\$940 00
Deduct estimated amount of cash on hand July 1, 1905.....	200 00
Deduct estimated amount from public fund .....	
Amount to be levied on taxable property of the district.	

"We estimate that a levy of 40 cents on the \$100 valuation will be sufficient to raise the above amount. For instructions see back of estimate.

"I hereby certify that at the annual meeting on the first Tuesday in April, 1905, — months school was ordered, and that the several amounts above specified were voted to sustain the same, as follows: (1) That a majority vote of those who are taxpayers was cast to increase the levy for school purposes to — cents on the \$100 valuation, provided so much is needed to raise the above amounts for teachers' and incidental funds, as provided by section 9777. (2) That a vote was taken for building purposes at a special election held May 13, 1905, and two-thirds of the qualified voters of the district voting at the election voted in favor of issuing bonds to the amount of \$5,700. (3) That by order of the board a levy of 25 cents on the \$100 valuation was authorized to raise the above amount for sinking fund to meet the legal bonded indebtedness, and 25 cents on the \$100 valuation to pay accrued interest on the same, as provided for in sections 9757 and 9758.

"Done by order of the board this 15th day of May, 1905.

"G. L. Cockrum, District Clerk."

On that estimate plaintiffs' school taxes of 1905 were levied (to wit, 40 cents on the

\$100 to run the school, 25 cents on the \$100 to create a sinking fund, and 25 cents on the \$100, to pay annual interest), spread on the taxbooks, and remain entirely unpaid. For the year 1906 the following estimate was similarly made and filed:

"Estimate: To the County Clerk, Knox county, Mo.—Dear Sir: We herein submit estimate of the amount of funds necessary to sustain the public school, amount of cash on hand, and an approximate rate to be levied on the taxable property in district town of Hurdland township No. —, range No. —, for a period of seven months for the year beginning July 1, 1906.

For teachers' fund (omitting sections) \$	840 00
For incidental fund " "	250 00
For building fund " "	000 00
For sinking fund " "	343 75
For annual interest " "	285 00

Total amount necessary to sustain school .....	\$1,718 75
Deduct estimated amount of cash on hand July 1, 1906.....	261 00
Deduct estimate amount from public funds .....	24 57

Amount to be levied on the taxable property of the district .....	\$ 538 18
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"We estimate that a levy of 90 cents on the \$100 valuation will be sufficient to raise the above amount. For instructions see back of estimate.

"I hereby certify that at the annual meeting on the first Tuesday in April, 1906, a seven months' school was ordered, and that the several amounts above specified were voted to sustain the same, as follows: (1) That a majority vote of those who are taxpayers was cast to increase the levy for school purposes to 40 cents on the \$100 valuation, provided so much is needed to raise the above amount for teachers' and incidental funds, as provided in section 9777. (2) That a separate vote was taken for building purposes, and two-thirds of the qualified voters of the district voting at the election voted in favor of a levy of 50 cents on the \$100 valuation to raise the above amount as provided in section 9778. (3) That by order of the board a levy of 25 cents on the \$100 valuation was authorized to raise the above amount for sinking fund to meet the legal bonded indebtedness, and 25 cents on the \$100 valuation to pay accrued interest on the same as provided for in section 9757 and 9758.

"Done by order of the board this 12th day of May, 1906.

"G. L. Cockrum, District Clerk."

And plaintiffs' school taxes for 1906 on this estimate were levied, spread of record, certified, and remained unpaid, the items of tax being divided as for the year 1905.

The chancellor entered the following decree: "The court declares the law to be that the judgment rendered by the circuit court of Knox county in quo warranto proceedings pleaded in the answer of the defendant, the school district of the town of Hurd-

land, is not res judicata to any of the matters at issue in this cause; that the plaintiffs are not estopped to prosecute this action; that the 'temporary order of injunction,' issued by the judge of said circuit court and pleaded in the petition herein, does not entitle the plaintiffs to any relief in this action. The court finds from the evidence in the cause that in the year 1902 the defendant, the school district of the town of Hurdland, became, ever since has been, and now is, a body corporate de facto, bearing the name and known as the 'School District of the Town of Hurdland,' and possessing the same corporate powers as other village school districts incorporated as such under the laws of this state; that on the 15th day of May, 1905, the board of directors of said last-named defendant forwarded to and filed with the county clerk of said Knox county its estimates certified by G. L. Cockrum, its then secretary, said estimates being in words and figures as follows, to wit: "Said estimate is hereinbefore set out.

On the filing leaf on the back of said estimate appears the following, to wit:

"Estimate of District No. Hurdland, Township 15, Range 13, for the Year Beginning on the 1st Day of July, 1905. G. L. Cockrum, Clerk. Post Office, Hurdland, Mo. Filed May 15, 1905. F. M. Miller, County Clerk. That thereafter and within the time prescribed by law Frank Miller, who was then and now is the county clerk of said county of Knox, did make out and extend a levy of 90 cents on the \$100 valuation, and assesses the amount so returned on the taxbook of said county for the year 1905. That prior to said estimate said school district had duly and legally authorized and directed the issuing by said district of its bonds aggregating \$5,700, but at the date of said estimate no loan had been effected by said district, nor had its bonds been negotiated, and there was then no \$5,700 loan indebtedness nor bonded indebtedness of said district. That the loan was not effected when the vote authorizing it was taken, but when the board, as was afterwards done by it in the year 1905, had negotiated the bonds. That the including of said \$350 item in said estimate was without any authority therefor, and is of no effect in law. The board having in its said estimate certified that a levy of 40 cents on the \$100 valuation was sufficient to raise the amount to be levied on taxable property of the district, which amount included said improper item, the county clerk had no authority to go beyond the estimate of the board, although it may have inadvertently certified an insufficient levy. The court further finds from the evidence that on the 12th day of May, 1906, the said board of directors forwarded to and filed with said county clerk its estimate duly certified by G. L. Cockrum, its then secretary, and in words and figures as follows, to wit. [Said estimate is hereinbefore set out.] That thereafter the defendants Mitchell and Mc-

Cauley, as judges of the county court of said Knox county, at its May term, 1906, and on the 11th day of May, 1906, as appears in the record of said court, made the following order, to wit: 'The county clerk is directed to levy for district school taxes the rates so certified by the clerk of the various school districts in this county.' That prior to the issuing of the temporary injunction in this cause said 1906 school taxes had been by said clerk regularly and duly extended on the taxbook in a separate column, and under the general heading 'School Tax' followed thereunder in the same column by the figures '5-2.' Other facts pertinent to the determination of this cause stand admitted by the pleadings.

"It is therefore ordered, adjudged, and decreed by the court that said temporary injunction, in so far as it enjoins Henry Early, his deputies and successors in office, from levying upon any of the property of the plaintiffs, and selling the same or any part thereof to pay any taxes now spread upon the taxbooks of Knox county, Mo., for the year 1905, in favor of the school district of the town of Hurdland against the property of plaintiffs, to bring any suits or to proceed in any manner at law to collect the same, be, and the same is hereby, made perpetual, and that in all other respects said temporary injunction be and the same is hereby dissolved. It is further ordered, adjudged, and decreed by the court that said school tax of 1905, as attempted to be levied by said defendant school district of the town of Hurdland, as aforesaid, and as ordered extended by said county court as aforesaid, and as extended by said county clerk as aforesaid, and as attempted to be collected by the defendant collector, was and is illegal, and the said respective acts and proceedings of the defendants in attempting to estimate, levy, order, extend, and collect the same were without any authority in law. That the defendant school district of the town of Hurdland be and the same is hereby perpetually enjoined and restrained from collecting or enforcing or attempting to collect or enforce said school tax for the year beginning July 1, 1905, as levied by said school district as aforesaid; and the defendant Henry Early as collector of Knox county, Mo., and his deputies and his successors in office, be and they are hereby perpetually restrained and enjoined from levying upon, holding under levy, or selling any of the property of the plaintiffs to pay said illegal school tax for the year beginning July 1, 1905, and from bringing any suits or proceedings in any manner at law to collect the same; and the said estimate of said school tax for the year beginning July 1, 1905, and the said extension of the same on the taxbook of said county as aforesaid, are hereby set aside and for naught held. That the plaintiffs have not shown themselves entitled to any relief by injunction as against said school

taxes for the year beginning July 1, 1906, and their application for such relief is hereby denied; and it is further ordered by the court that one-half of the costs of this suit be and the same are hereby taxed and adjudged against the plaintiffs, John H. Black, William H. Buhl, and William Delaney, and that one-half of said costs be and the same are hereby taxes and adjudged against the defendants."

On this record defendants contend that the injunction should have been dissolved and the bill dismissed as without equity; and plaintiffs contend that the injunction should have been made perpetual as to the school taxes for the year 1906, as well as those of the year 1905.

1. The main insistence of defendants is that in a suit to collect or enjoin the collection of school taxes the corporate existence of the school district itself cannot be inquired into, and that, when the invalidity of the tax is alone predicated of an alleged invalid organization of a school district (as we hold to be the case here) that has been exercising the functions of one and conducting a school, the case is without equity. In disposing of this insistence it may be well to state at the threshold that we are not called upon to now decide whether the school district of the town of Hurdland exists as a body corporate *de jure*, as distinguished from one *de facto*; and this is so because, for the purposes of this case, we conceive the law to be that a *de facto* body corporate, acting under color of law and legal right in conducting a public school for several years, is as free from collateral assaults on its corporate life as one *de jure*. At an early day (in 1852) it was held in *Kayser v. Trustees of Bremen*, 16 Mo. 88, that if a going corporation be without legal existence it must be dissolved, if at all, by *quo warranto*. That case was an injunction suit to restrain the collection of taxes imposed by the town. It was sought to be shown that the town of Bremen had no legal existence. After holding that the conceded facts gave the county court jurisdiction of the subject-matter of the incorporation of the town, Judge Scott said: "The validity of its existence can only be contested by a proceeding in *quo warranto*. It cannot be shown, in defense to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter had been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation, for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits, until it be judicially determined." The *Kayser* Case has been followed in a long line of cases from that day substantially to this, and if any cases be found in our reports that strike or seem to strike a discordant note, they have in turn not been followed. For example: *City of*

*St. Louis v. Shields*, 62 Mo. 247, was a suit on the bond of certain contractors, Lyman and Stilwell, who bound themselves to fill up a certain slough that had been declared a public nuisance. Defendants demurred to the petition on the ground that plaintiff had no legal capacity to sue, because the act of the General Assembly under which plaintiff claimed to exist violated the Constitution of the state. The demurrer was sustained, and plaintiff appealed. Wagner, J., in disposing of the case, said: "Judge Cooley said that, in a proceeding where the question, whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned. If it appear to be acting under color of law, and recognized by the state as such, such a question should be raised by the state itself by *quo warranto* or other direct proceeding. And the rule would be no different, if the Constitution itself prescribed the manner of incorporation. Even in such a case proof that the corporation was acting as such, under legislative sanction, would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. Cooley's Const. Lim. 254." In *Franklin Avenue German Savings Institution v. Board of Education of the Town of Roscoe*, 75 Mo. 408, the board of education undertook to avoid the liability of bonds issued on behalf of the school district by alleging and showing the district was not legally organized. Sherwood, C. J., in putting aside that defense, said: "It is quite immaterial, so far as the present action is concerned, what irregularities may have characterized the organization of 'the special school district for the town of Roscoe.' In 1870, prior to the issuance of the bonds in suit, a board of directors was elected, qualified and entered upon the discharge of their duties, and since that time their successors have been regularly elected and acted in that official capacity, and been generally recognized as the 'board of education of the independent school district of the town of Roscoe,' and the county court have so recognized them. This being true, such board must be regarded as one *de facto*, whose right to act none but the state is competent to question." In the *Inhabitants of Fredericktown v. Fox*, 84 Mo. 50, the defendant was charged with keeping a dramshop and selling intoxicating liquors without having a license. Among the defenses interposed was one that the town had no corporate existence. That defense was disallowed on the authority of the same proposition from Cooley, quoted with approval by Wagner, J., in *City of St. Louis v. Shields*, *supra*. It was held, *arguendo*, that to question such corporate existence was a function of government, and that a private person cannot directly or indirectly usurp this function—citing *Thornton v. Bank*, 71 Mo. 221; *Shewalter v. Pirner*, 55 Mo. 218; *Land v. Coffman*, 50 Mo. 243. In *State v. Fuller*, 96 Mo.

166, 9 S. W. 583, defendant appealed from a conviction for an assault to kill one Howard, deputy marshal of Ash Grove, a city of the fourth class. The assault was made in defying the authority of Howard, as such marshal, to make the arrest. It was contended that the town of Ash Grove was not legally incorporated. Therefore Howard was not an officer at all. In answer to that contention, Black, J., for this court, said: "The city is acting as a city of the fourth class, under color of law, and its right to do so is not questioned by the state. On the contrary the state recognizes its right to be and to exercise the powers of a city of the fourth class, and its corporate capacity as such city cannot be questioned in this collateral proceeding." In *Flynn v. City of Neosho*, 114 Mo., loc. cit. 573, 21 S. W. 904, the language of the Court of Appeals in *Pierce v. Lutesville*, 25 Mo. App. 317, was quoted approvingly, thus: "The reason of the rule which prohibits the fact of the existence of a de facto corporation from being contested in a private action of this kind, and which prescribes that it can only be done in a proceeding by quo warranto by the state, applies with equal force to municipal as to private corporations, and our Supreme Court, in stating and applying the rule, cites adjudications in respect of both kinds of corporations indifferently." *Burnham v. Rogers*, 167 Mo. 17, 66 S. W. 970, is a case quite on all fours with this. It was a suit in equity to enjoin the collection of certain school taxes for 1887, the defendant being township collector. The petition went back to the organization of the town of Amoret, denying that it was lawfully organized. Then it took up the Amoret school district, organized in 1892, and made allegations to the effect that its organization was not legal. It then set forth the steps to build a school house by the Amoret school district, and the attempt to borrow money for that purpose, and alleged the bonds were void for reasons pointed out. It then took up the assessment for 1897, and avers that proper notice was not given that a proposition to increase the taxation would be made at the annual meeting, and that such a proposition was not voted upon. It then points out that the board of directors made an assessment of 90 cents on the \$100. There, as here, a temporary injunction was awarded. A demurrer was sustained, and the case came to this court. In disposing of the averments of the petition relating to the illegality in the organization of Amoret and the Amoret school district, Valliant, J., said: "It sufficiently appears from the petition that whatever irregularities may have occurred in the organization of the town of Amoret and the Amoret school district these two corporations were organized and are existing and discharging the functions of such corporations and have been since 1892. Their right to exist and act as such corporations cannot be impeached collaterally in the manner attempted

in this petition. Confusion amounting to chaos would result if the life of every municipal or other public corporation in the state could be assailed in this manner." *School District No. 35 v. Hodgins*, 180 Mo. 70, 79 S. W. 148, was an attempt to condemn land for a schoolhouse site. The landowner denied the corporate existence of the school district; and Robinson, C. J., speaking for this court, said: "The right to assail the validity of a corporate creation of the state, or rather a corporation organized under authority of the laws of the state, is not the right of a citizen in a collateral proceeding instituted by such corporation to enforce a right manifestly belonging to corporations of like nature and character, but belongs alone to the state in a direct proceeding by quo warranto. It would be a most ruinous proposition of law to announce that any corporation of the state, whether public or private, can be required every time it attempts to assert a right in the courts of justice of the state to prove the regularity of every preliminary step taken by its promoters looking to its formation and creation, as a preliminary test of its right to prosecute its actions, begun, and if, perchance, the action is one in law to have this issue so raised, determined by a jury. Under such a rule of practice a corporation might find itself with or without being, according to the return of the jury, alternating, it may be, between life and death and several times during the same day as the return day of the jury in its different cases might indicate. It is neither in the letter or the spirit of the statute to permit such vexed and befogging issues to be made and considered as those presented in this case under the affidavit filed denying the corporate existence of plaintiff." Tending to the same effect are *State ex rel. v. Birch*, 186 Mo. 205, 85 S. W. 361; *Kansas City v. Stegmiller*, 151 Mo. 209, 52 S. W. 723; *Bank v. Rockefeller*, 195 Mo., loc. cit. 42-51, 93 S. W. 761, where many cases are considered, distinguished, and applied. Hence it is that on the facts uncovered below we are persuaded to hold and do hold that the infirmities, if any, in the organization of the school district of the town of Hurdland do not entitle plaintiffs to the relief prayed, and that the corporate existence of that district cannot be inquired into in this case, but must be left open to be determined in quo warranto, and this holding must result in reversing the decree and dismissing plaintiffs' bill, unless that portion of the decree in favor of plaintiffs can be sustained on other grounds, or unless there is something lodged in the case that takes it out of the general rule and doctrine announced in the foregoing cases.

2. Plaintiffs' counsel argue that the case at bar does not come within the general rule above. They argue that the defendant school district voluntarily became a party to the proceeding and tendered the issue of its cor-



porate existence; that, having intermeddled and tendered that issue, it ought not now be heard to claim the benefit of the doctrine announced in the first paragraph of this opinion. It seems the school district of the town of Hurdland was not an original party to the suit; that it was made a party on its own motion, possibly over the objection of plaintiffs. The precise grounds upon which it sought to interpose do not appear. But it must be self-evident (the bill assailing its corporate existence) that the county collector, county clerk, and the county court would not seem at first blush to be the only proper parties to be charged with the duty and shouldered with the burden of collecting the evidence and sustaining the validity of its organization; that in that condition of things it was natural the school district itself would come to the front and take up the cudgels in its own defence. Having taken its position in the forefront of the battle, it now says that its corporate life cannot be assailed by plaintiffs as private citizens in a suit to enjoin its school taxes. That position is well enough. That it sought to be and was made a party is not inconsistent with it; nor can it be said it estopped itself to raise all of its proper defenses by coming forward and submitting itself to the jurisdiction of the court. The contention of plaintiffs is unsound, and therefore disallowed.

3. Can that portion of the decree making permanent the injunction against the collection of the taxes of 1905 be sustained on other grounds? We think not. The decree justifies itself on the theory, as we understand it, that the estimate was bad and the tax levy void, because the bonds had not been sold at the immediate time the estimate was filed in the office of the clerk of the county court, and at the time the court ordered the clerk to make the levies and spread the taxes. Therefore there could not be included in such levy items for a sinking fund and for the interest. Other grounds for the decree are stated thus: "The board in its said estimate certified that a levy of 40 cents on the \$100 valuation was sufficient to raise the amount to be levied on taxable property of the district, which amount included said improper item. The county clerk had no authority to go beyond the estimate of the board, although it may have inadvertently certified an insufficient levy." Now, turning to the estimate itself, it will be seen that, among other items, were these: "For teachers' fund, \$660; for incidental fund, \$280." These two items aggregate \$940, and this aggregate item appears in the estimate opposite the words "total amount necessary to sustain the school." Then the amount of cash on hand is set forth, and the estimate says this should be deducted. Then this follows: "We estimate that a levy of 40 cents on \$100 valuation will be sufficient to raise the above amount." It is true that in the preceding part of the tabulated

statement other items are mentioned, to wit, an item of \$350 for a sinking fund, and \$285 for annual interest; but we do not construe the phrase, "the above amount," as referring to the last two items. That phrase occurs in connection with the \$940 aggregate item, and in connection with the deduction of \$200 cash in hand, and evidently refers to the amount necessary to sustain the school itself after deducting cash. This we think becomes plain from internal evidence furnished by the estimate itself, because it proceeds to say that the district had voted bonds to the amount of \$5,700 for building purposes, and that the board had ordered a levy of 25 cents on \$100 valuation for the sinking fund, and 25 cents on \$100 valuation for interest; and the whole document fairly construed by its good sense and four corners ought to be held to mean but one thing, we think, to wit, that the board wanted 40 cents on the \$100 valuation levied to sustain the school (i. e., raise \$940), and 25 cents levied for a sinking fund, and 25 cents levied to pay interest, in addition. So that, even if the interest and sinking fund items were erroneous, there would still be left a 40 cents levy on the \$100 as an item of valid tax due to the village district. There was no tender of payment of this item. The tender made in the petition does not relate to the village school district at all; and, therefore in no view of the case do plaintiffs offer to do equity while seeking equity.

But there is a deeper question in the case, to wit, were the items of 25 cents on the \$100 for sinking fund and 25 cents on the \$100 for interest improper items under the theory entertained by the chancellor, nisi? It seems that at the immediate time this estimate was made, while the bonds had been voted, and possibly issued, they had not been sold. Shortly thereafter, and long before taxpaying time, they were sold, became an indebtedness, and the schoolhouse was built by the proceeds. The portion of the decree now under consideration, adjudging the whole of the tax of 1905 void, is based, as said, on the foregoing misconception of the estimate and on the further notion that the bonds had not been actually sold at the time the estimate was made. The Constitution of this state (section 12, art. 10 [Ann. St. 1906, p. 287]) provides: "That any \* \* \* school district \* \* \* incurring any indebtedness, requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same." This constitutional provision has been held mandatory and self-enforcing (*State ex rel. v. Allen*, 183 Mo., loc. cit. 292, 82 S. W. 108; *Evans v. McFarland*, 186 Mo., loc. cit. 726, 85 S. W. 873), and is entitled to full force and effect.

The school estimate had to be put in by May 15, 1905. We are not called upon to decide that estimates could be furnished year after year and used as a basis for levying taxes to pay interest on, and creating a sinking fund for, school bonds not sold, and therefore in no sense an indebtedness of the district. That would be a hard case indeed, and one quite on the fringe of things. When such a case arises, it can be decided on its own facts, and its decision may be left a question, reserved and considered as inapplicable to the case at bar. But the law must be given a practical and reasonable construction and application. The Constitution required the school board to provide for a collection of an annual tax for a sinking fund and to pay the interest. It says this must be done at the time of incurring the indebtedness or before that time. Here it was done before the bonds were actually sold and delivered. Doubtless the State Auditor would require a constitutional showing to be made before registering the bonds. Doubtless they could not be sold without the constitutional requirement having been complied with. They were at once sold. The interest began to accrue. How was it to be paid? By a tax levy deferred until the next year? That would result in a default in the interest, impair the credit of the district, and run counter to the intent of the Constitution. The point in judgment in *Benton v. Scott*, 168 Mo. 378, 68 S. W. 78, does not touch the question here considered, and nothing said in that case militates against what is said here. We hold the finding of the court, criticising the form of this estimate is in error. We hold, further, that the estimate was properly made and the tax properly levied. Furthermore plaintiffs were not defending against the tax of 1905 on the grounds assigned by the court for invalidating it. It is a wise rule of law that the judgment of a court must be responsive to the pleadings; otherwise the door is opened wide for findings and decrees not based on the pleadings and not within them, thus leading to uncertainty and confusion and permitting cases to pass off on theories not threshed out at the trial and not within the pleadings or the evidence. The decree of the learned chancellor was therefore erroneous on this ground as well. *Roden v. Helm*, 192 Mo., loc. cit. 93, 94, 90 S. W. 798; *Schneider v. Patton*, 175 Mo., loc. cit. 723, 75 S. W. 155; *Irwin v. Childs*, 28 Mo., loc. cit. 578; *Newham v. Kenton*, 79 Mo., loc. cit. 385; *Reed v. Botts*, 100 Mo., loc. cit. 67, 12 S. W. 347, 14 S. W. 1089. See, also, *Kilpatrick v. Wiley*, 197 Mo., loc. cit. 162, et seq., 95 S. W. 213.

4. Other questions are discussed by counsel, including rulings on the admission and exclusion of testimony; but on due consideration we deem them one and all wide of the merits.

The premises considered, the decree is reversed, and the cause is remanded, with di-

rections to the lower court to dissolve the injunction and dismiss plaintiffs' bill. It is so ordered. All concur.

# STATE ex rel. BLACK v. TAYLOR et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 24, 1907.)

## 1. QUO WARRANTO—PARTIES—PRIVATE PERSONS.

In the absence of a statute conferring authority, a private person cannot proceed by quo warranto in his own name without the interposition of a proper state officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 41.]

## 2. SAME—PUBLIC OFFICERS.

Under Rev. St. 1890, § 4457 [Ann. St. 1906, p. 2442], providing that, in case any person shall usurp any office, the Attorney General or a prosecuting attorney shall exhibit an information in the nature of quo warranto, etc., the Attorney General or a prosecuting attorney is charged with the duty of exhibiting an information, and where an information has been filed by either officer he cannot discontinue the proceeding without the consent of the relator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 40, 43.]

## 3. SAME—DISCRETION OF PUBLIC OFFICERS.

The power to determine whether or not a quo warranto proceeding shall be instituted is vested in the Attorney General or prosecuting attorneys by Rev. St. 1890, § 4457 [Ann. St. 1906, p. 2442], providing that, in case any person usurps any office, the Attorney General or prosecuting attorneys "shall" exhibit an information in the nature of a quo warranto, and the officers have discretion whether to proceed or not; the word "shall" not being mandatory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 43.]

## 4. SAME—SIGNATURE.

The exercise by a prosecuting attorney of his official discretion in exhibiting an information in the nature of quo warranto need not be evidenced by an information based on his oath of office or authenticated by a jurat, but is evidenced by his signature to an information in due form and its exhibition in court, and the prosecuting attorney cannot permit others to use his name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 59.]

## 5. SAME.

The common-law power of a prosecuting attorney to file an information praying for a prerogative writ is inherent in the office, and in its exercise he performs functions which cannot be taken away except by clear terms of the statute, and he cannot give away such power through caprice or inattention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 40.]

## 6. SAME—CONTROL OF PROCEEDING.

Where a prosecuting attorney permitted the use of his name in an information in the nature of quo warranto without his signature thereto, he could not at the trial control the litigation and demand the dismissal of the proceeding, but the court will control the process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 43.]

## 7. SAME—NATURE OF PROCEEDING.

Quo warranto is civil in its nature, though using forms and punishments peculiar to criminal law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 1.]

Appeal from Circuit Court, Knox County; Charles D. Stewart, Judge.

Quo warranto by the state, at the information of James C. Dorian, prosecuting attorney of Knox county, at the relation of John H. Black, against W. S. Taylor and others, directors of a school district. From a judgment for defendants, the relator appeals. Affirmed.

O. D. Jones, George A. Mahan and W. N. Doyle, for appellant. L. F. Cottey, for respondents.

LAMM, J. Relator Black by counsel exhibited to the circuit court of Knox county, on the 5th day of June, 1905, an information in the nature of quo warranto against Taylor and five others, directors of the school district of the town of Hurdland in said county. Thereat leave was granted, and, summons issuing and service being had, respondents answered, and in July of that year (at a trial to the court without a jury) judgment went for defendants. From that judgment, relator appeals.

The information follows: "The State of Missouri, by James C. Dorian, the prosecuting attorney of Knox county, at the relation of John H. Black, gives the court to understand and be informed: That W. S. Taylor, A. S. Davis, G. H. Cockrum, James L. Gardiner, D. S. Durall, and S. C. Surrey, defendants herein, all of the county and state aforesaid, without any legal authority and right whatsoever have, they and their predecessors for the space of nearly three years, and since the 8th day of April, A. D. 1902, usurped, held, and exercised the office of school directors or members of the board of education of the school district of the town of Hurdland, Knox county, Missouri, when in fact and in law there were no such offices in said county of Knox, and still do so usurp, hold, use, and claim to exercise the same within this state, and since that day aforesaid have unlawfully claimed and enjoyed and used the power in law belonging and appertaining to such offices. That as such they are calling elections of said school district of the town of Hurdland submitting a proposition to vote, and have submitted such a proposition to vote, an issue of \$5,700 in bonds of said district, and now threaten to issue and sell the same, to build and furnish a schoolhouse therein, and have caused such an election to be held, and as such school directors of said school district of the town of Hurdland are now threatening to issue bonds of said district illegally and sell the same, without any authority in law, to the extent of \$5,700. That the relator herein owns real estate and personal property in said district subject to taxation, and is interested in the legal and orderly conduct of the affairs of said school district, and sues herein in his own behalf and in behalf of about 40 other resident taxpaying citizens and legal voters

of said district. He asks that the defendants be notified and required to answer herein and to show by what authority in law they claim and pretend to hold and exercise the powers and duties of the offices aforesaid and use the functions and powers as aforesaid, and that, failing that, they be ousted from such claimed offices, and that it be ascertained, adjudged, and declared that no such offices exist, and for all legal and proper orders and judgments and costs of suit. State of Missouri, at the Information of James C. Dorian, Prosecuting Attorney of Knox County, at the Relation of John H. Black. By W. N. Doyle and O. D. Jones, Attorneys."

An aggregation of errors is assigned by relator's counsel and discussed in their brief; but defendants make a contention lying at the gateway of the case, and, therefore, challenging attention at the outstart; for, if they are right in that contention, the gateway will not be passed, and errors beyond are afieid. For the purpose of considering this preliminary question so much of the answer as raises other issues may be put away. The answer, after pleading other defenses, concludes as follows: "These defendants, for other and further answer and plea to the jurisdiction of the court, with respect to both the subject-matter of the suit and to the person of the defendant, say: That plaintiff ought not to have or maintain this suit against these defendants, because it appears on the face of said information that it was not signed by James C. Dorian, prosecuting attorney of Knox county, Missouri, and because in truth and in fact the said information or pretended information in the nature of a quo warranto was never signed and filed by the said James C. Dorian as prosecuting attorney of Knox county, Missouri, and is not his information and complaint against these defendants, because prior to the time of the filing of the said information or pretended information the said James C. Dorian was requested by the relator herein to sign said information in his official capacity as prosecuting attorney of Knox county, Missouri, which he refused to do, and thereupon said information or pretended information was filed in this court without the official signature of the said James C. Dorian, prosecuting attorney of Knox county, Missouri, and without the legal signature of any one having legal authority so to do and sign the same. Defendants further state that under the Constitution and the laws of the state of Missouri the prosecuting attorney is vested with an official discretion in determining whether or not he will file a quo warranto proceeding against any person for usurping a public office, and that James C. Dorian, prosecuting attorney of Knox county, Missouri, did exercise his discretion in this matter by refusing to sign said information or pretended information, and by refusing to institute said quo warranto proceedings to oust these

defendants as directors of the school district of the town of Hurdland, in Knox county, Missouri. Defendants, further answering, say that they are informed and believe the facts to be, not only that the said James C. Dorian, as prosecuting attorney of Knox county, Missouri, refused to sign and file said information as aforesaid, but that he is not now willing to prosecute the same as such prosecuting attorney of Knox county, Missouri. Defendants aver that a wrongful and improper use of the process of this court has been used at the instance and procurement of plaintiff to compel these defendants to appear and defend this suit at great cost, expense, and inconvenience, and that such action is wholly ineffective to give this court jurisdiction over said matters in this proceeding, or over these defendants, for the reasons aforesaid. Wherefore defendants pray that this suit may be abated; and now defendants, having fully answered, ask to be discharged."

The foregoing averments of the answer were put in issue by a general denial in the second clause of the replication. A finding of facts and conclusions of law were requested, and among other conclusions of law the following one, directed to the issue above outlined, was filed by the court, to wit: "Under the evidence and pleadings in the case the court declares the law to be that this court has no jurisdiction of this cause, and the finding and judgment should be for defendants." The foregoing was challenged as error in the motion for a new trial, and error is assigned here on that ground. Having entered judgment on other features of the case in favor of defendants, the judgment concludes as follows: "It is further adjudged and decreed that this court has no jurisdiction of this case, and that the information be dismissed, and that defendants have judgment for their costs in this behalf laid out and expended, and thereof execution is awarded."

The evidence ament the foregoing preliminary question tends to establish the following facts and develop the following condition: Relator, a taxpayer in the Hurdland school district, employed counsel learned in the law to test the right of that district to exist as a body corporate to issue bonds for building purposes and run the village school. Thereupon they planned to exhibit an information in the nature of quo warranto having for its object to disorganize and end the corporate life of the Hurdland school district. Nursing such intent, as they understood the law, they needed to borrow the "use of the name" of the prosecuting attorney of Knox county, James C. Dorian. Accordingly that official was asked to come to the office of Mr. Jones, one of relator's counsel. When once there, the ball was set rolling by relator offering to retain him as counsel by paying him a fee for the "use of his name." It would seem this offer was made on the possible theory that one good turn deserves another, or in

accordance with the formula: "You tickle me and I'll tickle you." Witness the court's query: "You say you were employing him because you needed him as counsel?" So questioned, relator responded: "I don't suppose we needed him; but I thought it would be all right to employ him if we were using his name." The upshot of it was the prosecuting attorney declined the fee. The testimony of three witnesses is preserved in the record, directed to what was said and done on the heels of the foregoing incident at Mr. Jones' office—Black, Jones, and Dorian. Mr. Black testified it was explained to the prosecuting attorney (by Mr. Jones) that "It would have to be started in the name of James C. Dorian, prosecuting attorney. I believe you (Jones) explained to him (Dorian) that he didn't have to sign it, but that they would have to use his name, and he said, 'All right.'" We shall not set out the testimony of Mr. Jones and Mr. Dorian in full. The substance will do. Mr. Dorian testified, in effect, that the lawyers present (Mr. Jones, Judge Smallwood, and himself) were of the opinion that the prosecuting attorney had no discretion in the matter whatever; i. e., that he (Dorian) was obliged to allow the use of his name. Mr. Jones testified in part: "I turned to the Statutes of 1890, volume 1, to the form laid down there on page 50 of forms, to the form for quo warranto. I had it right before me, and I said 'Jim,—I always called him 'Jim,' I says, 'We are talking of bringing this proceeding, and we will have to use your name. I know,' I said, 'We cannot do it without your consent.' I read the form over to him." All hands being of the opinion the prosecuting attorney had no discretion, and they had the right to use his name, Mr. Dorian "consented" they might "go ahead." After the information was drawn it was presented to him and he refused to sign it. On this point the pith of his testimony, as we interpret it, was to the effect that his will or wish as prosecuting attorney ran counter to the proceeding. Accordingly he refused to sign the information or take any part in the proceeding beyond the cold permission to "use his name"—a permission resulting from a consensus of opinion among the relator's lawyers and the prosecuting attorney that the latter had no right to exercise any official discretion. The prosecuting attorney did not exhibit the information to the court, and says he was not present when it was exhibited. Mr. Jones thinks he was in the courtroom, but took no part in exhibiting it. Mr. Jones further testified in substance that the prosecuting attorney, after declining to accept the fee, put his refusal to take part in the proceeding on the ground that he had friends in the Hurdland school district who were divided, and "he didn't want to make them mad" by taking sides; that when he presented and read the information to him Dorian said it was all right; that, as they would have to use his name, he (Jones) said "they would

like for him to sign his name, and he said he would rather not, but for us to go ahead and sign his name, and do whatever was necessary to make it legal." It appeared at the trial that Mr. Dorian assumed an attitude of hostility to the continuation of the case; he there expressing himself that the proceeding was improvident and not for the public good. The clear purport of his statement to the court on this behalf was that the case got into court through a mutual misapprehension of the law relating to his discretion, which discretion never had been exercised, and he wanted to exercise it at the trial, *nunc pro tunc*, if he had that power, to stop the case.

The foregoing statement of facts, findings, rulings, and pleadings is sufficiently full for us to pass upon the aforesaid preliminary question.

1. To our minds this record cannot be intelligently read and considered without coming to the conclusion that the prosecuting attorney of Knox county did not want to institute this proceeding; nor did he have any real or substantial part or lot in it. From end to end the plan was, first, that he should take a fee and assume the role of a hired man; second, refusing the fee, the plan still contemplated that he should be eliminated as an official. This is so, because it is plain that relator, through counsel, took part in persuading him that he did not have to sign his name or appear to do aught as an officer. It is plain, too, that, while relator wanted his "consent," he also wanted him to believe, and helped make him believe, that he had no discretion not to consent. In other words, he was quite willing to accept a consent based on no discretion (a droll and indefensible solecism in the realm of sense), and to have the door of the court opened, using the prosecuting attorney as a mere lifeless key to unlock the door, under a theory of the law which, good or bad, his counsel believed in and acted on. Their notion being that the officer could act colorably or nominally, and that they could act vicariously, it results that the case at bar is not a case in which the prosecuting attorney, on behalf of the state of Missouri, is responsible for relator's present plight, whatever that plight be. We feel free, then, to look on the case as one unembarrassed by elements of unfairness. Neither relator nor his counsel were misled by the prosecuting attorney. To the contrary, they led themselves. They chose, blazed out, and took their own path. In so doing, if so be they fell into a vat of error, it contained a pickle of their own contriving.

2. That the prosecuting attorney of a county in Missouri is charged with a high, present, and discriminating duty in exhibiting an information in the nature of a *quo warranto*, and that (as a corollary) he has such corresponding discretion to go or not to go on as his oath of office, his learning in the law, his sense of official fitness and justice

may dictate to him, results from the inherent character of the proceeding itself. For, be it remembered, the state is the reservoir of all power (through its executive, its legislative, and its judicial branches), and it is fundamental that a private citizen may not intermeddle, and that the state alone may inquire into the right of any person or corporation to usurp or intrude into the powers and duties of a governmental agency, like a public office or a body corporate for public purposes. *Black v. Early et al.* (not yet officially reported) 106 S. W. 1014, and cases cited. "At common law *quo warranto* proceedings, being for the purpose of inquiring into matters which concern a public right or of redressing a public wrong, must be in the name of the sovereign. In the United States the same rule prevails where the purpose of the proceeding is to inquire into a right or to redress a wrong concerning the state." 17 Ency. of Pl. & Pr. p. 428. The same treatise announces the rule to be (page 433): "The right of a private person to proceed in his own name without the interposition of the proper state officer depends entirely and exclusively upon statutory authority, and in the absence of such authority he has no right to proceed." Now observe our statute (Rev. St. 1890, § 4457 [Ann. St. 1906, p. 2442]) charges the Attorney General of the state and the prosecuting attorneys of the respective counties with the duty of speaking in the name of this sovereign commonwealth, "in case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise." In such case, in matters of initiative they wield the bolt forged by the law. No other hand may. They stand charged with the duty of exhibiting to the court an information in the nature of *quo warranto*, at the relation of any person desiring to prosecute the same. When such information has been once filed and proceedings commenced in a circuit court at the relation of such person, such prosecuting attorney or Attorney General steps down from the exclusive stool of duty and responsibility, and, seating himself on a lower and more humble bench of power shared jointly with relator, he may not thereafter dismiss or discontinue such proceeding without his consent. Section 4457, *supra*. So much appears from that statute, and the case may proceed with the assumption that the power and duty of the prosecuting attorney to alone use the name of the state in *quo warranto* come down unimpaired, in full flower, until such time as the information is exhibited, filed, and the proceeding commenced; and, with that point once reached, the relator thenceforward (but not before) shares with him the control and disposition of the litigation. The statute uses the phrase "shall exhibit." It was argued in this court in *State ex inf. v. Talty*, 166 Mo. 529, 86 S. W. 361, that the phrase "shall exhibit," as therein used, "means that the act itself must

be done," and that the prosecuting attorney had no discretion with respect to the matter, but was bound as of course to exhibit the information when requested to do so by a given relator. In disposing of that argument, this court (page 559 et seq. of 166 Mo., page 369 of 66 S. W.) said: "That the word 'shall,' as generally used, is mandatory, may be conceded; but it is a cardinal rule that 'the intention of an act will prevail over the literal sense of its terms' (Sutherland on Statutory Construction, § 219). Otherwise, it might lead to absurd consequences, which could but be the result in this case if the statute be construed according to its strict letter. If the statute is to be interpreted in accordance with defendant's contention, the proceeding would be at the mere will or caprice of any person in position to prosecute it, and the Attorney General, or circuit or prosecuting attorney, as the case might be, a figurehead, a mere nonentity; and we are unable to believe that any such state of affairs was ever contemplated by the Legislature. The power of determining whether or not the action shall be commenced must exist somewhere, and from the very nature of the writ, and its character and purpose, it should rest with the officer who represents the people of the state with respect to such matters." In the *Talty Case*, *People ex rel. Peabody v. Attorney General*, 22 Barb. (N. Y.) 114, was cited, and the following quoted therefrom with approval: "Our Legislature has seen fit to invest the Attorney General with this discretion. His office is a public trust. It is a legal presumption that he will do his duty; that he will act with impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is, in its nature, a judicial act from which there is no appeal, and over which courts have no control." We may borrow and use with profit more from the same case. Thus: "The power merely is conferred. It is for him to determine whether a fit case is presented. As to everything but the form, the proceeding stands now as it did at common law." See, in this connection, *State ex rel. v. Meek*, 129 Mo., loc. cit. 436, 81 S. W. 913. "The usurpation of an office, though it frequently involves little else than private rights, is in the eye of the law a public offense. The only remedy is by an action in the name of the people. It is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility. It is not the province of the court to control his discretion, or to authorize a private prosecutor to assume his office, and in his name to wield the power of public prosecutor." If, now, the court itself may not authorize a private prosecutor to go on, how much less may a prosecuting attorney (as here) strip himself of his official prerogative,

loan it to another, and authorize that other to go on?

We come naturally, then, to the point of inquiring how the prosecuting attorney may evidence his exercise of official discretion and prerogative in exhibiting an information in quo warranto? That the information itself need not in terms be based on his oath of office or be authenticated by a jurat is clear. But it is equally clear that back of the information and back of the discretion exercised is the sanction and solemnity of a guiding, chastening, and steady official oath. What, then, shall he do to show that he has measured up to the standard of the law? May he, so to speak, farm out the privilege of exercising so nice, so powerful an official function? May he, as it were, loan his official arms and armor to those who "have an ax to grind"—to those who have private rights to enforce—by giving to them "the use of his name"? The answer is: He may not. The maxim, "*Delegatus non potest delegare*," blocks the way. He must consider, weigh, and then act. His act is evidenced by his signature to an information in due form and its exhibition in court. He may not avert his face and wash his hands of responsibility, or play the idle role of listlessly winking at the use of his name by others as was done in the case at bar; nor may such others receive at his hand as a gift the right to use his name in a proceeding instituted on behalf of the people. In a note, citing respectable authorities, on page 441 of 17 *Ency. of Pl. & Pr.*, the matter is summed up as follows: "It is the common law which authorizes the state's attorney to file informations, both in ordinary criminal prosecutions and in those prerogative rights where he represents, as Attorney General, the sovereignty of the state. This common-law power is inherent in the office of the state's attorney, and in its exercise he performs the functions which cannot be taken away only by the clear terms of the statute." If it be true that the functions of the prosecuting attorney in quo warranto are functions "which cannot be taken away only by the clear terms of the statute," it would follow, necessarily, that what cannot be clipped off and taken away by the court ought not to be given away by the prosecuting attorney through caprice, pique, policy, distaste, inattention, design, or otherwise. In *Attorney General v. Sullivan*, 163 Mass., loc. cit. 448, 40 N. E. 843, 28 L. R. A. 455, it was said: "But no private individual at common law has the right to use the name of the Attorney General for the purpose of suing out such a writ or of bringing such an information." To the same effect is *Commonwealth v. Lexington & Harrodsburg Turnpike Road Co.*, 6 B. Mon. (Ky.) 397. Absent the common-law right in a private person to use the prosecuting attorney's name, it only remains to add that, as said before, no such right to institute a proceed-

ing in quo warranto is conferred by our statute. It is from the fertile womb of the common law that the incidents of quo warranto, in the precise particulars under discussion, have birth. *State ex rel. v. Meek*, supra.

Applying to this case the foregoing reasoning and propositions of law, it is put beyond cavil or question that what was done here was in no just sense the act of the prosecuting attorney. It was not the exercise of any official discretion whatever. It was mere nonaction on his part, the mere putting aside of duty and power, a vain attempt to give to relator's counsel official power not theirs—powers pertaining to Dorian—his to hold and keep, not to loose or give. Therefore it is that the process of the circuit court of Knox county was improvidently used, and that the proceeding (begun in a misconception of the law) had no legal birth or life and was properly dismissed. In what has been said we have laid no stress upon the tardy wish of the prosecuting attorney, expressed at the trial, that the case be dismissed. He had lost the right to express wishes or control the litigation. Statutory opportunity had knocked at his official door unavailingly, and, rebuffed, had turned away from him. It was left alone for the court to assert the dignity of the law in the control of its own process on the facts uncovered; and this the court well did.

3. We are cited to *State ex rel. v. Campbell*, 120 Mo. 396, 25 S. W. 392, as holding a contrary doctrine. So far as that case is reported, the trouble with the information does not appear. It does appear that a demurrer was filed, and that demurrant had judgment. The grounds of the demurrer are not set forth. However, in the brief of counsel it is insisted that the petition should be dismissed because not signed by the prosecuting attorney of Phelps county, but by a private citizen not under any oath of office; and the learned judge who wrote the opinion was cited to certain criminal cases as authority. In disallowing the contention, he treated the matter from the standpoint that quo warranto was only quasi criminal in its nature, and therefore the rules which apply to informations of a criminal character, and require them to be signed and authenticated by the prosecuting attorney, do not apply in instances like the present. There was no discussion of the philosophy of the theory of that dictum. We find no fault with the proposition that quo warranto is only quasi criminal in its nature. It may be said to be civil in its nature to all intents and purposes, though still borrowing and using certain forms and punishments peculiar to criminal law. We have examined the demurrer in our files in the *Campbell Case*. No ground is set forth in that pleading relating to the authentication or signature of the prosecuting attorney to the information, even if the signature to a pleading could be struck at by a demurrer—a proposition not at all clear.

In that case this court had in judgment the sole question whether the demurrer was properly sustained on the grounds mentioned in it. Evidently what was said concerning the signature of the prosecuting attorney and the authentication of informations in quo warranto was mere obiter, used by the by to brush away the contention of defendant's counsel as formulated in his brief on that behalf, and which contention, under the rules of appellate practice, had no place there. The *Campbell Case* is, therefore, no authority for relator's position; nor, we make bold to say, can any well reasoned out authority be found. The precedents in the books are against relator. The uniform practice, as well as the good sense of the thing, lie the same way. Common usage is not to be lightly departed from. *Donnell v. Wright*, 199 Mo., loc. cit. 316, 97 S. W. 928.

We conclude the case was well decided on the point considered. Other questions, therefore, need no attention.

Let the judgment be affirmed. It is so ordered. All concur.

#### WEISSENFELS v. CABLE.

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907. On Rehearing, Dec.  
24, 1907.)

#### 1. DEEDS — CONSTRUCTION — PROPERTY CONVEYED.

An owner of a quarter section through which a stream ran in a general northerly direction conveyed "all that portion" thereof "lying on the west side of" the stream, excepting a railroad right of way, containing 32.71 acres, more or less. There was no evidence that the stream had shifted, but there was testimony that large trees were growing on either bank, and that the waters of the stream flowed within its ancient banks. *Held*, that the grantee acquired no land east of the stream.

#### 2. CANCELLATION OF INSTRUMENTS—FRAUD—PARTIES ENTITLED TO SUE—SUBSEQUENT GRANTEE.

The rule that a subsequent grantee may not maintain a suit to set aside for fraud a prior deed from his grantor to a third person does not apply where the grantee had a prior equitable right in the subject of the grant, in which case he may maintain such a suit, and thus perfect his prior equitable right.

#### 3. DEEDS—FRAUD—EVIDENCE—SUFFICIENCY.

To set aside a deed for fraud, the fraud must be established by evidence going beyond a mere preponderance of the testimony, and removing all reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 645.]

#### 4. SAME.

Evidence held insufficient to establish fraud warranting the setting aside of a deed on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 645.]

#### 5. EVIDENCE—PAROL EVIDENCE—DEEDS—INTENT OF GRANTOR.

In the absence of mutual mistake or fraud, and in the absence of any ambiguity in a deed, the grantor cannot cut down the operative words of a deed by proof of his intentions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2130.]

**6. SAME—CONSIDERATION.**

The rule that the consideration of a deed is open to explanation does not let in proof overturning the operative words of a grant in a deed free from ambiguity, or contradicting the deed itself or the descriptions therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1723, 1912-1917.]

**7. DEEDS—NOMINAL CONSIDERATION—EFFECT.**

A deed conveying land for a nominal consideration is not vitiated as a conveyance on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 26.]

**8. SAME—QUITCLAIM DEEDS—EFFECT.**

A quitclaim deed is, for the purpose of transferring title, as effective as any other deed, excluding from consideration outstanding equities not the subject of record and recourse on covenants of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 394.]

**On Motion for Rehearing.****9. JUDGMENT—CONFORMITY TO PLEADINGS.**

A judgment must be responsive to the pleadings and within their issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 34-37.]

**10. DEEDS — CANCELLATION — GROUNDS — MISTAKE.**

A mistake, to furnish ground for setting aside an instrument, must be a mutual mistake of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 156-164.]

**11. PLEADING—ALLOWANCE OF AMENDMENTS IN CONFORMITY WITH PROOF.**

If the evidence warranted an amendment to a pleading so as to include therein a cause of action for setting aside a conveyance on the ground of mistake, and such an amendment was offered, the court on appeal from a judgment for the party offering the amendment will treat the case as if the amendment had been allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 603-619.]

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Mathias Weissenfels against Lewis R. Cable. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

E. P. Garnett, for appellant. Scarritt, Scarritt & Jones, for respondent.

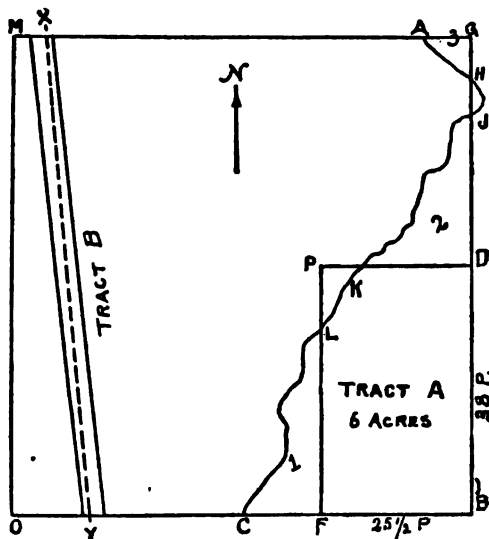
LAMM, J. In September, 1904, plaintiff brought suit in the circuit court of Jackson county, having for its object to ascertain and determine the estate, title, and interest of plaintiff and defendant, respectively, in certain parcels or tracts of land, all included in the general description of S. E.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$ , section 28, township 48, range 33, in said county, and to define and adjudge such title, estate and interest. Judgment went for plaintiff, and defendant appeals.

The petition alleges that plaintiff is the owner and in possession of 32.71 acres, being all of the aforesaid 40-acre tract, except 6 acres (hereinafter called "tract A") in the southeast corner, described as follows: Beginning at the southeast corner of said quarter section; thence north, along the east section line, 38 poles; thence west  $25\frac{1}{2}$

poles; thence south, 38 poles, to the south line of said quarter section; and thence east  $25\frac{1}{2}$  poles to the beginning—and except 1.29 acres (hereinafter called "tract B") on the west side of the said quarter section sold to a certain railroad company for a right of way. The answer follows: "Defendant, for answer to plaintiff's petition, denies each and every allegation in said petition contained, except as hereinafter stated. For further answer, the defendant says that he is the owner and is in possession of the following portion of the land described in plaintiff's petition; that is to say, the following described real estate in Jackson county, Mo., to wit: All that part of the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, township 48, range 33, which lies east and south of the Big Blue river, and that the plaintiff is not now and never has been in possession of this portion of said tract of land and that plaintiff has no right, title, nor interest therein. Further answering, the defendant says that he does not claim any right, title, and interest in the remaining portion of the land described in plaintiff's petition, and has never asserted any claim thereto. Wherefore defendant, having fully answered, asks to be discharged with his costs." The reply denies the allegations of new matter in the answer.

By diagrams and descriptions in the testimony, it is possible to construct a crude map, serving a useful purpose, thus:

PLAT # S.E.N.E. 28-48-33.



Let B, O, M, G, represent the S. E. N. E. of 28-48-33. Let X, Y, represent the railroad track. Then the land included in the adjacent parallel lines will be the right of way, tract B. Let B, F, P, D, represent the six acres excepted, to wit, tract A. Let C, L, K, J, H, A, represent the meandering channel of Big Blue river. Then the little tracts shown on the map, to wit, 1, 2, and 3 (letter-



ed C, F, L, K, D, J, and H, A, G, respectively), together with all of tract A lying east of the Blue, represent the land claimed by defendant, while the whole S. E. N. E., less tracts A and B, represents the land claimed by the plaintiff. The bone of contention is over the little irregular tracts 1, 2, and 3, said to contain less than two acres. It is agreed on all hands that Morgan Boone, Sr., is the common source of title; that he died in 1851, and that Morgan Boone, Jr., is his sole heir; that defendant is in possession and has fenced all of said S. E. N. E. lying east of the Big Blue, has cleared some or all of it, and put some of it ready for the plow. There has, however, been no such length of possession as would ripen it into a title by the statute of limitations.

The plaintiff, to show title in himself, introduced record evidence, as follows: (1) A warranty deed from Morgan Boone, Jr., and wife, to R. B. Garnett, of date December 14, 1888, of record December 21, 1888, consideration \$1,962.80, and conveying part of said 40-acre tract, to wit: "All that portion of the southeast quarter of the northeast quarter of section 28, township 48, range 33, lying on the west side of the Big Blue river [excepting tract B] which leaves the amount of land hereby conveyed, more or less, 32.71 acres." This deed is recorded in Book B 330, at page 453. (2) Also a warranty deed from said Garnett to one Bernard, dated September 21, 1888, recorded the same day, and conveying the same property by the same description. (3) Also a warranty deed from said Bernard to plaintiff, of date August 28, 1901, duly of record, consideration \$2,500, and conveying the same property by the same description. (4) Also a quitclaim deed from said Bernard to plaintiff, of date January 30, 1904, of record February 5, 1904 (no consideration disclosed), and conveying "all of the southeast quarter of the northeast quarter of section 28, township 48, range 33, except six acres in the southeast corner thereof." This conveyance has in it the following narration: "This deed is meant to correct the description in a warranty deed to the same parties conveying the same property." (5) And also a conveyance called a "special warranty deed" from Morgan Boone, Jr., to plaintiff, of date April 15, 1904, acknowledged September 21st, and put of record September 22d of the same year, consideration \$1, and conveying said quarter quarter section, except tracts A and B. This conveyance contains the following narration: "Containing 32.71 acres, more or less. This deed is made to correct a description of a deed from the grantor herein, Morgan Boone, to R. B. Garnett, date Sept. 14, 1888, in Book B 330, at page 458, of the recorder's office of said county, in which deed grantor intended to convey all said quarter quarter section, except six acres thereof sold off at the southeast corner, and the 1.29 acres in the railroad right of way." (6) The plaintiff (possibly a misprint for defendant) of-

fered in evidence the files and decree in a suit of "Thomas Lea, Plaintiff, v. Morgan Boone et al., Defendants." The abstract shows this was a suit to compel the conveyance of real estate. Attached to the petition was the following receipt: "Received March 28, 1851, of Thomas Lea, \$45.00 as a payment toward the land I sold to him on the east side of Big Blue, being a portion of township 48, range 33, and a part of the same land I purchased of John Maxwell as the agent and attorney of Lemuel Edwards, containing by estimation about six or seven acres which I sold to said Lea for \$7.00 per acre. Witness my hand the date above. Morgan Boone." It seems that Morgan Boone, Sr., died before making a deed, and that the suit culminated in a decree (date not disclosed) investing Thomas Lea with title to tract A, except that the north boundary line is 26½ poles, instead of 25½ poles. It was next admitted that the title of said Lea vested in the grantors of defendant. The foregoing record proof was supplemented by evidence from the assessor's books of Jackson county, tending to show that from 1851 down to 1887 the quarter quarter section in question was assessed in the following descriptions: "Morgan Boone, 34 acres, S. E. N. E. ex. 6 a. S. E. cor. Sec. 28, T. 48, R. 33; and D. Taylor 6 a. S. E. cor. S. E. N. E. Sec. 28, T. 48, R. 33." It was further supplemented by oral testimony, referred to further on.

To sustain his defense, defendant put in evidence conveyances as follows: (1) A warranty deed from Taylor et al. (grantees of said Thomas Lea) to defendant, dated April 28, 1902, conveying, with other lands, tract A by metes and bounds. (2) Also a quitclaim deed from Morgan Boone, Jr., and wife to defendant, duly acknowledged and dated February 15, 1904, put of record February 18th of the same year, consideration \$2, and conveying "all of that part of the southeast quarter of the northeast quarter of section 28, township 48, range 33, which lies east and south of the Big Blue river." Defendant put in evidence assessments since 1888 showing that the S. E. N. E. was divided for assessment purposes into a tract lying north of the Big Blue river, assessed to Bernard, and one lying south of the Big Blue river, assessed first to Taylor, and then to defendant. To further sustain the issues on his part, plaintiff went upon the stand as a witness, and also introduced the deposition of Morgan Boone, Jr.

By Morgan Boone, Jr., testimony was introduced tending to show in chief that he was the only heir of his father, who died three months before he was born; that he sold some land in the S. E. N. E. to R. B. Garnett in 1888, understanding at the time that his father had sold something like six acres off of the 40-acre tract before; that he had paid taxes on 34 acres until he sold 1.29 acres to a railroad company, and thereafter paid on 32.71 acres; that after the sale

to Garnett he claimed to have no interest in the S. E. N. E. His purpose in making the deed to Garnett he indicated this way: "Well, I aimed to deed him the 32.71 acres that remained of the 40 acres. \* \* \* Well, what I owned there, with the exception of the railroad property and what had been sold off on the southeast side of the creek by my father." At this point in his deposition his testimony was objected to because "the deed is the best evidence, and his purpose could not vary description in deed." The record shows the court's attention was called to this and other objections in the deposition (noted hereafter), but it seems no ruling was made on them. Continuing, witness testified he did not know the exact location of the line of the six acres. He said: "I always had supposed that the creek was the line," had no idea there was any of the six acres on the west side. Over the objection of defendant's attorney that "his intention could not change the description in the deed" (not ruled on by the court), he testified that he intended to sell to Mr. Garnett all he had in that quarter quarter section, except the six acres and the railroad tract. Since he made the Garnett deed, he had no possession or control of any part of the S. E. N. E. Having heard that Mr. Garnett did not buy the property for himself, but straightway deeded it to Mr. Bernard, he joked with him about making two deeds when one would have done. On cross-examination, Mr. Boone said the negotiations leading up to the sale to Garnett were altogether with him; that the trade was talked over and Garnett seemed to know the land and witness did not go over the land with him; that at the time witness thought all that he owned in the S. E. N. E. was on the west side of the Blue river; that the negotiations were directed only to selling land on the west side of the Blue; that the land on the west side of the Blue was the only tract he sold to Garnett—that was witness' understanding. "Q. And you did not sell him anything on the other side of the creek? A. No, sir. Q. You did not attempt to sell anything on the other side? A. No. There was nothing said about any of it being on the other side of the creek." The deed itself called for all the land on the west side of the Blue. Witness read the deed before he signed it. Garnett wrote into the deed the number of acres, and added the words, "more or less." Witness understood that to mean that, if there was more land on the west side of the Blue than 32.71 acres, Garnett got it; and, if there was less, he would simply get what was on the west side. Quarter quarter sections sometimes overrun. Witness supposed the center of the creek was the line. The abstract on which he sold did not contain the record of the six acres. Witness had always understood that all the land he owned after selling the six acres was on the west side, and had never understood differently until

the controversy came up between plaintiff and defendant.

Referring to the quitclaim deed made to defendant in February, 1904, witness said Mr. Cable "claimed that he did not have a good title over there, and that it [said deed] would perfect his title." Up to that time witness "understood" and "always thought" that the six acres covered the land east of the Blue, and that the owners of that tract claimed all on the east side. The Blue had been recognized as the line ever since witness could remember. The creek ran in such a shape that, if he (witness) had anything over there, he never thought it worth anything. He claimed nothing there. He knew nothing about the shape of the six acres. He had seen Weissenfels working on the west side of the Blue and cultivating up to the Blue, where it could be cultivated. On redirect examination, witness reiterated that in 1888 he was "aiming" to sell Garnett all the land he had left in the S. E. N. E. He further said that, when he made his quitclaim deed to defendant in 1904, defendant brought him an abstract, but he did not take the pains to look it up. He did not think it necessary because he knew what defendant wanted. He wanted to "better his title," and witness "intended to deed to him what he thought belonged to him." Over the objection that it was not competent to contradict a deed by parol evidence of grantor's intention in making it, he was allowed to testify that he did not intend to convey to defendant any land not already deeded to him or his predecessors in title. Continuing, he said that defendant paid him \$2, his expenses in coming to Kansas City; that there was nothing paid for the land. He did not understand that any of the six acres was west of the Blue; and, over the objection "that parol testimony is inadmissible to contradict or vary the terms of a deed," he was allowed to testify that he did not intend to let either of his grantees have any of the other's land. There was testimony from him, also, that the Big Blue is a fishing stream and many fishermen resort there. On recross-examination, witness reiterated that defendant, when he came to negotiate with him about the quitclaim in February, 1904, brought an abstract, and that he (witness) came to town to make the deed something like a week afterwards; that it was made to perfect Cable's title on the east and south of the Blue, and witness intended to make it out that way, and did not know at that time he owned any land on the east of the Blue; that, when he made the original deed to Garnett, he intended to convey to him all the land he owned west of the Blue; that there was no mistake made in the Garnett deed. He also testified: "I intended to convey to him all that I had." But, on being questioned whether there was anything said to him at the time of the Garnett trade about conveying all that he had there, he testified it was a supposition of his

only—he did not know there was anything said about that. He further testified Mr. Garnett was an attorney, had been for years, and that he (Garnett) got up the abstract to the land, and traded around in real estate in that neighborhood.

Defendant introduced R. B. Garnett as a witness, who testified that he had experience as a real estate lawyer for 25 years, and at one time conducted a set of abstract books; that he prepared the deed from Boone to himself—either he or Mr. Bernard, his partner, did; that the negotiation in regard to the purchase had reference to a tract of land bounded on the east side by the Blue; that he only bought the piece on the west side, never intended to buy any on the east side, never knew Mr. Boone owned any there; that one Corder acted as agent for Mr. Boone; that there was very little negotiation, since witness had the tract on his abstract books and knew about the land in that way. Witness was of the opinion that he had never talked with Mr. Boone, and negotiated entirely with Mr. Corder. The deed he got from Boone correctly described the land he bought. On cross-examination, witness said Mr. Boone was in Saline county at the time, living there on a farm, and that he may have talked with him after the transaction. On the same day he got the deed from Boone he deeded it to his partner; had agreed with him to take the land before he got the deed, in order to get rid of a horse and buggy witness owned. That was all witness had in the transaction, to wit, the sale of his horse and buggy. Witness executed a mortgage on the land for part of the purchase price; Bernard taking title subject to said mortgage. Referring to the consideration in his deed, to wit, \$1,962.60, and to the number of acres, to wit, 32.71, witness said he expected they arrived at the total consideration by multiplying the number of acres by \$60. His recollection was that they had a surveyor's plat when they wrote the deed, and the plat showed the number of acres, after deducting the six acres and the railroad right of way. On redirect examination, he testified that the surveyor's plat did not show any land east of the Blue. Witness had an abstract, and the abstract showed Boone's land only on the west side of the Blue. On recross-examination he said he did not pay much attention to the plat; did not know whether the administrator's deed to Lea for the six-acre tract was shown on the abstract, and did not examine the abstract as an attorney.

By Mr. Donnell defendant put in evidence tending to show that he knew the land for 20 years; that it was wild, and after the heavy timber was cut off it grew up in underbrush. In a negotiation between him and Mr. Boone relating to the purchase of the S. E. N. E. witness broke the negotiations off, and refused to buy because he could not get the land on the east side of the Blue. It was the common understanding in the neighbor-

hood that the Blue river was the dividing line between Boone's land and the six-acre tract.

The defendant then took the stand in his own behalf, and said he was a farmer, and not familiar with land titles; had farmed all his life; that when he got his deed in 1902 he took possession of all the land on the east side of the Blue river. Then the following occurred: "Q. Did you think at that time that your deeds called for all on that side? Mr. Jones: I don't think it is material what he thought. The deed speaks for itself, a description by metes and bounds. The Court: I don't think it is competent. Mr. Garnett: I don't think any of this evidence is competent. I think it is as competent for the defendant as for the plaintiff. The Court: I don't recall any testimony of that kind. Mr. Garnett: Mr. Boone testified in that way; but you haven't passed upon it. The Court: The objection is sustained. (To which ruling of the court the defendant at the time duly excepted.) Q. Mr. Cable, you say that after that deed you took possession of the whole of that tract of land east of the Blue? A. Yes, sir." Continuing, witness said that a Mr. Anderson was encroaching on him on the south; that thereupon among them they had a survey made. As we grasp it, this survey was also made in connection with the establishment of a road, and no one seems willing to father it or pay for it. When the surveyor ran out tract A as a parallelogram (with the northwest corner a little ways on the west side of the Blue), witness was not there, but plaintiff was. Witness afterwards had a conversation with plaintiff, and told him that he (witness) claimed no land on the west side of the Blue, but did claim all on the east side. Plaintiff then said he claimed all of the land, except the six acres; said he had bought it from Bernard. Witness asked where Bernard's deed was. Plaintiff said Bernard had it. Witness told him, "You had better get your deed and examine it." Plaintiff then built some fence. Witness tore it down. Witness then got his quitclaim deed from Morgan Boone, Jr., and fenced the land. When witness went to see Mr. Boone about the quitclaim deed, he took his abstract along and showed it to him, and told him he (witness) was in trouble; that plaintiff had fenced some of the land witness claimed; that there was a mistake in the deed; that he had talked with the surveyor, and the surveyor had explained to him where the line was, and was sorry witness was not present when the survey was made; that Mr. Boone took the abstract and said to witness: "I never owned no land across the Blue river at all. My father deeded that away before I was born." And he said: "I will be too glad to give you a quitclaim deed if that will fix it." "I told him I thought that was all that was required; that my abstractor told me to get a quitclaim deed." Mr. Boone told witness that "he [Weissenfels] knows he has got no right on

the east side of the Blue river." Witness paid Mr. Boone all he asked for the quitclaim deed. On cross-examination, witness said, in substance, among other things, that he saw the deed he got from the Taylors; that he bought the land through Whipple & Woods, agents for the seller, knew nothing about what the Taylors claimed to own; that what made him think the Blue river was the line was that he saw the receipt the elder Boone gave to Lea, and it says six or seven acres; that in getting the quitclaim from Mr. Boone he did not know he was buying any land; that he was just getting a quitclaim to fix his title. On redirect examination he further testified that he had heard plaintiff say more than once that his land was on the west side of the Blue river.

In rebuttal plaintiff took the stand and denied having any conversation with defendant to the effect that he only owned land west of the Blue, never had any conversation with defendant about what he owned until the survey was made; that he understood from Mr. Bernard that defendant only owned six acres of land in the southeast corner; that he had paid his taxes according to the assessor's book—first on 34 acres, and then on 34 acres less tract B. On cross-examination, he said he never had read his tax receipts, and did not know that he was assessed with land west of the Blue; that he had never read the deed from Bernard to him; that he had taken possession on the east side of the Blue up north at the corner (this possession, we infer, relates to a private road or pass-way there); that he never knew his deed covered only land on the west side of the Blue until Cable told him, after the survey was made. While there was some evidence that the banks of the Blue had caved in a place or so, yet there was no evidence worthy of the name that the main, well-defined channel of the Blue river had shifted since Morgan Boone, Jr., made his deed to Garnett. As said, this stream had reached the dignity of a fishing stream, and was of so pronounced a character that, when the survey was made, it was not fordable, and the surveyors waited for ice to form to cross and locate the northwest corner of tract A.

At the close of the evidence, plaintiff tendered two amendments to his petition on the theory that such amendments would accord with the proof. They were directed to charging that the quitclaim deed from Morgan Boone, Jr., to defendant of date of February, 1904, was obtained by fraud and deceit, and asking it to be annulled. The court refused to allow these amendments. Thereupon plaintiff offered to amend his replication, and set up the same matter. This was also disallowed. Thereupon the court entered its decree, vesting all the S. E. N. E. in plaintiff, except tracts A and B. On such record, ought the decree to be sustained?

1. To sustain plaintiff's theory that the original deeds from Boone to Garnett, from

Garnett to Bernard, and from Bernard to him (which deeds all refer to the Blue river as the east boundary of his land) gave him a title east of the Blue, plaintiff's learned counsel argue that the porous and friable quality of the soil of Jackson county make the shifting of the channel of the Blue an easy matter and naturally to be expected to come to pass. The inference is that the stream, in the flux of time and water, has made a new channel and new banks further to the west, thus putting a portion of plaintiff's original tract east of the Blue. The trouble with this theory is there is no evidence showing the channel of the Big Blue shifted as argued, or shifted at all. To the contrary, there was testimony that large trees were growing on either bank; and the testimony tends to show that the waters of the Blue were now flowing within its ancient banks, serving a purpose of use and diversion along (and for) several lines, to wit, fish lines as well as boundary lines.

2. It is argued on defendant's behalf that the naked record title to the little tracts 1, 2, and 3 was in Morgan Boone, Jr., at the date of his quitclaim deed to defendant, on February 15, 1904; that by that deed that title passed to defendant; and that, as long as that deed stands, it is an insurmountable obstacle in the way of plaintiff's recovery. As we see it, plaintiff's learned counsel inferentially concede the force of defendant's position, but seek to parry that force by arguing that the deed was the product of fraud and deceit practiced on Boone, and is without consideration, and therefore should be brushed away to let in plaintiff's special warranty from Boone, executed some months later. (Conveyance No. 5 in plaintiff's chain of title.) To that end it is insisted that the chancellor should have permitted an amendment to the petition to conform to the proofs, setting up fraud and deceit as a ground for annulling that deed and seeking to set it aside; and, failing in that, we should treat the petition as amended, and let the case ride off on the theory that the amendment was ingrafted upon the stock of the original petition, and the relief sought should be granted. But we cannot adopt plaintiff's view for more reasons than one. (a) In the first place, if we concede that the naked legal title to tracts 1, 2, and 3 had not passed out of Boone prior to the date of that deed, and if we go further, and concede that Boone was defrauded by the execution of that deed to defendant, then the fraud touches Boone alone, and the right of action on the fraud is not a vendible commodity to pass from one to another by dicker and sale. The right to sue to set aside that deed was in Boone, remained in him (if anywhere), and did not pass by his subsequent special warranty to plaintiff. *Smith v. Harris*, 48 Mo. 557; *Jones v. Babcock*, 15 Mo. App. 149; *Wilson v. Railroad*, 120 Mo. 45, 25 S. W. 527, 759; *Haseltine v. Smith*, 154 Mo. 404, 55 S. W. 633; *Hayward v.*

Smith, 187 Mo. 464, 86 S. W. 183. The general rule that a subsequent grantee may not maintain a suit to set aside a prior fraudulent deed from his grantor to another is subject to a main modification, viz., if such subsequent grantee had a prior, independent, equitable right in the subject of the grant, then he may maintain his bill to set aside the fraudulent conveyance of his grantor standing in the road of clearing up and perfecting his original, prior, independent, equitable right in the subject of the grant. See cases, *supra*. But such exception to the general rule does not help plaintiff in this case, because there is not a particle of substantive proof that plaintiff had a prior, independent, equitable right in any land east of the Blue river before he procured his special warranty deed from Morgan Boone, Jr. That deed was a junior conveyance. Defendant's quitclaim was a senior conveyance. By that quitclaim, until set aside, Boone's title passed from him. Therefore there was nothing for the special warranty to operate on. Boone, having nothing, could give nothing; ergo, plaintiff got nothing. (b) In the second place, if we were persuaded to adopt the theory of plaintiff's learned counsel, and treat the case as if the petition was amended as prayed into a bill to set defendant's quitclaim aside, then we are met with the further fact that there is no evidence of fraud or deceit practiced by defendant upon Morgan Boone, Jr. It is a commonplace of the law that, to set aside so solemn an instrument as a deed for fraud, requires proof of a character so high and stringent as to go beyond the mere preponderance of the testimony, and remove all reasonable doubt. Here there is not only no proof of the exacting standard indicated, but there is no proof of any probative weight of any fraud whatever, as said. Mr. Boone seems to be a just man and an amiable man. He does not say defendant misled him by a false suggestion or by a suppression of the truth. Apparently defendant told him the truth and all he knew of it. His desire in making defendant's deed was to give him the land on the east side of the Blue river, because he thought his father deeded that land away, and that plaintiff was entitled to nothing east of the river. Subsequently, when he made his new deed to plaintiff, he took another view of the matter. But his ambulatory views could not change the operative effect of his former deed, unless the fraud and deceit of defendant was the moving cause in making it.

3. Over the objection of defendant, plaintiff was allowed to introduce evidence of Boone's intent and purpose in making the Garnett deed, and his intent and purpose in making the quitclaim deed to defendant, and the special warranty to plaintiff. It is elementary that in the absence of mutual mistake or fraud and deceit, and in the absence of any ambiguity in a deed, the gran-

tor may not whittle away the operative words of a grant by testifying to a condition of mind what his intentions and purposes were. His act speaks louder than his intents and purposes. What he does weighs down what he thinks. The consideration of a deed is open to investigation and explanation; but this rule (in cases of the character at bar) does not go so far as to let in proof overturning the operative words of a grant in a deed free from ambiguities, or varying or contradicting the deed itself or the descriptions contained therein. The consideration in defendant's quitclaim from Boone was \$2, and therefore small; but the consideration in Boone's special warranty to plaintiff was \$1, and therefore smaller. But neither the one consideration or the other vitiated the deed as a conveyance. For the purpose of transferring title, a quitclaim is as effective as any other deed, barring outstanding equities, not the subject of record, and barring recourse on covenants of warranty. The foregoing propositions need no support from an array of authorities; but one or the other of them, as pointed out by defendant's diligent counsel in an excellent brief, may be found reasoned out and laid down in the following: *Chew v. Keller*, 171 Mo., loc. cit. 225, 71 S. W. 172; *Christ v. Keuhne*, 172 Mo., loc. cit. 124, 72 S. W. 537; *Edwards v. Latimer*, 183 Mo., loc. cit. 623, 82 S. W. 109; *Winter v. Railroad*, 160 Mo., loc. cit. 176, 61 S. W. 606; *Harding v. Wright*, 119 Mo. 1, 24 S. W. 211; *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 938.

Other questions discussed by counsel are not deemed controlling in arriving at a just result and may be put aside. In the view we take of this case, the decree does not do equity.

The cause is reversed and remanded, with directions to the lower court to enter a decree vesting the title to all of the S. E. N. E. west of the Big Blue in plaintiff, subject to the right of way of tract B, and vesting the title in all said S. E. N. E. east of the Big Blue in defendant, nothing herein to be considered as an adjudication one way or the other upon the right of plaintiff to use a private road or passway to his land crossing the Big Blue near the northeast corner of said S. E. N. E., about which there was some testimony. All concur.

#### On Rehearing.

In a motion for a rehearing plaintiff's learned counsel, among other reasons for granting one, set up the following contention, viz.: "Furthermore, it is proper to observe here that we claim mistake in the execution of the quitclaim deed as well as deceit"—the quitclaim deed referred to being the one from Boone to defendant. If counsel by that contention mean to say that they sought to amend the pleadings so as to base a right to avoid the deed on mistake as well as deceit, they inadvertently fall into error.

No such offer was made. The first amendment offered was this: "Plaintiffs further state that the quitclaim deed from Morgan Boone and wife to the defendant Cable, dated the 15th of February, 1904, was procured by deceit and misrepresentation and without consideration, and that same constitutes an apparent cloud on the title, and asks the same be removed." The second amendment offered was like unto the first. If counsel mean that in their brief here they claimed mistake in the deed as a reason for sustaining the decree, that is true. But it is elementary that a decree must be responsive to the pleadings, and must be within their lines. *Black v. Early*, 106 S. W. 1014 (just handed down), and cases cited. So, too, it is rudimentary that a mistake furnishing ground for equitable interference must be a mutual mistake of fact, etc. *Chrisman v. Linderman*, 202 Mo., loc. cit. 613, 100 S. W. 1090. There was no substantial evidence to base such form of mistake upon; and, there being no offer of such amendment, the question of mistake is in the air. If the evidence had warranted the amendment, and if the amendment had been offered, the decree being for plaintiff, we could have treated the case as if the amendment had been made. *Young v. Glasscock*, 79 Mo., loc. cit. 579 et seq.

The motion for a rehearing is overruled. All concur.

#### HOLTON et al. v. COCHRAN.

(Supreme Court of Missouri, Division No. 1.  
Nov. 27, 1907.)

#### 1. WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—BURDEN OF PROOF.

Where, in a will contest, the subscribing witnesses testified that testator was of lawful age and of sound mind, as well as to the due execution of the will, such evidence established a prima facie case for proponents, and shifted the burden to contestants of establishing testator's incapacity, or that the execution of the will was the result of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110, 383-402.]

#### 2. SAME—REQUISITES OF CAPACITY.

A person has testamentary capacity who is capable of comprehending all his property and all the persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 96-100.]

#### 3. SAME—EVIDENCE.

In a will contest, evidence held to warrant a finding that testator had not testamentary capacity at the time he executed the will, and that it was the result of undue influence exercised over him by his wife, who was the principal beneficiary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 137-161, 421-437.]

#### 4. SAME—INSTRUCTIONS.

An instruction in a will contest that, even though the jury might find that testator possessed "many" of the mental requisites which were necessary to qualify him to make a valid

will, yet if he was laboring under an insane delusion that his son and daughter had exacted of him and that he had turned over to them a greater amount of stock in a certain corporation than they were lawfully entitled to, and that such delusion overcame and controlled his will and judgment in the execution of the will, they should find against the instrument, was not contradictory as charging that, though he had "all" the mental requisites necessary to constitute testamentary capacity, the will was unsustainable if he had an insane delusion.

#### 5. TRIAL—INSTRUCTIONS—ASSUMED FACTS.

Where a pretended claim of testator that his son and daughter had compelled him to turn over to them more stock in a corporation than they were entitled to was so destitute of merit that no sane man with the affection testator entertained for his children would have persistently asserted it, it was not error for the court, in a contest of testator's will by which he practically disinherited such children, to assume, in an instruction on insane delusions, that testator's claim with reference to such stock was unfounded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-431.]

#### 6. WILLS—INSANE DELUSIONS.

Where testator harbored a delusion that his children, whom he disinherited, had compelled him to transfer to them certain corporate stock to which they were not entitled, and such delusion dominated him in making his will, he had not testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-81.]

#### 7. SAME—TESTAMENTARY CAPACITY—INSTRUCTIONS.

An instruction on testamentary capacity, requiring that testator must have sufficient understanding to comprehend the nature of the transaction he was engaged in when making his will, the nature and extent of his property, and to whom he desired to and was going to give it, "without the aid of any other person," etc., was not objectionable as adding to the requisites specified for testamentary capacity by Rev. St. 1899, § 4602 [Ann. St. 1906, p. 2501], in requiring that testator must have been able to act without aid.

#### 8. APPEAL—REVIEW OF EVIDENCE—OBJECTIONS.

In order to entitle appellant to a review of an objection to a hypothetical question, she is required to point out the specific objectionable features thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1141, 1272.]

#### 9. EVIDENCE—OPINION EVIDENCE—EXPERTS—HYPOTHETICAL QUESTION.

If a hypothetical question substantially embraces the facts disclosed by the evidence, it is proper; counsel being entitled to assume any state of facts which the evidence tends to establish, and to vary the question so as to cover the different theories of the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2360-2374.]

#### 10. WILLS—TESTAMENTARY CAPACITY—INSANITY—SUICIDE.

Where, in a will contest, there was evidence of a strong predisposition to insanity in testator's family, which fact, together with testator's act of suicide, physicians testified would have considerable weight in determining the condition of testator's mind at the time he executed the will, an instruction that the fact that testator committed suicide shortly after the execution of the will created no presumption that he was insane when the will was executed, or when he committed suicide, was properly refused.

#### 11. SAME—EVIDENCE—REMOVEDNESS.

In a will contest because of testator's alleged insanity at the time the will was made in

1902, evidence of his conduct at the death of his wife and father-in-law in 1891, as bearing on the issue of insanity, was not objectionable for remoteness.

Appeal from St. Louis Circuit Court; John A. Blevins, Judge.

Suit by B. R. E. Holton and others against Lillian M. Cochran. From a judgment for plaintiffs, defendant appeals. Affirmed.

This suit originated in the circuit court of the city of St. Louis, and was instituted to contest the validity of an instrument in writing, purporting to be the last will and testament of Edward K. Holton, deceased, on the grounds: First, that the testator was not of sound mind and disposing memory, and was, for that reason, incapable of making a valid will; second, that the instrument was caused to be executed by the undue and improper influence of his wife, Lillian M. Holton (now Cochran). Said instrument is in words and figures as follows:

"I, Edward K. Holton, of the city of St. Louis, state of Missouri, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament, hereby revoking all wills by me heretofore made.

"First. I give and bequeath to my brothers, Frank G. Holton and William J. Holton, each the sum of five hundred dollars.

"Second. I give and bequeath to my wife, Lillian M. Holton, the sum of five hundred dollars in trust for my brother, Albert S. Holton, and to be paid to him as his necessities may require.

"Third. I give and bequeath to my niece, Lillian M. Holton, the sum of seven hundred dollars, in token of her loyal services to my father and mother, now deceased.

"Fourth. I give and bequeath to my son, Birchard R. E. Holton, and to my daughter, Alice M. Bright, each the sum of five dollars.

"Fifth. I give and bequeath to my daughter, Lucinda B. Burrow, the sum of five thousand dollars.

"Sixth. All the rest, residue and remainder of my estate, real, personal and mixed, wherever situated, I give, devise and bequeath to my beloved wife, Lillian M. Holton, to have and to hold the same to her and to her heirs and assigns forever.

"Seventh. I do name and appoint my said wife, Lillian M. Holton, executrix, and Charles A. Thompson, executor, of this will, without bond.

"In testimony whereof, I have hereto set my hand this 10th day of November, 1902."

This instrument was duly signed by Edward K. Holton, and attested by three witnesses, namely, George Ringhausen, J. B. Corby, and W. Edwin Corby, and was duly probated by the probate court of the city of St. Louis on the 5th day of December, 1902. Lillian M. Holton, the widow, was the only defendant who filed an answer. It admitted the execution of the will, and alleged the testator was of sound mind and disposing

memory at the time of its execution, and denied its execution was procured by undue or improper influence exercised over his mind by his said wife, and terminated by alleging said instrument was his last will and testament. The record in this case covers about 1200 pages of closely typewritten matter, and the abstracts thereof cover more than 600 pages. Appellant contends with much earnestness that the verdict of the jury is not only against the great weight of the evidence, but that there is no evidence whatever in this voluminous record to support the verdict. This contention calls for a somewhat extended statement of the evidence and the facts which the evidence tends to prove. As to all the facts in the case which existed prior to the death of testator's first wife, which occurred April 23, 1891, there is but little, if any, controversy, and whatever changes took place, if any, as to the testator's mind and memory, occurred subsequent to that time. They are as follows:

Edward K. Holton, the testator, was born December 17, 1843, in the state of Wisconsin, and departed this life in the city of St. Louis on December 2, 1902, from wounds inflicted by his own hand. He was a strong, vigorous man, weighing 185 pounds. He dressed neatly and well, and had the bearing and appearance of a military man. His first wife was Miss Carrie Birchard. They were married in the year 1867. He lived happily with her and raised a family of three children, namely, Lucinda, Alice, and Birchard, the contestants. They were happy, contented, and dutiful children. Shortly after their marriage they moved to St. Louis, where he was actively engaged in the mercantile business for a period of about 35 years, extending down to the month of August, 1901. He and his wife were regular attendants of the Pilgrim Congregational Church, and sent their children to Sunday school, and educated one of their daughters in a Catholic school, and was always interested in church work and the charities connected therewith. He was a dutiful son, a loving husband, a kind and affectionate father, and a good and highly respected citizen. He was a man of fine sense, sound judgment, and ripe experience. He possessed a liberal education, and had traveled extensively at home and abroad. He was also a man of splendid business capacity and qualifications and devoted to and was attentive to business, and was very successful therein. He was connected with the St. Louis Shovel Company and left an estate worth from \$100,000 to \$125,000. He was active and ambitious, self-willed, strong-minded, determined, impulsive, demonstrative, loquacious, excitable, and inclined to be more or less egotistical. He was fond of his father and mother, and supported them during their old age. He was a kind brother, and assisted in the support and maintenance of an insane brother. All witnesses for both plaintiffs and defendant

testified that he had a high sense of honor and justice and was honest in all his dealings. His mother, Martha K. Holton, was of unsound mind for four or five years before she died, and lost her mind entirely four or five months before her death. His aunt, Eliza Bradley, his mother's sister, was insane. His brother, Albert Holton, was insane, and spent much of his life in an insane asylum and died therein. A cousin of his, Albert Kendrick, was insane, as was also one of Albert's daughters. The testator was a moderate drinker prior to the death of his wife.

Charles M. Thompson testified on behalf of defendant, in substance, as follows: "Capt. Edward K. Holton and his wife came to my office on November 10, 1902, at my request. I was in the railway supply business. I wanted him to go on my bond to the United States as security for my faithful performance of a contract to be entered into by me with the government. Immediately upon entering the office Capt. Holton, leaving Mrs. Holton in the main office, took me into the inner or private office and explained to me that he intended redrafting his will, and asked me to act as executor along with Mrs. Holton, whom he had named as executrix in a former will which he had with him, explaining that he wanted his wife to have the benefit of my advice in the administration of the estate. He showed me the will, which he had made before then. (The witness did not remember the exact date of the will, but it subsequently appeared, by the testimony of Mr. Zumbalen, that it had been executed November 16, 1901.) Holton told me this former will had been drafted by Mr. Zumbalen, a lawyer. Capt. Holton asked me for the privilege of having my private secretary or stenographer, Miss Laura Mayhugh, write out the new will for him, which I agreed to. We returned to the main office, and Capt. Holton sat down in that and dictated to Miss Mayhugh the matter which he wished embodied in the new will, holding the old one in his hand while he dictated. Miss Mayhugh took down the dictation in shorthand, and afterwards wrote it out on the typewriter and handed it to Capt. Holton, who handed the old will to me, and he and I read back to the old will with the new draft, comparing and checking back from the one to the other. The differences between the will of November 16, 1901, and that of November 10, 1902, were that by the former Capt. Holton had given his son Birch and daughter Alice \$1 each; in the new will he raised this to \$5 each. In the will of 1901 he had given his brothers Frank and William \$100 each; and he raised that to \$500 each in the new will. In the will of 1901 he had given his daughter Lucinda B. Burrow, then Lucinda Garnett, \$10,000; and in the one of 1902 he gave her \$5,000. (Mrs. Garnett, between the making of the two wills, had married a Mr. Burrow.) In the

will of 1901 his wife, Lillian, had been sole executrix; while in that of 1902 the witness was named with her as executor. (The draft of this first will of 1901 will be found in the testimony of Mr. Zumbalen.) Capt. Holton then called Messrs. J. B. Corby and William E. Corby and George Ringhausen up from the lower office and asked them to witness his will. He signed the paper in the presence of these three gentlemen, and they signed it at his request and in his presence and in the presence of each other; Capt. Holton stating to them that this was his last will and testament. He then tore up the old one, threw the pieces into a cuspidor, and put the new document in his pocket. Upon the completion of the business of signing the will and bond, the Captain and Mrs. Holton left the office, having been there from three-quarters of an hour to one hour. Mr. J. B. Corby and Mr. George Ringhausen were clerks in the employ of myself. Mr. J. B. Corby was 28 years old, and Mr. Wm. E. Corby 30 years old. Mr. Geo. Ringhausen's age does not appear in the abstract. I was 42 years old; Miss Mayhugh, 27.

All of the parties above mentioned were sworn on behalf of defendant, and testified that Mrs. Holton made no remarks or suggestions to the testator during the time the will was being drawn and executed. All testified he was not under the influence of liquor; was perfectly sober; acted as they had known him to act all through their acquaintance with him; appeared and acted to them like a man in possession of all his faculties; dictated everything connected with the drawing up and execution of the will; and declared in their presence it was his last will and testament. All of them knew Capt. Holton, and most of them had known him for many years, and all stated that his actions, conduct, and appearance on that occasion in no wise differed from what it had been during the years of their acquaintance with him. Each of them testified to his actions, appearance, and conduct. Not one of them noticed any depression, melancholy, or other abnormal symptoms, and they all identified the paper afterwards given in evidence as the paper which had been signed on that occasion by Capt. Holton as his will, and had been witnessed by the two Messrs. Corby and by Mr. Ringhausen, and which Capt. Holton had dictated in the presence of Mr. Thompson to Miss Mayhugh, and which Miss Mayhugh had written out for him on the typewriter from her notes of Capt. Holton's dictation. They all testified that it was the work of Capt. Holton alone, unassisted by any one, except the manual act of typewriting, which was done by Miss Mayhugh, and the comparison between it and the will of 1901 was done by Mr. Thompson and Capt. Holton, one reading the new draft while the other held the old will, and except that each of the three witnesses signed his own name. Furthermore, the dic-



tation by Capt. Holton had been such that, when Miss Mayhugh wrote it out on the machine from the notes of the dictation, no corrections had to be made in her work. "Not a letter changed." The instrument produced as the last will of Edward K. Holton, then so executed on November 10, 1902, together with the affidavits and certificate of probate, were introduced and read in evidence. This was the appellant's case in chief.

#### Respondents' Testimony.

The plaintiffs introduced evidence tending to prove the following additional facts:

That testator joined the army during the Civil War, at the age of 19 years, and served for 2 years. That he was very fond of and affectionate to his children. That the death of his wife was a great mental shock to him, and after that he began to drink heavily and continued it to the day of his death. That frequently he would cry and rave against the Almighty, and say there was no God nor Heaven, and that there was nothing in religion. That upon one occasion, when his daughter-in-law told him she was a Catholic, he said there was nothing in it, and that the Mohammedan religion was the only religion in which there was anything. That during the first few months after the death of his wife he would break out in a laugh, would then become very profane, and then burst into tears and cry, and again change from tears to laughter, and make remarks to his son or others who happened to be about him, "Aint I a damned fool," or "I am a damned fool." That in December, 1891, his father-in-law died, which occurred about 1 a. m. On that night he raved and swore, and declared there was no God. That his language and conduct upon that occasion were so violent that his children became frightened and left his house about 11 p. m., and passed the remainder of the night at the house of one of his daughters. That on the next day, when the children returned home, he made no mention of the occurrences of the previous night. Between the years 1891 and 1899 he remained single, and during that time his daughter Alice kept house for him. In January, 1899, at the age of 56 years, he married a strong, robust widow of 24 or 25 years of age, who had been the stenographer in his place of business for years. In September, 1899, his mother met with an accident, injuring herself quite seriously, and he went to Milwaukee to see her. After seeing her, he went down in the elevator with his father, and on the first floor he turned to his father in a very excited manner and loud voice said to him: "You old people (meaning his father and mother) are outliving your usefulness. You ought to have died seven or eight years ago." On this same visit he took his aged father and uncle to dine with him in one of the principal hotels of Milwaukee, and without provocation or apparent cause began

to abuse the waiter, swore and became very profane in the public dining-room, and otherwise disturbed and attracted the attention of all. That during this visit his brother William met him in Milwaukee, and during the conversation some mention was made of their insane brother. He jumped up and became very violent in his language and manner, and said in a loud and threatening voice: "God damn you. I will kill you if you oppose me." That nothing had been said or done by his brother William to call forth or justify such language or conduct. That within a few minutes after this occurrence he was laughing and talking pleasantly as though nothing unpleasant had occurred. That upon a visit to his father, a few days prior to the latter's death, he said to his father in a loud voice: "You should have died long ago. You have lived 20 years too long." During this same trip to Milwaukee, in conversation with his brother William as to what was the best way to care for their aged and helpless mother, he burst forth with oaths, and said in a loud tone of voice, and gesticulating with his arms: "God damn her! to hell with her! If I had my way I would put her in an insane asylum or poor-house." That his brother said to him in reply: "What do you mean by talking that way about our little mother? You must be crazy." He shouted: "Don't talk that way to me. Julius Birge has been in business with me for 33 years, and never talked that way to me." And upon his brother's reply, "I don't care anything about Julius Birge," he shouted: "Yes; Julius Birge. He is a viper—a snake. He has been colling about my neck, but now I have him off. I have him off." That on the next day he and his brother met, and he never mentioned the occurrences of the previous day. That he cared for and supported his father and mother during the last years of their lives, and bequeathed to a niece of his \$700, in token of her loyal services rendered to his father and mother during those years. That in 1900 his mother died, and he went to Milwaukee to attend the funeral, and while in the dining room, waiting for his breakfast, his brother came in and said to him, "Good morning," and said, "Ed, haven't you been to breakfast yet?" Whereupon he became violent in his actions and language, pounded upon the table with his fist, swearing and shouting at the waiter. That, upon seeing some flowers his brother had brought to place upon their mother's casket, he exclaimed, in substance, "Humph! rot; God damned rot!" and later, while discussing the funeral arrangements, he said: "I don't want any damn singing, and cut the services short, damned short; and let there be no prayers at the grave, and I don't want anybody to take their hat off at the grave." He was finally persuaded to let them sing the hymn "Nearer My God to Thee," and to offer a short prayer at the grave. During the sing-

ing he paced the floor above like a caged animal, cursing under his breath. He carried on in this same way, only more profane, and was more unreasonable, at the funeral of his father, which was held but a few months before. That he frequently said he was getting tired of business, and wanted to get out of it and take a rest. That he wanted to exchange his stock in the St. Louis Shovel Company for stock in the Ames Company, so he could sell the latter and thereby rid himself of all business. That he urged upon his chief associate in business, Julius Birge, to sell to the Ames Shovel & Tool Company at a less price than Birge thought it was worth, his object being to get out of business. That his associate, Julius Birge, persistently refused to sell for a price less than the business was reasonably worth, which greatly angered testator, and complained to him that he wanted to quit business. That the consolidation with the Ames Company was finally effected, on a basis of five shares of the Ames stock for one of the St. Louis Shovel Company's.

On December 29, 1891, Ezra Birchard, grandfather of testator's children died, and by his will he left his estate to these three grandchildren, share and share alike; the portion of Alice and Birch, who were minors, going to their father as trustee for them during their minority, the income and revenue to be used for their support and education. At the death of Col. Birchard, Capt. Holton was indebted to him in the sum of \$10,000, evidenced by a note bearing 8 per cent. interest, and secured by 100 shares of stock in the St. Louis Shovel Company, of the par value of \$100 each. Under his will Col. Birchard gave his son-in-law, Capt. Holton, the option of canceling said note and transferring said stock to his grandchildren, Alice and Birch, in payment of the debt. On March 10, 1893, Capt. Holton exercised the option and on that day received certificate No. 7 for 50 shares of said stock in his name, as trustee for his daughter Alice, and certificate No. 8 for 50 shares of said stock in his name as trustee for his son Birchard. Alice became of age in 1893 and Birch in 1898; but their father retained this stock until November, 1901. In December, 1894, immediately upon Alice's attaining her majority, she, under her father's direction, entered into a trust agreement with her father, whereby he was to hold said stock in trust for her until she should reach the age of 25 years, at which time the trust should determine and her father should reassign said stock to her, or, in the event of his death before that time, the stock should revert to Alice. Said contract provided, further, that during the continuance of the trust all income, profits, and dividends arising from said stock should belong absolutely to the father, provided that he pay his said daughter Alice during every year a sum equal to 8 per cent. per annum upon the par value of said stock, which amounted to \$400 annually.

Birch had an oral understanding with his father somewhat similar to the contract with Alice. Between 1894 and 1901 the father collected, as trustee, \$13,500 in dividends, and on November 18, 1901, \$2,224.77, making a total of \$15,724.77 collected in dividends, as trustee. After Alice became of age he paid her under said contract \$2,600, and after Birch became of age he made him an allowance of \$1,200, making a total of \$3,800. Profit off of his cestui que trustents \$11,924.77. Alice reached the age of 25 in December, 1900. On August 12, 1901, the St. Louis Shovel Company, with four other concerns, consolidated with the Ames Tool & Shovel Company, a Massachusetts corporation, on a basis of the stockholders of the St. Louis Shovel Company receiving a fraction over five shares of stock in the Ames Company for one in the St. Louis Company. When this consolidation took place Capt. Holton undertook to settle his trusteeship and turn over to Alice and Birch the stock which had been left them by their grandfather. By this time he believed and asserted with all the vehemence of a man with a fixed and positive conviction on the subject that Alice and Birch were only entitled to receive from him stock in the Ames Company of the par value of \$5,000. That amount was the par value of the stock their grandfather had left them. He told them that he was going to give them all that he received out of the deal with the Ames Company above \$100,000; but he designated an issue to himself of \$109,300. (The total stock that he and his children were entitled to receive in the Ames Company amounted to \$136,500. Alice and Birch were entitled to \$25,000 each, or \$50,000.) During the last few years of his life he treated this interest which he was paying the children under those contracts as an allowance which he was giving them, instead of interest due them. That he was one of the proprietors of this same company, owning about 25 per cent. of its stock. That by that arrangement the \$5,000 worth of stock belonging to each of his children in the St. Louis Company was worth \$25,000 of the Ames stock. That they demanded of their father the \$25,000 each, but he refused to give them that much, claiming that they were only entitled to \$5,000. That the only reason he had for claiming the children were only entitled to \$5,000 each was he had formed an idea and believed that he had been paying the children the interest as an allowance, and that it was through his efforts that the St. Louis Shovel Company stock was so valuable. That he was only one of a number who made that company what it was, and that during all the time he was connected with the company he was paid a regular salary for his services rendered, and that he drew his dividends upon the money he had invested therein. That he treated and considered \$20,000 of the \$25,000 stock which each of the children owned as his earnings, and for that reason he contended that he and

not they owned it. That whenever their claim was mentioned to him he would fly into a perfect rage, and swore and cursed them, and threatened to disinherit them if they persisted in their claims. That after the children received the amount of stock to which they were entitled to in the consolidated company he complained to almost every one who talked to him that his children had gone back on him, that they did not love him or respect him, and had unjustly exacted and wrongfully taken from him the \$40,000 worth of stock in the Ames Company. That this so turned and embittered his against the children that he said to some that he was going to disinherit them, while he told others that he had provided well for all of them, giving his wife one-third of his property, and the children the other two-thirds. During the summer of 1901 he would frequently go to his friends and cry and complain that he was unhappy. That about the same time he visited his daughter Lulu, in Philadelphia, and advised her to sell a mortgage she held on property in St. Louis, and when she told him she did not think it best to do so he became very indignant, raved, swore at, and cursed her, and said that she did not trust him, and that she was afraid he was going to steal her money, and that he became so violent that he took hold of her and shook her, and did not cease that conduct until she yielded to his request. That about this same time he visited her again at Atlantic City, and he was sick and remained in bed for two or three days, and during that time he would beat his head, roll and toss in bed, tear the sheets and his nightshirts, and continually complain of his head.

Upon the consolidation of the St. Louis Shovel Company with the Ames Company, Julius Birge was elected manager of the St. Louis branch. Testator went into his room and flew into a rage, crying and cursing, and charging Birge, his business associate for 35 years, with having kicked him out of business. That he had previously and frequently expressed to Birge and others that he wanted to get rid of all business, and that was the main reason why he wanted to consolidate the different houses. That in the summer of 1902, at one of the hotels in Chicago, and at Mackinac Island, where he had gone for his health, he met his brother, William, his son, Birch, and the latter's wife, and in the conversation which followed he would jump from one subject to another and cry without any apparent cause. That he was drinking heavily, and had been for two years past. That at the hotels he would order certain dishes and when the waiter would bring them he would curse and swear at him and say he had never ordered them, and talked loud and boisterously in the presence of all, notwithstanding that was the first time he had met his daughter-in-law, Birch's wife. That shortly after he complained of being sick and went to his room, and his son proposed to call a doctor. He

cursed and swore, and said he would kill the doctor if he came. That later he went down to the dining room with his daughter-in-law and two of her young lady friends, Miss Ferguson and Miss Jerome, who were strangers to him, and at the dinner table he got into a violent altercation with the waitress and was very violent in his language, so as to attract the attention of everybody in the room. He told vulgar stories to those ladies, to their great shame and humiliation. That after dinner, in the absence of his son, he invited his daughter-in-law and the two young ladies into a saloon to drink. In refusing the daughter-in-law said: "Birch would not like for his wife to do anything like that." Whereupon he said, "Wife! wife! You mean woman, don't you?" That in October, 1901, he was sitting in his chair in his office, when he complained of feeling badly, and all at once he had a fit, became unconscious, and fell back in his chair, and began to froth at the mouth, and his eyes rolled back as though he was dying. Two business friends from the East were present, and after restoring him to consciousness they took him home. That in 1901, at the meeting of the stockholders of the various concerns which effected the consolidation of the shovel houses, he was unable to concentrate his mind for any length of time on any particular subject, and was exceedingly nervous and excitable, and threw up his hands and said: "Let me alone. I am going to pieces." That he was irritable, excitable, unreasonable, and without self-control. That during the last two years he was in business he could not concentrate and keep his mind upon his business. He would jump from one thing to another, and was unable to do his work as he did prior to that time. He would get tired easily, could not work all day, would come down to the office late in the morning, and leave early in the afternoon, often leaving his work undone, and seemed unable to do detail work during the last year he was in business. That he could not think or talk coherently upon any subject, but would jump from one subject to another. That in 1901, upon returning home from one of the meetings which was called to consolidate the shovel houses, he threw up his hands and said in a most violent manner that "Julius Birge," his old business associate, "was a skunk and like an anaconda, choking him to death," and at the same time throwing out his hands as though pulling the snake from his neck, saying, at the same time: "Thank God; I am through with it now." That after he was out of business he would talk to his friends about his family and business career. He would cry, and say his wife and children did not love him; that they had gone back on him; that he had no friends; that no one cared for him; that he wished he was dead, and upon one occasion said: "Some day you'll wake up and read in the newspapers" shaking his hands, "Poor

Ned Holton is gone—dead.” Upon another occasion he said he was sorry he went out of business, and wanted to go in business again with his son Birch, and said to him: “If I go in with you, will you cheat your poor old father?” That in talking over those matters he would be crying one moment and laughing the next, and cursing and swearing the next. That during the last year of his life he lost from 30 to 40 pounds of flesh. He complained of being lonely, and was despondent and melancholy.

Dr. Spencer Graves, an eminent physician who has been practicing 16 years in St. Louis as a busy practitioner, testified: He was the family physician of Edward Kendrick Holton during his lifetime, covering a period from 1892, until his death. That during that time he was called to treat him on an average of three or four times a month when he was in the city. That during the last 18 months of his life he was called upon approximately seven or eight times every month when he was at home and treated him for catarrh of the stomach, mostly; also neurasthenia; also a nervous condition, insomnia, various functional ailments, colds, and so on. Said insomnia is an inability to sleep. Neurasthenia is merely a functional disturbance of the nervous system. That he was called to treat him about a week before his suicide, and at the time of his suicide. That in the fall of 1901 he noticed a change in Capt. Holton's physical condition. That he had noticed little peculiarities in his character before he retired from business, but did not take any special notice of any change until after that; noticed no marked change until after he had retired from business. “He had an idea that he was very much alone in the world, was one of the things that he harped on; that he had no companion; that he had nothing to live for. He talked on that subject a great deal. I thought that was a little unusual and unnatural for him. I noticed that he was more emotional and more despondent at times. He manifested this despondency in various ways. His despondency was manifested by his telling me how he felt, and perhaps he would cry. His emotionalism was manifested by his being easily influenced to tears. His emotional actions and his despondency and his tendency to tears increased as time went on. It increased to a sufficient extent for me to note it, and to observe that it was progressive. This progression kept up to the time of his death. I noticed a change in his physical condition. He became more emaciated, very much more emaciated, towards the last. His arteries were hard. He had atheromatous degeneration of the arteries. He had albuminuria, and decided symptoms of catarrh of the stomach. The arteries were not pliable as you find them in a normal man—rather what we call atheromatous degeneration. I do not think there was any special change in his personal appearance, except that his pupils

were sometimes dilated—one of them contracted or one dilated. There was a change in his temperament, in his excitability. He seemed to be more excitable in the latter months of his life; more excitable than he had been formerly. I noticed he was not probably so refined in his speech. He was very moody, you might call it. He would change from one mood to another; be crying at one time and talking about a trip in a few moments. He would be expressing himself about the way his children had treated him, and worrying and crying over them, and then in a few moments he would be talking about a trip to Europe. He said all of his children had gone back on him, and did not treat him with any consideration, did not consider him honest, and a great many things I could not repeat. I do not remember; just along that line. He had an idea that all his children were persecuting him, apparently, and it seemed to worry him a great deal. Whenever he would talk about it, he would cry. Q. Was that very frequently during the last years of his life? A. Well, generally, when I would see him; about as often as I would see him. I do not remember just the words that he said, but he would dwell upon the subject and talk about it a great deal. He drank to excess during the last two years of his life. The indications of catarrh of the stomach were attributable in his case to alcohol. Q. State what, in your opinion, was the cause of the change in his mental condition and his physical condition. A. I think it was a combination of age and alcohol; too much of it. There might be other things; but these were the only direct things which were called to my attention. Q. How old a man was Capt. Holton when he committed suicide, in your judgment? A. I think he was about 68. I should say his wife was about 25 or 24. I think that during the last 18 months of his life he was of unsound mind. Q. What form of insanity? What would you diagnose the case? A. Senile dementia, brought on by alcohol. Q. What is the effect of senile dementia, brought on by alcohol? What would be the effect upon his acceding to the will of another? What effect would it have upon a man's will. A. It would weaken his mind in every way. His will would not be as strong as it was formerly. Q. Does that apply to his will power? A. I think it does. I mean that his judgment would be weakened, and that consequently he would be more influenced along lines where his judgment was required. He would be more susceptible to suggestions, such as mental suggestions. Q. Was there any change you noticed in regard to his powers to follow a single subject of conversation? What were these changes? A. He would change from one subject to another very quickly; change from despondency to a different mood altogether. I mean that when he was talking upon one subject he would suddenly change to another, and at the

same time change his whole mood. He was weighed several times, and told me he was losing weight, but I do not remember just how much. There was a change observable in his face, in emaciation. There was a change. Albumen might be evidence of brain trouble, or a great many things. In the form of dementia brought on by age and dissipation, or alcohol, the change in the facial expression is not so frequent. There is a difference in senile dementia and other forms of general dementia—difference in the symptoms. Alcoholism is a chronic state of alcoholic poison. Alcoholism has nothing to do with senility, except to produce it. Sometimes it brings it about prematurely. In 1902, when Birch and his father were talking of going into the banking business, I gave him some advice regarding his father's ability to carry on business."

Julius C. Birge: President and manager of the plant of the St. Louis Shovel Company. Has been a manufacturer of shovels in St. Louis since 1867. President and principal stockholder of that company since its organization. He and his family owned 75 per cent. of the stock. Testified that he had known Edward Kendrick Holton since 1867, and had been on close business and social relations with him during all that time; that their social relations were always pleasant; that he saw him every day at business. Their business relations continued down to August 12, 1901, the time the St. Louis Shovel Company was transferred to the Ames Company; and Mr. Holton continued to come down to our place of business for one or two months after that. Witness noticed no sudden change in his physical condition; but he did notice a gradual change during the last two years of his connection with the company. That would be in 1900 and 1901. Back of the time of the death of his first wife, Mr. Holton had been an occasional drinker for a good many years. Prior to that he did not think he was an excessive drinker. He remembered that in the last two or three years his habits had very materially changed in that respect. Witness had known his second wife since she was 17 or 18 years of age. She occupied the position of stenographer very satisfactorily to the company until her first marriage. Her first marriage continued less than a year—about nine months—and she came back to them after her relations with her first husband were broken off. Capt. Holton told witness about his approaching marriage to her. They went to his house and told him all about it. He drank very heavily in the fall of 1900 and in 1901. Witness was on intimate terms of friendship with him during 35 years, as much as any man. Witness knew Charles Meyers and Mr. Howard Rowland. They are shovel manufacturers, and Mr. Holton had been accustomed to visit their homes. His relations with Mr. Meyers were always very intimate. Those gentle-

men were both directors in the Ames Company, and his relations with Mr. Meyers in particular had dated back probably 20 years. Witness noticed the change in his physical condition. This change seemed to have been later than his change in his mental condition. During the latter part of 1900 and 1901 his mental condition had very materially changed. There is no doubt of that. He was unable, for a year previous to the discontinuance of business, to concentrate his mind on any business matter for any considerable length of time without a physical—sort of physical—breakdown, stating that he was exhausted and tired, and he could not talk on business any more. He lacked the power to concentrate his mind on any business topic for any considerable length of time. He was very irritable, and any proposition which was not in line with his views that needed any discussion would cause him to go into spasms almost. He could hardly control himself. When the spasms passed over he seemed pleasant. "Q. Describe the suddenness of his change. You say he could not follow a single line of thought. Give us some instance. A. Well, my first notice was that it was especially marked during the latter part of 1900 and possibly quite a part of the year. He was neglecting his business very seriously. I talked with him occasionally concerning his habits. As to these paroxysms, in which he was very nervous and unstrung, I cannot recall the dates; but they were very frequent, and would occur whenever there was any business to discuss, with scarcely an exception during the last year or two of his business career. I saw him at Atlantic City in the summer of 1901. I was there about two days. He was confined to his room. I ate at the table with him and his wife. I had conversation with his wife with regard to the stock that was to be issued in the consolidated company. She told me about what a hard time she had had on her trip to Europe with him, and I told her she ought to have some of that stock. She asked me to speak to Capt. Holton about giving her some stock, and I did. She stated that his condition made the trip a very hard one for her; that his condition was of such a nature that it required her constant attention for every moment. During the negotiations preceding the organization of the Ames Company, we had five or six meetings in New York, lasting four or five days each. Mr. Holton had for a year or two been very desirous of having a consolidation of the manufacturers which went into the Ames Company—all the manufacturers of shovels. A proposition had been made for the consolidation, and Mr. Holton persistently urged that he was tired out and wished to get out of business. That was the burden of his remarks for consecutive months, nearly every day, as he would come into the office during 1901. At those meetings he did at times at-

tempt to participate in the discussions. He was in the meetings only a portion of the time. In July, 1901, at one of the meetings, he was drinking heavily, and one evening I went into his room, which was adjoining mine, to talk the matter over, and he was in such a rage that he was threatening and shook his fist in my face and called me names that I had never heard him call me before. I went up and got Mr. Rowland and Mr. Meyers, who were old friends of his, who had been watching him during the day, and they talked with him for hours, and in the course of time Mr. Holton says: 'Yes; Birge is all right. He has always done right by me. We have been together, old friends, for 30 years'—and he put his arms around me and cried, and it was all made up, and the next day he was very pleasant. Nothing had taken place to bring on that rage, except, as I expressed it to him, he had become infatuated with the one idea of making the arrangements with those other parties to consolidate the plant, regardless of any basis whatever. Mr. Holton never before expressed any lack of confidence in me. I don't think he ever accused me of personal unfaithfulness or perfidy in any form whatever up to that time. That meeting adjourned, and another was held about three weeks later, Mr. Holton, previous to the agreement, was not in a condition to transact business. The man was in a delirium, as I supposed, from drink. We endeavored to hold him down from doing himself or any one else violence. His talk was incoherent. He was cursing me, because he thought I would not let him have a respite from the labors of this world. He wanted to get out of business, and by accepting this arrangement he would get stock in the new company. He says: 'I can sell that, and then I can rest.' We remained at the hotel another day. Mr. Holton would now and then go into the meetings a few minutes, and was entirely friendly with me next day; but he did not seem to have any distinct recollection of what had occurred. On one occasion we had adjoining rooms at the Waldorf. About 2 or 3 o'clock in the morning he came into my room and sat on my bed. He was in a broken-down condition. He began to talk with me about his affairs, and he cried—shed tears on my bed. I suppose he was there for an hour and a half or two hours. He laid down on my bed a little while. I could not tell what he was shedding tears about. I asked him, and he said: 'You have a nice home, and here I am a poor, old fellow.' I could not understand why he was crying. He could not give any reason. Q. He was married at that time, and had a wife? A. Yes, sir. Q. Did he relate any of his trouble to you? A. No; no point to anything I could get about his troubles. He only felt badly. I think he cried nearly all the time he was there. At one meeting he called me out into the hall, around to a sort of retired place, and he

talked to me very severely about my lack of promptness in accepting the proposition that had been made to us; said I was a darn fool for not taking it up. He used his usual profanity. He was very severe; said he thought he had worked hard enough. He talked so loud that the other gentlemen who were at the other end of the hall complained. I was unable to keep him down. On that occasion I had, before coming to the meeting, stopped in Philadelphia to see Mr. Rowland. Mr. Meyers was to be there, and they did not wish Mr. Holton to be there, because they wanted to do some figuring. Mr. Holton learned, through me, that I had been to Rowland's factory, and we went into the ladies' café for dinner, and he talked to me so loudly there that it was necessary to leave the room, cursing me because I had gone there by stealth, as it were. I told him that he had been accustomed to go there very often, and that my motive was simply to get data for our mutual benefit. These gentlemen were all with me, and they told him about it. His manner was very remarkable in the ladies' café by reason of the fact that he talked to the limit of his voice and was apparently entirely unconscious of the presence of any one besides himself. Q. Do you remember any other occasion that indicated to you a change? A. Yes, sir; there were a good many; but I think we have had enough. One Sabbath we were at Coney Island. Mr. Holton roomed with Mr. Meyers and some one else. They took a big bedroom, with three or four beds in it. He had been drinking during the night. I do not recall the conversation there. There was considerable conversation; but I do not recall the nature of it. I saw what he had been doing during the night. I saw his bottle. I guess it was as much as a pint. It was a fair-sized bottle. I did not handle it; but they said he had emptied it. There were eight or ten occasions when he threw his arms around my neck and cried; but I would not state when and where. It was when he would become angry, and then get over it. Q. You began to notice the change in his mental condition about 1900. Now state in what way, other than already stated, that condition was manifested. A. I have stated a number of ways. I have stated that he would be unable to talk on business for any length of time without breaking down. He would generally throw up his arms and says, 'Let me alone; I am tired,' in that manner. Those paroxysms were very frequent. They were very frequent. They were universal; absolutely universal. After his marriage to his second wife, he told me he was going to make a will and give two-thirds of his property to his children and one-third to his wife. That was within—I think, was within—three years of his death. Mr. Holton was very demonstrative, very affectionate, to his children and his whole family. He was to me. I knew very little of his domestic life the last

year of his life; but I think his relations with his children, as far as I could see, were as pleasant during the last year of his life as at any time before. They had their troubles. He expressed himself on several occasions very bitterly towards his children by reason of their insistence of the amount of stock in the new company which was represented by their stock in the old. I cannot quote you verbatim what he said; but he said on two or three occasions that his children had gone back on him, and I endeavored to reason the matter, and he apparently wouldn't listen to any reason or explanation. Mr. Holton held 50 shares of stock, of the par value of \$5,000, in the St. Louis Shovel Company, as trustee for his daughter, Alice, and 50 shares, of the par value of \$5,000, as trustee for his son, Birchard. He was entitled as such trustee to receive stock of the Ames Company in exchange for this stock, \$15,201.46, par value, preferred stock, and \$10,128.20 in common stock, making a total of something over \$25,000 par value he was entitled to receive as trustee for his daughter, Alice, and the same amount for his son, Birchard. He had 173 shares of his own in the St. Louis Shovel Company, and for that was entitled to receive from the Ames Company something over \$51,900 par value of preferred stock and \$34,600 par value of the common stock, a total of something over \$86,500 par value. As a matter of fact, on October 23, 1901, he ordered \$39,300 common and \$70,000 preferred to be issued to Edward K. Holton, and \$7,000 preferred and \$8,000 common to be issued to Alice M. Bright, and \$6,000 preferred and \$8,000 common to Birchard R. E. Holton. The balance, which should have gone to Alice and Birchard, was issued to himself individually. Between 1894 and 1901, on the 100 shares belonging to Alice and Birchard, he collected \$13,500 in dividends of \$6,250 each. On the 173 shares belonging to himself he collected \$21,355 in dividends, and on November 18, 1901, in addition to this, collected on the 273 shares of all \$6,069.80 in dividends. Q. Did you notice any change in his facial expression? A. Yes, sir; I did. Mr. Holton's facial expression was very variable, I thought. It was changeable from day to day. His eyes had an expression that was very unpleasant. The pupils seemed to be dilated, and he had a wild, bad look. Sometimes it was, I thought, expressionless. Q. Well, would there be any change from one to another in rapid succession? A. Very rapid, indeed. He would be very much excited at one moment, and his expression would indicate a desire to do violence, and his movements and everything, and in a few minutes he would be as affectionate as he was in his better days. He was always a very affectionate man; always was to me, at least. I don't think I ever had a difference with Mr. Holton, except over some temporary business matters, in my life, until, perhaps, one

occasion. A meeting occurred in Boston. I think it was in October, 1901. Mr. Holton was present. All the stockholders or representative stockholders in the newly organized company were present. I declined a nomination for vice president. I was elected subsequently as manager of the St. Louis plant. I had no thought that Mr. Holton desired it, because he had always said that he wanted to get out of business. No one nominated him, and I had never invited a nomination. I was the largest stockholder in the St. Louis plant, held a majority of the stock, and I accepted the election as manager of this plant. After the meeting, Mr. Holton made a remark in which I saw that he was very much displeased. I asked him to go to his room in the hotel. I went with him. In substance, he expressed surprise that he had not been elected as manager. I recited what had occurred in our former conversation concerning his desire to get out of business; that he had never in the world intimated a desire to become manager of this plant. I referred to his condition, etc., and he turned on his heel and went into a paroxysm of rage and anger that made me feel very badly. I told him that we had been friends for many years, and that I would rather make any sacrifice than have anything of this kind occur. It was the first occasion where he had exhibited a feeling towards me which was enduring. After the St. Louis plant became a part of the Ames Company, Mr. Holton came to the office, I think, on the 18th of November, 1901, and desired to settle up and be let out, and he was paid all his salary and all that was due him as trustee for the children. He was paid his salary till January 1st. I paid it out of my own pocket. I think I had called at his house very soon after that. I had written him a letter concerning a mistake on an allowance which he had made to some jobbers, which changed the condition of the figures on the books, and which he had not advised me of. By making these allowances it would make a difference in the amount which should have been paid Mr. Holton of several hundred dollars. He never answered the letter. I called at his house. I don't think I had it in mind speaking about the matter particularly, and I never did speak with him concerning the matter, although no attention was given it. At the house I saw Mr. and Mrs. Holton. Mr. Holton was in the room reclining in a chair. Mrs. Holton told me he was unable to come down, and that I must not talk business with him; that when he talked business he broke down and went to pieces. That was in December, 1901. I remained in the room for half an hour. His condition was bad. He appeared weak and broken down. I talked no business with him whatever. Our conversation was pleasant. Mrs. Holton stood right by his chair and seemed to be attentive to him."

Correspondence was introduced (Exhibits

1, 2, 3, 4, and 5) showing: That on November 18, 1902, a letter had been written to Boston directing the transfer of 195 shares of stock in the Ames Company from Mr. Holton to his wife, directing that the dividends on both his stock and his wife's be sent to the Third National Bank of St. Louis, and stating: "Our bank account is a mutual one." (The evidence showed they had no mutual bank account.) That on November 19th a telegram had been sent to Boston as follows: "Express to my wife, Lillian M. Holton, stock certificates;" and on the same day a letter was written directing that the certificates be sent to his wife, Lillian M. Holton, whereas the letter the day before had directed them to be sent to 4126 Westminster Place. The letter of November 18th was in the handwriting of Mrs. Holton, but signed by Mr. Holton. In the telegram and letter of November 19th, the signature and body of both were in the handwriting of Mrs. Holton. Witness Birge continued: "But the stock which was issued to the children, as I told him at the time, was not under his control, which ought not to be to that extent, and I went home and talked to my wife about the matter as to what I ought to do. It is not a fact that Capt. Holton claimed to me that what he wanted to do was to have \$100,000 in the award of the Ames stock in his own name; that his surplus stock over and above \$100,000 he was perfectly willing to distribute to the children. The facts are not consistent with that, because he ordered \$109,300 issued to himself. That was before the controversy with the children came up. Mr. Holton was a very positive and self-assertive man. He lacked that self-assertive quality in the later years. He was a man of strong will—that is, in his better days—and earnest purpose. During the close of the deal for the trust, Capt. Holton was drinking a great deal. He was drinking regularly every day. There were periods when he would evidently drink to a very great excess. He drank too much all the time. He drank so much that it overcame his will power. Q. Made him tight? A. Well, I think I know the difference between a man who is intoxicated and the after effects of a period of debauch. I was absent from the city when this letter apportioning the stock was written, and when Mr. Holton gave his reason for apportioning it as he had. He said that he was entitled to \$70,000 preferred stock. His idea was that it belonged to him and he had a right to it; that he had a right to it by virtue of his having given his time to the business, I suppose, and his talents and energy for years, but during all these years he drew his salary as an officer of the company for his services, the same as I did. I had talks with him about this matter after the stock was finally issued to the children. He said that the children had gone back on him, and he talked very bitterly concerning the actions of his children. He did not particularize in what respect the children had

gone back on him, but there could not be anything else I suppose except this incident. I know of no trouble that they had. I endeavored to pacify Mr. Holton concerning that matter—to make him—I didn't think he looked at the matter as he ought to. That is the fact of it. The Court: Did you tell him so? A. Yes, sir; I did. I always regarded him as a man of strict integrity. He was particularly so in his early life. I don't know as I ever saw him do an act that was not very nearly square. It was Mr. Holton's custom to take a bottle with him, when he was away, to his room, and when we would have rooms together, and when we traveled together." It was shown by documentary evidence, witness identifying handwriting and signatures, that Edward K. Holton exercised the option given him in the will of Ezra B. Birchard to cancel a \$10,000 note which he owed Birchard, and on which Birchard held \$10,000 par value stock in the St. Louis Shovel Company as collateral security, by transferring to himself, as trustee for Alice M. Holton (now Bright), 50 shares of stock in the St. Louis Shovel Company, of the par value of \$5,000, and to himself, as trustee of Birchard R. E. Holton, 50 shares of stock in the St. Louis Shovel Company, of the par value of \$5,000. Mr. Holton's income consisted of his salary in the St. Louis Shovel Company, \$3,000 per annum, in the Seymour Manufacturing Company, of \$800 a year, dividends of \$300 or \$400 a year in the Seymour Company, and dividends on the stock which he held, both individually and as trustee, heretofore mentioned, amounting to \$40,924.80, between 1894 and November 18, 1901. Witness did not think Mr. Holton was a man of sound mind the last year prior to November 10, 1902.

Charles H. Meyers, of Beaver Falls, Pa., and Howard Rowland, of Cheltenham, Pa., were sworn on part of plaintiffs, and stated that they had known Capt. Holton for many years, and had done business with him during that time. Both corroborated the testimony of Mr. Julius Birge, and thought the testator was of unsound mind at the time he signed the will. Also Walter Birge and John B. Gundolfo had known testator for many years, and had been associated in business with him during that time, and they were sworn on behalf of plaintiffs, and fully corroborated the evidence of Julius Birge in all material parts, and stated that in their judgment testator was of unsound mind at the time he signed the will.

William J. Holton, a brother of deceased, and one of the respondents in this case, to whom a bequest of \$500 was given under the will, testified that he was manager of the oil stove department of the Standard Oil Company in Chicago; that his brother at the time of his suicide was in his sixtieth year; his father's name was James Holton, and mother's maiden name Maria Kendrick; his brother's middle name, Kendrick, was taken



from his mother; that his mother's mind was affected, and he thought it was caused by her anxiety and worry over his brother Albert, and also his father's death. Witness saw his brother, E. K. Holton, in November, 1899, at the Plankinton House, Milwaukee. His actions were bolsterous and profane at table. Mrs. Holton threatened to leave the table unless he kept quiet. He acted to witness like an insane man. He certainly was not staggering drunk or anything of that kind. Witness said: "I saw him the next day at the house, where he came to bid our father good-bye. He came into the room in a sort of a bolsterous way, and came up to father and told him he had to go back to St. Louis, picked him up in his arms, bade him good-bye, and said, 'You'll pull through all right; cheer up.' Shook hands with me, and left, and told me to notify him if father got worse. I said: 'Ed, I don't think you better go. I think father is on his deathbed.' He pooh-poohed the idea, and said, 'Pooh-pooh! he'll pull through all right.' Father died the following Monday, November 20, 1899, and he came up to father's funeral on the 21st. At that time his condition was very excitable, nervous, and bolsterous, especially at the funeral. He said he did not want any long sermon preached, or any prayers at the grave; that it was rot, and he would be damned if he would have it, and if we didn't tell the minister to cut it short, dammed short, he would interrupt the services. We pleaded with him, told him father was one of the old settlers and all the old settlers would attend the funeral, and begged him not to interrupt. 'Well,' he says: 'I can't sit still. It's got to be damned short. I don't want any prayers at the grave either.' I finally persuaded him to have a short prayer at the grave. He says: 'Don't anybody take off their hats. I don't want anybody to take their hats off and chance taking cold. It's all tommyrot to take off hats at the grave.' He behaved more like an insane man to me. After the funeral was over he went to my mother's, and he invited me down to the Plankinton House, where I saw him that night in his room. I came in and he greeted me pleasantly. He rang for the bell boy, ordered up drinks, and he had his drink. I said to him: 'Well, Ed; father is gone. I never expected him to die first. I thought our little mother would go first. Now, what are we going to do with her?' He says: 'To hell with her. I wish to God she was in hell, God damn her. \* \* \* If I had her here, I would put her in the insane asylum or the poorhouse. God damn her. She has been crazy for years.' I jumped to my feet in astonishment, in perfect horror. I told him to stop. I told him I wouldn't listen to such talk. I says: 'My God, man, you are insane to talk about our little mother that way. You ought to be ashamed of yourself.' I says: 'Whisky has just ruined you, is making you insane. Why, at your time of life, going down the hill of life, the way you are

drinking you will be in an asylum in less than a year if you don't quit.' He says: 'Don't talk to me that way. Julius Birge and I have been in business 33 years. He never talked that way.' I says: 'I don't give a damn for Julius Birge. I am talking to you, and not to Julius Birge.' He says: 'Julius Birge, God damn him! God damn him! he is a viper; he is a snake; he has been around my throat for 33 years, but I have got him off now (indicating throwing something off his neck). Now I am free, free. God damn him.' That is my brother's words and actions. The next morning at the café in the Plankinton House he received me very pleasantly, and seemed to have forgotten all that had passed the night before; in fact, met me with a smile, shook hands with me, and we sat down at the table together. In a moment he said to the waiter: 'Where in hell is my breakfast? God damn it, where is my breakfast? Why in hell don't you bring my breakfast? I have been waiting here an hour.' The waiter says: 'I beg your pardon, it's only 20 minutes, and it has to be cooked.' He beat the table, and finally the waiter brought it in. I says: 'Ed, don't talk that way. Why don't you keep quiet?' After the waiter brought it in, he said: 'That's all right, old man; here's a quarter for you. Don't mind me. Don't pay any attention to me at all.' After breakfast we went out to see mother together. He says to mother, 'Now, mother, what do you want to do?' She says, 'Well, I want to go to housekeeping.' He says: 'Well I don't see how you can, no one but you and Lilly. You better board.' She says, 'Well, I will not board here.' He says, 'Well, by God! you will go where I want you to, here or any other damn place.' He says, 'God damn it, you will go just where I want to put you.' I says: 'Ed, now you stop. I am in position to care for our mother. If you want to desert her now, you do so.' He looked at me in a kind of wild way, says, 'Humph!' He jerked his shoulders as much as to say, 'Yes you are.' Finally he said: 'Now, mother, you can do just as you please. I have got to go back to St. Louis, but whatever Willie does will be satisfactory to me. If you want to board or whatever you want, I will leave it here in Willie's hands.' He quieted down and put his arms around mother and kissed her. Mother was very much astonished and shocked. She didn't seem to realize the way he spoke to her. I attributed it to the condition of her mind. Q. Now, on the occasion that you refer to, where he broke out against Julius Birge, what, after his outburst, as you describe it, did he do? Was there any change then? A. Oh, he cried. He would cry; and order up drinks while there. In less than an hour he must have had seven or eight drinks. The next day Uncle William Kendrick was there. He and my brother were examining father's papers, and he called for whisky. There was a bottle of whisky that I had bought for my father, a quart; but

there had not been more than a whisky glass taken out of it I guess. My niece, Miss Lilly Holton, got the whisky for him, and while we were sitting there, probably an hour and a half or two hours, he alone finished the balance of the quart. I saw him that night at the Plankington House. He was fuller then than I ever saw him in my life. In three-quarters of an hour, he must have taken seven or eight drinks. I noticed him wabbling on his legs, the first time I ever saw him staggering. Still he was erect, with head up in the air, coat buttoned up, prince albert, silk hat, very commanding figure. Saw him the following Sunday, November 26, 1899, at Mrs. Noyes' house, where we had been invited to dinner. He said to me: 'Willie, if you will promise me not to oppose me in regard to Albert, and let his wife get her divorce and the property (which was a house and lot), I will promise to provide for Albert as long as I live and will leave him well provided for in my will, if I die first.' I said, 'If you will provide for him, so that he will never want, I won't oppose you.' He says, 'I will, and I will provide for him well.' Then he says: 'Don't you oppose me, because if you do, God damn you, I won't do a damned thing. He can go to hell for all I care.' I said: 'Now, Ed, there is no use raising your voice, you can't frighten me.' He jumped to his feet and says, 'God damn you, I will kill you.' I says, 'I guess not.' And Mrs. Noyes stepped between us and begged him to sit down; and he said, 'Are you going to oppose me in it?' I says, 'I told you I wouldn't if you would promise faithfully to provide for Albert.' I have forgotten just what occurred; but he came up a second time and was very profane, God-damning me in everything, and Mrs. Noyes stepped between us again. Just then dinner was called. Witness was so much disturbed over the incident that he did not eat much, but at the table his brother turned to him and was in a jovial frame of mind, laughing and joking with all, and said to witness, 'Are you going out to see Albert?' I told him, 'Yes.' He said: 'I would like to go out, too; but I can't. I have to go back to St. Louis. I would like to see him. Remember me to him. I wish you would take out some cigars for me to him.' I started out to the asylum, and he followed me out to the hall, and he said, 'Willie, I bid you good-bye,' and he extended his hand. 'Remember me to Albert. Try and go to see him as often as you can.' In March, 1900, I saw him the day of our mother's funeral. I bought some flowers, and laid them on my mother's casket. He went up, and my cousin said to him, 'This is from Willie.' He said, 'Humph! what in hell does he want to buy those for? All rot, damned rot.' Then he said to Mr. Noyes, 'Did you get the minister?' Mr. Noyes said: 'Yes; I also engaged the choir for Calvary.' He said: 'I don't want any damned singing at the funeral.' Mr. Noyes said: 'Now, Ed, we want

this singing. Mother was fond of "Nearer My God to Thee," and I have requested them to sing it, and hope you aren't going to interfere.' He said: 'Well, let them sing that, but no more. I want these services damned short.' I said: 'Now, Ed, look here. Our friends are here. This is the last of our little mother. The friends are going to be upstairs. You can go up there and roam around just as much as you please. We are going to have a service.' He looked at me, and says: 'Who is doing this?' I said: 'I don't care. We are going to have a service.' He said: 'Make it short. I don't want any damned prayer at the grave either.' I said: 'There will be prayer at the grave.' Finally I persuaded him to go upstairs, and he walked up and down the hall, cursing under his breath, speaking to some of the relatives. He acted like a caged animal. After the burial he was excitable and drinking a good deal. I saw him that night at the Plankington House. He was nervous, excitable, and bolsterous. That was March, 1900. As far as looks went he was very commanding, fine-looking, head erect, as I had always seen him for years, as far as his figure went at that time. I saw him next at the Auditorium Annex, Chicago, August, 1902. I was thunderstruck at his physical condition when I saw him. The change was so great. He seemed to have grown smaller; at least emaciated, stooped. He walked with a shuffling gait, wasn't the same Ed as of old. He appeared to be mentally weak. I told him I was glad to see him, and said: 'Ed, you are growing thin.' He said: 'Yes; I am thinner than I was. I don't weigh as much.' I asked him if he had seen Birch's wife. He looked kind of blank in the face, as if surprised. I had been told he knew Birch was married, so I thought it strange at the time. I said: 'Birch promised to be here to see you.' 'Well,' he says, 'he hasn't come. He don't want to see me any more. He don't give a damn for me.' I said: 'I know that Birch loves you. All your children love you.' He said: 'My children don't give a damn for me.' I said: 'Look here, Ed; the only thing you have got against Birch and Alice is that they made you give them what was coming to them, which was no more than right.' He says: 'No, by God! it wasn't right. That wasn't all coming to them. They made me give up what wasn't theirs.' I told him we wouldn't argue that; that Birch wanted to see him, and that no doubt he had been over here, and they probably told him the same thing they told me, that you were not here. Birch said that he had been over here, and they told him he wasn't there. I brought Birch over, and he went right to his father and says, 'Papa, how do you do?' His father met him with all the affection a father could meet him with, and said, 'I am glad to see you, Birch,' and turned to his (Birch's) wife and said, 'Daughter, I am glad to see you.' That was the first time he had met Birch's wife. He went to

his room and commenced to tell us about his troubles, and then he commenced to cry. He cried, and then commenced to cough; had a terrible coughing spell. I thought he was going to choke. I said to him: 'Ed, what do you mean by traveling alone? Where is Lillian?' He said: 'She has traveled 16,000 miles, and by God she can't go any further.' He wanted me to go to Mackinac with him, and I told him my clerk was off on a vacation and I could not go; otherwise I would be glad to go. Then he commenced to cry again, and jumped from one subject to another; would tell us a little while of his troubles; then he would turn to Birch and talk to him about going into business; then he said, 'Willie, I am proud of you, to think that you have got to where you have without the assistance of any of your friends.' He said: 'Albert, I provided well for him. He will never want as long as he lives. I have left him fixed in my will so that he will never want.' (The bequest to Albert, the insane brother, was \$500, to his [Mr. E. K. Holton's] wife, not Albert's wife, 'to be paid to him as his necessities may require.') Said to me, 'You aren't forgotten.' Turned to Birch and said, 'You are all remembered.' Kept ordering up drinks every few minutes. We were there three-quarters of an hour, and he had five or six drinks, if not more. Finally we went down stairs. He put his arms around Birch's neck and said: 'Good-bye, my boy. I will see you in Mackinac.' We were in that room about three-quarters of an hour. He swore a great deal, although Birch's wife was present, without apologizing for his language. He didn't carry on any one line of thought for any length of time; would jump from one thing to another; start in and tell about his travels; then he would commence to cry; then he would brace up and start about something else. I never saw him alive after that. The first I heard of his suicide was on the morning of December 3d. I received a night message, sent the night before, from Mrs. Holton, saying 'Edward had passed away at seven o'clock.' I came down here, went out to the house and asked Mrs. Holton what caused his death. She said that he had committed suicide. She said he had been in the habit of lying in bed two or three days at a time; that this day he lay in bed until noon; got up, dressed, and said he was going down town. She wanted to know if she could not go with him. He said he was going to see some of the boys at the Legion of Honor. He came back about 4 o'clock. She let him in; took him into the parlor; said she had a premonition that he had bought a pistol while he was out. She asked him, 'Captain, did you buy anything while you were out?' He said, 'Just a couple of cigars.' She said she knelt down in front of him as she had been accustomed to do, ran her hands under his vest and coat, around his waist, and felt the butt of a pistol, suppressed a scream, drew back quickly, and says,

'Captain, you have got a gun; what did you buy that for?' He said, 'To protect us from burglars.' She said, 'You better give it to me.' 'Oh, no; this is mine. I guess I will go to my room.' Went up, and she followed him. He went to the bathroom, took out a cigar, and reached to light it. She thought she had a good chance to get the gun and reached for it. He threw his hand back and she thought he flourished the gun. She wasn't sure. She thought he drew it and flourished it. She rushed downstairs to get help, got to the foot of the stairs, heard the pistol shot, then a second shot." Based on the facts he had enumerated to the jury, witness said he was of the opinion that his brother was insane. He had not only formed the opinion, but expressed it to the family and to others.

The evidence of William J. Holton was fully corroborated in the main by Lillian A. Bridge, née Holton, the niece of the testator, mentioned in the will, and by Wm. H. Kendrick, an uncle of the testator.

Alice M. Bright, youngest daughter of Edward K. Holton, testified that she was born in December, 1875; that her father and mother attended church together, and after her mother died her father sent the children to Sunday school and church; that the home was kept together about a year after her mother died, and that one summer after that she kept house for her father; after that she lived with her sister, Mrs. Garnett, now Mrs. Burrow; that her father and brother, Birchard, boarded together; that she was married in June, 1896; that she went to housekeeping about four months after she married; that her father visited her continually after she went to housekeeping; that she had no unpleasant relations with her father up to the time of his marriage to his second wife, nor until the summer of 1901. He was always loving and affectionate towards the children. She testified to her father's actions, indicating his unsoundness of mind after the death of her mother and grandfather Birchard, substantially the same as shown by the testimony of Mrs. Burrow herein set forth; that the Christmas before her father married Miss Kelly (Mrs. Lenori) he said he would like to have Christmas dinner at her house with his children and gave her \$10 to get the dinner; that while he was there he said: "Well, this will be our last dinner together. I am going to be married." He asked us all if we would consent to the marriage, and we said, if it would make him any happier, we would be pleased for him to marry. I went to the wedding. We visited each other after the marriage about once a week. During the summer of 1901 my father had been drinking a great deal more than he had previous to that. I noticed a physical change in my father two years before his death. I noticed a change in his mental condition six months prior to the stock transaction, which was in the summer of 1901. When the St. Louis Shovel

Company went into the trust, he said that I really was entitled to \$5,000 of stock in the trust, and that he would give me \$18,000, and that he would make me quite independent. He kept on changing about the amount he was going to give me, and I really didn't know how much I was going to get, and he didn't seem to be settled on the amount, so I thought I would inquire. I went to Mr. Birge, and got an idea about how much it would be, and had my husband telephone over to the St. Louis Shovel Company, and I found that it was five to one. I went over on several occasions to see my father about it; but he always was irritable and acted so peculiar that I was afraid to speak to him about it. I thought I would wait until he felt like speaking to me. So one Sunday afternoon I went over to his house with my husband. I had no sooner gotten into the house until he said he had decided to give me \$15,000. I said: 'Papa, is that all there is coming to me?' He says: 'Yes; that is all. You really are only entitled to \$5,000, but I am going to give you \$15,000.' 'Well,' I said, 'Papa, it is more than that, I know, that I should get.' He says, 'How do you know that?' and looked at me in a blank, staring way, without any expression in his face whatever. He was astonished at what I had said. He says, 'How do you make that out?' I said it was five to one the stock was listed at, and with that he turned to my husband and said: 'Warren, come upstairs; I have some papers to show you.' He turned to his wife and said: 'There it is again; some more trouble for me to rack my brain.' He began to swear and went upstairs. When he came down stairs he swore, and walked up and down the floor, and cursed and used such terrible language. At the time I was in a delicate condition, and I could not stand such a scare and had to leave the house at once. He claimed legally that I was only entitled to \$5,000. That is what he said. He said that was all I could get. He looked astonished at me, and didn't understand that there was more coming to me. He acted like he didn't know anything about it; looked at me in an astonished way. I told him that there was five to one, instead of three to one. He said: 'How do you make that?' Every time I saw him after that (referring to the fact of his stating he was going to keep \$100,000) he says: 'I don't know how much I am going to give you. I don't know whether I will give you \$18,000 or \$10,000, or how much. You are entitled to \$5,000.' He never said a word about his will in connection with the fact that he was going to give me about \$16,000. He said he would provide well in his will; would remember us children at all times. That was not in connection with our letting him keep \$100,000. After he came downstairs, showing my husband papers, he walked up and down the floor and swore in such a rage, and said that I would have to be satisfied with what he

would turn over to me, or I would get just \$5,000 that belonged to me. I said: 'Papa, I think I ought to have what my grandfather left me, and I certainly intend to have it; and if you aren't willing to give it to me I will have to see you in court about it.' I made some similar remark like that. After that Sunday I saw my father quite often. Very often he came to my house and I went to his. That continued until the last Sunday in February, 1902, before he went to Europe. On that Sunday he and his wife came over to my house to say good-bye. I threw my arms around his neck, and asked him how he was feeling. He said he was not feeling very well. He went upstairs. He met my little girl at the head of the stairs, and he played 'bear' with her a few minutes before coming into the room. We got to talking about how free my brother was spending his money at the time; and he looked and glared at me, and got up out of his chair, and shook his fist in my face, and told me he never wanted to lay his eyes on me or a blank one of his children again. I became very much frightened, and went into the other room. Lillian, his wife, walked in behind me, came up to me, and said, 'Now, Alice, don't cry; for your father is not responsible for what he says or does.' Q. What did you do when he shook his fist in your face? What did he say about your connection with your brother getting what he did? A. He said it was something that didn't belong to him, and shook his fist. He swore and cursed. He went into a passion of anger and rage; and he left and didn't say good-bye. He swore all the way downstairs, cursing my husband and all of us, and left right away; left his wife there, and she had to borrow car fare to get home on. That was the last Sunday in February, and my child was born March 11th following. He shook his fist in my face, and he said he never wanted to lay eyes on me or a blank one of his children, and swore, and I can't say the words. I became very much frightened, and I got up and began to cry, and started into the other room. My father was not back to my house ever after that. I never saw him again. He said he never wished to see me. Mrs. Holton never asked me to go and see my father. No, sir; she did not. She came to my house, and I said to her: 'Don't my father ever ask for me? Don't he ever say anything?' She says: 'No, never.' That is what she said. She said he wanted to see my baby. And I said: 'Tell papa to come over to see it.' She told me that just five days before my father died. If I had ever gotten a word from my father that he wanted to see me, I would have gone in a minute; but I never got the word. I asked her if my father wanted to see me. She said he never spoke of me. I asked her every time she came over to see me. I always asked her about my father, and every time I would ask her she would always say that father never said anything about me—

never said he wanted to see me at all. I told her to tell papa to come over and see the baby, but he never came. After that Sunday they went abroad. I called at papa's house, and found from Mrs. Kelly that he was back, and at French Lick. I saw Mrs. Holton frequently after that, and asked her every time about my father; but she said he never said anything about me—never said he wanted to see me. Mrs. Holton told me that my father drank continually, that he was always having bottles with him in his room when he went to bed, and that she had to hide the bottles."

Witness identified Exhibit 8, a contract which her father had her sign when she became 18 years of age, dated the 2d day of January, 1894, in reference to her \$5,000 stock in St. Louis Shovel Company; said she knew nothing about the "whereases" in the contract. The contract was in substance that her father should hold this \$5,000 stock in trust for her until she arrived at the age of 25; that during that time he should pay her \$400 a year (8 per cent. interest on \$5,000), and when she arrived at 25 the trust should be terminated, and he should reassign the stock to her. The trust terminated by her reaching the age of 25 in December, 1900, and she waited until October, 1901, for the reassignment of this stock. Her father took the dividends thereon after she arrived at the age of 25, which dividends she has never received. The evidence of Alice Bright was fully corroborated by that of Birch Holton and Lucinda Burrow, son and daughter of testator; and, among other things, Mrs. Burrow testified to the following matters:

"Mr. Rule: At the time of the death of your mother, was there any change in your father's actions toward his children, immediately after the death of the mother? A. No. Q. Was there any change that you observed in his mental condition at that time? A. Yes, sir. Q. Just state in your own way what was done—what he said and did at that time. A. My mother's death came so suddenly that for weeks and days following he wasn't able to sleep or eat, until finally he said that his physician told him that the only rest he could get would be to take a European trip, which he did; and after he had been abroad about a month he was able to sleep some and get some rest. Q. Well, just state what he did, and what he would say and do, during that time? A. Well, he would rave and say he had nothing to live for, and that he didn't believe in God, and that he wished he was dead. He would be very excited. He would walk, and smoke, and drink, and nothing gave him any rest, and he couldn't sleep at all at night; not at all. Q. Well, did he show his feelings in any other way? A. Well, he was greatly grieved. He cried pitifully. Q. How did he show his grief? A. He cried constantly. He couldn't see anything that belonged to my mother that he wasn't reminded of her, and he would cry. Q. How long did this condi-

tion of affairs last after your mother died? A. I should say it lasted for at least three years. Q. What statement would he make, if any, to indicate his condition of mind? Just state what he said to you and the other children. A. Oh, he would say life was all over for him; he had nothing to live for; he cared for nothing. And I always told him he had his children; he had a great deal to be thankful for. But he didn't think so; he felt my mother was taken; he felt everything was taken away."

Witness further testified: "He took more interest in his children after his first wife's death, and was more affectionate towards them than before. I had letters constantly from him when abroad the first time. I noticed a change in my father's mental condition. He was more excitable at the time of my mother's death. He was very restless, irritable, despondent, unhappy; would get angry very quick, and the least thing would provoke him. He drank a great deal more than he ever had. My grandfather died on December 29, 1891, my— Q. Will you describe your father's actions on that occasion? A. He was very much overcome at my grandfather's death, and drank a very great deal that day and night, and he was just raving. Nobody could say anything or do anything to please him, and on my grandfather's deathbed he wished to change his will. He was afraid to leave the children.

"Mr. Rule: What was said by both parties, both your father and grandfather? A. When my grandfather was dying, he wished to change his will. Q. Just state what he said. A. He said he wanted to change his will.

"Mr. Reynolds: Were you there at the time? A. Yes, sir; we were all there—my brother, my sister, my father, and myself.

"Mr. Rule: That was just six months after your mother died? A. My mother died in April, and grandpa died in December; and grandpa said: 'Ed, I want to change my will. I wish to make somebody else the executor besides you.' And he was dying when he said it, and in 15 minutes afterwards he was dead. Q. What did your father say? A. Father said: 'Oh, Colonel, that is all right. Don't mind about that. I will take care of the children and your will.' Did your grandfather give any reason why he wanted it changed? A. He said father was drunk so much he was afraid he wouldn't be able to execute it properly. Q. Said that to your father? A. To my father in our presence. It was almost his last words. Q. What was your father's nervous condition after the death of your grandfather? Go on and finish the incidents of the night of your grandfather's death. State what occurred there at the house. A. My grandfather died about 1 o'clock in the morning, and papa had been drinking very heavily all day and evening, and after his death he became so boisterous, and he quarreled and raved and fussed with everybody, until I was so frightened I took

my brother and sister and left the house and went to my own home on Thirty-Third and Leonard avenue, and remained there until morning before I returned. Q. Well, what did your father say? A. Oh! he swore at us all, and said there was no God, and nothing for him to live for. Q. Did you leave any one at the house with your father? A. Yes, sir; we left the trained nurse and servants and the undertakers. Q. Now, when you returned to the house the next morning did you have any conversation with your father about his actions of the night before? A. He had forgotten all about it. Q. Well, did you have a conversation then? A. Yes, sir; but I mean he didn't refer to the evening before. He was just as pleasant and subdued and quiet as he could be. Q. You referred to it? A. No; never said a word about it."

Witness further testified as follows: "My father lived at 3858 Washington avenue after my grandfather's death. He kept house for about a year after that. A cousin of ours came to live with him and take care of the children and the house. He was extremely unhappy, drank a good deal, and was very restless and miserable. After moving off of Washington avenue he went to boarding, and lived at the Franklin Hotel. He married his second wife the 17th of January, 1899. I came to St. Louis for Christmas dinner at my father's house. He told us all that he was going to marry a young lady, his stenographer; that he was very lonely; that he wanted a companion; that it was not a love match. He simply wanted some one to take care of him and be a companion for him. He wanted to know if we objected, and I told him if it would bring him any happiness I was very glad to see him married, and we all said about the same thing. He married a Miss Kelly. Following the marriage they boarded a little while. I took a trip to Europe with my father and his second wife in April, 1900. The voyage took 11 days. During that time they quarreled and fussed all the way over, to such an extent that everybody heard it. My father used boisterous and profane language in the stateroom and out of it. I parted with them in Brussels. I returned to the United States in December, 1900. Then I lived in Philadelphia about a year and a half."

Drs. M. A. Bliss, Frank R. Fry, and Henry Herman, upon the hypothetical question set out in appellant's abstract, said that they thought the subject of the hypothetical question was of unsound mind; that he had presenile dementia, accentuated and hastened by the use of alcohol; that the subject of the hypothesis had a weakened will, and would be influenced in most any direction by a stronger will; would be most readily influenced by being led, not by being driven, and influenced especially by those who contributed to his creature comforts. Drs. Bliss, Herman, and Fry were all three experts of the highest standing. Plaintiffs in-

troduced some 10 or 12 other witnesses, who testified that they had known Capt. Holton for years, and then stated the facts upon which they based their opinions, and then stated that in their judgment he was of unsound mind at the time he executed the will, November 10, 1901. The hypothetical question propounded to said physicians covers some 10 or 12 pages of printed matter and embraces substantially all the facts which plaintiffs' evidence tended to prove. It is omitted from this statement because of its great length, and because it will serve no good purpose by setting it in this statement. Such additional facts as are necessary to be stated for the proper disposition of this case will be found in the opinion.

This was substantially all the evidence offered and introduced by plaintiffs, respondents here.

At the close of it counsel for appellant asked the court to give these two instructions:

"(1) The court instructs the jury to find that the instrument produced by the defendant, Lillian M. Holton, bearing date November 10, 1902, is the last will and testament of Edward K. Holton, deceased.

"(2) The court instructs the jury that there is no substantial evidence in the case tending to show that defendant, Lillian M. Holton, exercised any undue influence over Edward K. Holton, her husband, in causing him to make the disposition of his property as set out in the paper produced as his will; and as to this issue the jury will find for the defendant."

The court refused to give either of said instructions, to which refusal appellant duly excepted.

The defendant below, appellant here, Mrs. Lillian M. Cochran, designated throughout the trial as Mrs. Holton, introduced witnesses who testified to the following effect:

S. S. Gould, 58 years old, in the shovel manufacturing business for 25 years, and vice president of and stockholder in the St. Louis Shovel Company, had known Capt. Holton since 1880; intimately associated with him, in business and socially, from 1886 to within two months before his death; had met him frequently and continuously from 1886 until the 25th of September, 1902, which was the last time he had met him; met him then in St. Louis; testified that there was no particular change noticeable in Capt. Holton during all the period of his acquaintance, any further than incident to any man in the lapse of years; considered him a very bright business man. Capt. Holton was in active management of the business of the St. Louis Shovel Company until it went into the trust in 1901. No one in that company had more to do with the active management than he had. He was excitable at all times; very demonstrative; gesticulated, talked violently, easily provoked to anger; very erect in his carriage, a fine dresser; was very much humiliated by the fact that he was not retained in the em-

ployment of the company when it went into the trust; thought his associate, Julius C. Birge, was responsible for that. Witness was with Mr. C. A. Thompson in August, 1902, when they met Capt. Holton at the Auditorium; was there with him two days; saw no change in his personal appearance at that time from what it had always been. He was not stooping. He was not emaciated. He had no peculiar look in his eye, and the only trouble that he had was that he was suffering from stomach trouble that had bothered him for a number of years. He conversed intelligently; was not intoxicated. From his acquaintance with Capt. Holton, and long association with him, considered him a man of perfectly sound mind, and there was no mental difference in him mentally the last time he saw him, September 25, 1902, from what it had been in all the years of his acquaintance with him.

Dr. William Pennington, practicing physician in charge of the French Lick Springs Hotel, at French Lick Springs, Ind., met Capt. Holton there in June, 1902, and then again in October of the same year; knew Capt. Holton professionally and socially; became very intimate with him. Capt. Holton came there to be treated and put himself under the charge of witness. He made a thorough examination of the Captain physically on both occasions that he was there; did not have to treat him for alcoholism. His trouble was with his stomach. Witness had examined him carefully enough to say that he had no signs or symptoms of presenile dementia. First time witness met Capt. Holton in June, he was under his charge for five weeks; the last time, in October, 1902, a little over two weeks. Was a very striking looking man, erect, rather a military bearing, very neat, scrupulously neat, in his dress, a very intelligent conversationalist, had traveled a good deal, well informed about general matters; considered him a man of entirely sound mind; told witness on one occasion, when witness had been speaking to him about his family, that he had but one son, and that he had placed in him his hope and faith for a future great man, but his hope and faith had not been well founded. It had been blighted, in that his son had been given up to reckless dissipation and shiftless investments, and he did not amount to what he had hoped he would. Capt. Holton was quick on his feet, looked well, had no shuffle in his walk, and from his observation of him considered him an exceptionally bright man, and that he was of sound mind. Did not express any dislike for his son when talking of him; only spoke of his disappointment in him.

John W. Estes, manager of the Equitable Life Insurance Society for Missouri, and before that traveling man for Meyer Bros. Drug Company, in that employment had traveled all over the United States for about 14 years and came in contact with a great many men. Met Capt. Holton in October, 1902, at French

Lick Springs. Was there with him about two weeks, every day. He and Capt. Holton left there and came to St. Louis together. Capt. Holton, in a conversation about his son, stated that his son had not done very much good for himself, that he had given him a good deal of money, that they had had a disagreement, that his son did not advise with him any more, and that they did not get along well together. He was with Capt. Holton at French Lick Springs until the 27th or 28th of October, 1902, and about two weeks after, about the middle of November, 1902, met him in St. Louis. He had not changed any in appearance or manner from what he was when he saw him at the Springs; looked as well or better than he did at the Springs, and witness had remarked to him at the time Capt. Holton carried himself as any other man of his age; was very straight, did not shuffle, and dressed very neatly; considered him a man of sound mind.

Dr. Henry N. Chapman, physician, in active practice in St. Louis, graduate of various medical schools; had been assistant to Dr. E. W. Saunders, member of the board of health of the city and on the visiting staff of the City Hospital; acquainted with Capt. Holton and Mrs. Holton for three or four years before the Captain's death; met him at his house and at witness' office and on the street and at the houses of mutual friends; had met him at least 30 times in the last three years. Last time he met him was about three weeks before he died, when he met him on the street and stopped and had quite a talk with him. The Captain was feeling very well at the time. Looked better than witness had ever seen him look, and witness remarked on that fact. Capt. Holton was under witness' professional charge during the summer of 1902. He consulted witness, and he was under the care of witness professionally for treatment for catarth of the head. Observed his physical and mental condition; saw no traces of neurasthenia, nor of arterial sclerosis; examined Capt. Holton to such an extent as to be able to state what his physical condition was, and stated it. There never was a stage of dementia of any kind, senile or infantile or any other kind, present in Capt. Holton. From his observation of him, and association with him, and examination of him, was of the opinion that his mental condition down to the last time witness saw him was perfectly sound. Capt. Holton occasionally spoke of the fact that his children had treated him badly. Did not state the particulars.

William R. Hodges testified he was 64 years old, in the granite business in St. Louis, and member of the city council; had known Capt. Holton for 30 years; knew him intimately for the last 18 years of his life; was one of the pallbearers at his first wife's funeral; met him very frequently; transacted business with him in 1891, when he made a contract with Capt. Holton for the erection of a monument for the Captain's father-in-

law, Mr. Birchard; had business with Capt. Holton about a year before his death; had witness figure on a design for a monument which he wished to erect in Wisconsin over his father and mother. Witness made the sketch for him and gave him the figures. Capt. Holton afterwards came to him and told him he could get it done cheaper at Milwaukee, using the design witness had made for him, and for which he insisted on paying witness. Had great many conversations with him on all sorts of matters. Capt. Holton called on him immediately after his return from Europe in 1902. Asked about what Capt. Holton's manner was in conversation, he said: "Well, I will say this: In some respects Capt. Holton was an exception to the ordinary run of men. He was a man of very intense feeling. He was a very intense man. In making an ordinary statement, he would state it with a positiveness and intensity much greater than the ordinary man would make such a statement. He was a very demonstrative man, and if you had a conversation with him and he disagreed with you, for a person who was not intimately acquainted with him and familiar with his mental characteristics, you might conclude that he was very angry with you; but it was simply his emphatic and intense manner, which seemed to be natural with him. He was a man given to gesticulation; would swing his arms and his hands. He was very erect." The last time witness saw him was within a week of his death, in witness' office; had a conversation with him; saw no change in Capt. Holton's personal appearance, and observed none in his manner or mental tone, different from what it had been in all the years of his acquaintance with him, except that he showed the changes natural to a man whom you had known 30 years. He had grown more stout; was rather more excitable. His natural intensity was somewhat more pronounced than when he was a young man, but there was no mental change noticeable in him. The last time he saw him, which was within a week of his death, his mind was as sound, in the opinion of witness, as it had been at any time throughout the 30 years of their acquaintance. Considered him a man of sound mind. He spoke sometimes of his relations with his family; had seemed troubled and disappointed that his relations with his children were not what he thought they should be. Understood this was something over the distribution of stock and of some estate that the captain had had in his charge, but did not learn this from Capt. Holton. On cross-examination witness was asked this question by counsel for respondents: "Now, Captain, you, possibly, more than any other man, would notice him with that degree of care that would enable you to fix whether, between the times in the conversation about his drinking and the time you met him in October or November, 1902, there had been any change in his physical appearance?"

Witness answered that he did not notice any special change; had not noticed any in the last years of Capt. Holton's life, no more than among witness' friends generally of that age. When a man gets along about 58, 59, or 60, there are sometimes physical changes that take place very rapidly. Asked whether they had taken place in Capt. Holton, witness said, "Not especially so," that he remembered.

John J. Cantwell testified he had been in the shovel business since 1839; knew Capt. Holton in his lifetime; had known him for from 30 to 35 years; transacted a great deal of business with him, and that continued down to 1898, when witness went out of that line of business. Met Capt. Holton very frequently after that; had many conversations with him; met him after Capt. Holton's return from French Lick Springs in October, 1902, and he told him the trip there had done him a great deal of good. Witness said he looked better at that time than he had previously. He was dressed in his usual way, was a good dresser, and carried himself erect; saw him about four days before he died. Had thought he looked better than for some time before. Conversed in their usual manner. In an ordinary conversation Capt. Holton was assertive in his manner; was a first-class business man. Witness noticed no change in Capt. Holton's demeanor or mental characteristics in the last few months of his life from what it had previously been. Within the past two years Capt. Holton spoke of his children having given him a good deal of trouble. That was all there was to that. Did not say what it was about. Capt. Holton had not changed any in his conduct or habits in the last years of his life; had always been a drinking man; was loquacious and talkative. In witness' opinion he was a man of sound mind. On the occasion of meeting him three or four days before he committed suicide, their conversation lasted about five minutes; was on the usual ordinary subjects between old friends when they met; spoke to the captain of his looking well. He was as sane a man, witness said, the last day he saw him, as he was the day he first met him, in his opinion. Had never given a thought to the question of his sanity; had no occasion to discuss it; always supposed he was sane; thought so all the time he knew him, and thinks so now.

David G. Evans, 63 years old, had lived in St. Louis since 1866; had known Capt. Holton nearly 40 years ago. They were boys together in Wisconsin, and came to St. Louis within a few months of each other. His acquaintance with Capt. Holton was entirely social and personal. Met him two or three times a week between the time of his return from French Lick Springs in October, 1902, and the day of his death. Conversations with him would last sometimes a half hour, sometimes ten minutes, sometimes two or three hours. Had seen Capt. Holton oftener after



he was out of business than before. He always had a peculiarity of talking in a loud tone of voice; was very demonstrative, given to gesticulation. "He was positively of a positive character." Drank occasionally. In the past 10 years witness said he had met him "very, very many times." Could not possibly say how many times, or when or where. They were both in Europe in 1902, and got back some time in July, and after that they had met very frequently. From his acquaintance with him, through all these years, had no doubt of his soundness of mind; considered him a man of sound mind. In conversations the question of their children would come up sometimes, and Capt. Holton complained that his children had not been as dutiful and filial as they might have been, and that he was disappointed in them. Witness thought they had an effect on Capt. Holton's feelings, but did not think it had any effect on his mind. He would show his feelings sometimes about the matter by tears coming to his eyes. He was a very responsive sort of man anyhow, and his feelings easily affected, and in speaking of his troubles he seemed to be affected by his own recitation of them. Holton had never spoken to witness as to the details of the trouble with his children, but knew that it had something to do with the distribution of the stock in the Ames Shovel & Tool Company. He said Capt. Holton was a "moody" man—not in the sense that a man gets gloomy and blue, but in the sense that he was a responsive sort of a man, and changed rapidly from one mood to another; always did. He would get despondent and was easily cheered up; would be in a notion to do one thing today and something else to-morrow. Was a man of fine appearance, erect in his carriage, neat dresser, given to violent gesticulation, threw his arms around, and very positive and domineering.

James O. Churchill, 60 years of age, special deputy United States surveyor of customs, formerly collector of customs; had been a clerk of the United States court and United States commissioner; had known Capt. Holton for 15 years; met him frequently, possibly every Saturday afternoon, for a number of years past; had many discussions with him over current events, different matters, the tariff question, and such things as men usually talk about; had played cards with him. Capt. Holton's manner was very positive. He was given much to gesticulation; vehement in his talk. He was very erect in his carriage, neat in his dress, and of rather commanding figure. Met him about a week or ten days before his death. Did not notice any change in him then from what it had always been. Considered him a man of sound mind.

Ford Smith, 82 years of age and a lawyer; lived within 60 feet, two doors, of Capt. Holton; in the last two years of Capt. Holton's life had seen him from 8 to 12 times a week; conversed with him on all sorts of matters;

rode up and down town with him in the street cars, which was a ride of about 30 minutes. He talked in a very intelligent manner and expressed himself very intelligently. Considered him a man of sound mind.

John H. Helmbucher testified he was 62 years old, engaged in business in St. Louis since 1881; is in the iron and steel business. Acquainted with Capt. Holton since early in the 70's. First met him in Pittsburg, when Capt. Holton came to see him in connection with some business matters. Knew Capt. Holton intimately, and did business with him after he came to St. Louis in the fall of 1881 down to the time that Holton ceased to be actively engaged in business in 1901, when his company sold out to the trust. Had not noticed any change in Capt. Holton's mental acumen in that period. Saw Capt. Holton after he went out of business frequently. The last time was a week or ten days before his death. Saw him in the summer of 1902, when he came back from Europe, or in the fall of that year. Capt. Holton gave him an account of his trip abroad. They went into a saloon, took a drink together, stood there, and had a quite a long conversation. Capt. Holton complained of having nothing to do and that he was tired of loafing around and would like to get at something; said he had sold out at the wrong time. He was not excited; talked very rationally and very intelligently, and he conversed as rationally and in the same manner as any other man would. The conversation lasted about an half hour; talked as rationally as he ever did in the whole course of their business and social acquaintance. Talked about the condition of the iron market. Saw no change in his mental character in the later years of his life. Considered him a man of sound mind.

F. B. Northrop, in the oil business; acquainted with Capt. Holton for ten or twelve years; boarded at the same hotel with him for a month or two; sold him oils for use in his company. Capt. Holton did the buying and contracting for his company. He was a very shrewd dealer, and witness dealt with him until 1895. After that kept up his acquaintance and met him frequently. Last time he saw witness to have any conversation with him was a week or ten days before he died. Conversed on business matters, current events. Through the years 1901 and 1902 had many conversations with him. He was a quick talker, a very proud, dignified man, very well in his personal appearance, always very neat, always walked very straight, in military style. Witness had not noticed any change in the mode and manner of his conversation and the trend of his mind, or any diminution of his mental power in the 10 years of his acquaintance with him, and was satisfied that during all the time he knew him and down to the last time he saw him he was a man of sound mind.

August Gehner, title investigator, dealer in real estate, connected with the Gehner Realty

& Investment Company, German American Bank, and a number of other institutions, is 57 years old; had lived in St. Louis since 1859; had known Capt. Holton seven or eight years before his death; met him outside of St. Louis at French Lick Springs, Ind., in July, 1902, where witness was for about four days, and spent about three hours a day with him there; had known him in St. Louis before then, and had transacted business for him in connection with a real estate deal. Witness had his son with him at French Lick Springs on that occasion, and Capt. Holton remarked that he was sorry that he could not travel with his children, but that he had some dispute with them. Capt. Holton said he would like to go back into business or use his means in active business. He conversed like any business man would. Witness walked around with him those three or four days, three or four hours a day, and they talked about all sorts of matters. After returning from French Lick Springs he had met Capt. Holton possibly a dozen times or so in St. Louis on the street, at the St. Louis Club, and other places; played pool with him; had conversations with him about a week prior to his death. Had also met Capt. Holton at Mackinac in the summer of 1902; they were at the same hotel; met him daily sitting on the veranda; chatted and talked with him. They were there together about a week in August; had many conversations with him on that occasion; talked about business investments, old war times, current events. Capt. Holton talked like any sensible business man would do. In his opinion Capt. Holton was a man of sound mind. He was always gentlemanly, very neatly dressed, very pleasant, carried himself very erect; saw no change in his conduct in the past weeks of his acquaintance from what it had always been. On cross-examination, said he saw him about a week before he committed suicide.

George W. Taylor testified: Thirty-four years old; in the life insurance business in St. Louis. The nature of his business caused him to observe people very closely. Met Capt. Holton in French Lick Springs in June, 1902; was there with him about ten days; had many conversations with him, mostly about the captain's travels, places he had been to, people he had met, and countries he had visited. They walked around together a good deal there. Capt. Holton carried himself in a military manner, very peat in his dress, very emphatic in his conversation, a man of very fixed opinions. Met him in St. Louis after that a few days before his death. He looked then much as he did in French Lick Springs. In his opinion he was a man of sound mind.

Lloyd G. Harris testified: Sixty-three years of age; in the manufacture of handles for tools and shovels; dealt in lumber; lived in St. Louis since 1874; became acquainted with Capt. Holton 40 years ago, when they were playmates together in Milwaukee. They

both went into the army, and were in the same company for a while; met during their army service. Did not meet after that until witness came to St. Louis and started in the manufacture of hickory handles and wagon woodwork. Witness' company had business transactions with Holton's company, commencing in 1874. Transacted the business with Capt. Holton. He was a very shrewd business man, a very positive man, very intelligent, and very quick. After their business association ended, they were thrown into close contact socially. For the past 15 years or 16 years have met very frequently—at least a dozen times a year; had been with him for probably an hour at a time at each meeting. They discussed politics, general business, tariff questions, whatever was current news, and their home life. On these occasions Capt. Holton conversed as he had during all their long and intimate acquaintance. He was very demonstrative—used gestures; sometimes almost too vehement when in the heat of argument. Noticed no change in his mental characteristics in the last two years of his life from what it had been for ten years, except that after going out of business he was not satisfied with the situation and wanted active occupation and so expressed himself. He was always well dressed, retained his military training, and walked erect. Considered him a man of sound mind. No marked change in his general appearance the last time witness saw him from what it had been right along. The last time he saw him was ten days, or a little less, before his death. Saw him a week before that. Was willing to take his solemn oath, he said, on cross-examination, that he had seen him at least a dozen times inside of six weeks before his death, and that that was no mere impression on his mind.

Otto H. Witte, 57 years old, hardware merchant, had known Capt. Holton about 30 years; bought shovels, spades, and everything of the kind that the St. Louis Shovel Company could make; always bought from Holton. He was the general manager of that company. His dealings with Capt. Holton were large, and lasted 25 or 30 years, and continued down to the time Holton left the business in 1901. Witness seldom came in contact with any one else in that concern, except Holton. Saw no change in his business character in all the years that he knew him down to the time he quit in 1901. He was a very demonstrative man, but pleasant to do business with; gesticulated when he talked. Had met him about a week before his death; did not notice any change in him then from what he had been before. He came to see witness in his office, and had a short conversation with him, about three or four days before his death; also had quite a conversation with him about a month before that. In the months prior to his death had seen him once in about two weeks. Before he went out of business saw him every

few days. When he met him, conversation would last an hour or two. Talked about market and change in business, etc., and in opinion of witness he was a man of sound mind.

William B. Dean, 70 years of age, in the grain business in St. Louis; had lived here since 1865; became acquainted with Capt. Holton 25 or 30 years ago. His acquaintance was social, friendly, and a family acquaintance. Last time he saw Capt. Holton was in St. Louis in August, 1902. Met him frequently before that. Met him in French Lick Springs in July, 1902. Was there with him about 10 days—with him every day while there. Had conversations with him in regard to his trip to Europe; discussed the waters he had been drinking when on his trip to Europe. Had some talk about his children. Said his daughter had married a man who had treated her badly, and that he had aided her to get a divorce. Said something about his son, conveying the idea that his son's conduct was not entirely satisfactory to him. Did not speak about his daughter Alice. Said he regretted having gone out of business when he did; needed active employment. He was a very emotional man, talkative, carried himself erect, a good dresser. Noticed no change in his mental condition the last time he saw him from what it had been during all the years of their acquaintance. Considered him a man of sound mind.

Otto Weik testified: Was acquainted with Capt. Holton. Met him in French Lick Springs the 14th day of June, 1902. Had known Mrs. Holton before her marriage, and Mrs. Holton introduced him to the Captain. They discussed business; had conversations on many subjects; afterwards met him at his home in St. Louis, the last time within a week before his death. Considered him of sound mind. Was a good dresser, sprightly man for his age, carried himself very erect, and looked much younger than his years. The last time he met him, he said on cross-examination, witness asked him why he should go into business when he had plenty of money to live on. Capt. Holton said, "yes; but that wasn't it," and he said that his children had caused him lots of trouble; did not say in what way, nor discuss it.

Edward Remington testified: Is the manager for W. L. Douglas shoe concern in St. Louis. Lived here since 1889. Had known Capt. Holton for five years previous to his death. Got acquainted with him through his acquaintance with Mrs. Kelley, whose daughter was Capt. Holton's second wife. Witness had boarded with Mrs. Kelley. After the marriage of Capt. Holton and Miss Kelley, witness visited him frequently while Capt. Holton was alive, as much as once or twice a week. Usually took Sunday dinner there. Knew the family very well. His acquaintance with Capt. Holton was entirely social. Spent evenings there and had many conversations. Was there with other guests,

and Capt. Holton conducted himself in a gentlemanly manner. Sometimes he was drinking and very rough in his manner. Again, when he was sober, he was not rough. Can't say he ever saw him drinking to excess. When drinking, he was domineering and a little abusive. Was a great talker. Often discussed business with him. When Capt. Holton was in town, he often dropped in to witness' place of business. Last time witness saw him was on the Sunday afternoon before he died. He died the following Tuesday. Was there the Friday evening before that. Talked longer with him that Sunday evening than usual, and played cards. Capt. Holton complained that evening of being sick. Was not under the influence of liquor. Talked as he had always talked. Witness met him many times in the last two years of Capt. Holton's life. Seldom missed a week. Knew all of Capt. Holton's children. Only time Birch Holton had ever spoken to witness about his father was one day when he came to witness' store and told witness he would probably never see him at the house any more. Said he expected to have a lawsuit with his father, if his father did not settle with him, and he expected, if he had a lawsuit with him, he would not be at the house any more. That was in 1901, and a short time after Birchard Holton had returned from the North where he had been for a short time. That was before Birch had married. On that occasion Birchard told witness that he wanted some sort of a settlement with his father, and he told witness something about it; but he did not remember the details. Had heard Capt. Holton talking about the settlement he had made with his children after it was made, and Capt. Holton gave him the impression that he was humiliated by the manner in which his children had compelled the settlement. Considered Capt. Holton a man of sound mind. Noticed no material change in his appearance and manner of carrying himself in the last week of his acquaintance from what it had been when he first met him, and the same with regard to his mental character and manner of conversation. Capt. Holton's walk was like that of a man young in years.

Dr. Wm. Conrad testified that he was a practicing dentist; had been practicing his profession in St. Louis for 26 years; had known Capt. Holton since 1893, since which time he had attended to Capt. Holton's teeth. Capt. Holton had been in his dental rooms many times from that time until a short time before his death; about five weeks prior to his death. Witness had had many opportunities of observing him while he was under his treatment. He was under his treatment possibly every four to six months, and from four to six weeks at a time. If there had been anything peculiar about him, witness could not have failed to observe it, as he was obliged to observe his patients carefully. There was nothing in Capt. Holton's appear-

ance or demeanor out of the ordinary to attract attention. Witness had had many conversations with him during this period on a great variety of matters, and on the subject of the treatment of his teeth and the symptoms he had. Considered him a man of sound mind. On cross-examination Dr. Conrad was asked if he thought that a man who complained to a dentist of how a tooth aches must necessarily be of sound mind, and Dr. Conrad said, "not necessarily so," but he would say that insane people don't ever complain of their teeth. He knew that, from his experience of from 15 to 20 insane patients during his practice of 26 years.

Miss Grace Grupe, assistant to Dr. Conrad during the period stated, had known Capt. Holton since 1891; was a very punctual man; had seen him a great many times in the office; had conversations with him such as she ordinarily had with their patients, and saw nothing unusual in his appearance to attract attention. The last time she had seen him was the 11th of November, 1902. She thought he was of sound mind.

Hon. Horatio D. Wood testified that he is one of the judges of the St. Louis circuit court; had been acquainted with Capt. Edward K. Holton for the last 15 or 16 years of his life; had met him and had very many conversations with him during these 16 years—conversations on social matters and matters of current news and general subjects that men would converse about. Holton always carried on these conversations in an intelligent manner, the same as any one else. The last time witness saw him was some time between the end of September and the 1st of December, 1902. Had noticed no change in Capt. Holton's mental character in the latter years of his life. Had seen him in meeting of their army society every month. There was no meeting at which they did not have some conversation on some subject or other. That had been the case for the past 15 years, down to the date of his death. When counsel for appellant asked Judge Wood if he had an opinion as to the soundness or unsoundness of mind of Capt. Holton, counsel for respondents asked leave to cross-examine Judge Wood upon his opportunities to see and observe the conduct of the testator before he expressed an opinion. The court gave respondents' counsel that opportunity. Asked at the conclusion of this cross-examination if he had an opinion and could give it, based on his intercourse, as to the soundness or unsoundness of mind of Capt. Holton, Judge Wood answered that he had such opinion, and that in his opinion he was a man who was perfectly sound in mind.

Appellant read in evidence the deposition of Dr. A. Paggi, who testified that he was 49 years old, a practicing physician, and resides in Florence, Italy; received his education at different institutions he named; been in active practice since 1879. Knew Capt. Holton while he was traveling in Italy in

1902. Met him in Florence, Italy, in the spring of that year at a hotel; prescribed for him; treated him for kidney trouble, from which he was suffering. He was under witness' care two weeks. He saw him six or seven times; became well enough acquainted with him to enable him to form an opinion as to his mental condition. He saw no signs of insanity; but, as he indulged in spirits, he may have been sometimes out of his mind, though witness had not seen him in that condition. In answer to cross-interrogatories, witness said that he would spend half an hour, sometimes longer, with Capt. Holton on each visit. Capt. Holton's wife was with him. Capt. Holton complained of weakness, of dyspepsia. He had enlarged liver; albumen present in his stomach. Witness said he had made a diagnosis of Capt. Holton's case as to his physical condition; made none for mental, as there was no need to do so. He showed signs of dissipation. On redirect interrogatories, witness deposed that from his observation of him he thought Capt. Holton used stimulants, but not so far as to affect his mind; stated that in his opinion Capt. Holton was capable of transacting his own business. This part of the answer, on motion of respondents, was stricken out by the trial court, and appellant duly excepted.

John R. Cook, witness for appellant, testified that he is assistant cashier of the Third National Bank of St. Louis; has been such for the past 10 years; was in the banking business 30 years; knew Capt. Holton. He was a depositor in the bank, and transacted business with him in that connection; but his business was more frequently with the tellers. Last business witness transacted with Capt. Holton was on the 11th day of November, 1902, when he came to the bank and got a letter of credit. Was about to go to Europe or Japan, and wanted a letter of credit whereby he could get money while traveling. The bank officers fixed up the letter of credit, so that he would be able to get his money wherever he went. He transacted that piece of business in a perfectly correct manner. Wanted a letter of credit to the extent of \$3,000. Stated what he wanted. Witness had the bookkeeper draw identification paper, and after it was drawn up witness took it to Capt. Holton to sign. It was for identification, and to be forwarded to their European correspondents. Then gave Holton the letter. Capt. Holton also signed another letter to cover payment of his drafts drawn against his letters. Witness produced the papers spoken of, and they were read in evidence. Witness further testified that on the 12th of November Capt. Holton got the \$3,000 worth of credit, and his identification signature was attached to a separate book. Capt. Holton also signed a letter guaranteeing Kuntz Bros. on these letters of credit, and at the same time he left with witness a certificate for 100 shares of Ames Shovel & Tool Company preferred stock. A receipt

was given to Capt. Holton for that. Receipt here read in evidence. That was the last time witness saw Capt. Holton. The understanding arrived at with Capt. Holton that day was that, as he always kept a good balance with the bank, that the balance should be kept up by deposits made while he was away. In case the balance should get below any draft which he would draw against these letters, then, if the bank desired, it could hold these 100 shares of stock as collateral. He always kept a good balance with the bank. In writing out these letters of credit, Capt. Holton made some suggestions about changes in them, and the changes were made as suggested. According to witness' recollection, the receipt as originally presented to Capt. Holton stopped with the words, "to be used as collateral if desired," and at Capt. Holton's suggestion the witness added the words, "when all credits are satisfied, certificate to be returned to him, subject to his order or inspection." The last sentence Capt. Holton put in, and after that was done he signed two books crediting Kuntz Bros.' letters. The date of the transaction was the 12th of November, and the date in the receipt of the 18th of November, witness said, was a clerical error. Witness considered Capt. Holton perfectly sound in mind. His conduct in the transaction and attending to the business was perfectly natural; his conversation about the matter entirely correct. Witness thought, when he transacted the business with Capt. Holton, he was perfectly sound, and he is still of that opinion. On cross-examination witness said that he saw no one else there than Capt. Holton. Business was transacted entirely with him. Did not have two transactions with Capt. Holton—one on the 12th and one on the 13th. Accounts for the receipt being dated on the 18th as purely a clerical mistake. Mistake could not be in the letters of credit. The bookkeeper prepared them and brought them up to where he and Holton were, and Capt. Holton signed them right off. He made application for the letters of credit on the same day they were issued, and it was all done on the same day. Knows the letters of credit were drawn on the day they were dated. It would not be possible that they were prepared the day before, and the day they were drawn was the 12th of November, 1902. On redirect examination witness said that no one directed or guided Capt. Holton, or prompted him, on the occasion of his getting these letters of credit and having this transaction. This was the last transaction witness had with Capt. Holton. He had been a customer of the bank for a long time. Letters of identification and receipt offered in evidence.

George W. Galbreath, cashier of the Third National Bank, testified on behalf of appellant that he remembered Capt. Holton being in the bank and getting the letters of credit about the 12th of November, 1902. He came to witness to get the letters, and witness

turned him over to Mr. Cook, the assistant cashier.

Mr. Henry Weaver, witness for appellant, testified that he is in the hotel business; runs the Planters' Hotel in St. Louis; also runs the Grand Hotel at Mackinac; was proprietor of that hotel during the season of 1902; been in the hotel business since he was 12 years old. Remembers meeting Capt. Holton at the Grand at Mackinac in the summer of 1902. His conduct at the hotel was all right. Did not notice any peculiarity in him other than in any other guests. He was there some time; can't say how many times he met him. His wife was there with him. Often had conversations with him on everything in general; had known him in St. Louis, and was glad to meet him at the island. There was nothing peculiar about his conversation. They conversed about politics, and about boats, golf, and riding around. Witness was there when Capt. Holton left and settled his bill. Had met him in St. Louis a number of times since he returned from Mackinac. Did not talk with him as long as he had up in Mackinac. Up there they talked half an hour at a time. There was nothing out of the way in his appearance. He always dressed tidy. His deportment was good, he walked upright, and got around as well as witness did. There was nothing strange or peculiar in his actions, and witness considered him of sound mind. On cross-examination he said Capt. Holton might have been sick in the hotel at Mackinac before Mrs. Holton came there; but as a rule he (witness) would hear of such things, because a report is made in case of sickness, and he had not heard of any such thing occurring in connection with Capt. Holton.

Dr. Oman Duesmenil testified in behalf of appellant that he is 47 years old; practicing physician in St. Louis for 26 years; a college graduate; specialist of skin diseases; has had a general medical practice. Knew Capt. Holton during the latter part of 1901, and the last time he saw him was December 9, 1901. He was under his treatment for a skin disease and inflammatory trouble of the face, produced by trouble of the stomach, intestinal troubles, and alcoholic stimulants. Treated him for it. He came to witness' office every fortnight for a year and a half; saw him about 30 times. In that period he was rather lively in his conduct, and witness noticed nothing strange or different in his conduct than in other patients. Had no other business transactions than that. He paid cash every time he came.

Charles A. Thompson, recalled for appellant, testified that he had known Capt. Holton about 18 years, and his relations with him were very close in business, as well as socially; exchanged opinions freely, and relations were intimate. First knew Capt. Holton when he was connected with the St. Louis Shovel Company, and witness was with Mr. Andrew Warren. All his business with the-

old company was carried on through Capt. Holton until the formation of the trust in 1901. The social relations began in 1892, and naturally resulted from the business relations. Purchased large amount of goods from the shovel company, and all through Capt. Holton. There was no change or difference in Capt. Holton's conduct in business matters from 1895, when they commenced, after 1891, when his wife died, or down to 1901, when he went out of business. On the 10th of November, 1902, Capt. Holton was in his office by appointment to sign a bond for witness. He certainly was not under the influence of liquor on that occasion—was not intoxicated—and he was in witness' office possibly an hour and a half. After he got out of the shovel trust, Capt. Holton rather used his office as headquarters. The last time witness saw him was on the 12th of November, 1902, when he came to witness' office and spent two or three hours with him; conversed about current topics, politics, the market, and subjects that gentlemen usually discuss under those occasions. The first time Holton mentioned anything about his family troubles was the time his daughter, Mrs. Burrow, had some trouble with her first husband; only talked with him once about his daughter Alice, and in that he displayed some feeling over the fact that she had threatened to sue him in regard to some settlement. That was in the latter part of 1901, after the merger of the St. Louis Shovel Company into the trust. He expressed himself on several occasions as dissatisfied with the manner in which his son Birchard had been handling his patrimony. Said he was a d—d fool; that he was disappointed in Birch disregarding his advice in his business propositions; that he would have no money; would lose it all; not capable of taking care of it. Met Capt. Holton in August, 1902, at the Auditorium Annex, in Chicago; was with him about three hours the day he left by boat for Mackinac; went to the boat with him. Mr. S. S. Gould was there with them. Saw Birchard Holton and his wife there on that occasion. Saw Capt. Holton join them, and he stayed with them not over 15 minutes, and then came back into the café and joined Gould and witness, and was with them all that afternoon, and the three of them went to the boat. On that occasion Capt. Holton's appearance was perfectly normal. He walked as erect and as firmly as if he was on dress parade. He always talked very loud; have been with him in cafés, and he gave his orders in a loud tone of voice, and in a very peremptory way. If things were to his satisfaction he said so, and if they were not he would express his dissatisfaction in a loud tone of voice. He often had quarrels with the waiters; often ordered things not on the bill of fare. Met Capt. Holton and his wife in New York in 1901, at the time of the consolidation of the shovel concerns, and Capt. Holton told him that the matter was practi-

cally settled. Capt. Holton was in his normal condition on that occasion, in possession of all his faculties, and, from witness' acquaintance with him, he was of opinion that he was a man of sound mind. On cross-examination, witness said that what Capt. Holton said about his daughter Alice was that she had threatened or was going to take her affairs out of his hands and put them in a lawyer's hands—going to sue him. Witness did not know what it was about. That was in November, 1901. When he spoke of Capt. Holton's erect carriage and his dress parade, referred to the whole period of his acquaintance with him. Whether his health was good or not, his manner was always just the same; always buttoned up his coat; stood up straight and erect. In the latter years of his life, Capt. Holton told him he was in ill health a great deal; but his appearance did not indicate it. From his appearance and acquaintance with him, judged him to be 58 or 60 years old. When Capt. Holton dictated the present will in question in witness' office, on the 10th of November, 1902, he dictated it from a previous will which Mr. Zumbalen, the attorney, had written. Capt. Holton took the old will out of his pocket. There was no memorandum whatever on it, and he made none, but just opened it up and went on reading in dictating. He did not say anything to his wife about it, nor she to him.

Mrs. Anna M. Kelley, witness for appellant, testified that she was the mother of Mrs. Holton, the defendant. On the day Capt. Holton killed himself, he went down town about half-past 1 and came back about 4. Had been drinking. His wife discovered he had a pistol with him, and tried to get him to give it up. He would not give it up, and went upstairs, and they heard two shots in the room. Capt. Holton drank often, mostly before meals, and always had liquor in the house, and, when they had visitors, he drank with them. On cross-examination, she said that she thought that, at times, he drank to excess. He often cried, or shed tears, when he talked of the trouble between Mrs. Bright and Birch and himself. His complaint against Alice and Birch was that he said they humiliated him in the East by sending on to the East to have a settlement of some kind made. This was about the stock in the Ames Shovel & Tool Company. He said they had humiliated him in the matter, and had branded him a thief with the Eastern people; that they would not allow the Eastern people to send the papers to him, but insisted on having them sent direct to them. That was what he meant by saying that they had humiliated him sending East "to get a settlement." Did not hear the discussion between them when the settlement was made in November, 1901. The first she noticed of his grieving about the treatment of him by his children was in the fall of 1901, and he grieved over that down to the time of his death. Towards the latter he did not talk about it

as much as he had at first. She heard Capt. Holton tell his son, Birch, that if he forced this settlement on him he would cut him off in his will. That was about the settlement of the stock. He got angry very easily.

Joseph H. Zumbalen testified on behalf of appellant: Is an attorney at law and practicing in St. Louis for 17 years; is 43 years of age; associated in practice with Mr. Clinton Rowell, formerly Rowell & Ferris, before that with Fisher & Rowell, then with Mr. Clinton Rowell. Knew Capt. Holton in his lifetime. Never met the present Mrs. Holton. Had known Capt. Holton since 1890; was a client of their firm, and witness personally attended to business for him from 1890 down. The settlement of Col. Birchard's estate by Holton as executor was conducted under witness' direction as a lawyer. Drew up the contract between Capt. Holton and his daughter Alice (Plaintiff's Exhibit 8a, of date January 2, 1894). During the fall of 1901 that contract came under discussion between Capt. Holton and witness. As the shovel company had passed into the control of the Ames Shovel & Tool Company, the question arose as to the distribution of the trust stock received for the shovel company stock. Capt. Holton did not ask the advice of witness about the matter, or what settlement he should make with his children. He simply told him about it, and that he had made it, and witness said he has a very indistinct recollection of it. What Capt. Holton told him about this stock controversy was preliminary to another matter. They discussed this contract, but not the construction of it—simply the validity of it. He told witness that his daughter Alice said that, unless they agreed upon the distribution of that stock, she would claim all the dividends that had been collected on it by him under this contract, and Capt. Holton asked witness whether she could do that, and whether the contract was valid or invalid. Witness says that he told him that he thought it was a valid contract, and told him why he thought it was valid. Capt. Holton seemed to think that Alice and Birch were claiming a larger number of shares than they were entitled to of the Ames stock, and a larger number than he thought he was bound to give them; but, as to the precise details of that, and the number of shares, and exactly what the controversy hinged on, witness said he could not tell. Capt. Holton gave as his reason for not thinking that Alice and Birch were entitled to the increased number of shares that he had paid them a large rate of interest on their stock, and had taken all the chances of getting anything out of the shovel company stock in return, and he considered that the ultimate success of the shovel business was largely dependent upon his own personal efforts with the shovel company, and he looked upon it, in a large measure, as the result of his own labor. After that Capt. Holton came to witness about the

12th of November, 1901, and told him he wanted him to draw up his will for him. Holton brought with him a written memorandum of how he wanted his will drawn, which witness produced, and it was read in evidence. Witness read it first before the jury as it came to his hands from Capt. Holton, and then read the interlineations in the memorandum which he said Capt. Holton gave him. These interlineations were in witness' own handwriting. In the memorandum as handed to witness by Capt. Holton, this is stated: "I give and bequeath to my son, Birchard R. E. Holton, one dollar; to my daughter, Alice M. Bright, one dollar. The reason of the small bequest is that, during my life, I have earned and paid to them \$20,000 each on an inheritance bequeathed by their grandfather, based on \$5,000 each, making in all \$25,000 each, and I feel that I have fully done my duty as a father in providing this amount." Then, after making other bequests, he provided for giving the balance of his estate to his wife. There was no signature to this memorandum. The witness then stated what suggestions he had made to Capt. Holton about drawing the will, and he states that it was on his suggestion that the reasons for making the bequest or the legacy of \$1 to Birchard and to Alice were left out of the will. Witness then produced and read his office copy of the will, which he had drawn up for Capt. Holton on that occasion, and the original of which was signed by Holton in his office, and witnessed by Mr. Joseph Laurie and Mr. John H. Douglas, Jr. Holton had left the memorandum with Mr. Zumbalen on the 12th of November, and came back on the 16th of November. Witness gave him the will he had drafted. Capt. Holton executed it and took it away with him. No one was with him at the time he brought this memorandum and when they discussed the matter of the will and agreed on the changes. Capt. Holton said that the reasons for cutting off Alice and Birch were those previously stated, and he finally acceded to the judgment of witness that it was best to leave that out, and also to leave out of the will as it was drawn the suggestion contained in the memorandum about a trust in favor of Mrs. Garnett's (now Mrs. Burrow's) daughter, and about some insurance matters. After witness handed the will to Capt. Holton, on the 16th of November, he read it over and said it was just as he wanted it. The next time witness met Capt. Holton was the 25th of November, 1901. On that occasion he transferred a number of shares of stock to his wife, and had witness attest his signature. Witness identified these certificates, from which it appeared that this assignment to Mrs. Holton had subsequently been erased, and these certificates were part of those that came into Capt. Holton's estate. Witness saw him afterwards, so far as he has a distinct recollection as to time, after Capt.

Holton returned from Europe in 1902. Remembers distinctly seeing him on the 26th of November, 1902. Had seen him earlier in the fall, but did not recollect anything particular taking place between them. On the 26th of November, 1902, he came to witness' office to acknowledge an assignment of the life insurance policy to his son, Birchard. Stayed there about half an hour; talked about his trip abroad; said he was out of business, and it was difficult to dispose of his time; seemed quite unhappy and discontented, so much so that he finally broke down and commenced to cry; said he was like a fish out of water; had been accustomed to working hard all his life, but he cannot even go to see his friends now, because they were all busy and he did not like to interrupt them. There was no change in his manner of conversation. Noticed no change whatever in his habit of mind. He was always very nervous and excitable, and rarely quiet for five minutes at a time. Had been that way ever since witness knew him. He was always ready to argue for his convictions, and to assert them, and hung onto them unless you showed him he was wrong. In the opinion of witness, Capt. Holton was a man of sound mind. On cross-examination witness said that it was at his suggestion that the reason for making the small bequest for Alice and Birch had been left out of the will. It was not left out because Capt. Holton agreed that it was not true. He maintained that it was true. Capt. Holton had showed witness the letter of December 6, 1901, from Alice and Birch to him (Defendant's Exhibit D), and he was considerably wrought up over it, as he said it indicated to his mind that his children had a fixed determination to insist upon the last penny, and, as he thought, to dictate to him how he should distribute his estate. Witness distinctly remembered seeing this letter, but could not recall when it was Capt. Holton showed it to him. On redirect examination witness said that Capt. Holton had urged with great persistency his right to the increase in the shovel company stock that had come to it from the Ames Company; had not asked witness' advice as a lawyer, or his opinion as a lawyer, as to whether he had a right to that increase. The question as to his legal right to it did not arise at all. He placed it on the ground that he was the father of these children, and had raised them, and had done well by them, and that they ought not to act toward him as strangers would, and that it was not a question of mere right and wrong; but he had acted liberally towards them, and they ought to feel disposed to act the same towards him, and, if he wanted a certain thing a certain way, that it was but right and just that they should let him have it that way. The question of the legal right never arose, and was not discussed, because he ultimately conceded that when he made the settlement,

as witness understood it. He did not put it on the strictly legal right. He insisted upon his right to retain \$100,000 of the Ames stock, because he wanted that much, and because he thought his children ought to allow it to him under the circumstances. Witness said that he thought Capt. Holton had a basis for that, as he had already stated that was the basis stated in the memorandum, and stated also in the contracts between him and Alice and Birchard, and on the other statement which witness had made to the effect that Capt. Holton considered he had been largely instrumental in creating the value of this property and making the value of this stock for his children. He discussed that view of it in connection with the memorandum for the will which he gave to witness.

Mrs. Lillian M. Holton testified on her own behalf. This testimony is in the record and we submit it to the court. It appears in that testimony that, when witness was recalled to the stand on the second day of her examination, she stated that when she had given her name when first put on the witness stand as Lillian M. Holton she had made a misstatement; that she had been married to Mr. Robert T. Cochran in November, 1903, and was now his wife, and that she had not informed any one of this, and particularly had not informed her attorney of it, until that morning, about a half hour before. She said that she had concealed the fact of her marriage through timidity.

Dr. Edward Francis Brady, a physician, 51 years old, with 27 years' practice, testified on a hypothetical case submitted to him by attorneys for appellant that the subject of it was of sound and disposing mind.

This was practically all the testimony in the case. The suggestion was made of the change of name of Mrs. Lillian M. Holton to Lillian M. Cochran, and it was changed of record accordingly; but all through the trial and in the bill of exceptions and abstract Mrs. Cochran is referred to as Mrs. Holton.

At the conclusion of all the testimony the appellant asked the court to instruct the jury that there was no substantial evidence of the incompetency or unsoundness of mind of Edward K. Holton, or of any undue influence having been exerted over him at the time he executed the instrument read in evidence, and that the jury will find that the instrument was the last will and testament of said Edward K. Holton. The court refused the instruction, and appellant, Lillian M. Cochran, duly excepted. At the instance of plaintiffs, respondents here, the court gave instructions marked 1, 2, 2a, 3, 7, 8, and 9, to the giving of each of which appellant duly excepted, and on its own motion gave an instruction as to the number of jurors necessary to concur in the verdict, which are as follows:

"(1) The issue submitted to you in this proceeding is this: Is the paper writing here produced and offered in evidence before you



the will of Edward K. Holton, deceased? If, under the instructions given, you find from the evidence that said paper writing here produced is the will of Edward K. Holton, deceased, you will return your verdict in this form: 'We, the jury, find that the paper writing produced and read in evidence is the will of Edward K. Holton, deceased.' If, under the instructions given, you find from the evidence that said paper writing here produced is not the will of the said Edward K. Holton, deceased, then you will return your verdict in this form: 'We, the jury, find that the paper writing produced and read in evidence is not the will of Edward K. Holton, deceased.'

"(2) In determining the issue of sufficient soundness of mind or testamentary capacity possessed by the testator to make a will, before you can find in favor of the proposed will, you must believe from the preponderance of the evidence that at the time of the signing and execution thereof said testator had sufficient understanding to comprehend the nature of the transaction he was engaged in, the nature and extent of his property, and to whom he desired to and was giving it, without the aid of any other person, and unless the defendant has shown by such preponderance of evidence that Edward K. Holton did possess all these requisites you should find the issue in the negative and against the will.

"(2a) In determining the issue of sufficient soundness of mind or testamentary capacity possessed by the testator to make a valid will, the will itself and all its provisions may be considered by the jury, in connection with all the other facts and circumstances given in evidence.

"(3) Although the jury may find from the evidence that Edward K. Holton, at the time of executing the paper offered as his will, possessed many of the mental requisites in these instructions set out as necessary to qualify him to make a valid will, yet if the jury further find from the evidence that from the time of turning over to his son, Birch, and his daughter Alice the stocks of the Ames Company belonging to them, down to and including the time of the execution of the paper here offered as a will, the said Edward K. Holton labored under the insane delusion, as hereinafter defined, that said son and daughter had exacted of him and that he had turned over to them a greater amount of said stocks than they were lawfully entitled to demand and receive from him as their trustee, and that such delusion overcame and controlled his will and judgment in the execution of the papers offered as his will, and that without the operation of such delusion upon and controlling his mind and judgment he would have made other provisions in his will for his said son and daughter, or either of them, then you should find that the paper offered is not the will of Edward K. Holton. An insane delusion is a fixed and settled be-

lief in something that in fact had no existence, which no rational mind would believe."

"(7) You are the exclusive judges of the evidence and of the credibility of the witnesses. You will take the law as given you in the instructions of the court. In weighing and reconciling the testimony, you should look to the manner and demeanor of the witness in testifying; to his or her readiness and willingness, or tardiness and unwillingness, in answering upon the one side or the other, if such be the fact; to the interest or want of interest of any witness in the case; to whether the witness has any bias or feeling, or not; to his or her relationship to any of the parties in interest; to the witness' means of knowledge of the facts he testifies to and professes to know and understand; to his or her chance or opportunity for knowing the facts; to the reasonableness or unreasonableness of the story told; to its probability or improbability; to whether the witness has made contradictory statements, or not, about material matters involved in the case; and, having thus carefully considered all the matters, the jury must fix the weight and value of the testimony of each and every witness and of the evidence as a whole.

"(8) Under the law the opinions of expert witnesses are admissible in evidence, and are to be given such weight and value as the jury may think right and proper under the circumstances. The value of an expert opinion depends, not only upon the qualifications and experience of the witness, but upon the facts which he takes into consideration and upon which he bases his opinion. If the facts assumed, and which are made the basis of the opinion, are not established by the proof, then the opinion would have no basis upon which to rest, and would be of no value; and in weighing such opinions the jury must look to see whether the facts assumed are established by the proof or not, and you cannot take the facts assumed by the witness to be true simply because they are so assumed, but you will look to the proof to determine whether they are proved or not.

"(9) By the expression used in the instructions in this case, 'preponderance or greater weight of the evidence,' is not meant the mere number of witnesses who have testified for or against a given question of fact in issue before you. Such expression means that, after you have fully and carefully considered all the evidence in the case, you should decide any one of the questions of fact in favor of the party with whom you find the proof on such fact to have the most convincing effect upon your minds, after you have fully considered all the facts and circumstances in evidence bearing upon such question."

To which action of the court in giving said instructions numbered 1, 2, 2a, 3, 7, 8, and 9, the defendant, Lillian M. Holton, otherwise Cochran, then and there duly excepted.

The defendant, Lillian M. Holton, other-

wise Cochran, asked the court to give instructions Nos. 1, 3, 4, and 6, which are as follows:

"The court instructs the jury:

"(1) The issue in this case is whether or not the document produced and read in evidence, of date November 10, 1902, is the will and testament of Edward K. Holton, deceased. Under the law of this state every male person, being 21 years of age and upwards, may dispose of all his estate by will, saving to the widow her dower, in such manner as he sees fit and proper, provided he is at the time he makes the will of sound mind, and provided the will is in writing, or type-written, which is the same thing, and is signed by him, and is attested by two or more competent witnesses subscribing their names thereto in his presence. If, therefore, the jury believe from the evidence in the case that the writing produced and read in evidence was formally executed by Edward K. Holton, according to the above requirements of the law, and that two or more of the subscribing witnesses thereto have testified to the sanity of Edward K. Holton, and that he was of proper age to make a will, then the court instructs you that a prima facie case in favor of the will is made out, and it then rests upon the contestants—that is, the plaintiffs in the case—to overcome this prima facie case by substantial evidence. By 'prima facie case,' as here used, is meant such a case as, in the absence of evidence to the contrary, is held to be true."

"(3) The court further instructs you that there is no legal evidence in this case tending to prove that Lillian M. Cochran possessed any undue influence over the mind of Edward K. Holton, as the term 'undue influence' is used in the law, or that she exerted or exercised any undue influence upon him at the time when he is alleged to have executed the paper produced as his will; and in arriving at your verdict you will confine yourselves to the evidence bearing upon the question whether or not Edward K. Holton, at the time when he is alleged to have executed said paper as his will, was of sound mind, as 'sound mind' has been defined in the other instructions.

"(4) The court further instructs you that it requires no greater mental capacity to make a valid will than to transact any ordinary business, and that the owner of the property, who is of sound mind, as 'sound mind' had been explained to you, has a lawful right to dispose of his property by will as he sees fit and proper, save as to such rights of dower as are in the wife. The natural objects of one's bounty, in law, are a man's wife, his children, and those united to him by blood or marriage; but if, being of sound mind as heretofore defined, and recollecting his children or kin, he chooses to disinherit them or give them or any of them a less share in his estate than they would have under the law if he had died without making a will, or to deprive those nearest to

him in blood of all benefit of his estate, he has a right to do so, and to determine what provision he desires to make for them, and such disposition of his property is valid, whether the jury considers it reasonable or unreasonable, just or unjust. If, therefore, the jury believe from the evidence in the case that Edward K. Holton, recollecting and knowing who his children and the natural objects of his bounty were, chose to entirely disinherit any of them, or to leave them or any of them a comparatively small portion of his estate, or less than he left to others, or less than under the law they would have been entitled to if he had died without making a will, he had a right to do so, provided he was at the time of sound mind, as sound mind has been explained."

"(6) The court further instructs you that the fact that Edward K. Holton may have committed suicide shortly after making his will in itself creates no presumption that he was insane when he committed suicide, or that he was insane when he is alleged to have executed the paper produced as his will."

The court gave each of said instructions except the sixth, which it refused to give, to which action in refusing to give said sixth instruction said defendant, by counsel, then and there duly excepted.

The said defendant also asked the court to give instructions marked defendant's second and fifth instructions, each of which the court refused to give, but modified each of them by adding thereto the following words in italics, "without the aid of any other person," and gave them in that modified form, to all of which the appellant duly objected and timely saved her exceptions. Said instructions, as modified and given, are as follows:

"(2) The court further instructs you that, this prima facie case being assailed and the validity of the document as the will of Edward K. Holton being attacked on the ground of the alleged unsoundness of mind of Edward K. Holton at the time when he is alleged to have executed said paper, it is for the defendants—or proponents of the will, as they are called—to prove that Edward K. Holton was of sound mind at the time when he is alleged to have executed the paper produced, of date November 10, 1902. In determining the question of whether or not Edward K. Holton possessed testamentary capacity, as it is called—that is, whether or not he was of sound mind, as that term is used in reference to the capacity to make a will—on November 10, 1902, the date when he is alleged to have made and declared the paper produced as his will, the court instructs you that if you find from a preponderance of the evidence in the case that said Edward K. Holton, at the time it is claimed he executed the paper in writing produced as his last will, had sufficient understanding and intelligence to comprehend the nature of the transaction in which he was then engaged, the nature and extent of his property, and

all persons who reasonably came within range of his bounty, and those to whom he desired to and was giving it, *without the aid of any other person*, then the court instructs you that he was possessed of sufficient mental capacity or soundness of mind to make a will."

"(5) The court further instructs you that, even if you believe from the evidence in the case that Edward K. Holton drank to excess or was suffering from disease, and either of these to such an extent as to weaken or impair his mental faculties, yet if you find that, at the time when it is alleged he executed the paper produced as his will, he was sufficiently sober and sufficiently in possession and control of his mental faculties to know and understand and comprehend the fact that he was then signing and publishing and declaring said paper as his will, and so as to understand and comprehend the nature and extent of his property, and who were reasonably within the range of his bounty, and to whom he was giving and how he was disposing of his property, *without the aid of any other person*, then the court instructs you that you should find he had sufficient mental capacity to make a will; and, if you so find, your verdict will be in favor of the defendant, and you will find that the paper produced of date November 10, 1902, is the last will of Edward K. Holton."

Afterwards, on April 1, 1904, during the February term of said court, the jury, under the evidence and instructions given, found the issues for the plaintiffs, respondents here, and against the validity of the will, and judgment was rendered accordingly. In due time defendant, appellant here, filed her motion for a new trial, which was by the court overruled, to which action and ruling of the court she duly excepted, and in due time appealed from said judgment, and has brought the case to this court for review.

Geo. D. Reynolds and Geo. V. Reynolds, for appellant. Virgil Rule, for respondents.

WOODSON, J. (after stating the facts as above). 1. The evidence of the subscribing witnesses tended to show the testator was of lawful age and of sound mind, as well as the due execution of the will. This made a prima facie case for the proponent. *Harris v. Hayes*, 58 Mo., loc. cit. 96. The burden, then, of establishing incompetency of the testator to make the will, or that its execution was the result of undue influence exercised over his mind by others, was shifted to and rested upon the contestants. *Harris v. Hayes*, supra. This brings us to the first proposition contended for by the appellant, namely, that there is no substantial evidence in this record to support the verdict, and for that reason the trial court erred in refusing appellant's instruction, in the nature of a demurrer to the evidence, asked at the close of respondents' case in chief. The legal test of the requisite mental capacity to make a valid

will is measured by the following well-established rule: "The rule in this state is that one who is capable of comprehending all his property and all persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property, has sufficient capacity to make a will. *Riggin v. Westminster College*, 160 Mo. 579, 61 S. W. 808. Measured by this rule, let us look at the evidence preserved in this record and see if the testator comes up to these requirements. In testing his mental capacity according to this rule, we must not allow ourselves to become confused as to the time his mind is being inquired into. That he fully came up to those requirements prior to the death of his first wife cannot be denied; but what the condition of his mind was on November 10, 1902, the day on which the will was executed, is a different question altogether, and one not altogether free from doubt. Conceding that he was capable of comprehending all his property and all the persons who reasonably came within the range of his bounty, can it be said and declared as a matter of law, under the light of the evidence in this case, that he possessed sufficient intelligence to understand his ordinary business and to know what disposition he was making of his property at the time he signed this will?

We think not. Prior to the death of his wife the evidence shows that the testator was a man of more than ordinary intelligence and business ability, and that he was not only capable of transacting his ordinary business affairs, but that he was also very successful in all his business enterprises. The contestants introduced a large number of witnesses, about 25 in number. They consisted of his family physician, three medical experts, the three children of the testator, and several other blood relations, all his business associates, with probably one exception, a number of gentlemen with whom he had business transactions, extending over a period of many years, and several of his neighbors and personal friends and old acquaintances. All the physicians who testified in the case stated that the continued and excessive use of alcoholic liquors would affect the mind, and, if continued for a sufficient length of time, would eventually destroy it entirely. That, however, is common knowledge, and is known by every one of ordinary intelligence and common observation. Dr. Graves, the testator's family physician, who appears from his evidence to be an unusually bright and well-posted physician, testified that he had attended Capt. Holton professionally for 9 or 10 years just prior to his death, and treated him on an average of three or four times a month during that time, excepting the last 18 months of his life, and that during those months he treated him seven or eight times a month, while the testator was in the city. In substance, he testi-

fied that Capt. Holton, prior to the death of his wife, was a moderate drinker, but subsequent to that event he used alcoholic liquors to an excess, and that the quantities consumed by him increased as time passed down to the time of his death; that this excessive use of alcoholic liquors had materially affected his mind, and that for two years prior to his death he was suffering from neurasthenia, catarrh of the stomach, and senile dementia, brought on by excessive drink; that senile dementia was a general and progressive breaking down of the intellectual faculties; and that the testator was of unsound mind at the time he executed the will in question, and that he had been so for more than two years prior thereto. He also testified that he attended Capt. Holton in his last hours, and that he died of gunshot wound, self-inflicted. Drs. Bliss, Fry, and Herman were witnesses in behalf of contestants, and testified as experts in the case. A hypothetical question of great length, detailing in substance all the material facts which the evidence tended to prove, was propounded to each of them, and, in answer thereto, states that in their judgment the testator was suffering from pre-senile dementia, and was of unsound mind at the time he signed the will.

All of the members of his family and blood relations, including his business associates, testified that there was a gradual and complete physical and mental change took place in him during the last two years of his life. From a strong, vigorous specimen of manhood that he was, he became weak and emaciated, having lost from 40 to 50 pounds in weight; had a drawn, pinched face, and wild staring eyes; that from a bright, sunny disposition, in love with life and full of hope, we find him tired of life, filled with despondency, inconsolable, and melancholy. The loving husband buried his affections with his first wife, and there was no apparent effort made to resurrect them before the altar at the second marriage. The affections of a kind and proud father were metamorphosed into hatred, spite, and ill will, and the only heritage he left to his offspring was banishment from his presence forever with a curse. The dutiful son lost all respect and love for his old and helpless parents, and with an oath told them they had lived too long, and that he wished his "mother was dead and in hell." At the funerals of his father and mother he acted more like a demon than an affectionate and dutiful son. He said, substantially, he did not want any damned singing during the services, nor prayers at the grave; that he wanted the services cut damned short, and if they were not cut short he would interrupt them. He lost all respect for religion, cursed, and said there was no God or Heaven. His high sense of honor and justice changed to dishonor and injustice toward his children, coveting with an insane or abnormal desire to take from them the heritage their grandfather left in

his hands as trustee for their use and benefit. This man of fine sense and sound judgment has given up to excessive drink, debauchery, and to the abuse of his fellow man. This once companionable man is all at once left almost without a friend, as he repeatedly stated, in substance: "No one cares for me, not even my wife or children, and my business associates have mistreated me and kicked me out of business." His splendid business ability had surrendered to the ravages of time and to the withering effects of the excessive use of alcoholic liquor, so that for more than one year before he went out of business he was unable to concentrate his mind on any business matter for any length of time whatever without a physical breakdown, and would repeatedly state he "was exhausted and tired." He got to the point that whenever any business proposition would come up for discussion, and if it did not conform to his views, he would fly almost into a spasm and could hardly control himself. During the greater part of 1900 and 1901 he greatly neglected his business. Frequently he would not go to the office before 11 o'clock in the morning, and often he would not return in the afternoon. He grew worse in that regard until the year 1901. He very seldom visited the office, or attended to his ordinary duties, which was a matter of great annoyance to his business associates, and they repeatedly complained to him about his neglect of duty. He persistently stated that he was tired out and wanted to get out of business, so he could get a respite from the labors of this life; that was the burden of his remarks for months in the former part of 1901. His main object in wanting to consolidate with the Ames Company was to enable him to get out of business. His talk was incoherent, and he would curse and abuse Birge because he thought Birge would not let him get out of business. He wanted to get stock in the new company. He said: "I can sell that, and then I can rest." He cared but little about the terms of consolidation. He wanted to accept the first terms offered, and became very angry at Mr. Birge for not accepting the first proposition made, and cursed and shook his fist in his face because of that refusal. He could not concentrate his mind upon any business topic without becoming exhausted and tired out. After the consolidation with the Ames Company Birge was chosen manager of the St. Louis branch. This greatly offended Capt. Holton, and he said he wanted that place, and that he (Birge) had kicked him out of business. He could not understand the simple duties of his trusteeship of his children's estate. He could not see by what right they could make him account to them for \$40,000 stock in the Ames Company, which was four-fifths of their stock in that company, given to them for their \$10,000 stock in the St. Louis Shovel Company. During the last year or so of his life his wife did most of his correspondence,

and signed his name to some of the letters. She looked after his bank account and drew his checks, and she looked after and attended to the exchange of his stock in the St. Louis Shovel Company for that in the Ames Company; and the evidence shows she was none the worse for having done so. This record discloses that, what little business he had to transact during the last two years of his life, she attended to the most of it for him. The first will executed by him was drawn from a memorandum in her handwriting, and the will in question was dictated from that one with but few changes, which were principally in her favor. He repeatedly stated that he intended to will one-third of his property to his wife and the other two-thirds to his children, and subsequently stated to various parties that he had provided well for his children and his insane brother, while in fact he had given the former nothing by his will, and had given the brother the munificent sum of \$500, to be paid to him by his wife as his needs might demand. The record shows she had him to transfer to her all his life insurance, the amount of which does not clearly appear, but somewhere between \$5,000 and \$15,000. He also, at her solicitation, transferred to her about \$20,000 worth of the Ames Company stock and about \$4,500 in cash, and about 20 days before he committed suicide he cut down the bequest to his daughter Lulu from \$10,000 to \$5,000, and then willed the entire remainder of his estate to his wife, which was worth something over \$100,000.

There are a few facts in this record which stand out in bold relief, and among them are the following: Every witness, without an exception, introduced by respondents, most of whom were either blood relations or business associates, testified that in their opinions the testator was of unsound mind at the time he executed the will, and had been for about two years prior thereto. The sincere love and devotion Capt. Holton entertained for his first wife and all of his children. In fact, the loss of his wife was really the primary cause of his excessive drinking and downfall, and at the same time increased and intensified his love and affections for his children. The unjust and illegal claim he made to the major portion of his children's stock in the Ames Tool & Shovel Company, and their disinheritance by him, because they would not yield to his unlawful and unjust demands. And this record does not show Capt. Holton entertained any special love for his second wife, or that she entertained much for him. Upon this state of the record, the question naturally presents itself, why did he disinherit his children, whom he loved better than all others on earth, and give that which naturally belonged to them to another, who was a wife but in name, and for whom he entertained but little respect and less affection? Why did he have his children assign to her the insurance policies on his life

and payable to them? Why did he reduce the bequest of \$10,000 made to his daughter Lulu in the first will to \$5,000 in the second or last will? And why did he want to illegally and unjustly take from his son, Birch, and daughter, Alice, \$40,000 worth of stock in the Ames Company? In answer to the last question, under the light of the evidence in this case, it would not take a very strong prophetic eye to see that his object and purpose was to take from them that which legally and morally belonged to them, and to illegally and immorally give it to their step-mother, the person and agent who so ably and successfully conducted and managed his business as to have at his death, not only a "joint bank account" with him, but the exclusive ownership of his entire fortune. Viewed in the light of all the facts and circumstances surrounding the testator and the beneficiaries under the will, we can but denounce it as one of the most unnatural and unjust wills to which our attention has been called; and in our judgment there is but one explanation for his conduct, and that is he was of unsound mind and did not understand his ordinary business, nor what disposition he was making of his property. *Crossan v. Crossan*, 169 Mo., loc. cit. 639, 70 S. W. 136; *Achambault v. Blanchard*, 198 Mo. 384, 95 S. W. 834; *Sayer v. Trustees et al.*, 192 Mo. 95, 90 S. W. 787. We are therefore of the opinion that the contention of appellant that there is no evidence in the case to support the verdict is not well founded, as the facts and evidence disclosed by this record abundantly show.

We have carefully read every word and line of the voluminous abstracts of record in this case, and find much strong and creditable testimony introduced on the part of appellant tending to prove the sanity of the testator and to show that he was mentally capable of making a valid will. Yet, when we consider that most of her witnesses did not bear the same close family, social, and business relations to the testator that the respondents' witnesses bore to him, and for that reason they did not possess the same favorable position and opportunities of seeing and knowing him as they did, this gives to their evidence great weight. As said by this court: "Testimony of the mental capacity of the testator should come, as far as possible, from those persons who have had extensive opportunity to observe his conduct, habits, and mental peculiarities, extending over a considerable period of time, and reaching back to a period anterior to the malady. *Knapp v. Trust Co.*, 199 Mo. 640, 98 S. W. 70. The marked changes in his social and business habits, mind, and love and devotion for his children are strong evidences of unsoundness of mind. As well said by Gantt, J.: "Insanity is indicated by proof of acts, declarations, and conduct inconsistent with the character and previous habits of a person." *Knapp v. Trust Co.*, 199 Mo., loc. cit. 665, 98 S. W. 70. We are, there-

fore, not only unable to say the verdict is against the weight of the evidence, but in our judgment there is not only substantial evidence in this record to sustain the verdict, but if it was within the province of the court to weigh the evidence, and if we were called upon to do so, we would unhesitatingly say the preponderance of the evidence was on the side of the respondents. We are therefore of the opinion the trial court correctly refused appellant's demurrer to the evidence.

2. The second assignment of error made by the appellant is the action of the court in giving respondents' third instruction. That instruction, in effect, told the jury that, even though they might find the testator possessed many of the mental requisites which were necessary to qualify him to make a valid will, yet if they further find that he was laboring under an insane delusion that his son, Birch, and his daughter, Alice, had exacted of him and that he had turned over to them a greater amount of stock in the Ames Company than they were lawfully entitled to, and that such delusion overcame and controlled his will and judgment in the execution of the will, then they would find the instrument was not the will of testator. Counsel for appellant seem to misconstrue the meaning of this instruction. Their contention is that this instruction confused the minds of the jury and was contradictory in itself; for if he had the mental requisites to make a will he could not have had an insane delusion, and if he had an insane delusion he had not the mental requisites to make a valid will. Counsel seem to be laboring under the erroneous impression that this instruction told the jury that, even though they found from the evidence that the testator possessed all of the mental requisites necessary to qualify him to make a valid will, yet, if he was laboring under a delusion, then they would find that it was not his will. But by reading the instruction it will be seen that it does not make use of the word "all" in connection with the mental requisites one must possess in order to make a valid will; but it uses the word "many" in that connection, which makes the instruction read and mean that even though he may have possessed many of the mental requisites, yet if he still had an insane delusion, and that delusion controlled him, then it was not his will. This we understand to be a correct statement of the law, because he must possess all of the requirements of the rule, namely, must be "capable of comprehending all his property and all persons who reasonably come within the range of his bounty and have sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property. *Riggin v. Westminster College*, 160 Mo. 579, 61 S. W. 803. This rule makes four requisites, and one must possess all of them before he is capable of making a valid will; and the instruction complained of in effect told the jury that the possession of a portion

of them was not sufficient, but that he must have possessed all of them. Clearly there was no error in the instruction, nor in the action of the court in giving it. It is in harmony with a long, unbroken line of adjudications in this state. *Benoist v. Murrin*, 58 Mo. 322; *Jackson v. Hardin*, 83 Mo. 175; *Brinkman v. Rueggeseck*, 71 Mo. 558; *Hughes v. Rader*, 188 Mo. 708, 82 S. W. 82.

A second objection lodged against this instruction is that it practically told the jury that there was no basis for Capt. Holton to claim anything over the \$5,000 referred to. We have very carefully read all the evidence in the record bearing upon this claim of the testator, and have failed to find any evidence whatever tending in the remotest degree to support any legal or moral right he had to any portion of the bequest made to his son and daughter, or to any of its increase. The only pretense set up by him to said fund is that he was an officer and stockholder in the St. Louis Shovel Company, and that through his efforts the value of the children's stock therein had greatly increased, and for that reason he was entitled to all, or at least a portion, of that increase. But the evidence conclusively shows that he was the father and trustee of said children, and that he was paid a fair consideration for whatever services he rendered the company, and that he received, not only the dividends declared upon his own stock in the company but also all of those on the children's stock, over and above 8 per cent. interest, which he paid them annually in lieu of the dividends, which greatly exceeded the 8 per cent. by nearly \$8,000. Besides this, the evidence shows he was but one of a number of gentlemen who contributed their valuable services to this company, and through whose efforts the stock was made so valuable. In fact, he was by no means the controlling spirit in that company, and, had it not been for the dogged tenacity of Julius Birge, its president, displayed during the negotiations of consolidation, much of the value of the stock would have been sacrificed to the Ames Company, which would have included all of the stock of the company—his own, as well as that of his children. This pretended claim of the testator was so destitute of merit, and so devoid of all justice and equity, the irresistible conclusion must be reached that no sane man, with the love and affections he unquestionably entertained for his children, would have so persistently asserted it as he did, nor would have disinherited them, and forever banished them from his presence, simply because of their denial of that unreasonable and unjust claim; and especially is this true where the evidence shows they were practically without means, and that he had plenty and was living in affluence. We are therefore not only of the opinion that Capt. Holton was of unsound mind at the time he executed the will, as stated in paragraph 1 of this opinion, but we are also of the opinion that there was sub-

stantial evidence tending to prove he was laboring under an insane delusion that his son and daughter had unjustly exacted of him and that he turned over to them a greater amount of the Ames stock than they were lawfully entitled to demand from him as their trustee, and that such delusion controlled his will and judgment in the execution of the instrument offered as his will, and that there was no error in the action of the court in submitting that issue to the jury. If that delusion existed and dominated him in making his will, as the jury found, and in which we concur, then Capt. Holton was incapable on that account of making a valid will. *American Bible Society v. Price*, 115 Ill., loc. cit. 632, 5 N. E. 126; *Knapp v. Trust Co.*, 199 Mo. 640, loc. cit. 667, 98 S. W. loc. cit. 78; *Lancaster v. Lancaster*, 87 S. W. 1137, 27 Ky. Law Rep. 1127; *Benoist v. Murrin*, 58 Mo., loc. cit. 319; *Thomas v. Carter*, 170 Pa. 272, 33 Atl. 81, 50 Am. St. Rep. 770; *Boardman v. Woodman*, 47 N. H. 186.

3. The next complaint of appellant is found in her objection to instruction No. 2 given for respondent, and to the action of the court in refusing to give the second and fifth instructions as asked by her, and their modification by the court, and its action in giving them in the modified form. Instruction No. 2 given for respondent in effect told the jury that, in determining the testamentary capacity of the testator to make a will, they must believe from the evidence that he had sufficient understanding to comprehend the nature of the transaction he was engaged in, the nature and extent of his property, and to whom he desired to and was going to give it, *without the aid of any other person*, and, unless she has shown by the evidence he possessed all of these requisites, then they should find against the will. The particular objection urged against this instruction is directed against the words, "without the aid of any other person," which are found therein italicized. Counsel for appellant contends that, "if it is meant by the use of those words to include that as a test of the validity of the will, then it is an injection of a qualification not set out in the statute of wills." *Rev. St. 1899, § 4602 [Ann. St. 1906, p. 2501]*. Counsel clearly misconceived the meaning of this instruction. It is not meant by the use of those words to add an additional qualification to those prescribed by the rule of law, declaring what the mental requisites are which a person must possess in order to be qualified to make a valid will. They are employed for the sole purpose of indicating to the jury the degree or strength of the mind which was necessary for the testator to possess at the time of the execution of the will, in order to stamp it with validity. If the testator's mind was not strong enough "without the aid of some other person" to comprehend all his property and all the persons who naturally came within the range of his bounty, or if he did not have

sufficient intelligence to understand his ordinary business, or to know what disposition he was making of his property, without the assistance of some one else, then he was not a man "of sound mind" within the meaning of those words as used in the statute of wills. A man would have to be almost an idiot or a raving maniac if he could not, with the assistance of others, recall to mind his property and the natural objects of his bounty, or be made to understand he was making a will and to realize to whom he was giving his property; but, if let alone and unassisted, he could be wholly incapable to call all of those things to mind, and comprehend the nature of the transaction and the disposition he was making of his property. The instruction in question was bottomed upon the doctrine announced in the case of *Crossan v. Crossan*, 169 Mo., loc. cit. 641, 70 S. W. 139, in which the court, speaking through Gantt, J., said: "At the time of signing and executing the will, the testatrix had sufficient understanding to comprehend the nature of the transaction she was engaged in, the nature and extent of her property, and to whom she desired to and was giving it, without the aid of any other person." That case and the authorities upon which it is based is decisive of the question here presented.

Appellant's instructions 2 and 5 asked were in effect the same as respondents' No. 2, just discussed, with the words "without the aid of any other person" omitted therefrom. The court refused the instructions as asked, and then modified them by inserting the words, "without the aid of any other person," and gave them in that modified form, to which action of the court the appellant excepted. According to the law as declared in passing upon instruction No. 2 as given for respondents, we must hold that there was no error in the action of the court in refusing said instructions as asked, nor in modifying and giving them in the modified form.

4. It is next insisted by appellant that the trial court erred in permitting the hypothetical question propounded by respondents on the subject of the testator's insanity or the unsoundness of his mind to be asked or answered. It is contended that the question "failed to present the principal and controlling facts, many of the facts presented are incorrectly grouped and incorrectly stated, and that they were stated in a misleading manner." The question is very lengthy, and would probably cover 10 or 12 pages of one of our Reports, if set out in full, which we believe is unnecessary. We have, however, carefully examined the facts assumed in the hypothetical case, and are of the opinion that it embodies substantially all of the material facts relating to the subject under consideration. Counsel for appellant have not pointed out to us in what particular the facts are improperly grouped, or in what manner they are misleading to the jury. We have re-examined the question with those sugges-

tions in mind, and have failed to discover the error complained of in that regard. If, however, the question is subject to the criticisms made by appellant, it is her fault in not calling our attention to the specific objectionable features. *Longan v. Weltmer*, 180 Mo. 340, 79 S. W. 655, 64 L. R. A. 969, 103 Am. St. Rep. 573. If the hypothetical question substantially embraces the facts disclosed by the evidence, that is sufficient and all the law requires. *State v. Baber*, 74 Mo., loc. cit. 297, 41 Am. Rep. 814; *Clevenger's Medical Jurisprudence*, 544. And "counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts which the evidence tends to establish, and may vary the question so as to cover and present the different theories of facts." *Hicks v. Citizens' Ry. Co.*, 124 Mo., loc. cit. 125, 27 S. W. 542, 25 L. R. A. 508.

5. Complaint is made to the action of the court in refusing appellant's sixth instruction asked. It told the jury, in effect, that the mere fact that Edward K. Holton may have committed suicide shortly after the execution of the will in question created no presumption that he was insane when he executed the will, or when he committed suicide. While it may be true that the mere fact he committed suicide would not raise a presumption that he was insane at the time he signed the will, or at the time he took his own life, yet the evidence abundantly shows that there was a strong predisposition to insanity in the testator's family, which fact, and the act of suicide, the physicians testified would have a good deal of weight in determining the condition of his mind at the times in question. Under this state of the evidence the instruction would have been misleading to the jury, and would have virtually eliminated from their consideration the fact of suicide, which fact they had the right to consider and weigh with all the other facts and circumstances in the case. If the fact of suicide was admissible at all in the evidence, then the jury should have been left at liberty to weigh that fact, just as they would any other fact in the case, without any special attention being called thereto on the one side or the other. The jury was not told that suicide would raise such a presumption, and clearly there was no error in the court's action in refusing to give to the jury the instruction mentioned.

6. It is finally contended by appellant that the admission of the evidence of the action of Capt. Holton at the time of the death of his wife and father-in-law, which occurred in 1891, had no tendency to establish the condition of the testator's mind at the date of making the will in 1902. In this contention we cannot lend our concurrence. Judge Sherwood tersely and clearly stated the law upon that question in the following language: "Although, when a charge of insanity or imbecility is made against a testator, evidence is competent to show the condition of his

mind long prior to and closely approaching the time of the will's execution, as well as the condition of his mind shortly subsequent to such execution." *Von De Veld v. Judy*, 143 Mo., loc. cit. 363, 44 S. W. 1117. And in the case of *Knapp v. Trust Co.*, 190 Mo. 640, 98 S. W. 70, this court said, in case of this character, that the inquiry should extend over a considerable period of time and reach back to a period anterior to the malady.

7. There are several other minor reasons assigned for a reversal of the judgment, based principally upon the rulings of the court regarding the admission and rejection of testimony. We have carefully examined all of them, and find no substantial merit in any of them, and it would be a useless prolongation of this opinion, which is too long now, to further review them. In our opinion, the cause was well tried, and the conclusions reached are in harmony with the right and justice of the case.

The judgment of the circuit court was for the right parties, and it is therefore affirmed. All concur.

#### KIRBY v. MANUFACTURERS' COAL & COKE CO.

(Kansas City Court of Appeals. Missouri. Dec. 2, 1907. Rehearing Denied Jan. 6, 1908.)

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.

The miners' statute of 1899, Rev. St. 1899, c. 183, art. 2, § 8823 [Ann. St. 1906, p. 4099], requires entry ways in mines to be run parallel for ventilation purposes, with cross-cuts not more than 50 feet apart. Section 8826 [Ann. St. 1906, p. 4099] requires, in part, that all shots prepared by the miner for extracting coal from the solid shall be so placed, drilled, and charged that when fired they shall perform safely the work required of such shots. *Held* that, where two entries were allowed to converge until only 7 or 8 feet apart at a point where by law a new cross-cut must be made, and a shot was driven deep into the dividing wall, so that when fired it broke through into the other entry and killed plaintiff's husband, there was a violation of the statute, which under the express provisions of section 8820 [Ann. St. 1906, p. 4096] gave plaintiff a right of action for damages therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 209.]

##### 2. SAME.

*Held* further, that while section 8826, Rev. St. 1899 [Ann. St. 1906, p. 4099], requires the safe placing of shots to be done by the miner, a fellow servant of deceased, yet the fact that the entries were allowed by the pit boss to converge to such a short distance apart at a spot where a new cross-cut must be made, and that he allowed a shot to be placed at such spot, was negligence on his part, rendering the employer liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 491.]

##### 3. SAME—CONTRIBUTORY NEGLIGENCE.

The miners' statute of 1899, Rev. St. 1899, c. 183, art. 2, § 8826 [Ann. St. 1906, p. 4099], requires the shot firer, if he discovers that a drill hole is gripping too much, or that it is drilled too much into the tight, so that it may, in his judgment, prove dangerous, to pass it



without firing, and promptly notify the mine foreman that it has been condemned. *Held*, that the section only imposes diligence and caution on the shot firer, and does not necessarily make him negligent in failing to discover the danger in a shot fired by him.

#### 4. SAME—QUESTIONS FOR JURY.

In an action against a mine owner for the death of an employe, the question of decedent's contributory negligence *held* for the jury, under the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

#### 5. SAME—ASSUMPTION OF RISK.

A servant does not assume the risk of his employer's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 547.]

#### 6. SAME—GROUNDS OF ACTION.

The miners' statute of 1899, Rev. St. 1899, c. 133, art. 2, § 8823 [Ann. St. 1906, p. 4098], requires entries in coal mines to be run parallel with cross-cuts not less than 50 feet apart for ventilation purposes. A pit boss allowed two entries to converge till, at a point where a cross-cut must be run, they were only 7 or 8 feet apart, and permitted a shot to be placed in the dividing wall, which blew through into the next entry and killed plaintiff's husband. *Held*, that an action for his death was not an attempt to recover for a violation of the statute, on account of an injury not intended to be prevented thereby; the action not being based on the violation of the statute, but on the negligent placing of a shot in a wall unsafe therefor, and made unsafe by failure to run the entries parallel as required by law.

#### 7. TRIAL—RECEPTION OF EVIDENCE—DISCRETION OF COURT.

It is not an abuse of the discretion of the trial judge for him to permit plaintiff's counsel to confer privately with one of defendant's witnesses before entering on the cross-examination of such witness.

#### 8. APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR.

Objections to evidence elicited by plaintiff as being the conclusions of the witness will not be ground for reversal, where the same line of questioning was pursued by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3597-3599.]

Error to Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by Kate B. Kirby, against the Manufacturers' Coal & Coke Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Percy Werner, for plaintiff in error. Higbee & Mills, for defendant in error.

ELLISON, J. The defendant is a coal mining corporation, who had in its employ one Joseph Kirby, who, while engaged in such employment, was killed by the blasting of coal in the mine. The plaintiff is his widow, and brought the present action for damages resulting to her on account of his death. The judgment in the trial court was in her favor.

The defendant contends that the action can only be maintained under the provisions of article 2 of chapter 133 of the miners' statute of 1899 (Rev. St. 1899 [Ann. St. 1906, p. 4082]) and amendments thereto. It furthermore insists that the petition is based on the statute. The trial court so interpreted the petition.

We will therefore consider whether a case has been made out under the statute. So far as is necessary to state the case as respects our conclusions, coal was being mined through entries or entry ways, and by drilling holes into the walls of coal and charging them with explosives and attaching fuses. The case shows that defendant's servants drilled and charged these holes, and that other servants (called "shot firers") exploded them. The deceased in this case was one of the latter class of servants. The mine in question was worked on the "room and pillar plan," and, as is provided by section 8823 of the statute (Rev. St. 1899 [Ann. St. 1906, p. 4098]) had two entry ways. These ways are required by this statute to be run parallel "for the egress and ingress of the air," and "cross-cuts must be made at intervals not to exceed 50 feet apart." The entry ways in question were designated as No. 5 and No. 6. The last cross-cut connecting them was 50 feet back of the place where the explosion occurred, and the distance between the two entries at the former point was about 26 feet. Instead of being run parallel, as required by the statute, they were excavated in such way as to approach each other until, at the point of explosion, they were only about 7 feet apart. At this point of explosion, about 50 feet from the last cross-cut, as just stated, one of defendant's servants, with the knowledge and approval of the pit boss, drilled a hole and charged it with explosive and fuse for the purpose of having it fired by the shot firer. This hole was drilled diagonally into the wall of coal for several feet, and ended within less than 2 feet from the wall on the opposite side in entry No. 6. At the proper time the deceased, who was shot firer in that entry, came along and lighted the fuse of that charge, and then, for safety, quickly made his way around into entry No. 6 and down to about opposite the point where he had lighted the fuse. The explosion blew large quantities of coal and other substance with great force out into entry No. 6, and killed the deceased. It was shown that, if the entry ways had been run parallel from the last cross-cut, that is to say, if they had not been cut out in such way as to approach each other, the wall dividing them would have been so thick at the point of explosion that entry No. 6 would not have felt it or been affected by it, and hence the deceased would have been unharmed. It was shown that the pit boss knew the entry ways had approached too close together. He knew that the wall or pillar dividing them was not more than 7 or 8 feet thick, where, according to the testimony of the miner who drilled and charged the hole, the cross-cut was to be made. Aside from the testimony of that miner, the pit boss necessarily knew that a cross-cut would be made there as that was the proper distance from the last one, and he knew that blasting or firing would be done at that

point. Some of the foregoing statement is drawn from the evidence offered by defendant; other parts of it from the evidence in behalf of plaintiff which, after the verdict, we accept as the fact. The statute provides (section 8820, Rev. St. 1899 [Ann. St. 1906, p. 4096]) that, "for any injury to persons or property occasioned by any violation of this article or failure to comply with any of its provisions, a right of action shall accrue to the party injured," etc. We have already stated that by the terms of section 8823 the entries should be run parallel, and that a cross-cut connecting them should be cut every 50 feet. It is further provided (section 8826, Rev. St. 1899 [Ann. St. 1906, p. 4099]) that "all shots prepared by the miner for the extraction of coal from off of the solid, must be so placed, drilled and charged, that the same, when fired, shall perform safely the duty required of such shots," etc. The question then is, was the statute violated by the defendant? That section 8823 was violated there is no room for question. So we think it equally clear that that part of section 8826 just quoted was violated; for it was shown that the situation and surroundings at the point in question made it manifestly an unsafe place in which to insert a blast or shot of explosive. It should be clear to any one that a heavy charge of powder of the character of the one here considered, with less than two feet of coal on the opposite wall, would blow out that wall.

Defendant insists that the violation was not by it, and makes strong objection to plaintiff's instruction No. 1. It involves a construction of that portion of section 8826 reading as follows: "And all shots prepared by the miner for the extraction of coal from off of the solid, must be so placed, drilled and charged, that the same, when fired, shall perform safely the duty required of such shots," etc. The instruction asserted that this statute devolved such duty on the operator of the mine. Defendant insists that it is a duty imposed upon the miner, who is a fellow servant with the firer, and, if not performed by the miner, it is the neglect of a fellow servant for which no liability attaches. The statute does not in terms state upon whom the duty is enjoined. It simply says certain specific things must be done without, in terms, saying who shall do them. But evidently its directions are addressed to the miner, for they concern things which, necessarily, the miner must do. Therefore, in an action by a fellow servant of such miner, the neglect of the miner is the neglect of a fellow servant, and the master cannot be held. But, of course, if the action were by a stranger, the neglect of the miner would be that of the master. Notwithstanding the construction we thus place upon this part of the statute, yet we believe that, in view of undisputed facts, the instruction was not improper. Though we have already stated it in substance, its importance justifies us in repeat-

ing that the face of the case discloses that defendant's pit boss, whom we must look upon as the defendant itself, knew that the entries were so far from being parallel as to leave the wall dividing them at this point but 7 or 8 feet in thickness—a space he knew to be too thin. He knew that a cross-cut must be made at this point, and that shots or charges of explosives would be inserted in holes to be drilled in the wall. He knew, of course, that it was plaintiff's duty to fire the shots. The placing of a shot in such thin wall where it could not, in the language of the statute, "perform safely the duty required," being done with his knowledge and consent, was his negligence. But still it may be said that it could be conceded to be the negligence of the pit boss, that is, the operator of the mine, yet it was not statutory negligence, since the statute, as we have just said, was not addressed to the operator, and the action, being on the statute, ought to fail. But if the negligence in placing the shot is the direct or immediate act of the operator, then the statute applies to him, for the statute was intended to apply to whoever was directly responsible for placing the shot. If the master himself with his own hands was to drill the hole and insert the charge or shot, surely the statute would apply to him, for he would be the miner in that instance for all practical purposes. When this work was being prosecuted, before and at the time of the death of deceased, it was under the order and direction of the pit boss. Though he knew that shots would be placed in the thin wall to be fired, yet he directed the work to proceed. This was tantamount to placing the charge in the wall with his own hands, and he thereby came within the terms of the statute as addressed to the miner.

But, as already intimated, defendant insists that deceased was guilty of contributory negligence under the terms of the statute itself. Section 8826, after reading as quoted above, proceeds: "But if the shot firers find or discover that a drill hole is gripping too much or that it is drilled too much into [what the miners term] 'the tight,' and as may in the judgment of the shot firers, prove a windy, blown out or otherwise dangerous shot, said shot firers shall there and then condemn such shot as too dangerous to fire and pass the same without firing it. It shall also be the duty of the shot firers to notify the mine foreman as soon as practicable, when a shot is condemned." In our opinion that statute does not throw upon the shot firer the entire responsibility for the safety of a charge or shot, as defendant insists. It was not intended to absolve the mine owner from the care and liability imposed upon him by the statute, even as against the shot firer himself. These were imposed for the protection of the firer as well as his fellow miners. It would be a harsh view of the object of the statute to say that it meant the mine owner might be

negligent with impunity, and that it was the duty of the frirer to seek for and discover such negligence and condemn and report it. It is true that the statute makes it the duty of the shot frirer to refuse to fire the shot, if he "finds or discovers" it to be improper as described by the statute. But that is a command or direction to him which only imposes upon him the diligence, watchfulness, and caution which would be exercised by an ordinarily prudent man performing such dangerous service. If he is thus alert in the performance of his duty, and yet does not discover the negligence of the mine owner, the statute does not deprive him of his action. In the performance of this duty the shot frirer is not compelled to assume that the master has violated the law or neglected known obligations. This was the view taken by the trial court, as is evidenced by the instructions given for plaintiff and those refused for defendant. In other respects the facts were not such as to have justified the court in declaring deceased guilty of negligence, as a matter of law. In his situation he may well have failed to observe that the wall between the two entries had been allowed to grow dangerously thin or narrow. He worked with only a miner's small lamp attached to his cap. It was not his duty to aid in the running of the entries, nor to direct their course; and while section 8823 in directing that the entries should be run parallel was for the purpose of proper ventilation, and so the jury was instructed, yet, in judging of the safety of the shot, deceased could well rely upon defendant's lawful performance of its duties, which, if substantially performed in this instance, would have left the wall between the two entries so thick that no possible danger would have existed in firing the shot which killed deceased. That the case, as a whole, made the question of contributory negligence one for the jury, we entertain no doubt. It was not such a case on the evidence as would have justified the court in declaring that there was contributory negligence as a matter of law.

In view of the ground upon which plaintiff places her case, and the evidence relied upon to support it, there is no room for application of the doctrine of assumption of risk. The case proven is one of negligence on the part of the master, and the only defense applicable is that of contributory negligence. A servant may be guilty of contributory negligence in performing service with knowledge of the master's negligence, but in that case the principle of law as to assuming the risk does not apply. "The servant never assumes the risk of the master's negligence." *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Bailey's Personal Injuries*, § 463. He assumes the risks that are "ordinarily and necessarily incident to the business, but, on the other hand, he does not assume and agree to bear all the extraordinary and unusual

risks that might be caused by the misconduct and negligence of the master." *Chambers v. Chester*, 172 Mo. 461, 483, 72 S. W. 904; *Eureka Coal Co. v. Wells*, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259.

Defendant says that, though the statute was violated, yet no recovery can be had for the "violation of a statute on account of an injury not intended to be prevented by the enactment of the statute." The point is made to bear upon section 8823, directing that entries shall be run parallel for the purpose of ventilation; and as the death in this case was not occasioned by any lack of proper ventilation, no recovery can be had for a violation of that statute. But, in our view, the action is not based on a violation of that statute. The action is grounded on the fact that the shot was put in a wall which was unsafe for such shot, and was made unsafe by not paralleling the entries as provided by the statute. So, though the unsafe place was made by a failure to observe the law as to entries, it was placing the shot in such unsafe place, where it could not "perform safely the duty required of such shots," that was the cause of the death.

After defendant had concluded the examination in chief of one of its witnesses, counsel for plaintiff was permitted by the court to confer privately with the witness before beginning the cross-examination. While this was somewhat out of the ordinary course, yet we must concede that it was not necessarily an improper thing to do. And, since it was permitted by the trial court, we know that in his judgment the circumstances were such as to justify it. It was not a case of abuse of that discretion which must be allowed to courts in directing the course of trials. We do not regard objections to evidence in plaintiff's behalf on the ground as being mere conclusions of witnesses as meritorious. Besides, the same line of questioning was indulged in by defendant. There is nothing in these objections to justify a reversal of the cause.

What we have written disposes of the principal objections made to the trial. We have examined other points made, and do not find that they are of sufficient moment to reverse the judgment, and it is therefore affirmed. All concur.

#### JACOBS v. CITY OF ST. JOSEPH.

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908.)

#### 1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—INJURIES—NOTICE.

Rev. St. 1896, § 5724 [Ann. St. 1906, p. 2909], requires notice of claims for injuries on defective sidewalks to the mayor of cities of the second class, stating the place where, the time when, such injury was received, and the character and circumstances of the injury. *Heid*, that a notice reciting that plaintiff fell and sustained great injuries on a broken board in a

sidewalk at a specified time and place was fatally defective for failure to describe the character of plaintiff's injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, §§ 1696-1707.]

## 2. SAME—DEFECTIVE NOTICE—ACTION — PETITION.

Under Rev. St. 1899, § 5724 [Ann. St. 1906, p. 2909], requiring sworn notice of injury on a defective city sidewalk to be made to the mayor as a condition precedent to the injured party's right to maintain an action therefore, where the notice served was insufficient, it was not cured by an unsworn petition, in an action brought against the city for the injuries, which contained the matters omitted from the notice, and was filed within the time plaintiff was required to serve such notice.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Julia Jacobs against the city of St. Joseph. From a judgment for plaintiff, defendant appeals. Reversed.

See 102 S. W. 988.

James M. Wilson and G. L. Zwick, for appellant. Chas. C. Crow and James M. Mytton, for respondent.

ELLISON, J. This is an action for personal injuries, alleged to have been received by plaintiff on account of a fall on one of defendant's sidewalks. Defendant is a city of the second class. The judgment was for plaintiff.

Persons having claims against cities of the second class arising on account of injuries received on defective sidewalks, etc., are required as a condition precedent to maintaining an action therefor to notify the mayor in writing within 60 days of the occurrence, "stating the place where, the time when, such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefore." Section 5724, Rev. St. 1899 [Ann. St. 1906, p. 2909]. The notice given in this case was sworn to, and is as follows: "Julia Jacobs, of lawful age, being first sworn, states that on the 3d day of October, 1903, in the city of St. Joseph, Mo., on Twentieth street, between Sacramento street and Mitchell avenue, and while walking along the sidewalk in front of the residence and property of Charles Lang, at said time and place, she fell and was injured on account of a loose and broken board in said sidewalk, on account of which she sustained great injuries. Affiant further states that she will claim damages from the city of St. Joseph, Mo., on account of same." The notice was insufficient, in that it failed to state, in any way, the character of plaintiff's injuries. On the necessity and general requisites of such notices we refer to *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123, *George v. St. Joseph*, 97 Mo. App. 56, 71 S. W. 110, *Burnette v. St. Joseph*, 112 Mo. App. 668, 87 S. W. 589, and *Strange v. St. Joseph*, 112 Mo. App. 629, 87 S. W. 2.

The statute requires the notice to be served within 60 days of the occurrence. Since

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an action might be brought at any time within the period of limitations, the object of the statute is to give the city opportunity to investigate the case while conditions are fresh, and thus protect itself against actions which may be brought long after the occurrence. *Harris v. Newbury*, 128 Mass. 321. In this case the action was begun within the 60 days, and the petition stated the time and place, together with the character and circumstances, of the injury. Plaintiff makes the point that thereby the city had all the notice required or contemplated by the law. It is frequently said in the cases on the subject that a notice is a condition precedent to bringing the suit. But our statute does not say that a notice must be given before bringing the suit. It reads that "no action shall be maintained against a city \* \* \* unless notice shall first have been given," etc. To bring an action, and to maintain an action, are not necessarily the same thing. One may bring an action, and yet from reasons disconnected from his right to bring it he may fail to maintain it.

But we need not and do not make decision of this point, since our statute requires the notice to be sworn to, and the petition is not verified. So if it should be proper to hold that a petition could operate as a notice, it should of course fill all the requirements of a notice. The case must therefore fall, and the judgment be reversed. All concur.

## WESTERN COMMERCIAL TRAVELERS' ASS'N v. TENNENT.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907. Rehearing Denied Jan. 7, 1908.)

### 1. INSURANCE — "FRATERNAL BENEFICIARY ASSOCIATIONS"—NATURE AND STATUS.

An insurance association which has no lodge system, ritualistic form of work, or representative form of government is not within Rev. St. 1899, § 1408 [Ann. St. 1906, p. 1111], defining a fraternal beneficiary association as a corporation, society, or voluntary association for the benefit of its members and their beneficiaries, and having a lodge system, with ritualistic form of work, and a representative form of government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1824-1826.

For other definitions, see Words and Phrases, vol. 3, pp. 2942-2943.]

### 2. SAME—STATUTORY PROVISION.

An amendment adopted in 1901 (Laws 1901, p. 96) to Rev. St. 1899, § 1423 [Ann. St. 1906, p. 1118], part of the act of 1897 (page 132) relating to fraternal beneficiary associations, providing that associations of commercial travelers incorporated as fraternal benefit associations shall be subject to the provisions of the act, does not bring within its provisions a commercial travelers' association organized in 1878 without a lodge system or representative form of government, which never amended its charter, or otherwise took advantage of Rev. St. 1899, § 1409 [Ann. St. 1906, p. 1113], authorizing associations previously organized to do business under the act on complying with its provisions, nor made reports to the state superintendent of insurance, as required by section 1411 [Ann. St. 1906, p. 1114].

## 3. SAME.

A commercial travelers' association organized in 1878 which did not comply with the act of 1897 (Laws 1897, p. 132), relating to fraternal beneficiary associations, did not thereby forfeit its charter or become an old-line insurance company, but is a mutual benefit association doing business on the assessment plan, and confined in the issuance of certificates of insurance to classes named in the charter.

## 4. SAME—BENEFICIARIES—PROVISIONS OF CONSTITUTION OF ASSOCIATION.

The mother of a member of a mutual benefit association not living with insured, but with her husband, an able-bodied man 67 years old, who had recently failed in business, was not a member of insured's family nor a dependent on him because of gifts amounting to \$200 within a few months before her death, and hence was not entitled to a benefit under a provision of the association charter and of Laws 1879, p. 65, restricting the beneficiaries to the families, widows, or other dependents of members.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1935.]

## 5. SAME—FAILURE OF BENEFICIARIES.

Under a provision of a mutual benefit association constitution that, if all beneficiaries designated in a certificate die, the benefit shall be paid to the heirs of the member, and under the statute of distributions, where a member canceled a valid designation of beneficiary and made an invalid one, his heirs were entitled to the benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1942-1945.]

## 6. APPEAL—RECORD — QUESTIONS PRESENTED — EXCLUDED EVIDENCE.

Where the record fails to show what excluded testimony would have been, the appellate court cannot determine whether it was relevant, or whether its exclusion was prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Bill of interpleader by the Western Commercial Travelers' Association against Louisa H. Tennent and others. From a judgment in favor of Christina May Tennent and another, Louisa H. Tennent appeals. Affirmed.

Johnson & Richards, for Louisa H. Tennent and Christina May Tennent. John V. Denvir, Jr., for the Western Commercial Travelers' Association.

BLAND, P. J. The Western Commercial Travelers' Association is an insurance corporation. Section 1, art. 2, of its charter, is as follows: "The objects of this association are: (1) To obtain as its active and honorary members a large number of white male persons, (a) of good moral character, (b) of good health, (c) who are not under 21 nor over 45 years of age, (d) who are traveling salesmen; (e) salesmen (or clerks in wholesale or manufacturing houses); or (f) buyers or salesmen for proprietors, copartners or corporations engaged in a legitimate mercantile manufacturing or commercial business, and who are proprietors, copartners, officers, directors or stockholders of corporations engaged in such business; (2) adopt, maintain and execute such plans as shall tend to the mutual benefit and protection of its mem-

bers; (3) levy and collect assessments from its active members for such sums as may be necessary to provide a death loss fund for the sole purpose of the relief and aid of families, widows and orphans and other dependents of its deceased members; and (4) levy and collect from its members such sums as may be provided in its constitution and by-laws for the payment of its necessary expenses and the promotion of its objects." On May 5, 1894, John H. Tennent, Jr., became a member of the association, and it issued to him a membership certificate or policy of insurance for \$4,000, payable at his death to his mother, Louisa H. Tennent. On February 8, 1896, Tennent surrendered the original certificate and took a new one, in which his wife, Christina May Tennent, was designated as beneficiary. On May 15, 1903, Tennent again changed the beneficiary, and a new certificate was issued to him in which Louisa H. Tennent, his mother, was designated as beneficiary. On May 23, 1903, Tennent died. After proofs of loss were furnished the association, Louisa H. Tennent and Christina May Tennent and John H. Tennent, a minor son of the deceased and Christina May Tennent, laid claim to the benefit fund, whereupon the association filed its bill of interpleader in the St. Louis circuit court, paid the fund into court, and asked that the claimants be required to interplead therefor. They were ordered to interplead, a guardian ad litem was appointed for John H. Tennent, Jr., and each of the claimants filed a separate interplea. Issues were raised on these interpleas by answers filed thereto. These issues were submitted to the court, who, after hearing the evidence, on the written request of Louisa H. Tennent, made a finding of the facts and rendered judgment in favor of Christina May Tennent and John H. Tennent, Jr., awarding to each one-half the fund, less certain costs which had been allowed by the court to the association. Both Louisa H. Tennent and John H. Tennent, Jr., appealed from this judgment.

The contention of Louisa H. Tennent is that the association is a fraternal beneficiary society, and that she, being a blood relative of the deceased member, is competent to take the fund as beneficiary, under the provisions of section 1408, Rev. St. 1899 [Ann. St. 1903, p. 1111]. She also contends that she is entitled to the fund by reason of the fact that she was a member of the family of the deceased member, and a dependent upon him. The other interpleaders contend that the association is not a fraternal beneficiary society; that Louisa H. Tennent was not a dependent upon the insured, was not a member of his family, and is not entitled to the fund by reason of being a blood relative of the deceased member, for the reason that blood relatives are not named as beneficiaries in the charter of the association. A fraternal beneficiary association, as defined by the stat-

ute (section 1408, Rev. St. 1899 [Ann. St. 1906, p. 1111]) is a "corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and \* \* \* shall have a lodge system, with ritualistic form of work and a representative form of government," etc. The association does not fill the measure of this definition, for the reason it has no lodge system, with ritualistic form of work, nor has it a representative form of government. In *Westerman v. Supreme Lodge K. of P.*, 196 Mo., loc. cit. 701, 94 S. W. 477, 5 L. R. A. (N. S.) 1114, the court said: "It is only essential to constitute the defendant a fraternal beneficiary association that it be organized for the benefit of its members, and not for gain or profit. It must have a representative form of government and ritualistic form of work." See, also, *Baltzell v. Modern Woodmen*, 98 Mo. App. 153, 71 S. W. 1071. The association was incorporated July 15, 1878, under the then laws of this state, relating to benevolent associations, and has not since amended its charter, or otherwise taken advantage of section 1409, Rev. St. 1899 [Ann. St. 1906, p. 1113], to bring itself under the act of 1897; nor has it made reports to the state superintendent of insurance, under the provisions of section 1411, Rev. St. 1899 [Ann. St. 1906, p. 1114], nor do we think it is brought under the provisions of said act by the amendment of 1901 (Laws 1901, p. 96) of section 1423, Rev. St. 1899 [Ann. St. 1906, p. 1119], which originally read as follows: "This act shall not apply to or affect grand or subordinate lodges of Masons, Odd Fellows or similar orders paying only sick disability or funeral benefits, or any association not working on the lodge system which limits its certificate holders or membership to a particular class, or to the employees of a particular town or city, designated firm, business house or corporation." The amendment of 1901 added the following to the above section: "Provided that associations of commercial travelers and those employing commercial travelers incorporated as fraternal benefit associations or societies shall in all respects be subject to the provisions of this act." The purpose of the amendment was not to legislate this class of associations who had no lodge system, with ritualistic form of work, and representative form of government, bodily into fraternal beneficiary associations, but was to take them out of the class of fraternal benefit associations whose membership is composed of persons following a particular avocation, and segregate them from that class of benefit associations whose membership is confined to members of a designated secret order, so as to enable benefit associations composed of commercial travelers to avail themselves of the benefits of the act by providing for a lodge system, with ritualistic form of work and a representative form of government, and by making annual

reports to the state superintendent of the insurance department. The evidence is that the association has no lodge system nor a representative form of government, and has never made a report to the state superintendent of insurance; hence, it cannot be classed as a fraternal beneficiary association under the act of 1897. But the failure of the association to comply with the Laws of 1897 does not ipso facto forfeit its charter nor convert it into an old-line insurance company. *Kern v. Legion of Honor*, 167 Mo. 471, 67 S. W. 252; *Baltzell v. Modern Woodmen*, supra. It is a mutual benefit association, doing business on the assessment plan, and is confined in the issuance of certificates of insurance to the class of beneficiaries named in its charter. *McDonald v. Life Ass'n*, 154 Mo. 618, 55 S. W. 999; *Grand Lodge v. McKinstry*, 67 Mo. App. 86; *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 214, 95 S. W. 967. The act under which the association was incorporated (Laws 1879, p. 65) restricted the beneficiaries of such societies to the families, widows, orphans, or other dependents of members. This provision was copied into the charter of the association (article 2, § 1); hence, to entitle Louisa H. Tennent to the fund, she must come within one of these classes, and she comes within the classes named if she was a member of John H. Tennent's, Jr., family or was dependent upon him. In respect to the relations which existed about the time Louisa H. Tennent was designated as beneficiary and until his death between John H. Tennent, Jr., and his mother and wife, the learned trial judge made the following finding of facts: "That said Christina May Tennent and John H. Tennent, Jr., lived together as man and wife continuously and in the same dwelling house until February, 1906. That some time in February, 1906, John H. Tennent, Jr., left his then residence in the city of St. Louis on a business trip, intending to return to his said home. That at said time and up to the date of his death his occupation was that of a traveling salesman. That from and after the time of leaving his home until the day of his death he contributed nothing to the support of his wife and child, and at the time of leaving left them in destitute circumstances. That his wife and child continued to live in the house in which they had lived with him from the date of his departure in February, 1906, until some time in March, 1906, at which time she removed to the residence, in the city of St. Louis, of her brother, and from that day until after the death of her husband she continued to reside in the city of St. Louis, dependent upon the bounty of her said brother. That said John H. Tennent, Jr., never at any time called at the house at which he had lived with his wife and child. That he never after the date of his leaving in February saw his wife or was seen by her. That the said Christina May Tennent some time in March

expressed her unwillingness to further live with the said John H. Tennent, Jr., under the then existing conditions. That at that time the said Christina May Tennent was, and she is now, without means of support except as she enjoys the bounty of her relatives—her brother. That between the date of his leaving his home in February and the date of his death John H. Tennent, Jr., requested his wife by letter to live with him in Texas, but that he did not at any time send her any money, or provide the means of transportation. That during the months of March, April, and May said John H. Tennent gave or sent to his said mother, Louisa H. Tennent, sums of money aggregating over \$200 for her support. That the husband of Louisa H. Tennent is living, of the age of about 67 years, and is able-bodied, his age considered, and that between February, 1906, and the date of the death of John H. Tennent, Jr., the said husband of Louisa H. Tennent was without employment or occupation and without means. That during the period between the time when John H. Tennent, Jr., left his wife and child, and the date of his death, the said Louisa H. Tennent, his mother, to whom he made the gift amounting to \$200, was possessed of at least \$1,000 in her own right. That during said period said Louisa H. Tennent was living with her husband, maintaining the residence, and had living in her house one boarder who was paying a monthly sum in compensation for her board and lodging. That the said John H. Tennent had during the period between the date of his leaving his wife and child, and the date of his death, no fixed place of abode. That he visited his said mother at her residence on Washington avenue, in the city of St. Louis, during the month of March, 1906, but did not remain over night. That again in the early part of May, 1906, he went home to his mother and father, and remained there for about five days. That during that visit he purchased meat, vegetables, and groceries necessary for the household of his mother and father. That again on May 27, 1906, he went to the house of his mother and father in Webster Groves, Mo., and that he died on May 28, 1906. \* \* \* Section 4 of article 8 of the constitution of said association provides: 'Should all of the beneficiaries designated in any certificate issued by it die, the benefit shall be paid to the heirs of the deceased member in accordance with the laws of the state of Missouri. Should a member die without leaving designated beneficiaries or heirs at law who apply for the benefits within one year from the date of his death, then his benefit shall revert to and become a part of the Death Loss Fund of the association.' Upon these facts, the learned trial judge made the following findings of law: "The court finds that as a matter of law the mother of the deceased, John H. Tennent, Jr., was not at any time mentioned in the evidence a member of his family within

the meaning of that word as used in the charter, constitution, and by-laws of the Western Commercial Travelers' Association or the law governing this case. That the said Louisa H. Tennent was not at any time mentioned in the evidence dependent upon said John H. Tennent, Jr. That the said Louisa H. Tennent was not at any time a dependent within the meaning of the provisions of the charter and constitution of the Western Commercial Travelers' Association or the laws governing this cause. \* \* \* That the designation of Louisa H. Tennent as a beneficiary of John H. Tennent, Jr., was void. That Louisa H. Tennent does not fall within the designation of the words 'family' or 'member of deceased's family,' as used in the laws of this state and the charter of the Western Commercial Travelers' Association. That the certificate issued to Christina May Tennent having been surrendered, and said John H. Tennent, Jr., having attempted to designate some other person, the court declares as a matter of law that he died without having designated any person qualified under the provisions of the charter, constitution, and by-laws of the Western Commercial Travelers' Association, and that, therefore, the fund now in court, less the costs and expenses to be properly deducted therefrom by orders of this court, should be paid in equal shares, one-half to Christina May Tennent, one-half to John B. Denvir, Jr., as guardian ad litem, for said John H. Tennent, a minor."

The facts as found are in accord with the undisputed evidence. It should be added that the uncontradicted evidence shows that John H. Tennent, Sr., the husband of Louisa H. Tennent, and the father of John H. Tennent, Jr., at all times mentioned in the evidence was living with his wife, and had a home where they dwelt together as one family, and there is nothing in the evidence to show that the husband was not in fact, as well as in law, the head of the family. It appears from the evidence that John H. Tennent, Sr., failed in business about the beginning of the year 1906, and was stripped of all his means and was out of employment until some time in September, 1906; but the evidence nowhere shows or tends to show that he abandoned all effort to support his family, or that he shifted the burden of their support upon the shoulders of his son, John H. Tennent, Jr., nor does it show that from advanced age or physical weakness he was unable to support his family. John H. Tennent, Jr., had a family of his own, and, though his wife was living separate and apart from him, their married relations were not dissolved; hence he continued to be the head of the family. *Brown v. Brown's Adm'r*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415. Louisa H. Tennent was living with her husband as a member of his family. Neither she nor her son could at the same time be members of two separate and distinct families, and we find that she was

not a member of the family of John H. Tennent, Jr. Was she dependent upon him within the meaning of the charter of the corporation? In *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 550, in defining the word "dependent," as used in a benefit certificate, the court said: "I would not restrict dependents to those whom one may be legally bound to support, nor yet to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support." This language was used in a contest wherein the wife of the deceased member and another woman, with whom he had lived for a number of years as his wife, and who was ignorant that he was married to another woman, were contestants for the fund.

In *Nye v. Grand Lodge, etc.*, 9 Ind. App., loc. cit. 150, 36 N. E. 436, the court said: "Those who may be dependent upon another for support and maintenance may not be of the family or related by blood to the member. It is a question of fact, and not of law, to determine who are members of a family, or of blood relationship, or dependents. *American Legion of Honor v. Perry*, 140 Mass. 590, 5 N. E. 634." In *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187, it was ruled: "A dependent, as the term is used in reference to these benefit societies, is one who is sustained by another. The maintenance of dependents is such support as consists in the furnishing of 'food, clothing, lodging, or education.' Maintenance in the matter of clothing does not refer to occasional gifts of clothing, but to such a regular supply of clothing as may be reasonably necessary to make the body comfortable." The state of Florida has a statute granting the right of action for death by wrongful act or negligence, and confers the right of action upon designated persons. Third in the list are persons who are dependent for support upon the person killed. In *Duval v. Hunt*, 34 Fla. 85, 15 South. 876, the court held: "When the suit is brought, in such cases, by a person who bases his right to recover upon the fact that he is a dependent upon the deceased for support, then he must show, regardless of any ties of relationship, or strict legal right to such support, that he or she was, either from the disability of age or non-age, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support. When adults claim such dependence, there must be, because of some of the disabilities above mentioned, an actual inability to support themselves, and an actual dependence upon some one for support, coupled with a reasonable expectation of support, or with some reasonable claim to support from the deceased." Bacon in his excellent work on *Benefit Societies and Life Insurance*, after reviewing the decided cases, says: "From the definition and cases cited it seems that whether or not a person is included among the dependents of a member of a benefit society is a question of

fact, and that each case must be decided on its own merits." 1 *Bacon on Benefit Societies & Life Insurance*, § 261, p. 628.

The contributions or donations made by John H. Tennent, Jr., to his mother and her family, began with \$30 in the latter part of March, 1906, followed by \$25 on April 16th, \$43.85 on May 8th, and closed with \$100 on May 23d. The latter sum, his mother testified, went to pay his funeral expenses. There is no proof that John H. Tennent, Jr., ever contributed one cent to the support of his mother or her family prior to March, 1906. His sudden liberality toward his mother and family may be accounted for on two grounds: First, on account of the fact that his father had recently lost his fortune and was out of employment, causing a temporary stringency in the financial affairs of the family; and, second, on account of the strained relations between himself and wife at the time the donations were made, which strained relations were caused by his neglect and refusal to support his wife and child. We do not think this evidence proves, or tends to prove, that Louisa H. Tennent was a dependent upon her son within the meaning of the charter of the association; and hence she is not in any class for the benefit of whom the association is authorized to issue a beneficiary certificate, and is not entitled to the fund. The beneficiary named in the certificate not being legally entitled to take the fund, under section 4, art. 8, of the constitution of the association, it is payable to the heirs of the deceased member, to wit, his wife and son. This is also true under our statute of distributions. *Pleimann v. Hartung*, 84 Mo. App. 283; *Grand Lodge v. Hanses*, 81 Mo. App. 545; *Keener v. Grand Lodge A. O. U. W.*, supra.

Louisa H. Tennent was asked to repeat conversations she had with her son before his death in regard to her future support. On objections she was not permitted to repeat these conversations. This ruling is assigned as error. If she was a competent witness to repeat these conversations (which we do not concede), her counsel neglected to get in the record what she would have testified, had she been permitted to repeat the conversations, so this court cannot see whether the excluded evidence was material or relevant to the issues in the case, or determine whether the complaining party was prejudiced by its exclusion. *Ruschenberg v. Railroad*, 161 Mo. 70, 61 S. W. 626.

No reversible error appearing, the judgment is affirmed. All concur.

#### DUNHAM v. FRANCE.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

PARTNERSHIP—DISSOLUTION—FIRM CONTRACTS—LIABILITY OF RETIRING PARTNER.

Plaintiff, who had borrowed money from defendant's firm, contracted with them that a



boarder of plaintiff's, who was an employé of the firm, should pay a part of his board bill to the firm, who agreed to apply it on plaintiff's debt as long as the boarder continued to board with plaintiff and to work for the firm. Defendant left the firm without notice to plaintiff, and thereafter the sums paid the new firm by the boarder were not applied to plaintiff's debt. *Held*, that the boarder ceased to work for the old firm by defendant's act in withdrawing therefrom, and he, not having notified plaintiff of his withdrawal, was not relieved from his obligation under the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 484-488.]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by Catherine E. Dunham against Albert L. France. Judgment for plaintiff, and defendant appeals. Affirmed.

Motter & Shultz, for appellant. B. J. Woodson and A. D. Vorles, for respondent.

ELLISON, J. Plaintiff's action is based on a written contract. She recovered judgment in the trial court.

Plaintiff had borrowed a sum of money, and given a deed of trust to secure its payment. She had a boarder named Gilbert, and he was in the employ of the firm of Patrick, Lea & France (the latter being the defendant) at a salary. Plaintiff agreed to pay the firm \$40 per month, which they, for valuable considerations, agreed to receive and apply on the indebtedness. The contract then provided that so long as Gilbert continued to board with plaintiff and remained in the employ of the firm he should pay to them for plaintiff the monthly payment of \$40, and deduct the same from the amount of board he would owe plaintiff. In other words, the contract provided that so long as Gilbert boarded with plaintiff and worked for defendant's firm he should pay them the \$40 due from her. Shortly after the execution of this contract defendant quit the firm, and it was continued as Patrick & Lea, the latter assuming the obligations to apply the money received from Gilbert. There does not seem to be any dispute as to the sum Gilbert paid, or rather allowed to be taken from his salary. But all or the greater part of it was paid in that way after this defendant left the partnership, and the failure to apply it on plaintiff's indebtedness was the failure of the partnership of Patrick & Lea. Yet it is conceded that this defendant remained liable for the performance of the contract notwithstanding his withdrawal.

But we take defendant's point to be this: That since the moneys received from Gilbert and not applied on the plaintiff's indebtedness is the ground of plaintiff's complaint, and since the contract only obligated defendant's firm to receive such money from Gilbert while he was in the employ of such firm, and since he was not in the employ of the firm after defendant withdrew, as that had the effect of dissolving the partnership, and since he thereafter was in the employ of Pat-

rick & Lea, who continued the business, the contract, by its own terms, was no longer operative. In other words, when Gilbert ceased to be in the employ of Patrick, Lea & France, the contract ceased as to his paying them \$40 per month, and any payments he afterwards made to Patrick & Lea were outside the contract, and put no obligation upon this defendant as an ex-member of the firm. But the evidence tended to show that defendant did not notify plaintiff that he had quit the firm. By his own act he brought about the condition which he says ought to relieve him of his obligation on the contract. Gilbert did not leave the employment of the old firm by his act. He ceased to continue in that employment by the act of defendant in withdrawing, and thus leaving him to continue his work with the remaining members, Patrick & Lea.

It seems to us that defendant himself changed the situation, and not Gilbert, and that he should have notified plaintiff of what he had done, if he wanted it to have the effect of relieving him from his obligation. We are satisfied the judgment could not have been for the defendant, under the evidence, and hence order its affirmance. All concur.

#### CITY OF MARSHALL ex rel. COLYER et al. v. WISDOM et al.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

#### MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—TAX BILLS—VALIDITY.

Where a city authorizing a street improvement to be completed within 90 days from the time the contract therefor takes effect, to be paid for in special tax bills, delayed for 11 months after the contract was awarded to the lowest bidder the execution thereof, the tax bills, in the absence of evidence explaining the delay, were invalid, under Rev. St. 1899, § 5989 [Ann. St. 1903, p. 3024], providing for street improvements under contracts on plans and specifications, etc., for want of jurisdiction to proceed.

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by the city of Marshall, on the relation of Klt Colyer and another, against Mary A. Wisdom and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Robert M. Reynolds and Robert B. Ruff, for appellants. Flournoy & Flournoy and Alf F. Rector, for respondents.

JOHNSON, J. This action was brought to enforce the lien of three special tax bills belonging to a series issued by the city of Marshall, a city of the fourth class, to pay the cost of paving one of the public streets. The validity of the bills is attacked in the answer on several grounds, but the court held them to be valid, and entered judgment in favor of plaintiffs, from which defendants appealed.

The resolution declaring the improvement

to be necessary was duly passed in proper form by the board of aldermen on May 9, 1899. The ordinance authorizing the improvement was passed June 9th. It provided that "the work shall be completed within 90 days from the time the contract therefor binds and takes effect, and shall be paid for in special tax bills, etc., and, further, that "the city clerk shall, as soon as practicable after the passage and approval of this ordinance, give public notice of the letting of the work herein provided for by an advertisement to be inserted for two consecutive weeks in the Daily Democrat News, a newspaper printed in the city of Marshall, Mo., asking for sealed bids for the doing of said work, and reserving the right to reject any and all bids," etc. The notice was published as prescribed, bids were received and opened at the time designated, and on July 21, 1899, an ordinance was passed awarding the contract to the relators, "said firm being the lowest and best bidder therefor." Nothing further was done until June 14, 1900, when a written contract was executed by Colyer Bros. and the city, and on the same day the board of aldermen passed an ordinance which provided "that the contract executed on the 14th day of June, 1900, between Colyer Bros. and their bondsmen and the city of Marshall, for the work of macadamizing, guttering, curbing, and bringing to the established grade North street from the center line of English avenue to the west line of Benton avenue, under the provisions of ordinance No. 481, approved on the 9th day of June, 1899, be, and the same is, hereby ratified and confirmed." The improvement was completed by the contractors within 90 days from the date of the execution of the written contract, and the special tax bills were issued and delivered to the contractors on August 11, 1900. The evidence does not disclose the cause, if any, of the long delay between the awarding and the execution of the contract.

It is argued by defendants that this unexplained delay of 11 months constituted a substantial violation of the provisions of the ordinance which authorized the improvement, and of the statute applicable thereto. Section 5989, Rev. St. 1899 [Ann. St. 1906, p. 3024]. On the other hand, plaintiffs contend that there was a literal compliance with the terms of ordinance and statute, since in the former it was expressly provided that the period of 90 days allotted to the contractor for the completion of the work should not begin to run until the execution of the written contract, and, as the improvement was completed within that period, the delay in the execution of the contract should be regarded as immaterial. We are cited to *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107, and *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276, *Boulton v. Kolkmeier*, 97 Mo. App. 530, 71 S. W. 539, *Jaicks v. Middlesex Investment Co.*, 201 Mo. 111, 98 S. W. 759, as authorities supporting the contention of

plaintiffs, but none of these cases is directly in point. The one most nearly applicable is *Jaicks v. Middlesex Investment Co.*, supra. There the contract for doing the work was not made until about a year after the passage of the ordinance, which, unlike the ordinance in the present case, failed to prescribe a time in which the improvement should be completed. In differentiating the facts of that case from those appearing in *Ayers v. Schmohl*, 86 Mo. App. 349, *Allen v. La Force*, 95 Mo. App. 824, 68 S. W. 1057, and *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163, the Supreme Court said: "An examination of those cases will demonstrate that they have no application to the proposition now in hand. Here we have an ordinance which confers the power to make certain improvements and to let by contract the work for making such improvements. \* \* \* It is now the settled law in this state that the failure of the ordinance to fix a time for the completion of the work does not invalidate such ordinance, and it must be kept in mind that the proposition in this case is not that the work was not completed within the time designated by the contract, but the complaint is directed at the delay in exercising the power to let the contract under the ordinance."

In the present case, in prescribing in the ordinance a time for the completion of the work, time was made of the essence of the proceedings. Property owners and bidders were assured, in effect, that the proceedings would be conducted to the point of the execution of the contract without unusual or unnecessary delay; otherwise the provision imposing a limit on the time the contractor might consume in the completion of the work would amount to nothing. The jurisdiction acquired by the board of aldermen over the parties interested and the subject-matter (*Springfield v. Weaver*, supra) was a jurisdiction to proceed in the usual course of such matters, and within the limits defined by law. The board had no authority to abandon the improvement as apparently it did, and then after the expiration of a long period of time resume jurisdiction at the place where it left off. If, without any excuse, it could delay the execution of the contract for one year, no reason is apparent for saying that it could not delay the matter for five years. It is but fair to presume that, had the bidders known that instead of 90 days in which to complete the work they would have more than a year, other and lower bids would have been offered. Should we tolerate the suggestion that the city officers may delay arbitrarily the execution of the contract in cases where they have made time of the very essence of the proceeding, we would give sanction to a rule which not only might be destructive of real competition in the bidding, but would open the door to fraud and favoritism. *McQuiddy v. Brannock*, 70 Mo. App. 542; *Galbreath v. Newton*, 30 Mo. App.

393; *Excelsior Springs Co. v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701.

Our conclusion is that the tax bills should be held invalid for lack of jurisdiction in the council to proceed under the abandoned ordinance. The judgment is reversed. All concur.

**DRAKE v. GORRELL (MISSOURI PAC. RY. CO., Garnishee).**

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

**1. JUSTICES OF THE PEACE—APPEAL—APPELLATE JURISDICTION.**

Where a justice allowed an appeal, and lodged the papers and transcript with the circuit court, that court had jurisdiction, though there may have been no affidavit for the appeal, nor any bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 534-542.]

**2. SAME.**

Rev. St. 1899, § 4075 [Ann. St. 1906, p. 2220], provides that, if appellant on appeal from a justice's court fail to give notice of appeal, the cause shall, at appellee's option, be tried at the first term, or be continued until the succeeding term, but that no appeal shall be dismissed at the first term for want of notice. Section 4076 [page 2221] provides that, if appellant fail to give such notice before the second term, the judgment shall be affirmed, or the appeal dismissed at appellee's option. *Held*, that the failure of a garnishee to give notice of appeal constituted a failure to confer jurisdiction over the plaintiff appellee, and it could only affirm the judgment or dismiss the appeal, and it was error to dismiss the cause for want of prosecution, since plaintiff appellee, not having been brought into court, could not be in default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 579-591.]

**3. APPEAL—RECORD — JURISDICTION OF LOWER COURT.**

Though Rev. St. 1899, § 4074 [Ann. St. 1906, p. 2217], requiring notice of an appeal from a justice's court to be given, does not require the filing thereof, yet the fact that notice was given, being jurisdictional, must affirmatively appear either by the filing of the notice, or by a recital in the judgment, and an affidavit filed by appellant on appeal from the circuit court having attached thereto, as an exhibit, a notice formally sufficient, the service of which appears to be acknowledged by appellee, cannot be considered to show such service.

Error to Jackson County Court; Hermann Brumback, Judge.

Action by D. D. Drake against Charles T. Gorrell, wherein the Missouri Pacific Railway Company was summoned as garnishee. From a judgment for plaintiff against defendant and the garnishee in justice's court, the garnishee appealed to the circuit court, which court dismissed the cause for want of prosecution, and plaintiff brings error. Reversed and remanded.

Platt, Lea & Wood, for plaintiff in error. Elijah Robinson, for defendant in error.

**JOHNSON, J.** Plaintiff brought his action against the defendant before a justice of the peace, and the Missouri Pacific Railway Company was summoned as garnishee. Judgment

was taken against defendant and the garnishee. The defendant made no attempt to appeal. An appeal was allowed the garnishee to the circuit court, and a transcript of the proceedings was filed in the office of the clerk of that court on the 16th day of April, 1904. In November, 1905, the cause was dismissed for want of prosecution on the day it was docketed for trial. Afterward plaintiff brought it here by writ of error.

It appears there was no affidavit for the appeal, nor was there any bond. There are papers in the record whereby it appears that the St. Louis, Iron Mountain & Southern Railway Company, by its agents, made affidavit for appeal, and gave an appeal bond, but since the justice allowed the appeal to the garnishee, and lodged the papers and transcript with the circuit court, that court had jurisdiction of the cause. *Welsh v. Railway*, 55 Mo. App. 599; *Draper v. Farris*, 56 Mo. App. 417; *Watson v. Barbee*, 55 Mo. App. 147; *Nicholson v. Railway*, 55 Mo. App. 593. Those cases overruled that of *Whitehead v. Cole*, 49 Mo. App. 423, though the latter was inadvertently cited to support one part of the case of *State, to Use, v. Hammond*, 92 Mo. App. 231.

It is contended by plaintiff that as the record fails to show affirmatively that notice of appeal from the justice was served on plaintiff by the garnishee in the time and manner prescribed by statute, the circuit court acquired no jurisdiction over the cause, except for the single purpose of dismissing the appeal, or affirming the judgment at the option of the appellee, and therefore error was committed in dismissing the cause on account of the absence of plaintiff at the time it was called for trial. While it is stated in *Ellis v. Kyes*, 47 Mo. App. 155, and in *State, to Use, v. Hammond*, supra, that, where no notice of appeal is given, there is no jurisdiction of the cause, yet it is clear that jurisdiction of the person is what is meant. The circuit court becomes possessed of the cause upon filing of transcript and papers by the justice. Plaintiff cites, also, the case of *Roll v. Cummings*, 117 Mo. App. 312, 93 S. W. 864, to support his position; but it will be seen that, where jurisdiction is there spoken of, jurisdiction of the person is meant, and it is so stated at page 317 of 117 Mo. App., page 864 of 93 S. W. The notice of appeal has reference to jurisdiction of the person. It has been likened to a summons. *Cooper v. Insurance Co.*, 117 Mo. App. 423, 93 S. W. 871. The statute itself reads that the appeal should not be dismissed for want of notice at the first term (Rev. St. 1899, § 4075 [Ann. St. 1906, p. 2220]), thus showing that the want of notice does not affect the jurisdiction of the cause.

The failure of the garnishee to give notice of appeal in accordance with the statute constituted a failure to confer jurisdiction in the circuit court over the person of the plaintiff, and deprived it of authority to

make any other disposition of the cause than to affirm the judgment of the justice, or dismiss the appeal at the election of plaintiff. In such state of case the plaintiff could not be in default, since he had not been brought into court, and manifestly it was error for the court to treat him as one in default by dismissing his case. Section 4076, Rev. St. 1899 [Ann. St. 1903, p. 2221]. But it is said by the garnishee that notice of appeal in fact was served on plaintiff in accordance with the statute, and a written notice formally sufficient, service of which appears to be acknowledged by plaintiff, is attached as an exhibit to an affidavit filed in this court by the garnishee. Counsel argues that the statute (section 4074 [page 2217]) does not require the filing of the notice, and that the service of the statutory notice of the appeal is all that is required to confer jurisdiction on the circuit court over the appellee. This is true; but the fact that notice was given, being jurisdictional, must affirmatively appear on the face of the record either by the filing of the notice and the return thereon with the circuit clerk, or by a recital in the judgment or order disposing of the cause, of the fact that the notice was given. The record before us being silent as to this important fact, we have nothing on which to base a presumption that the notice was given. We could not permit proof of the fact to be made in this court, as that would involve the assumption that we have the right to determine an issue of fact. The notice and affidavit offered by the garnishee must be ignored, and the cause determined on the face of the record properly before us.

For the reasons stated, the omission from the record of any showing that the notice of appeal was served infects the judgment with reversible error. Accordingly the judgment is reversed, and the cause remanded. All concur.

### RUCKERT v. RICHTER et al.

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908.)

#### 1. JUDGMENTS—COLLATERAL ATTACK.

The jurisdiction of an inferior court over the subject-matter must affirmatively appear on the face of the record, and if it does not so appear the judgment rendered must be treated as a nullity, and may be attacked in a collateral proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933-934.]

#### 2. EVIDENCE—JUDICIAL NOTICE—POPULATION OF COUNTY.

The court takes judicial notice that on August 28, 1900, Cole county had less than 50,000 inhabitants, and that therefore the jurisdiction of a justice of the peace therein was controlled by Rev. St. 1899, § 3835 [Ann. St. 1903, p. 2124], and not by section 3836 [page 2126], which applies to counties having over 50,000 inhabitants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 31-33.]

#### 3. JUSTICES OF THE PEACE—JURISDICTION—SUFFICIENCY OF RECORD.

Rev. St. 1899, § 3835 [Ann. St. 1903, p. 2124], provides that justices of the peace shall have original jurisdiction in all civil actions and proceedings for the recovery of money, when the sum demanded, exclusive of the interest and costs, does not exceed \$250. The record of a justice recited that a suit was founded on a note, but did not state the amount of the principal, or that the note bore interest, or that the amount of the judgment, which was in excess of \$250, was not for the face of the note, exclusive of any interest. *Held*, that the record did not affirmatively show the jurisdiction of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 207-216.]

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by A. J. Ruckert against Anton Richter and another. From a judgment quashing an execution issued on a judgment for plaintiff, he appeals. Affirmed.

A. M. Hough, for appellant. W. S. Pope and C. Waldecker, for respondents.

JOHNSON, J. Plaintiff recovered judgment against defendants in an action on a promissory note brought before a justice of the peace in Cole county, had execution issued by the justice, which was returned "not satisfied," filed a transcript of the judgment in the office of the clerk of the circuit court, and had execution issued thereon. On motion of defendant, presented to the circuit court, the execution was quashed, and the cause is brought here by plaintiff on appeal from the judgment entered on the motion.

The material part of the transcript of the judgment rendered by the justice is as follows: "On 28th day of August, 1900, issued a writ of summons against the defendants, returnable on the 11th day of September, 1900, at 10 o'clock a. m., and delivered the same to G. A. Smith, constable of Jefferson township, in said county and state, on the 1st day of September, 1900, the said writ having been returned, duly served upon defendants, as follows, by reading the within writ to Anton Richter on the 31st day of August, and leaving a true copy of this writ with one of the family of Peter Schwaller, over the age of 15 years, the 1st day of September, 1900, in Jefferson township, Cole county, Mo., and the cause coming on to be heard now, to wit, 11th day of September, 1900, comes the plaintiff, by his attorney, A. M. Hough, and the defendants in person and by their attorneys, Waldecker, Pope, and Belch, the attorneys for defendants, file their written motion for bond for costs which is sustained, and the cause continued at cost of plaintiff, to allow plaintiff to give required bond, the above cause, having heretofore been continued by the justice at his pleasure, was, by the justice, on the 19th day of August, 1905, set for trial on the 30th day of August, 1905, and the parties, plaintiff and defendants, by their respective attorneys, duly notified by the justice that said cause

was set for trial on said 30th day of August, 1905, and on said 30th day of August, 1905, said cause coming on for trial, and the plaintiff appearing by his attorney, but the defendants, although duly notified, come not, but make default; and this suit being founded upon a note, signed by the defendants, and the justice having ascertained the amount due from defendants to plaintiff on said note, to be the sum of \$337.95, it is ordered and adjudged by the justice that the plaintiff recover of the defendants said sum of \$337.95, together with his costs in this behalf expended, and have therefor execution."

It is the contention of defendants that the record "discloses that the justice had no jurisdiction over the persons of defendants when the judgment was rendered, and falls to show affirmatively that he had jurisdiction over the subject-matter of the suit." We do not find it necessary to decide the question of whether the justice had jurisdiction over the persons of defendants at the time he rendered judgment, in view of the conclusion we have reached that the judgment must be pronounced void on the ground that the record of the justice fails to show affirmatively that he had jurisdiction over the subject-matter. No rule is more firmly established than that the jurisdiction of an inferior court over the subject-matter must affirmatively appear on the face of the record. If it be not thus shown, the judgment rendered by the inferior court must be treated as a nullity, and may be attacked in a collateral proceeding. *York v. Roberts*, 8 Mo. App. 140; *Werz v. Werz*, 11 Mo. App. 26; *Fisher v. Davis*, 27 Mo. App. 321; *Edmonson v. Kite*, 43 Mo. 176; *Schell v. Leland*, 45 Mo. 289; *Iba v. Railroad*, 45 Mo. 469; *Corrigan v. Morris*, 43 Mo. App. 456. Section 3835, Rev. St. 1899 [Ann. St. 1906, p. 2124], provides that "justices of the peace shall have original jurisdiction in all civil actions and proceedings for the recovery of money \* \* \* when the sum demanded, exclusive of interest and costs, does not exceed \$250.00." We shall take judicial notice of the fact that Cole county, at the time of the proceedings in question, had less than 50,000 inhabitants, and consequently that the jurisdiction of a justice of the peace in that county is controlled by section 3835, and not by section 3836 [page 2126], which applies to counties or cities having over 50,000 inhabitants. The record of the justice recites that the suit is founded on a note, but fails to state the amount of the principal, or that the note stipulated for the payment of interest, and, for aught disclosed, the entire amount of the judgment rendered might have been for the face of the note, exclusive of any interest. If, in an effort to give to the recitals of the record the most liberal construction permissible, we should assume that simple interest was computed at the legal rate from the time of the filing of the suit, still the record would fail to show that the principal of the

obligation was within the jurisdiction of the justice. Certainly we would not be justified in indulging in the presumption that the judgment included interest which had accrued at the time of the commencement of the suit. To do this would be to ignore the rule that the proceedings must disclose affirmatively the jurisdictional facts, and to say that such vital defects may be remedied by presumptions, based on conjecture, and which may be wholly at variance with the actual facts.

The learned trial judge committed no error in sustaining the motion to quash, and, accordingly, the other judges concurring, the judgment is affirmed.

#### SCHMIDT v. MUTUAL RESERVE FUND LIFE ASS'N.

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

#### 1. LIFE INSURANCE—MUTUAL BENEFIT INSURANCE — ASSESSMENT ASSOCIATION — WHAT CONSTITUTES.

Contracts of an assessment insurance association with certain classes of its members, whereby each class is to pay a level rate, do not render the association an ordinary life insurance company, where it reserves the right to increase the rates of assessment.

#### 2. SAME—ASSESSMENTS—INCREASE OF RATE—CONSTRUCTION OF CERTIFICATE.

The constitution and by-laws of an assessment insurance association were by the certificate of membership made a part of the contract. They gave the directors power "to fix the amount and rate of assessments, fees, and dues," and the by-laws and certificate provided for a death benefit assessment at such rates "according to the age of each member" as the directors might establish. On the back of the certificate, but not referred to therein, was a table giving the basis of the assessment rate for each member according to age, and assessments were made on that basis according to the age of each member at his entry into the association. *Held*, that a readjustment of the rates by resolution of the directors of the association to conform to the estimated cost of insurance according to the experience of the association, equalized among the members by taking into account the attained age of each member, was authorized by the constitution and by-laws and the contract itself.

#### 3. SAME — DISCRIMINATION AS TO RATES — CLASSES OF MEMBERS.

Where the constitution and by-laws of an assessment insurance association, which by the certificate of membership are made a part of the contract of insurance, provide that the board of directors shall adjust assessments, a resolution adopted in pursuance thereto, requiring each member of a certain class to pay for his insurance the actual cost thereof according to the experience of the association on the basis of his attained age and expectancy of life, is not a discrimination against a member of such class simply because two other classes of the association's members pay flat premiums based on their ages at the dates of entry, where the evidence shows that such premiums are based on the experience of the association and the standard mortality tables, and cover the cost of insurance to the association.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Charles Conrad Schmidt against

the Mutual Reserve Fund Life Association to recover the amount of dues and assessments paid by him to the association. From a judgment for defendant, plaintiff appeals. Affirmed.

Defendant is a New York corporation chartered to do a life insurance business on the assessment plan, and in 1885 was, and still is, licensed to do business in this state. On August 5, 1885, on the application of Charles C. Schmidt, then 59 years of age, the association issued to him a certificate, in the form of a policy of insurance, for \$2,000, payable to his legal representatives in 90 days after proof of his death, provided said Schmidt kept the policy in force by payment of stated annual dues and all mortuary assessments made against him. Schmidt paid his dues and assessments to January, 1898, when call or assessment known as "call 98" was made upon him for the payment of \$33.84. This sum was largely in excess of any previous assessment made on him, and he refused to pay it, and his policy was declared forfeited. The action was brought by Schmidt to recover the sum of \$1,201.95, the amount of dues and assessments paid by him to the association. The right to recover is based upon the allegation that call No. 98 was not authorized, was illegal and excessive, and that the cancellation of Schmidt's policy was wrongful and unlawful. Pending the appeal, Schmidt died and the cause has been revived in this court in the name of his administrator.

The policy is as follows: "In consideration of the application of this certificate of membership, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the admission fee paid, and of the dues for expenses to be paid on or before the 5th day of August in every year during the continuance of this certificate, and of the further payment of all mortuary assessments, payable at the home office of the association in the city of New York within 30 days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine), and within 30 days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association, from and after the delivery hereof, with a receipt for the payment of the first annual dues, signed by the president, secretary, or treasurer of the association, does hereby receive Charles Conrad Schmidt, of St. Louis, county of —, state of Missouri, as a member of said association. Within 90 days after receipt of satisfactory evidence to the associa-

tion of the death of the above-named member, during the continuance of this certificate of membership, upon the following conditions, there shall be payable to the legal representatives of Charles Conrad Schmidt (self), of St. Louis, county of —, state of Missouri, the sum of \$2,000 from the death fund of the association, at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set forth, and no claim shall be otherwise due or payable, except from the reserve fund as hereinafter provided. (1) If, at such date as the board of directors of the association may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by the said board of directors, and the net amount received from such assessment (less 25 per cent. to be set apart for the reserve fund) as provided in the constitution and by-laws of said association shall go into the death fund. (2) The net earnings of the association, together with 25 per cent. of said net receipts from each assessment shall constitute a 'reserve fund,' which shall be deposited with a trust company, or companies, or departments constituted by governmental or legal authority, and upon the order of the board of directors of the association shall be securely invested in United States bonds, mortgages, or other interest-bearing securities for the exclusive benefit of the members of the association, and the interest on the same, as it accrues, shall be placed to the credit of the 'death fund,' to be used in providing for the current death claims. The reserve fund above \$100,000 and in excess of sums represented by outstanding bonds may be applied to the payment of claims in excess of the American Experience Table of Mortality, and when any claim by death is due, after a mortuary assessment upon each member of the association has been made, according to the rules of the association, to making up any deficiency that may then exist in the death fund. (3) After the expiration of each period of five years, during the continuance of this certificate of membership, a bond shall be issued for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date towards paying future dues and assessments under this certificate; and, should membership hereunder cease from any cause, said bond shall at once become null and void, and any portion of said principal not thus used shall be applied to increase the bonds issued at the next quinquennial apportionment to other members of the association holding certificates issued during the same year as this certificate, and at each apportionment the rate of assessments

may be changed to correspond with the actual mortality experience of the association."

The policy further provides that, if such assessments be not paid within the time stated, the certificate shall be null and void, and all rights thereunder, including any moneys theretofore paid for assessments, shall be forfeited to the association. The certificate also provides as follows: "If, at such date as the board of directors may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall be made, \* \* \* and such assessment shall be at such rates according to the age of each member as may be established." And it further provides: "This contract shall be subject to all the provisions contained in the constitution and by-laws of this association, with the amendments made or that may hereafter be made thereto." On the back of the policy, but not referred to therein, nor expressly made a part thereof, is indorsed what is designated as an "Assessment Rate Table," which contains a list of amounts opposite ages, beginning with 15 years of age. Above this table is the following statement: "No assessment will be made while there remains in the death fund a sum sufficient to pay existing claims in full. The basis of the assessment rate for each member according to the age taken at the nearest birthday for each \$1,000 is as follows: [Here follows the list of amounts and ages above referred to.]" Opposite age 59 is the sum of \$4.25.

Schmidt's application contains the following provisions: "On the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may from time to time determine) an assessment shall be made upon the entire membership in force at the date of the last death of the admitted death claims prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member," and that said certificate is also issued and "accepted subject to the express condition that if any of the payments above stipulated shall not be paid on or before the day of the date as above provided, at the home office of the association in the city of New York, or to a collector of the association furnished with a receipt signed by the president, secretary, or treasurer, \* \* \* then \* \* \* the consideration of this contract shall be deemed to have failed, and this certificate shall be null and void, and all payments made thereon shall be forfeited to the association." Defendant alleges that said application provides: "And the applicant further agrees that \* \* \* if he or his representatives shall omit or neglect to make any payment as required by the conditions of such certificate, or by the constitution and by-laws of said association, then the certificate to be

issued hereon shall be null and void,' \* \* \* and all money paid thereon shall be forfeited to said association.'"

The certificate of insurance refers to the constitution and by-laws of the association and makes them a part of the contract of insurance. The following provisions of the constitution and by-laws were in force at the date the policy was issued:

#### "Article II. Board of Directors.

"Sec. 4. The corporate powers of the association shall be vested in the board of directors, who shall have power to adopt such by-laws as they deem necessary, not inconsistent with this constitution, and to amend the same, and to fix the amount and rate of assessments, fees, and dues, and to enact rules and regulations for the government of officers and employees, and for the management of the affairs of the association."

#### "Article V. Mortuary Department.

"Sec. 1. The mortuary department shall be distinct from the other departments of the association, and all moneys received from the mortuary calls, less the cost of collecting, shall pass through said department and after deducting the expenses thereof, governmental taxes, legal and other expenses in defending or protecting the association against the payment of unaudited or fraudulent claims, shall be deposited by the treasurer in banks or trust companies, designated by the board of directors, to an account to be known as the 'Mortuary Account of the Mutual Reserve Fund Life Association,' and shall only be withdrawn from said account by transfer, on the order of the president and treasurer to the 'reserve fund,' or for investment in such securities as may be required by the laws relative to deposits to secure admission for the transaction of business by the association, as may be approved by the board of directors of the association, and which securities shall be deposited, as required by article X, section 2, of the constitution, or in settlement of death claims under the certificates of the association; said claims having been first approved by the executive committee of the association."

#### "Article X.

"Sec. 1. Seventy-five per cent. of all the net death assessments, as provided by article V, section 1, of the constitution, received by the association shall go into the death fund, from which losses shall be paid. The remaining 25 per cent. shall be carried to the reserve fund, no part of which shall be used for expenses.

"Sec. 2. The net earnings of the association, together with 25 per cent. of said net receipts from each assessment, shall constitute a 'reserve fund,' which shall be deposited with a trust company, or companies, or departments constituted by governmental or legal authority, and upon the order of the

board of directors of the association shall be securely invested in United States bonds, mortgages, or other interest-bearing securities, for the exclusive benefit of the members of the association, and the interest on the same, as it accrues, shall be placed to the credit of the 'death fund,' to be used in providing for the current death claims.

"Sec. 3. The reserve fund above \$100,000 and in excess of sums represented by outstanding bonds may be applied to the payment of claims in excess of the American Experience Table of Mortality, and when any claim by death is due, after a mortuary assessment upon each member of the association has been made, according to the rules of the association, to making up any deficiency that may then exist in the death fund.

"Sec. 4. After the expiration of each period of five years during the continuance of a certificate of membership a bond shall be issued for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date towards paying future dues and assessments under said certificate; and should membership under said certificate cease from any cause, said bond shall at once become null and void, and any portion of said principal not thus used shall be applied to increase the bonds issued at the next quinquennial apportionment to other members of the association holding certificates issued during the same year as the aforesaid certificate, and at which apportionment the rate of assessments may be changed to correspond with the actual mortality experience of the association.

"Sec. 5. On the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may from time to time determine) an assessment shall be made upon the entire membership in force at the date of the last death of the audited death claims prior thereto for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member. \* \* \* A failure to pay the assessment within 30 days from the first week day of February, April, June, August, October and December (or within 30 days from the day of the date of such periods as may be named by the directors) shall forfeit his membership in this association, with all rights thereunder, and the certificate of membership shall be null and void."

In 1888 the by-laws were amended, and section 4, art. 11, of the amended constitution reads as follows: "After the expiration of each period of five years during the continuance of a certificate of membership a bond shall be issued for an equitable proportion of the reserve fund, and the principal of said bonds shall be available ten years from its date towards paying future dues and

assessments under said certificate; and should membership under said certificate cease from any cause, said bond shall at once become null and void, and any portion of said principal not thus used shall be applied to increase the bonds issued at the next quinquennial apportionment to other members of the association holding certificates issued during the same year as the aforesaid certificate, and at which apportionment the rate of assessments may be changed to correspond with the actual mortality experience of the association." At an adjourned meeting of the board of directors, held January 12, 1895, on recommendation of the actuary of the association, the following resolution, known as the "Shields Resolution," was adopted: "Be it resolved, that the rates of assessment for all members of this association admitted prior to January 1, 1890, be and the same hereby are reapportioned, in accordance with the table of assessment rates now in use, to rates indicated by adding to the age of entry, one-half the number of years from January 1st of the year of admission to January 1, 1895, fractions of years resulting from the division to be counted as full years, and that said reapportioned rates of assessment, together with the present rates of assessments for all members admitted since December 31, 1889, constitute the rates of assessments of this association, beginning with call No. 81, until otherwise ordered by this board: Provided, however, that any increase beyond the rate indicated for more than 70 years may, at the member's option, be debited to his policy and deducted from the amount payable thereunder, instead of being paid in cash." A table of rates was worked out under this resolution, and Schmidt was assessed \$19.50 bimonthly, and paid these assessments under protest until call No. 96 was made in June, 1898. This call was made under resolutions of the board adopted at adjourned meetings held on September 18, 1895, and December 15, 1897. The resolution adopted September 18, 1895, is as follows: "Whereas, there is, and has been for a number of years past, a table of assessment rates, regularly and duly adopted by this board, and in use by this association, fixing and determining the rates of assessment at 'current' or 'attained' ages from the age of twenty-five (25) to the age of eighty (80) inclusive, both bimonthly and annually, which table is the table of assessment rates referred to in the resolution adopted by this board on the 12th day of June, 1895, as the 'Table of Assessment Rates Now in Use,' and which was annexed to said resolution of June 12, 1895, and marked 'Exhibit A': Now, therefore, for the purpose of spreading said table of rates in full upon the minutes of this board, with a view of making a complete and permanent record thereof, it is hereby resolved, that this board does hereby reconfirm, reconfirm, and readopt as the table of assessment rates now in use, and hereafter to be



used, the table of assessment rates in the words and figures following, that is to say:

"Table of Assessment Rates."

"For cash \$1,000 of insurance (not including dues) at current ages."

Age.	Bimonthly.	Annually.
59 .....	6.41	38.46
71 .....	16.92	101.52
72 .....	18.47	110.82

The following is the resolution adopted December 15, 1897: "Be it resolved, that pursuant to the terms of the contracts with the members, and in virtue of the power reserved to the association, for call No. 96, to issue and become payable February 1, 1898, and for all subsequent calls until otherwise ordered by the board of directors, the rate of assessment for each member of this association holding a policy or policies upon the fifteen-year plan shall be determined from the table of assessment rates now in use and upon the basis of the completed age in years of each member respectively, and of the amount of insurance by him carried at the date of each call."

Plaintiff was 71 years of age when call No. 96 was made, and his mortuary assessment was \$16.92 on each \$1,000 of his insurance. In respect to this call the actuary of the association testified the basis of the assessment was "on the table adopted in 1889, at attained age, as determined by the last birthday of each member," and said: "I made an examination, as actuary of the association, of the entire membership of what was called the 15-year class (the earlier form of policy issued by the association) with regard to the payments that had been made on mortuary account, and of the benefits which had been received. I found that the benefits to beneficiaries of these members, and the amounts that were outstanding to be paid on account of accrued, but not due, claims exceeded the entire mortuary payments that the members belonging to that class had made to the association from the beginning of the organization by something over \$800,000; that assessments levied upon the age and rate at which calls from Nos. 81 to 95, both inclusive, had been levied, would not produce a sufficient amount of money to meet existing death losses upon these members during the succeeding year, let alone the matter of meeting the accrued claims, and that, therefore, it was necessary for equity and justice, and the preservation of the institution, that those members should be brought up to attained age as a basis of their mortuary payments, in order that they should meet the cost of the insurance they were receiving, as the other members of the association were meeting the cost of the insurance they were receiving." Schmidt received due notice of the call, but refused to pay it, and so wrote the association, claiming the call was unjust, and

accusing the officers of the association of rascality and fraud, and persisting in his refusal to pay, his policy was forfeited by the association. He had received two bonds under section 4, art. 11, of the amended by-laws, but they were forfeited with his policy.

Prior to January, 1895, the rate of assessment was determined by the age of the member at admission. After 1895 the age "for determining the rate to be levied against each member was made the attained age at one-half the distance between the age of entry and the 1st of January, 1895; that is, instead of determining the rate of assessment by the age attained at original entry, as had been done, it was thereafter determined by the age attained one-half way between original entry and the 1st of January, 1895." The cost of insurance was arrived at "by determining the expected loss according to the American Experience Table of Mortality, and determining the relation between that expected loss to the actual loss experienced by the association, \* \* \* based upon the calculation showing what the cost of the insurance to these members themselves was, and the income that was being derived from them, as based upon their then age in 1894." Members insured prior to 1900 were then classed as 15-year members. Since 1895, the policies that have been issued "are in two general classes. One is known as the '10-year distribution policy,' under which the first application of surplus accrues at the end of 10 years; there being a rate of assessment which is expected to remain level during the 10 years, and then increased at the end of 10 years to attained age. Then there is another class of policies, known as the '5-year class,' under which there is a higher rate of assessment, the payment of which is expected to remain level throughout life." Under these classifications the assessments of members in the 5-year class were fixed upon the experience of the association and the standard mortuary tables, with the expectation or running level throughout the life of the member, and were intended to cover the cost of the insurance represented by this class of members. Members in the 10-year class were assessed in like manner, with the expectation that the level assessments would not be increased for 10 years. At the end of each 10-year period the assessments of this class were readjusted by the then attained age of each member; but the association, according to the testimony of the actuary, reserved the right to raise the assessments upon both of these classes if it became necessary.

Clause 4 of the charter of the association provides: "The mode and manner in which the corporate powers granted are to be exercised are by issuing certificate of membership, policy, or other evidence of interest to and promise or agreement with its members whereby, upon the decease of a member, money or other benefit, charity, relief, or aid is to be paid, provided, or rendered by said

corporation or association to the legal representatives of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief, or aid are derived from voluntary donations, or from admission fees, dues, and assessments, or some of them, collected or to be collected from the members thereof or members of a class therein, and interest and accretions thereon, or rebates from amounts payable to beneficiaries or heirs, and wherein the paying, providing, or rendering of such money or other benefit, charity, relief, or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief, or aid so realized is applied to the uses and purposes of said corporation or association and the expenses of the management and prosecution of its said business." The classification of members was made under this provision of the charter. Schmidt offered in evidence a folder or card, which he testified was delivered to him by a soliciting agent of the association before he applied for insurance. The language of this folder would induce any ordinary person to believe the rate of assessment would not be increased during the life of the policy. This folder, however, was dated several years after the date of Schmidt's policy, and he must have been mistaken about the time when it was delivered to him.

The issues were submitted to the trial court sitting as a jury. No declarations of law were asked or given. The court made a finding of the facts, and then rendered judgment for defendant, from which Schmidt appealed.

Kinealy & Kinealy, for appellant. Jones & Hocker, for respondent.

BLAND, P. J. (after stating the facts as above). 1. Resolutions under which the assessments were readjusted upon the basis of attained age were not amendments of the by-laws, and for this reason plaintiff contends the assessments were unlawfully increased. The constitution and by-laws of the association provide that the board of directors shall adjust calls or assessments, and in 1895 the board of directors adopted the policy of assessing each member on the basis of his attained age and expectancy of life, and authorized the executive committee to carry out the terms of the resolution. Under this resolution each member was required to pay for his insurance in bimonthly payments the actual cost of carrying the same according to the experience of the association, and this is denominated in the testimony of the actuary as an "equitable adjustment of the assessments," and also in the preamble of the resolution of June 12, 1895. This readjustment, according to the evidence of the actuary, was recommended by the superintendent of insurance of the state of New York, for the reason, he claimed, that members in the 15-year class were not paying for their insurance and were en-

joying an undue advantage over members in the 10 and 5 year classes. Both the by-laws and the certificate of insurance authorized the board of directors to make this adjustment. Plaintiff's contention is that, while members in the 15-year class are required to pay assessments based on attained age, the 10 and 5 year classes are only required to pay a flat bimonthly premium or assessment, based on their age at the date of entry, and that it is not expected that members of these classes will be required to pay more than the flat premium stated in their policies at any time in the future, irrespective of the age they may attain, and that a division of the association's membership into classes and the issuance of certificates upon the flat premium plan largely increased the mortuary assessments of members in the 15-year class from what they would have been, had not the classification been made and certificates issued on a flat premium plan. The evidence shows it was not expected that the assessments of members in the 5-year class would be raised at any time during the life of their policies, and that the level rate of the 10-year class only held good for 10 years, and at the expiration of each period of 10 years another rate, based on attained age, would be assessed. These level rates, according to the evidence, are based on the experience of the association and the standard mortuary tables, and cover the cost of the insurance to the association. The evidence also shows that call No. 96 was calculated on the same basis. In other words, the evidence shows that under the readjustment all members of the three different classes were required to pay assessments equal to the cost of carrying their insurance according to the experience of the association; so there is no apparent inequality in the assessments upon the members of the three classes, nor does the contract with the 10 and 5 year classes to pay a level rate, with the right reserved in the association to increase these assessments, have the effect to designate the association an ordinary life insurance company. *Hayden v. Franklin Life Ins. Co.*, 136 Fed. 285, 69 C. C. A. 423.

The right of the association to make call No. 96, has been before other courts and adjudicated in favor of the association. *Crosby v. Mutual Reserve Fund Life Association*, 38 Misc. Rep. 708, 78 N. Y. Supp. 237; *Haydel v. Same*, 104 Fed. 718, 44 C. C. A. 169; *Barbot v. Same*, 100 Ga. 681, 28 S. E. 498; *Mutual Reserve Fund Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854; *Gaut v. Mutual Reserve Fund Life Ass'n (C. C.)* 121 Fed. 403. The calls or mortuary assessments are periodically adjusted on the estimated cost of insurance according to the experience of the association, and are equalized among the members by taking into account the attained age of each member. It seems to us that this is equity, and it certainly is authorized by the by-laws and constitution of the association,

and expressly provided for in the contract of insurance itself. As opposed to this view, plaintiff cites the case of *Strauss v. Mutual Reserve Fund Life Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 606, 83 Am. St. Rep. 699, where it was held that call No. 96 resulted in discrimination against members in the 15-year class and was injurious. Strauss became a member in 1883. The terms of his contract of insurance are not stated in the opinion, nor are any of the facts upon which the court based its opinion. What is stated in the opinion is that it clearly appears from the sixteenth, eighteenth, twenty-first, and twenty-second findings of the facts there was discrimination and that plaintiff was injured thereby. There is no direct evidence in the record before us that call No. 96 resulted in discrimination by which Schmidt was injured, nor can the inference that the call resulted in such discrimination be drawn from the evidence contained in the record. On the contrary, the evidence of the actuary (the only evidence on the subject) is to the effect that call No. 96 was the result of a readjustment of assessments, by which each member was required to pay his equitable part of the death fund; and the Strauss Case is repudiated in *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163. Plaintiff also cites the case of *Mutual Reserve Fund Life Insurance Co. v. Foster*, 20 Times Law Reports, 715 (decided by the House of Lords July 29, 1904). A letter had been written Foster, and documents put into his hands by a solicitor of the association, and a table of bimonthly rates, showing a minimum and maximum rate for each £100 of insurance, according to the age of each member, and a similar table was also indorsed on the back of his policy. Under call No. 96, Foster was required to pay an assessment considerably in excess of the maximum rate as shown by the table indorsed on the back of his policy. Under protest he continued for some time to pay the bimonthly assessments under this call, and then sued the association to recover the excess he had paid above the maximum rate indorsed on the back of his policy. The Lord Chancellor said there had been "great ingenuity in concealing the real effect of the contract" of insurance, and denominated the nature of the document tendered Foster as "tricky," and stated it was clear Foster did not understand the contract. No letters were written to Schmidt, nor were any documents put into his hands by any agent or representative of the association before he made his application for insurance, and there was no indorsement on the back of his policy of the table of minimum and maximum rates. The following only in respect to rates was indorsed on his policy:

#### "Assessment Rate Table.

"No assessments will be made while there remains in the death fund a sum sufficient to pay the existing claims in full. The basis of the assessment rate for each member, according to age, taken at the nearest birthday, on each \$1,000 is as follows: [Here follows table, the rates increasing with age.]"

The rate opposite age 59 is \$4.25. There are, therefore, no facts to warrant us to denounce the transaction of the association with Schmidt as "tricky," unless it can be said that the policy, constitution, and by-laws of the association are calculated to deceive. We do not find them more complicated, more involved, or more difficult to understand than are policies, constitutions, and by-laws of most other associations of the same character. The truth is most life insurance policies are so written as to be incomprehensible to the ordinary man, and by such are taken upon trust, and, if defendant's form of policy should be condemned as "tricky," to be consistent we would have to condemn about every life insurance policy brought before us. There is no evidence to satisfy us that call No. 96 violated the terms of Schmidt's policy, impaired its value, or resulted in a discrimination to his injury; and for these reasons *Smith v. Supreme Lodge K. of P.*, 83 Mo. App. 512, and other cases along the same line, cited by plaintiff, have no application to the facts in this case. We agree with the following paragraph from the opinion of Judge Hough, before whom the case was tried: "I further find that under the contract there was no limit upon the amount that could be assessed against the plaintiff's certificate so long as the assessment was made to meet existing claims by death, and that the provision of said contract that assessments shall be made 'according to the age of each member' means the age of the member when the assessment is levied. All of the evidence in the case indicates that at the time this assessment was levied the death fund of the defendant association was depleted and an assessment was necessary in the judgment of the board of directors, and the assessment on plaintiff was made for such a sum as in their judgment was believed to be necessary to meet existing claims by death. Under these circumstances, although the assessment was larger than those theretofore levied against the plaintiff, yet, as the amount of assessments to be levied was by the contract left to the discretion of the board of directors and there is no proof that this discretion was abused, the assessment was a valid assessment, and the non-payment of it on or before March 3, 1898, worked a forfeiture of the certificate."

The judgment is affirmed. All concur.

## LUCAS v. BROWN et al.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

## 1. COSTS — STATUTORY PROVISIONS — STRICT CONSTRUCTION.

At common law, no recovery of costs was permitted, and statutes authorizing their allowance will be strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 1-5.]

## 2. SAME—WITNESSES' FEES—STATUTORY PROVISIONS.

Rev. St. 1899, § 1547 [Ann. St. 1906, p. 1174], provides that in civil proceedings the party prevailing shall recover costs. Section 9464 [page 4345] provides that in a proceeding to establish a private road costs shall be paid by objector if the award of the jury shall be the same or less than that awarded by the commissioners, but that otherwise they shall be paid by petitioner. Section 3259 [page 1855] requires a witness to swear to the number of days of necessary attendance under subpoena and the distance traveled, and section 3260 requires the clerk to enter the same in his fee-book. Section 4681 [page 2545] requires the summons to be issued by the clerk of the court or other officers named, and section 4682 requires the summons or subpoena to contain the names of all witnesses for whom a summons is required. Section 4671 [page 2547] requires a subpoena to be directed to the person to be summoned to testify, and provides the manner of service. In a proceeding to establish a private road, the clerk of the court, at an attorney's request, signed and affixed the seal of the court to subpoena blanks in which the names of the witnesses were not inserted, and delivered them to the attorney who caused the witnesses' names to be written in, and the subpoenas delivered to the sheriff for service. *Held*, that fees paid to witnesses so summoned, and fees for issuing and serving such subpoenas, were not recoverable as costs.

## 3. SAME.

The universality of the practice of the clerk of the court to sign and affix the seal of the court to subpoena blanks in which the names of the witnesses to be summoned have not been inserted, and to deliver them to attorneys who thereafter themselves filled in the witnesses' names and delivered them to the sheriff for service, should not be permitted to defeat the plain import of the statute that the subpoena, when issued by the clerk, shall contain the names of the witnesses to be summoned, so as to make costs for service and witnesses summoned under such practice recoverable.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Proceeding to establish a private road by James R. Lucas against Lucy M. Brown, as guardian and curator of George P. Brown, insane, and Lucy M. Brown. Judgment was entered in the circuit court for defendants for greater damages than awarded by the commissioners. Thereafter, on motion of plaintiff to retax, the court struck out several items entered as costs, and defendants appeal. Affirmed.

J. C. Hargus, Chas. W. Sloan, and C. H. Skinker, for appellants. Lee E. Crook, Rechow & Pufahl, and Mann & Daniel, for respondent.

JOHNSON, J. In a proceeding brought by plaintiff to establish a private road over

land of defendants, a jury in the circuit court assessed defendants' damages at a greater amount than that awarded by commissioners in the county court. Judgment was entered against plaintiff on the verdict, which included the costs of the proceeding incurred by defendants. Afterward, on motion of plaintiff to retax, the court struck out a number of items entered by the clerk as a part of the recoverable costs. Defendants appealed from the judgment sustaining the motion, and present a number of grounds for reversal, only one of which we deem worthy of special consideration. It appears that the attendance at the trial of a number of defendants' witnesses was in response to subpoenas served by the sheriff, which were incomplete at the time they left the hand of the clerk of the court. At the request of one of defendants' attorneys, the clerk officially signed and affixed the seal of the court to three subpoenas, in which the names of the witnesses to be summoned were not inserted. These blanks were delivered to the attorney who, some time after, had a clerk in his office write in the names of the witnesses, and deliver the subpoenas to the sheriff for service.

The question we are called upon to decide is whether costs made in this manner by the successful party may be recovered from the losing party. As far as we are advised, it has not been before any of the appellate courts of this state for decision. We are cited to a number of decisions in other jurisdictions (Slater v. Carter, 35 Ala. 679; Stevens v. Ewer, 2 Metc. [Mass.] 74; Potter v. Hutchinson Mfg. Co., 87 Mich. 59, 49 N. W. 517; Sweet v. Palmer, 95 Mich. 449, 54 N. W. 951; Merrill v. Townsend, 5 Paige [N. Y.] 80; Croom v. Morrisey, 63 N. C. 591; Wright v. Wheeler, 30 N. C. 184; Miller v. Hall, 1 Speers [S. C.] 1; Jewett v. Garrett [C. C.] 47 Fed. 625; McWilliams v. Hopkins, 1 Whart. [Pa.] 276; Craighead v. Martin, 25 Minn. 41; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Phinney v. Donahue, 67 Iowa, 192, 25 N. W. 126; Garrison v. Hoyt, 25 Mich. 509; Clarke v. Lyman, 10 Pick. [Mass.] 45; Abney v. Ohio Lumber Co., 45 W. Va. 446, 32 S. E. 256), but they afford us little aid, for the reason that the question must be answered by the construction which should be placed on the language employed in our own statutes relating to the subject, and it does not appear in any of the cases cited that the statutory law dealing with the subject of compelling the attendance of witnesses, and of assessing against the defeated party the costs incurred by his opponent, is the same as that in this state. "At common law, no recovery of costs was allowed, and when statutes were passed authorizing their allowance, they [the statutes] were always strictly construed. State ex rel. v. Seibert, 130 Mo., loc. cit. 213, 32 S. W. 670, and cases there cited. And this rule of statutory construction obtains in this

state." *Veldt v. Railway*, 109 Mo. App. 102, 82 S. W. 1122. Under this rule, defendants should be permitted to recover from plaintiff only such costs as were incurred by them in substantial conformity to the provisions of pertinent statutes. "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." Section 1547, Rev. St. 1899 [Ann. St. 1906, p. 1174]. In a proceeding to establish a private road, "if any person through whose land such road passes shall object on account of the amount of damages awarded to him (by the commissioners) an issue shall be made up in said court, and a jury sworn to determine the amount of damages to which the objector is entitled, and judgment shall be given in conformity to such finding, and an order for the establishment of the road shall be made as above, and the costs of the trial shall be paid by the objector if the award of the jury shall be the same or a less sum than that awarded by the commissioners, otherwise the costs shall be paid by the petitioner." Section 9464, Rev. St. 1899 [Ann. St. 1906, p. 4345]. The word "costs" in these sections means costs legally made, i. e., costs which the statutes provide shall be assessed and entered by the clerk as the costs of the case to be paid by the losing party. In the present case, plaintiff, because of his failure to maintain in the circuit court the adequacy of the award of damages made by the commissioners, should be treated, under the section of the statute last quoted, as the losing party.

In dealing with the method by which a witness may claim his fees for attendance and mileage, the statutes provide (section 3259, Rev. St. 1899 [Ann. St. 1906, p. 1855]): "Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice, as the case may be, as to the number of days of his actual necessary attendance under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, have actually and necessarily attended such court, or before such justice, and withdrawn himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance." And that "the clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, \* \* \* the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognizance, and shall swear the witness to the truth of the facts contained in said entry." Section 3260.

In *Veldt v. Railway*, supra, we held "that, as the witnesses were not first sworn to the

truth of the feebook entry by the clerk, he was neither authorized to allow the fees for which they applied, nor to tax the amount thereof as costs in the case." It would seem too plain for serious discussion that, in order for the fees and mileage of a witness and the fees of the clerk and sheriff for issuing and serving a subpoena to be legally taxed as costs in the case, it must be made to appear that the attendance of the witness was compulsory and not voluntary, and that the provisions of sections 3259 and 3260 of the statutes above quoted have been satisfied.

The only method for compelling the attendance of the witness is that provided in section 4661, Rev. St. 1899 [Ann. St. 1906, p. 2545]: "In all cases where witnesses are required to attend the trial in any cause in any court of record, the summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public, or justice of the peace of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear." The section following requires that the summons, or subpoena as it is called, "shall contain the names of all witnesses for whom a summons is required by the same party, in the same cause, at the same time, who reside in the same county, and may be served in any county in the state." The manner in which the subpoena may be served is prescribed in section 4671 [page 2547]: "Subpoenas shall be directed to the person to be summoned to testify and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause, and the sheriff, coroner, marshal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held."

Obviously, under these sections of the statute, a subpoena must be regarded as a process of the court out of which it is issued. That it must be issued and served in the form and manner provided in order to be a valid process is a proposition we deem incontrovertible, and, it follows from what we have said, that costs incurred under a process improvidently issued cannot be taxed against the losing party. In plain terms, the statute says a subpoena must be issued by the clerk, and must contain the names of the witnesses against whom it is directed. This does not mean that the clerk, or one of his deputies, must perform the manual work of preparing the subpoena, but it does mean that when he officially signs it, and affixes to it the seal of the court, it must be complete in all substantial particulars. The subpoenas in controversy, when delivered by the clerk to defendants' attorney, were not lawful writs. They were nothing more than pieces of blank paper to which the clerk

signed his name and affixed the seal of the court. Defendants' attorney was not empowered by law to issue writs of this character, nor was the clerk authorized to delegate to him the exercise of a power belonging to the clerk alone.

We appreciate what counsel have said relative to the universality of the practice followed in the present instance, but however general it may be, a mere custom should not be permitted to defeat the plain import of a statutory law. When the legislative will becomes crystallized into a statute, it is supreme and practices or customs at variance with it must give way.

The judgment is affirmed. All concur.

### HINES v. ROYCE.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

#### 1. FRAUD—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover money invested in corporate stock, because of defendant's fraud in representing the corporation's condition, evidence examined, and *held* to show that defendant's representations as to the proposed increase of capital stock and the quality and value of the corporation's goods were false, and induced plaintiff to make the investment.

#### 2. SAME—LIABILITY THEREFOR—MEANS OF KNOWLEDGE OF FACTS.

Neither law nor equity will afford relief for false representations, where the subject-matter is equally known to both parties, or where both parties have equal means of information, and regarding which one or the other is negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 23.]

#### 3. SAME.

Where plaintiff, in response to defendant's advertisement that the capital stock of a corporation was to be increased on account of the prosperous condition of its business, and that the new stock would be issued to purchasers, bought from defendant, without examining them, certain shares which showed on their face that they were a part of the original stock, and no new stock was ever issued by the corporation, plaintiff could not recover on the ground of defendant's false representations, since he had every opportunity to inform himself concerning the stock purchased, and negligently failed to use such opportunity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19-23.]

#### 4. SAME.

Plaintiff, in response to defendant's advertisement that a corporation was doing a prosperous business and carrying a stock of goods to a certain amount, purchased from defendant, after looking over the goods, certain shares of the corporate stock. Plaintiff was not qualified to determine the quality and value of the goods, and relied upon defendant's representations. The business was in a failing condition, and the goods of less value than represented. Plaintiff remained in the corporation for some time, but was not an accountant, and there was nothing to show that he knew the exact conditions of the corporation until his withdrawal therefrom. *Held*, that plaintiff was entitled to recover for defendant's misrepresentations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19-23.]

#### 5. SAME.

A seller is liable to an action of deceit, if he fraudulently represents the quality of the thing sold to be other than it is in particulars, which the buyer has not equal means of knowing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19-23.]

#### 6. SAME—PLEADING—PROOF.

It is not required that a pleading should state the evidence upon which a party relies, and so, where a petition, in an action to recover money invested in a corporation, alleged that defendant was guilty of fraud in representing the business of the corporation to be in a flourishing condition, a prospectus giving the corporation's capital stock and stating that the corporation proposed to materially increase such stock to meet the demand of its increased business, etc., was properly admitted, even though there was no reference to it in the petition.

#### 7. SAME—ADMISSIBILITY OF EVIDENCE—CIRCUMSTANCES OF FRAUD.

In an action for damages by a purchaser of corporate stock, because of defendant's fraud in representing the business of the corporation as being in a flourishing condition, it was proper to interrogate defendant as to the amount of the corporation's liabilities, such testimony tending to show its solvency or insolvency.

#### 8. TRIAL—VERDICT—REFUSAL TO ACCEPT.

Where the court charged that if they found for plaintiff the verdict should be for a certain amount, and the jury returned a verdict for plaintiff in a less amount, the court properly refused to receive the verdict and ordered the jury to return to their room and further consider the case.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by V. G. Hines against W. K. Royce. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry C. Solomon, for appellant. Ellis, Cook & Ellis, for appellee.

BROADBUSH, P. J. This is a suit by plaintiff against the defendant for damages for an alleged fraud. The admitted facts are as follows: The defendant, who resided in Kansas City, Mo., caused to be published an advertisement soliciting persons with capital to take interest in a certain dry goods corporation known as the "Royce Dry Goods Company." At that time the plaintiff, who was a resident of Sarcoxie, Mo., answered said advertisement, and received a letter from defendant dated February 28, 1903, in which among other things was stated that said dry goods company was conducting a large and profitable business at Kansas City, Mo., with a stock of about \$100,000 in value, practically all new goods bought at first hand; that the capital of the said company had been \$60,000, but at a meeting held on the day of the writing of said letter the managing officers of the corporation had voted to increase the capital stock to \$100,000; that the corporation was ready to issue such increased stock to purchasers; that the managing officers had concluded to install a new manager in the shoe, clothing, and furnishing goods department of their business; and that upon receiving said letter plaintiff went to Kansas City, and had an interview with de-

fendant, in which he repeated to plaintiff substantially all that was said in the letter. The plaintiff paid to the defendant \$4,500, and received in exchange from the defendant 45 shares of \$100 each in said corporation. The plaintiff remained in charge of the said department of the business until some time in the early part of July in that year, when on account of some altercation he had with a customer he was discharged by the defendant. The 45 shares of stock issued to the plaintiff was not additional stock of the corporation, but a part of the original stock which was owned by the defendant. There was no such additional stock issued by said corporation. The 45 shares of stock issued to the plaintiff showed upon their face that it was a part of the original stock. The plaintiff upon receipt of this stock did not examine them, but put them in a drawer in defendant's establishment to which he had access. The plaintiff's evidence tends to show that on about the 2d of July, 1903, he first learned from the defendant that the corporation had issued no increase of treasury stock, and he then learned for the first time that the shares of stock issued to himself were not increased treasury stock, but were shares of original capital stock, and owned by defendant, at which time he demanded of defendant the return of said \$4,500, and offered to return to defendant the said certificates of stock issued to him; that the Royce Dry Goods Company did not have a large and prosperous business; that it was not carrying a stock of goods to the value of \$100,000, and that the goods carried by it were not new and not bought at first hand, but were largely made up of secondhand, inferior goods; that it was not true that defendant had issued, prior to said transaction with plaintiff, a part of said increase of treasury stock to subscribers and purchasers; and as a matter of fact the plaintiff introduced evidence tending to prove all the material allegations of his petition. We do not understand that defendant contends that the plaintiff failed to introduce such evidence, but that his contention is that it disclosed such a state of facts as debarred his right to recover; viz., that according to plaintiff's own testimony when he came to Kansas City after having received defendant's advertisement he was afforded every opportunity to examine said stock of goods on hand, and did examine them to his own satisfaction; that he was a merchant of experience, capable of informing himself of the quality and the value of the goods on hand; that the shares of stock issued to him showed upon their face that they were not issued for any increase of the capital stock of the corporation, but a part of its original stock; that the plaintiff had the opportunity of inspecting them after they were issued to him; that the said advertisement did not purport that any new stock had been issued, and only that it was proposed to be issued; and that the plaintiff expressed no

dissatisfaction and made no complaint until he was discharged as aforesaid from the employment of the corporation. While such was proved the plaintiff introduced evidence tending to show that, notwithstanding he had been a merchant of several years' experience, his experience had been in the line of the shoe business mostly, and that it was not such as to qualify him to know the value and quality of other kinds of goods belonging to said corporation, and that he relied entirely upon the representation of defendant as to the character of the stock which he was receiving, and as to the value and quality of the goods. And it was shown that the goods were of much less value than \$100,000, and that in the course of a short while the corporation became insolvent and went into bankruptcy. The cause was submitted to the jury, which returned a verdict for the plaintiff, and judgment was rendered, from which defendant appealed.

The evidence conclusively establishes that the representation made by the defendant in reference to the proposed issue of increased stock of the said corporation and quality and value of the goods was false and no doubt was an inducement to the plaintiff to purchase said stock. But it is contended by defendant that there can be no recovery for said false representation, because the plaintiff had within easy reach everything necessary to enlighten him concerning said corporation's stock, and the quality of and value of the goods. It is said in *Davis v. Ins. Co.*, 81 Mo. App. 264, that: "Neither law nor equity will afford relief on the ground of false representation, where the subject-matter is equally known to both parties, if both parties have equal means of information, and in regard to which one or the other is negligent." And such is the general rule declared and recognized by all the appellate courts of this state. *Dunn v. White*, 63 Mo. 181; *Brauckman v. Leighton*, 60 Mo. App. 38. In business transactions parties must not neglect to use their own judgment and discretion. *Langdon v. Green*, 49 Mo. 363. It is clear from these authorities that plaintiff, nothing else having been shown, would not be entitled to recover as to false representation made by defendant as to character of stock the said corporation would issue or had issued to him, for he had every opportunity of informing himself as to those matters, and he negligently failed to use such opportunity. But notwithstanding he had every opportunity of examining the stock of goods on hand as to their value, the evidence tends to show that in the main he was not qualified after seeing the goods to determine their quality and value, and that he relied upon the defendant in respect to that matter. This was a matter of much importance as a consideration for the amount of money invested by plaintiff in the business. The evidence tends to show that the plaintiff was induced thereby to invest his money in a

falling business that had been represented to him by defendant as prosperous and which afterwards went into bankruptcy. We are of the opinion that the plaintiff had a right to rely upon representation of the defendant as to the condition of the business of the corporation, and the fact that he remained in the corporation the length of time stated before he withdrew from the business would not, standing alone, preclude his right of recovery, unless it was shown that he had received such information during such time as would advise him of the true situation of affairs. And the fact that he was discharged by the corporation does not prove conclusively in view of the other facts and circumstances mentioned that his withdrawal is to be attributed to such discharge. Starting out with the assumption, which the evidence disclosed beyond doubt, that the defendant set a trap when he made said advertisement to defraud some one, and that he did in fact defraud and deceive plaintiff, the facts and circumstances ought to be well established that the plaintiff entered into the concern with his eyes open to every material false representation made by defendant, or that he had the means at his command to inform himself of the situation in every important particular, and failed and neglected to do so. He could not have easily ascertained all the facts in regard to the property of defendant corporation and its condition. Had he been an expert bookkeeper, he might have found out that the corporation was failing and on the eve of bankruptcy, but it was shown that he was not such. A seller is liable to an action of deceit if he fraudulently represents the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means of knowing. 1 Story's Equity, § 197; Clinkenbeard v. Weatherman, 157 Mo. 105, 57 S. W. 757. This is well-settled law.

The defendant contends that the court committed error in the admission of evidence of a prospectus of the said dry goods company, in which was set forth that the capital stock of the company was \$60,000, which the company proposed to increase to \$100,000, to meet the demand of its increased business, and a statement therein that \$40,000 additional stock would be issued, etc. The objection to this evidence is that there is no reference to the prospectus in the plaintiff's petition. But we conceive that such a reference was not necessary. The object of its introduction was to show that fraud had been committed by the defendant. It is not required that pleading should state the evidence upon which the party relies, but only the facts. The plaintiff alleged in his petition that the defendant had been guilty of fraud in representing that the business of the said corporation was in a flourishing condition. The evidence objected to went to

establish that allegation. The defendant assigns as error the action of the court in permitting plaintiff to interrogate the defendant as to the amount of the liabilities of said corporation as being irrelevant and not within the issues of the case. We think this was admissible, as it tended to show condition of solvency or insolvency of said corporation.

Other objections made to omission of testimony we think were without merit. We will not incur the record with reference to them, except that wherein the defendant claims that the court admitted evidence relating to an offer of a compromise between plaintiff and defendant. The record discloses that all such evidence was upon objection of defendant excluded by the court, and we find none that was received that related to a compromise or an offer to compromise.

We have examined the plaintiff's instructions, and we find they are not subject to the objection urged by the defendant that they do not contain a full and complete statement of the law pertaining to the action. On the contrary, in our opinion, they fully cover the question in issue between the parties. The jury after being sent out returned a verdict in favor of plaintiff for \$1,500. The court refused to receive this verdict, because the jury was instructed that if they found for plaintiff the verdict should be for \$4,500. The court ordered the jury to return to their room and further consider the case. After which they returned to the court a verdict for \$4,500. The defendant in support of his contention that this was error cites *Haydel v. Hurck*, 5 Mo. App. 287; *Ranney v. Bader*, 48 Mo. 539. Neither of those cases, nor the case of the State of Missouri ex rel. v. Knight, 46 Mo. 83, sustain the defendant's theory. In the case of *Ranney v. Bader* the verdict of the jury was: "We, the jury, find for the plaintiff, and assess his damages at \$293, with 6 per cent. interest." The court said the verdict was correct, as the law fixed the rate of interest anyway, and the finding of interest did neither good nor harm. In the case of *State v. Knight*, 46 Mo. 84, the verdict was: "We, the jury, find a verdict for defendants, they to pay the cost of the suit." The court held that the verdict was in favor of the defendant, and that the statement that they were to pay the cost of the suit was mere surplusage, and should be disregarded. Here, however, the first verdict returned was not a proper verdict, because the jury had disregarded the instructions of the court, that if they found for plaintiff the verdict should be \$4,500. Therefore a verdict of \$1,500, was not responsive to the instructions, and the court was not bound to receive such verdict. A review of the whole case shows that the verdict was for the right party, and the judgment should be sustained.

Affirmed. All concur.



## CITY OF FULTON v. SIMS.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

## 1. MUNICIPAL CORPORATIONS—INTERFERENCE WITH STATE INSTITUTIONS.

An ordinance establishing public scales and declaring that coal, etc., shall not be sold without being weighed thereon is inapplicable to require one selling coal to a state institution, located within the corporate limits, to first have the same weighed on such scales; the city being without authority to interfere with the purchases, which Rev. St. 1899, § 7708 [Ann. St. 1906, p. 3679], authorizes the institution to make.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1311–1314.]

## 2. SAME—ORDINANCE—CONSTRUCTION.

An ordinance establishing public scales and declaring that commodities specified shall not be sold without being weighed thereon, but providing that owners of scales may have commodities weighed thereon which they purchase, is a police regulation and does not require one selling a commodity specified to have the same weighed on such scales, where it is weighed on the purchaser's scales.

Appeal from Circuit Court, Callaway County; A. H. Waller, Judge.

William T. Sims was charged with a violation of an ordinance of the city of Fulton, and from a judgment of acquittal, the city appeals. Affirmed.

D. P. Bailey, for appellant. Harris & Hay, for respondent.

ELLISON, J. Defendant was charged with a violation of an ordinance of the city of Fulton, a city of the third class. On a trial in the circuit court he was acquitted.

It appears that the city had an ordinance establishing public scales and providing that coal, hay, etc., should not be sold or bought without being weighed on such scales and a certificate of weight given to the purchaser. Defendant was the owner of a coal mine situated outside of the limits of the city. He sold and delivered coal to State Hospital for Insane, No. 1, an eleemosynary institution of the state. Article 1, c. 118, Rev. St. 1899 [Ann. St. 1906, p. 3676]. At the trial the following facts were agreed upon: "That the defendant William Sims did, on the 18th day of August, 1906, haul from his coal mines outside city limits of Fulton, and deliver to the State Hospital No. 1, in the corporate limits of the city of Fulton, one load of stone coal as alleged in the information herein, without first having the same weighed on the city scales and obtaining a certificate of weight as prescribed in the ordinances mentioned in the information, and that the said coal was sold to the said hospital by the defendant by contract entered into on the 1st day of September, 1905, which was prior to passage of ordinance under which this action is brought, and which provides that said coal should be weighed on hospital scales free of charge, and that said coal was delivered under and in fulfillment of said contract and was weighed on scales

belonging to said hospital." The ordinance in question provides that:

"Section 1. Election and compensation," etc.

"Sec. 2. Weights and measures to be kept.

"Sec. 3. Public scales established.

"Sec. 4. Duties of weighmaster.

"Sec. 5. Weights and measures.

"Sec. 6. Corn, Hay, and Coal to be Weighed on City Scales.—No person shall buy or sell, or offer to buy or sell, or receive or deliver, in the city of Fulton, any corn, hay or mineral coal, in bulk or wagon, or dray load, until the same shall first be weighed, before the delivery or reception thereof, on the city's scales, and a certificate of the weight is given and procured as required by this ordinance: Provided, persons who are dealers in buying and selling corn, hay or mineral coal at a stand or permanent place of business in this city and who have a merchant's license from the city to engage in such business, may sell corn or coal in quantities not exceeding fifteen bushels, and hay not exceeding five hundred pounds, without having the same weighed by the city weighmaster," etc.

"Sec. 7. Private Scales Not to be Used, Except.—All persons now or hereafter owning or having charge of any heavy draft scales within this city other than the city scales provided by this or other ordinance are prohibited from weighing or permitting to be weighed on such private scales, any loaded wagon or other vehicle, or any horse, mule, cattle, hogs, sheep or other animal, unless the thing weighed is owned or to be purchased by the owner of the scales: Provided, that railroad companies and owners of stockyards are exempt from the provisions of this section so far as concerns the weighing of live stock, and of such grain, hay and other products as may be intended for their own use or immediate shipment.

"Sec. 8. Penalty for not paying," etc.

"Sec. 9. Prescribes fees," etc.

"Sec. 12. Penalty.—Any person violating any of the provisions of this ordinance \* \* \* shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one nor more than one hundred dollars."

At the close of the case the trial court gave the following instruction: "That under the law and the evidence the verdict must be for defendant." And at the time of giving the same announced that it held "that the city of Fulton could not require parties selling coal or other supplies to a state institution though located within its corporate limits, to first have the same weighed on its public scales." The coal sold by the defendant was for supplies to a state institution, which is conducted under the control and management of the state. It is especially provided by statute that the board of managers of the institution shall purchase supplies for its use and consumption. Section 7708, Rev. St. 1899 [Ann. St. 1906, p. 3679]. The city of Fulton and the hospital for the insane are

each under the control of the state, and the functions of each are separately provided for. In the respect here considered, each is independent of the other, and we therefore can discover no reason, in the absence of statutory provisions, supporting the city in interfering with the hospital in the purchases which the statute authorizes it to make for itself. *Ky. Institution for the Blind v. Louisville, 97 S. W. 402, 30 Ky. Law Rep. 136, 8 L. R. A. (N. S.) 553.* That case arose over the city attempting to compel the institution to provide certain fire escapes for its buildings, and we consider it to be in point in the present controversy. The Kentucky Court of Appeals among other things said that "the municipal government is but an agent of the state—not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government, even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city have ever a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have."

Another reason we think justified the trial court in discharging the defendant. It will be borne in mind that this coal was weighed on the scales owned by the hospital. By reference to section 7 of the ordinance as set out above it will be seen that persons owning their own scales may have commodities weighed thereon which they purchase for themselves. As stated by defendant's counsel, this provision would be meaningless if the seller were prohibited, in such cases, from selling by the weight of such scales. It is therefore our conclusion that the ordinance in question, by its own terms, does not apply to a sale where the commodity sold is weighed on the purchaser's own scales, with his approbation. And why should an ordinance apply to such a sale? Such ordinances, unless designed and authorized by the charter for taxing purposes, are police regulations. *City of Lamar v. Weidman, 57 Mo. App. 513; City of St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291.* And they are ordained for the benefit of the purchaser to protect him from false weights. *Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566.* When his own scales are used, and the seller is satisfied, the public should rest content.

The judgment is affirmed. All concur.

#### Lamm et al. v. RAILEY.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

**COSTS—EJECTMENT—DISCRETION—STATUTES.**

Rev. St. 1899, § 1547 [Ann. St. 1906, p. 1174], provides that in all civil actions the prevailing party shall recover costs, except where

a different provision is made. Section 1550 [Ann. St. 1906, p. 1176] provides that, where a verdict is on any issue in favor of defendant, he shall have judgment for costs, in the discretion of the court. *Held*, that the fact that defendant in ejectment filed a general denial and a counterclaim did not bring the question of costs within the discretion of the court, but that plaintiff, on recovering judgment, was entitled to have all the costs taxed against defendant, under section 1552 [Ann. St. 1906, p. 1177], providing that in all actions not founded on contract, if plaintiff recover any damages, he shall recover his costs.

Appeal from Circuit Court, Monticau County; Wm. H. Martin, Judge.

Action by Maggie A. Lamm and another against Samuel Railey. From a judgment taxing part of the costs against plaintiffs, they appeal. Reversed.

Edmund Burke and John Cosgrove, for appellants. R. M. Embry, for respondent.

**BROADBUSH, P. J.** This is an appeal by plaintiffs from a judgment of the court taxing against them certain cost incurred during the proceedings. The action was ejectment. The defendant was duly served to appear at the January term of the court for the year 1905, it being the 9th day of said month. After service of summons upon defendant, and a short time prior to the beginning of the term, his attorney notified plaintiff's attorney that he would file a motion to require the plaintiffs to give security for the costs in the case. Under rule 7 of said court all motions for security of costs were required to be filed on or before the day upon which such cause is set for trial. On the 3d day of January, 1905, the defendant caused to be issued out of the office of the clerk three subpoenas for 21 witnesses to appear in said cause in his behalf on the 10th day of said month, of whom only 10 testified in the case. On the 5th of said month subpoenas were issued in behalf of plaintiff for the attendance of 20 witnesses. On the 9th day of January defendant filed a demurrer to plaintiffs' petition, which was sustained by the court on the 11th day of January, whereupon on the said last-named day the plaintiffs, with leave of court, filed an amended petition to which on the 12th day of January defendant filed an answer and counterclaim, and on the same day the plaintiff filed a reply. At the time the court sustained the demurrer to plaintiffs' petition it was announced in open court that the answer to the proposed amended petition would be a general denial. No motion at any time was filed requiring plaintiff to give security for cost. On the trial a lease was introduced as evidence by plaintiffs, and in connection therewith three witnesses were introduced; to wit, Charles P. Spielier, S. H. Johnson, and J. Gump. The defendant introduced witnesses in support of its answer and counterclaim. The plaintiffs introduced no other witnesses than those named. The finding and judgment were in favor of plaintiffs. This judgment

was in favor of plaintiffs for the cost of the case. Afterwards, on the same day, the court made an additional order in reference to the taxation of cost; viz., that the cost of all witnesses used in the trial of the cause be adjudged against the defendant, and that the cost of all witnesses not used in trial of the case be adjudged against the plaintiffs, which included all plaintiffs' witnesses, except those mentioned, and also all the defendant's witnesses, and which included the fees due the clerk for issuing subpoenas for the witnesses, and also the fees of the sheriff for serving them. On the 21st of January the plaintiffs filed a motion to have the cost adjudged against them set aside, which motion was continued until the 5th day of May, 1905, and on which day, by leave of court, was withdrawn, and on the same day by leave of court refiled; whereupon defendant's attorney stated to the court that he consented that all claims for witness fees for the third day would be assumed by the defendant. The motion came up for hearing again on the 27th day of May; whereupon Mr. Emery, defendant's attorney, testified that after he had determined to file a demurrer to the petition of plaintiffs he had all of his witnesses summoned; that he retained some of his witnesses after the demurrer had been sustained for the purpose of trial after the issues were made up, but he could not tell how many. The motion was not taken up again until the 12th of January, 1906, when the plaintiffs offered the following declaration of law, namely: "The cost in this case should all be taxed against the defendant, unless it shall appear from the evidence that the plaintiffs summoned witnesses vexatiously, and there is no evidence of any witness summoned vexatiously, and for the purpose of making unnecessary cost." This declaration of law the court refused. The court overruled plaintiffs' motion to retax the cost, except to the extent of \$34.35, and adjudged all the remaining cost, amounting to \$98.70, against the plaintiffs.

The question of cost is a matter regulated by the statute. Section 1547, Rev. St. 1899 [Ann. St. 1906, p. 1174], provides that: "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." Section 1548 of the same statute [Ann. St. 1906, p. 1176] provides as follows: "On all motions the court may give or refuse costs at its discretion, unless where it is otherwise provided by law." And section 1549, Id. [Ann. St. 1906, p. 1176], provides that: "When any defendant, in any action, shall plead several matters, any of which shall, upon demurrer joined, be adjudged insufficient, or if a verdict shall be found on any issue in the case for plaintiff, costs shall be given at the discretion of the court." Sections 1550 and 1551 [Ann. St. 1906, p. 1176]

also provide in what cases the court may tax cost at discretion. They read as follows:

"Sec. 1550. Where there are several counts in any petition, and any one of them be adjudged insufficient, or a verdict on any issue joined thereon, shall be found for the defendant, costs shall be awarded at the discretion of the court.

"Sec. 1551. Where several persons are made defendants to any action, and any one or more of them shall have judgment in his favor, every person so having judgment shall recover his costs, in like manner as if such judgment had been entered in favor of all the defendants, unless it shall appear to the court that there was reasonable cause for making such person defendant to such action."

This case being one of ejectment, and the answer a general denial and a plea of counterclaim, does not bring the question of cost within the provisions of the statute giving discretionary power to the court to tax cost.

Section 1552, Id. [Ann. St. 1906, p. 1177], provides as follows: "Sec. 1552. In all actions not founded on contract, the damages claimed in the petition shall determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his cost." This being an action *ex delicto*, under said latter section the cost should have all been taxed against the defendant and in favor of plaintiff. *Du Pont v. McLaran*, 61 Mo. 511; *Vineyard v. Lynch*, 86 Mo. 684; *Hecht v. Helmann*, 81 Mo. App. 373.

It was made to appear that plaintiffs did not have the witnesses summoned in their behalf for the purpose of vexation, that they were not guilty of any intentional wrongdoing, and that they acted in good faith. There appears to be no good reason for taxing the cost pertaining thereto against them.

The cause is reversed and remanded, with directions to tax all the costs in favor of plaintiffs against defendant. All concur.

#### ROGERS v. RUNDELL et al.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence in an action against mine owners for death of a miner by the caving of the roof of the mine held sufficient to show negligence in supporting the roof.

##### 2. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

It is a question of contributory negligence, and not of assumption of risk, where the peril of a servant in the performance of his duty is increased by the negligence of the master, and the servant knowing of the negligence, and that it had rendered the performance of his duty more hazardous, continues in the performance of his duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

##### 3. SAME—INSTRUCTIONS.

An instruction in an action for death of a miner from the caving of the roof of the mine

that if he knew the dimensions of the drift in which he was injured and the character and condition of the ground in which it was cut, so far as they were reasonably ascertainable, and the way in which the timbering was done, and the risks and danger incident to working therein under all said conditions, and continued to work therein without complaint, there could be no recovery, is objectionable as leaving out of consideration the question whether or not deceased might have reasonably, under the conditions as they appeared to him, have proceeded with the work, with the expectation of safety by the use of ordinary care; there being evidence tending to show that he might have reasonably thought he could safely proceed with the work.

#### 4. EVIDENCE — OPINIONS — EXAMINATION OF EXPERTS.

The question "what do you say from your experience \* \* \* as to the propriety of driving a drift with limestone and boulders and selvage 35 feet wide and 25 feet high" is not a proper question for expert testimony, as it only calls for an expression of a conclusion.

#### 5. SAME.

The question asked an expert miner "what effect would the leaving out of a collar brace have on the strength of the timbering in a drift" is competent.

#### 6. SAME.

The question to an expert "I will ask you to state whether, in your judgment as a miner, it was proper or improper to cut that drift at the width which it was cut and the way in which the ground was handled" was improper, as asking for a conclusion, and not for an opinion.

#### 7. APPEAL — REVIEW — HARMLESS ERROR — QUESTIONS TO WITNESSES.

Though the question to an expert "I will ask you to state whether, in your judgment as a miner, it was proper or improper to cut that drift at the width which it was cut and the way in which the ground was handled" was improper as asking for a conclusion, and not for an opinion, the answer that it was cut the usual width was proper.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Nellie Rogers against M. W. Rundell and others. Verdict for defendants was set aside and a new trial granted, and defendants appeal. Affirmed.

F. L. Forlow and A. E. Spencer, for appellants. W. C. Irwin, W. J. Owen, and Thomas & Hackney, for respondent.

BROADDUS, P. J. The cause was tried before a jury, and a verdict rendered in favor of the defendants, which, upon motion of plaintiff, was set aside. From the action of the court in setting aside the verdict, the defendants appealed.

The suit is against the defendants for damages in the sum of \$4,500, which plaintiff claims was the result of defendants' negligence, which caused the death of her husband, Charles M. Rogers, a miner. The negligence alleged was, generally, in failing to properly cut and construct timbers, or otherwise protect the drift from caving; in cutting the drift too wide and too high; in failing to furnish sufficient timbers and of sufficient size and quality to render the drift reasonably safe; in failing to properly place and secure said timbers so as to prevent their falling or being knocked down; and in suf-

fering a large boulder to remain in the roof of the drift. The answer was a general denial.

The grounds upon which the court granted a new trial were as follows: That the court erred in giving improper instructions asked by defendants, in refusing competent relevant evidence offered by the plaintiff, and in admitting incompetent and irrelevant evidence offered by the defendants. The plaintiff introduced evidence that, at the time of the killing of her husband, he was in the employ of the defendants, in defendants' mine, in a drift from 160 to 170 feet from the surface of the ground; that this drift was 80 feet long from the shaft, and that it was 34 feet wide, and about 25 feet high; that it was in what was called "bouldry selvage ground," which was treacherous, and was liable to fall from the effects of the air dissolving and loosening it. There was evidence that the place where plaintiff's husband was killed and where the cave of the roof occurred, and on the left hand side of the drift, were two old drifts, which ran into the main drift six feet from the bottom thereof, and extended as high as the roof of the same; that the defendants failed to put in support of the roof in said drifts, and failed to shore up the left side of the drift, and failed to take necessary precaution to prevent the dirt from falling from the roof of the two old drifts; that before the timbering was done in the drift there was a boulder in the roof that hung down below the place where the timbering should go, and that defendants' foreman instead of removing the boulder popped it off, that is to say, in mining parlance, shot off the hanging part, and that it was then discovered that the boulder was in selvage ground, and this boulder was uncovered and showed a surface of several feet. There was evidence that the post used by defendants in timbering the shaft were placed as far apart as 8 feet, and in some places further, and in one place the post were 14 feet apart; and that in some instances these post were of no greater diameter than 7 or 8 inches at the smallest part. It was in evidence that, in mining, collar braces were used to keep the post from spreading or coming together, but that at the point where the final break came that killed plaintiff's husband no collar braces had been placed; and that the post were not stayed at that point. The evidence tended to show that the weight of the timbers, unless they were braced, would have a tendency to spread; and that on the day before the killing of plaintiff's husband while the miners were at work they heard a rumbling in the roof; that loose dirt and other substances were caving down on the left side of the drift and on the left side of the timbers.

We have stated some of the main evidence of the case, and it is sufficient to say that plaintiff's evidence tended to support the allegation of her petition. It was disclosed

that plaintiff was a miner of many years' experience, who had been working in the drift where the accident occurred, and that he had helped to cut the timber in the drift, and that he knew all that could be known about its condition. The evidence of the defendants tended to show that the roof, where it fell, was apparently a lime roof, which would stand without timbers, but, notwithstanding, they timbered the same in the usual way; that the drift was considered safe, and that its dangerous condition was not discovered before the accident; and that the boulders fell suddenly and without warning. It has been stated that the court set aside the verdict in favor of the defendants on the grounds of error in giving instruction in their behalf. Instruction numbered 10, given for defendants, is attacked by plaintiff as being erroneous, and, as such, a sufficient justification of the court in setting aside the verdict and granting a new trial. This instruction is as follows: No. 10. "If you believe from the evidence that Charles Rogers knew the width and height of the drift in which he was injured, and the character and condition of the ground in which it was cut, so far as said character and condition was reasonably ascertainable, and knew the way in which the timbering was done and the risks and danger incident to working and mining therein under all said conditions, and continued to work therein without complaint, then, as a matter of law, he assumed the risk of the dangers thus known and of injuries caused thereby, and your verdict must be for defendants."

In *Dakan v. Chase & Son Mercantile Co.*, 197 Mo. 238, 94 S. W. 944, the court, in speaking of a similar case, uses the following language: "If the peril of the servant in the performance of his duty is increased by the negligence of the master, and if the servant, knowing that the master has been thus negligent, and that that negligence has rendered the performance of his duty more hazardous, continues in the performance of that duty, a question of contributory negligence then arises, not a question of assumption of risk." This seems to be the general rule adopted by the appellate courts of this state. In such cases the rule is that "if the danger arising from the master's negligent act is so obvious that the servant, considering his capacity and opportunity, must have known and realized its degree, the court would declare his act of so continuing in his work contributory negligence as a matter of law, but if the peril was not so obvious, if the danger was such as to make it a question whether or not the servant, considering his capacity and opportunity of judging, might reasonably expect that he could continue the service by exercising ordinary care, then it is a question for the jury." *Idem*, loc. cit. 267, of 197 Mo., page 952 of 94 S. W. The instruction in this case is similar to the one condemned in the case cited. The instruction in the case cited di-

rected "a verdict for defendant if the plaintiff was aware of the plan of the buildings, its compartments, the manner of conducting the business, etc., regardless of plaintiff's capacity to know or appreciate the danger, and regardless of the question of whether or not she might have reasonably thought that under the conditions as they appeared to her she could proceed with the work with reasonable expectation of safety, using ordinary care." Tested by the rule that is thus laid down, instruction 10 given in behalf of defendants was erroneous. One important element is entirely left out of consideration in said instruction, namely, whether or not the deceased might have reasonably, under the conditions as they appeared to him, have proceeded with the work, with the expectation of safety by the use of ordinary care. The evidence tended to show that the plaintiff's husband might reasonably have thought that he could safely proceed with his work. In fact, the defendants are contending in their argument that there was no apparent danger at all. Under such circumstances, it is clear that the danger was not so obvious and threatening as would prevent an ordinary prudent man, in the exercise of reasonable care, from continuing his work. The defendants contend, however, as there was no evidence that the deceased made any complaint of the dangerous condition of the mine, or had any assurance of its safety by defendants, the instruction was proper. We will notice some of them. In *Lacey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340, the action is based on negligence of defendant in propping up a lateral crossbeam in a building where plaintiff was required to work, in discharge of his duty, in consequence of which the crossbeam fell upon and injured him. The court held that: "It was not a latent defect of which he had no knowledge, and of which his employer knew, or might have known, by the exercise of that degree of diligence that is required the master in furnishing a safe place for his servant to work." But that the danger was not only apparent, but that the plaintiff assisted in making it dangerous. In *Bradley v. Ry. Co.*, 138 Mo. 298, 39 S. W. 763, the decision of the court does not sustain defendants' theory. In that case the plaintiff was required to work at an embankment that had been undermined, and where the danger was obvious, yet the court held, notwithstanding the obvious danger which was known to the plaintiff, that the defendant was required to use reasonable care to prevent the embankment from falling upon the plaintiff. In *Hurst v. K. C. P. & G. Ry. Co.*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539, where the servant had full knowledge of the danger and accepted the employment, it was held he assumed the risk attendant to the discharge of his employment. And the principle in the case of *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, was similar. In *Minnier v. Ry. Co.*, 167 Mo. 99, 66

S. W. 1072, it was held that: "The servant, in entering the service of the master, assumes the risks that ordinarily and usually are incident to the business being conducted by the master." We do not think the case of *Lacey v. Hannibal Oil Co.*, supra (or others cited), is in conflict with *Dakan v. Chase & Son Mercantile Co.*, but entirely in harmony with it, for the danger was so obvious and threatening as to deter a man of ordinary prudence to continue his work at the place where he was injured, and the court so found as a matter of law.

During the trial a witness was asked the question: "What do you say from your experience in and about the Webb City district as to the propriety of driving a drift with limestone and boulders and selvage 35 feet wide and 25 feet high?" The witness was an experienced miner, and it is contended by plaintiff that it is a proper question for expert testimony. We think not, as it only called for an expression of a conclusion, and not the expression of an opinion. The same witness was asked the following question: "What effect would the leaving out of a collar brace have on the strength of the timbering in a drift?" The question was objected to, which objection was sustained. We believe the question was competent. *Buckley v. Kansas City*, 95 Mo. App. 189, 68 S. W. 1069; *Combs v. Roundtree* (Mo.) 104 S. W. 77; *Spencer v. Bruner* (Mo. App.) 103 S. W. 578; *Standley v. Ry. Co.*, 121 Mo. App. 537, 97 S. W. 244. The defendants asked the witness the following question: "I will ask you to state whether, in your judgment as a miner, if it was proper or improper to cut that drift at the width which it was cut, and the way in which the ground was handled?" The question asked for a conclusion and not for an opinion of the witness, which was improper. However, the answer of the witness was proper, as he states that it was cut the usual width. The other questions and answers put to the same witness were proper questions to answer.

We see no reason for interfering with the action of the court in setting aside the verdict and granting a new trial. Therefore the cause is affirmed. All concur.

#### MAIN v. HALL.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

#### 1. FRAUD — ACTION — PLEADING — MATTERS OF DEFENSE.

It is a general rule that, where fraud is relied on as a defense, the answer must state the facts constituting the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 36-43.]

#### 2. SALES — ACTION FOR PRICE — PLEADING — EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In an action for the price of goods, which defendant refused to receive, it may be shown under the plea of non est factum that defendant's signature was procured by fraudulently

substituting such writing for one defendant supposed he was signing.

#### 3. TRIAL — INSTRUCTIONS TO JURY — DEFINITION OF TERMS.

It is unnecessary for the court to define the word "negligence," where he uses it in an instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, § 371; vol. 37, Negligence, § 371.]

Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by W. F. Main against Jesse F. Hall. From a judgment for defendant, plaintiff appeals. Affirmed.

Martin E. Lawson, for appellant. Jesse E. James and William J. Courtney, for respondent.

**BROADDUS, P. J.** The plaintiff's suit is for the value of certain merchandise alleged to have been sold to defendant on his written order. The answer is a general denial and a plea of non est factum. The judgment was for defendant, from which plaintiff appealed.

The defendant was a young man with three years' experience as a merchant, and doing business at Kearney, Mo. The order in controversy is mostly in print and quite lengthy, on the back of which is printed a list of a great many articles of merchandise and their prices. The testimony of defendant shows that on June 25, 1906, J. B. Weil, plaintiff's traveling salesman, came to his store and sold to him different articles of merchandise of the value of \$90.96; that the said Weil filled out a written order, similar in all respects to the one in suit, containing an order for such goods, the amount of which was stated on the back of said order; that he carefully examined the paper on both sides, and knew its contents, and that it corresponded with the goods he had purchased; that just at that time he left Weil with the paper to go to another part of the store to wait upon a customer; that when he returned he again looked over the front page of the paper, saw that it was what he had previously examined, but did not examine it on the back; and that he signed it under the writing on the front side with the supposition that it was the original order. In a short time goods arrived of the value according to the invoice, which was boxed up with the goods, of \$213.59. The defendant immediately re-shipped the goods to plaintiff.

On the trial plaintiff objected to the evidence of defendant tending to show that the written order was obtained by fraud, which objection the court overruled. It is plaintiff's contention that such evidence, fraud not being pleaded, was incompetent. It is a general rule that, where fraud is relied on as a defense, the answer must state the facts constituting the fraud. *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514; *Paving Co. v. Field*, 188 Mo. 182, 86 S. W. 860. But notwithstanding such is the general rule, it also held that under a plea of non est factum it may be shown that

the "signature of defendant was procured through the secret and fraudulent substitution of it in the place of another which the defendant supposed he was signing." *Kingman & Co. v. Shawley*, 61 Mo. App. 54. The decision is peculiarly applicable to this case, owing to its similarity. And so it was held in *Broyles v. Absher*, 107 Mo. App. 168, 80 S. W. 703; *Wright v. McPike*, 70 Mo. 175; *Corby, Ex'x v. Weddle*, 57 Mo. 452.

The plaintiff also complains of the action of the court in failing to define negligence in an instruction given in behalf of defendant. Such a definition is held not to be necessary. *Sweeney v. K. C. Cable Co.*, 150 Mo. 385, 51 S. W. 682. The plaintiff insists that the verdict should have been for him, and not for defendant. But we believe that the finding of the jury is fully supported by the evidence, and is for the right party.

Affirmed. All concur.

### CARLTON v. ST. LOUIS & SUBURBAN RY. CO.

(St. Louis Court of Appeals. Missouri. Nov. 19, 1907. Rehearing Denied Jan. 7, 1908.)

#### 1. EVIDENCE—CARRIERS—INJURIES TO PASSENGERS—PREMATURE STARTING OF CAR—PHYSICAL FACTS.

Where plaintiff was injured by the premature starting of a street car as she was endeavoring to alight, while facing outwardly at right angles to the car, her evidence that when the car started she fell so the back of her head struck the step of the car was not necessarily contrary to natural law.

#### 2. DAMAGES—PERSONAL INJURIES—EVIDENCE.

In an action for injuries to a female passenger who earned a living by washing and sewing for families, evidence that she was of unchaste character, while irrelevant on the damages sustained from pain of mind and body in consequence of the injury, was admissible, as bearing on the damages recoverable for future loss of earnings.

#### 3. SAME—INSTRUCTIONS.

An instruction that if the jury found that plaintiff prior to receiving her injuries was of unchaste character, such fact could only be considered as affecting her credibility as a witness, and did not affect her right to recover, and should not be considered in determining defendant's alleged negligence and plaintiff's right to recover, was erroneous in limiting the evidence of unchastity to plaintiff's credibility.

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Lulu Carlton against the St. Louis & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jefferson Chandler and T. M. Pierce, for appellant. Irvin V. Barth, for respondent.

GOODE, J. This is an action for personal injuries alleged to have been caused by the negligence of the crew of one of defendant's trolley cars. The amount prayed for is \$10,000, and the verdict is for \$2,500. The respondent boarded one of defendant's cars on the evening of February 24, 1904, at the cor-

ner of Newstead avenue and the Suburban tracks in the city of St. Louis. She was accompanied by her young daughter. When near the corner of Fourteenth and Wash streets respondent rang the bell for a stop in order that she might alight at that corner. Three or four people preceded her in alighting from the car, and just as she was in the act of stepping to the surface of the street, and while her left foot was on the ground and her right foot on the step of the car, the conductor, without warning to her, signaled to proceed, whereupon the motorman turned on the power, and in the sudden movement of the car respondent was thrown down, her head striking the step of the car, rendering her unconscious for a short time. Respondent was three months advanced in pregnancy, and six days after the accident there was a hemorrhage from the womb, causing it to be necessary, as the physician testified, to remove the fetus, which was done. Expert evidence of a physician was given tending to show that the fall of respondent would probably have brought about the miscarriage or loss of the fetus, and that diseased conditions might have resulted from the consequent operation. Respondent swore that prior to the accident she was a strong healthy woman, and had supported herself and her family by hard work. Her employment was to do washing for other families and take in sewing. She testified that she was able to make from \$7 to \$14 a week.

The first point made for reversal is that the physical facts contradict her oral testimony, inasmuch as she swore that when the car started she fell so the back of her head struck the step of the car. It is contended for the appellant that this was a physical impossibility, because as respondent was in the act of alighting, she was facing outwardly at right angles to the car, and the forward movement of the car would give her such a motion in falling that the back of her head could not possibly strike the step. It might well be argued to the jury that this would not have happened; but the argument that it could not, according to the laws of nature, is manifestly fallacious. The sudden movement of the car might not have been a violent one, and still strong enough to cause respondent's right foot to slip off the step, letting her fall backward and strike her head against the car. It appeared from respondent's own testimony that she was unmarried and had been for a good while. At the time of the accident she was with child, thus establishing that she was of unchaste character. Respondent swore she would have been married that spring, had not the accident occurred. Whether or not her pregnancy was due to intercourse with the man she expected to marry does not appear. During the progress of the trial it was strongly insisted by counsel for appellant that as respondent's condition was the result of illicit intercourse appellant could not be compelled to pay dam-

ages for the miscarriage—a palpable non sequitur—and so the lower court ruled. This ruling was not complained of on appeal, but an instruction which grew out of the position taken by appellant's counsel as to this matter is assigned for error. The instruction is as follows: "Although the jury may believe and find from the evidence that the plaintiff prior to receiving the injuries complained of in this case was unchaste, or that the pregnancy alleged in the evidence was the result of her unchastity, such fact can only be considered by the jury as affecting her credibility as a witness in the case; and whether she was chaste or of moral character or not at or prior to the time of the alleged injuries does not in the least affect her right to recover in this case, and should not be considered by the jury in determining the alleged negligence of the defendant and the right of the plaintiff to recover for injuries, if any, through the negligence of defendant." In instructing on the measure of damages, in case there was a verdict for respondent, the jury were told they might assess her damages at any sum they believed from the evidence would be fair compensation for the pain of body or mind she had suffered or would suffer by reason of her injuries and directly caused thereby, and "for any loss of the earnings of her labor which she has sustained or will sustain by reason of said injuries and directly caused thereby." The contention of appellant is that the court, in instructing the jury that they might consider the fact that respondent was unchaste only as affecting her credibility as a witness in the case, committed error in view of the demand made by respondent to recover for future loss of earning capacity, and the fact that such a recovery was authorized by the court in instructing the jury on the measure of damages. It is argued that, according to common experience, a woman of unchaste character would be likely to earn less at washing and sewing for families than one of chaste character; and hence the jury were entitled to consider the fact that respondent was unchaste, not only as affecting her credibility as a witness, but in connection with the probable loss of earnings, which she had already, or might in the future, sustain in consequence of her injury. We are inclined to the opinion that this position is well taken, though we do not say it would be right for the court to direct the jury to take her unchastity into consideration in assessing damages. What we must decide is whether it was right to direct them to consider the fact for no other purpose except to determine respondent's credibility. No doubt there can be no difference in the measure of damages on account of the bad character of a party who sues for personal injuries, in so far as compensation for the pain of mind and body suffered in consequence of the injury is concerned; for a person of depraved character may endure as much of such suffering as one of virtuous character, and be entitled to the

same damages. The like doctrine would apply to loss of property or any other actual injury. But loss of earnings in such employments as the respondent pursued might, and very probably would, depend more or less upon the character of the party; that is to say, families who wanted a seamstress or laundress might be inclined to discriminate between an unchaste and a chaste woman in favor of the latter, and give her employment in preference to the other and at better wages.

It is said in 8 Am. & Eng. Enc. Law (2d Ed.) p. 645, that there is a conflict of opinion on the question of whether or not evidence of the moral character of a plaintiff is admissible in an action for damages for personal injuries. But most of the opinions can be reconciled if attention is paid to whether or not the attempt to take the moral character of the person into consideration is made in connection with damages for bodily and mental pain, or in connection with damages for loss of time or earnings. As already said, the moral character of the respondent has nothing to do with her right to recover damages for bodily or mental pain; but there are respectable authorities in favor of the proposition that her character might have been considered by the jury in passing on what damages should be awarded for loss of earnings. This point was decided in *Abbot v. Tolliver*, 71 Wis. 64, 36 N. W. 622, a case strikingly similar to the one at bar. The lower court had charged that the fact that the plaintiff was unchaste, or had more than one husband, had nothing to do with the amount of damages she was entitled to recover. In disposing of the point on appeal the Supreme Court said: "This charge was excepted to, and we think it had a tendency to mislead the jury on the question of damages. We do not wish to intimate that an unchaste woman who is maimed and disabled by an accident on the railroad may not suffer as much pain of body or anxiety of mind as a virtuous woman would from a like injury; but still, when it comes to a question of awarding damages, it may be that a jury would not give, perhaps ought not to give, the same damages for injuries to an unchaste woman that they would allow a virtuous, intelligent, and industrious woman, who could command good wages, or take care of a family. The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury received in view of all the facts. We think the court erred in refusing a new trial on the ground that the damages were excessive. For this reason the judgment of the circuit court is reversed, and a new trial awarded."

In *Boyle v. Case* (C. C.) 18 Fed. 880, the action was for physical injury caused by a



mob, it seems, of which the defendants were members, and which had inflicted corporal punishment on the plaintiff, who was a bartender. It was held as to the compensatory damages for physical pain and mental anguish that this fact was immaterial, but that the damages for the humiliation might depend somewhat upon it; thus holding that the damages may sometimes depend on a plaintiff's character. The court said: "A man whose life is low, coarse, and brutal, who is accustomed to brawls, to knock-downs and drag-outs, may not feel the same degree of suffering and shame at being beaten or whipped as one who lives a higher and purer life, and who deserves and is accustomed to receive from his associates and the community personal esteem and favorable consideration. As I have said, what may be a great indignity to one person may not be felt to be such by another. Apply these suggestions to the circumstances of this case, as they appear to you from the evidence, and allow the plaintiff what you think right on this account. In estimating compensatory damages in this case, you will endeavor to reach a fair and just conclusion; and, in this respect, your conclusion ought not to be unfavorably affected towards the plaintiff by the number and respectability of the defendants, or the character of the motives or causes which induced them to act. Nor should these damages be diminished, so far as the physical pain and mental anguish are concerned, by the fact that the plaintiff is an obscure man in the lower walks of life, that he is a bartender, a professional gambler, or even a vagrant. The physical pain and mental anguish, which you find from the evidence the plaintiff suffered from the whipping and the attendant circumstances, you ought, by your verdict, to compensate him for, irrespective of his calling or condition in life. But the damages to be allowed for the indignity and disgrace involved in his treatment by the defendants depends largely, as I have said, upon such circumstances."

In *Kingston v. Fort Wayne, etc., R. R. Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131, the question was whether plaintiff's habits of intoxication could be shown on the question of the damages sustained in consequence of the injury. Plaintiff claimed damages for physical injury, that is, pain and suffering, and for loss of wages during the period of the accident, and for probable loss of future earnings. The injury was alleged to have been caused by a street car conductor carelessly pushing him from a car. From the opinion it appears the Supreme Court held first that the trial court had erroneously admitted proof of plaintiff's habits, but on further consideration held the evidence was properly admitted as throwing light on the probability of his securing employment and the con-

tinuity of any employment he might procure. It should be observed that the ruling was that proof could be made of the actual fact that he was addicted to intoxication, and not proof of his reputation in that regard. Now, in the present case, the respondent proved herself that she was of unchaste character, and what we rule is that the fact might be considered by the jury on the question of her probable loss of earnings in consequence of the accident.

In *Metropolitan St. R. R. v. Kennedy*, 82 Fed. 158, 27 C. C. A. 136, it was assigned for error that Kennedy was permitted to prove he was sober and industrious, but the court held it competent on the issue of damages, as "the earning power of the plaintiff was an element in estimating the loss which he had sustained, and was likely to sustain in the future, by being incapacitated for labor in consequence of the injuries received."

The foregoing are all the decisions we have found which throw light on the point before us, and on their authority we hold the court erred in instructing the jury in such form that they might well think they could ignore the unchaste character of the respondent in assessing damages for loss of time or earnings.

For respondent it is argued that the instruction, fairly interpreted, did not mean to forbid the consideration of respondent's character in connection with her loss of earnings, but only excluded it in connection with her right to recover at all for the injury received. Respondent's counsel insist the court was compelled to instruct the jury, as was done, in view of the position taken by counsel for the appellant before the court, and in the presence of the jury, that respondent's unchastity was grounds for a verdict against her. Appellant's counsel did not so contend, but, as indicated above, insisted that as respondent's pregnancy was the result of unlawful intercourse, appellant ought not to be mulcted in damages for the abortion which followed the injury. However, if we should allow that the lower court was justified by the attitude of appellant's counsel in instructing the jury that the mere fact that respondent was unchaste would not debar her from recovering compensation for her sufferings and actual loss, we would have to hold, nevertheless, that the instruction was written in such form as was calculated to induce the jury to believe they should consider her bad character only as affecting her credibility as a witness, and not as affecting her right either to a verdict, or the amount of damages to be assessed if the issues were found in her favor.

The other points made by appellant's counsel have been considered and found devoid of merit. The judgment is reversed, and the cause remanded. All concur.

## STATE v. HAMILL.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

## 1. INTOXICATING LIQUORS—SALES TO MINORS—PROSECUTION.

Rev. St. 1899, § 3009 [Ann. St. 1906, p. 1724], being Sess. Acts 1891, p. 131, § 19, prohibits sale of intoxicants to minors without the written permission of the parents, etc.; and having been construed to refer to only dramshop keepers, and not to include merchants, etc., Rev. St. § 2179 [Ann. St. 1906, p. 1397], was enacted in 1897, and prohibits any person from making such sales without such consent. Section 3009 was amended by Acts 1905, p. 141, so as to make such a sale by a dramshop keeper an offense, either with or without consent of the parents, etc. *Held*, that the amendment of section 3009 did not exempt dramshop keepers from liability under section 2179, and that they may be prosecuted under either section, and may defend an indictment under section 2179 on the ground that the sale was made with the written consent of the parent, etc.; but, if prosecuted under section 3009 as amended, such defense is not available.

## 2. INDICTMENT—CHARGE UNDER ONE SECTION—CONVICTION UNDER ANOTHER.

Generally, if one is indicted under one section of a statute, and the evidence shows him not guilty of violating that section, but guilty of violating another, he may be convicted of a violation of such other section, if the indictment is broad enough to include the offense.

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Peter Hamill was convicted of selling intoxicants to a minor without written permission, and he appeals. Affirmed.

J. C. Growney, for appellant. John M. Dawson, for the State.

JOHNSON, J. Defendant was indicted, tried, convicted, and fined \$40 under the provisions of section 2179, Rev. St. 1899 [Ann. St. 1906, p. 1397], for the offense of selling intoxicating liquors to a minor without the written permission of the parent, master, or guardian of such minor first had and obtained. He offered to prove at the trial that he was a licensed dramshop keeper, but the court rejected the evidence. He contends that a licensed dramshop keeper must be prosecuted for the offense in question under section 3009, Rev. St. 1899 [Ann. St. 1906, p. 1724], as amended in 1905 (Acts 1905, p. 141), and is not subject to prosecution under section 2179, which, he argues, was intended by the Legislature to apply only to persons other than licensed dramshop keepers.

Section 3009 was enacted in 1891 (Sess. Acts 1891, p. 131, § 19), and until its amendment in 1905 provided that "every dramshop keeper, or any other person, who shall sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors in any quantity to any minor, without the written permission of the parent, master or guardian of such minor first had and obtained

\* \* \* shall be deemed guilty of a misdemeanor and be punished by a fine of not less than fifty dollars nor more than two hundred dollars." In *Bachman v. Brown*, 57 Mo. App. 68, decided by the St. Louis Court of Appeals in 1894, it was held that the words "any other person," as used in the statute, referred to "any one representing a dramshop keeper, or who may be temporarily in charge of his business when such an offense is committed," and did not include a merchant or druggist, who might sell intoxicating liquors to a minor. In 1897 the Legislature, moved, no doubt, by that decision, enacted the statute now appearing as section 2179, which declares: "Any person who shall directly or indirectly sell, give away, or otherwise dispose of or furnish or deliver any intoxicating liquor in any quantity to any minor without the written permission of the parent, master or guardian of such minor first had and obtained, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than forty dollars nor more than two hundred dollars." Clearly it was the legislative intent to bring within the operation of this statute any person, whether merchant, druggist, dramshop keeper, or bartender, who might be guilty of the offense of selling intoxicating liquor to a minor without the consent of the latter's parent or guardian. The amendment in 1905 of section 3009 did not serve to exempt dramshop keepers from liability under section 2179. It had no other effect than to make it an offense for a dramshop keeper to sell intoxicating liquor to a minor, either with or without the consent of his parent or guardian. We are of opinion the Legislature intended that a licensed dramshop keeper might be prosecuted under either section. If indicted under section 2179, he might interpose the defense that the sale was made with the written consent of the parent or guardian; but, if prosecuted under section 3009 as amended, such defense would not avail him. This is the view we expressed in the case of *State v. Gallagher* (decided at this term) 106 S. W. 111, and nothing has been brought to our attention to cause us to change it.

Further, we shall add that the indictment in the present case is broad enough to include the offense defined in section 3009. "It is a general rule of criminal procedure that if one is indicted under one section of a statute, and the evidence shows that he is not guilty of a violation of that section, but is guilty of the violation of another section, he may be convicted of a violation under the section of which the evidence shows him guilty, provided the indictment is broad enough to include the offense within its allegation." *State v. Quinn*, 94 Mo. App. 59, 67 S. W. 974.

It follows that the judgment must be affirmed. All concur.

**CHRISTIAN v. McDONNELL.**

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908.)

**1. TRIAL.—INSTRUCTIONS IGNORING ISSUES.**

Where, in an action for broker's commissions, there was evidence that plaintiff's agency had been revoked before defendant began negotiations with the purchaser, while plaintiff's evidence indicated that such revocation was made with knowledge that it was through plaintiff's efforts the purchase was made, an instruction ignoring the question whether plaintiff's alleged efforts to sell the land had not been abandoned or his agency revoked before defendant and the purchaser met was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 613.]

**2. TRIAL.—INSTRUCTIONS.—ASSUMED FACTS.**

An instruction assuming as a fact a disputed contention was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 420.]

Appeal from Circuit Court, Atchison County; Wm. C. Ellison, Judge.

Action by John L. Christian against Duncan McDonnell. From an order granting defendant a new trial after verdict for plaintiff, he appeals. Affirmed.

L. D. Ramsey and L. J. Miles, for appellant. J. P. Lewis and J. W. Stokes, for respondent.

**BROADDUS, P. J.** The plaintiff's suit is for commission for the alleged sale of certain of defendant's lands in Atchison county, Mo. He claims that his contract with defendant was that, if he could procure a purchaser for the land, he should receive as his compensation all in excess of \$8,000 that the purchaser would offer to pay, and that the terms upon which he was to contract with the purchaser was a payment of \$1,500 cash, and the residue on or before March 1, 1908. This contract was alleged to have been made in April, 1906, which he claims was modified in March, 1907, so as to give defendant the privilege of renting the land for the year 1907, in which event plaintiff was to dispose of the rent as an inducement to obtain a purchaser and to augment the purchase price. He claims that he procured a purchaser for the land on the 29th day of March, 1907, for the sum of \$10,156.25, of which sum \$2,000 was paid in cash, \$300.62 was credited on account of defendant retaining the rents instead of turning them over to the purchaser, and the balance of said sum made payable March 1, 1908. The defendant claims that some time in the early part of the summer 1906, that he informed plaintiff that he would take not less than \$8,000 net for his land, and that at different times during that year and the following winter plaintiff at different times spoke as if he thought he could buy or find a purchaser for it. And, further, that he never

gave plaintiff any exclusive option on the land or its sale, and reserved the right to sell it himself; that he made a sale of the land without the intervention of plaintiff; and that at no time did plaintiff introduce to him any prospective purchaser. The cause was submitted to a jury, which returned a verdict for the plaintiff, which, on motion of defendant, the court set aside, and the plaintiff appealed.

The plaintiff's evidence tended to prove the contract as alleged, and that it was through his efforts that a purchaser for the land was found. On the other hand, defendant's evidence tended to prove that it was not through plaintiff's efforts the land was sold. The court sustained the motion for a new trial on the ground of error in giving in plaintiff's behalf instructions numbered 2, 3, and 4. The court assigned as reason for its action that instruction 2 ignored "the question as to whether or not plaintiff's alleged efforts to sell the land or find a purchaser had not been abandoned, or his agency revoked before defendant and purchaser met."

The instruction was clearly wrong, as there was evidence that plaintiff's agency had been revoked before defendant had begun negotiations, while that of plaintiff tended to show that such revocation was made with the knowledge that it was through plaintiff's efforts the purchase was made. It was a question for the jury and not for the court.

Instruction numbered 3 was subject to the defect pointed out by the court as it "assumed, as a fact, the disputed contention that the plaintiff had negotiated with the purchaser for a sale of the land before defendant met him." On this question the defendant's evidence was to the effect that plaintiff had not as a matter of fact negotiated with Bovell Million, the purchaser, but with his father, Wm. Million. Bovell states that his father first went to see the land, but did not like it, and that he of his own accord went upon the land and bought it; and that he never had any communication with plaintiff in reference to the matter, either before or after the sale. With such evidence we cannot see how the court could have acted otherwise, when attention was called to the error.

Instruction 4 was erroneous for a reason similar to that noted as to instruction numbered 2.

Defendant insists that the appeal should be dismissed for failure of plaintiff to file a proper abstract and statement. Both are defective. They are nearly always so. But as enough appears in them to compel an affirmance of the action of the trial court, we have concluded to overlook their defects.

Affirmed. All concur.

## FOREST v. ROGERS.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

## 1. TRUSTS — EXPRESS TRUSTS — PAROL EVIDENCE.

Though Rev. St. 1899, § 3416 [Ann. St. 1906, p. 1949], provides that the declaration of an express trust shall be in writing, such a trust may be proved by parol evidence introduced without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 62-65.]

## 2. APPEAL—PRESENTATION OF QUESTIONS BELOW—EVIDENCE ADMITTED WITHOUT OBJECTION.

A party who fails to object to parol evidence and tries the case on the theory that it was competent may not have a new trial, as though there were no such evidence, or as though it was improperly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258-1280.]

## 3. TRUSTS—EXPRESS TRUSTS.

It is not a case of express trust, the declaration of which Rev. St. 1899, § 3416 [Ann. St. 1906, p. 1949], provides shall be in writing, where defendant was employed by plaintiff to sell his real estate and to return to him the proceeds, after payment of certain indebtedness, a quitclaim being executed by plaintiff to defendant to facilitate the transaction.

Appeal from Pettis County Court; Louis Hoffman, Judge.

Action by James D. Forest against Noble H. Rogers. Defendant was granted a new trial, and plaintiff appeals. Reversed and remanded, with directions.

C. C. Lawson, Jesse L. England, and Geo. F. Longan, for appellant. A. L. Shortridge and W. D. Steele, for respondent.

**BROADDUS, P. J.** This is a suit by plaintiff to recover the sum of \$450, which he claims the defendant received as his agent, as the consideration for the sale of a house and lot belonging to plaintiff.

The case is as follows: The plaintiff's property was incumbered by two deeds of trust, to secure the payment of two notes aggregating the sum of \$650. The plaintiff concluded, on account of his health, to leave Sedalia, where he resided and where the property was situated, and go to California, and, before leaving, he employed defendant to look after the rent of his property and sell the same. It was agreed between them that the plaintiff and his wife execute to defendant a quitclaim deed to the said property, so that, when a purchaser was found, the trade could be closed without waiting to send the deed to the plaintiff. But such was not done at that time, for after the plaintiff and his wife had gone to California the defendant sent a quitclaim deed to them for execution, which the plaintiff and his wife signed and acknowledged, and which conveyed the lot to defendant. They returned the quitclaim deed to defendant at Sedalia. In June, 1904, the defendant sold the lot in question for \$1,100, being a sum several hundred dollars more than the said incumbrances. The plaintiff

demanded this sum from the defendant, which he refused to pay. The cause was tried before a jury, and a verdict was returned for plaintiff for \$372.50. The evidence of the facts we have stated was given by the plaintiff and his wife.

The defendant filed a motion for a new trial which the court sustained for the following reasons: "That the verdict was against the weight of evidence and against the law under the evidence; that it was for the wrong party; that the court erred in admitting incompetent and immaterial evidence offered by the plaintiff; that the court erred in refusing defendants' instruction numbered 1 (one); and that the court erred in giving instructions numbered 1 (one), 2 (two), and 3 (three) at the instance of the plaintiff."

The contention of the defendant is that the agreement constituted an express trust, which could only be proved by writing, that the only evidence going to sustain the trust was the verbal testimony of the plaintiff and his wife. Section 3416, R. S. 1899 [Ann. St. 1906, p. 1949], provides that the declaration of an express trust be in writing or by will. See, also, *Mulock v. Mulock*, 156 Mo. 431, 57 S. W. 122; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Crawley v. Crafton*, 193 Mo., loc. cit. 431, 91 S. W. 1027; *Heil v. Heil*, 184 Mo. 685, 84 S. W. 45; and *Church v. Albers*, 174 Mo. 331, 73 S. W. 508.

The evidence of the plaintiff and his wife was introduced without objections by defendant. The statute in regard to proof in declaring a trust, could have been taken advantage of by the defendant and the evidence excluded, but it was a matter which he could waive, as the statute was made for his benefit. He tried his case upon the theory that the evidence offered and received was competent, and he only raised a question of its competency after the trial and after a verdict had been rendered against him. It is said: "Parties are not allowed to assume inconsistent positions in court. \* \* \* Having elected to adopt a certain course of action they will be confined to that course of action which they adopt." *Bensick v. Cook*, 110 Mo. 173, 19 S. W. 642, 83 Am. St. Rep. 422. "Evidence admitted without objection cannot, on appeal, be objected to on the ground that a finding, based thereon, was erroneous." *Cady v. Coats*, 101 Mo. App. 147, 74 S. W. 424. "Parties are bound, on appeal, by the positions they have taken in the trial court." *Hall v. Goodnight*, 138 Mo. 576, 37 S. W. 916. The defendant assigned no other cause on which the action of the court on granting a new trial could have been based.

We are of the opinion that under the facts, the case was not one of an express trust as contemplated by the statute, but that the relation existing between the plaintiff and the defendant was merely that of principal and agent. The defendant was employed by the plaintiff to sell and dispose of this real estate, and with the proceeds to discharge cer-

tain indebtedness, and return to his principal the surplus. The plaintiff does not seek to enforce any remedy as against the property conveyed to defendant. All that he asks is that the defendant be compelled to pay over the surplus proceeds of the lands, less the incumbrances on the same, which he was authorized by the plaintiff to sell. The transaction amounted to nothing more than an authority to sell, convey plaintiff's property, and to receive and account for the proceeds. It was not an attempt to declare any trust or confidence in lands.

The verdict was for the right party, and the cause is therefore reversed and remanded, with directions to set aside the order granting a new trial, restore the verdict, and enter judgment thereon. All concur.

**HAMMETT & KATTER v. WABASH R. CO.**  
(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

**1. CARRIERS—LOSS OF GOODS—EXCUSE—BURDEN OF PROOF.**

In an action against a carrier for loss of goods, where the plaintiff proves delivery to the carrier and nondelivery to the consignee, the burden is then upon the carrier to justify nondelivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 378.]

**2. EVIDENCE—WEIGHT AND SUFFICIENCY—UNCONTRADICTIONED EVIDENCE.**

The court is not bound by evidence merely because there is no testimony directly contradicting it in the case, where it is inaccurate and somewhat contradictory in itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2431.]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by Hammett & Katter against the Wabash Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. F. Mallan, for appellant. C. E. Murrell and Campbell & Ellison, for respondents.

**BROADDUS, P. J.** The facts of the case are as follows: The plaintiffs on June 4, 1903, at Kirksville, Mo., delivered to defendant two boxes of goods for shipment to Salem Kazzam, consignee, at Lexington, Mo. In about four weeks thereafter the consignee went to the station at Lexington and made demands for them, but they were not delivered to him for the reason that they had not then arrived at said station. The consignee then directed the defendant's agent, when the goods arrived, to reship them to Holden, Mo. The consignee afterwards received one of said boxes, but the other was never delivered. The plaintiffs contend that the lost box never reached Lexington, its destination. The goods were billed at Kirksville to Lexington Junction, and it was shown that they

would not go further than Lexington Junction without rebilling. The defendant contends that the goods arrived at Lexington July 3d, and were reshipped to Holden July 13th. The defendant's evidence that the goods arrived at Lexington and were reshipped to Holden consists in the statements made by Mr. Loomis, the agent of the Missouri Pacific Railroad at that place. His testimony mostly consists of his recollection of what was shown by a waybill and other written entries made in the office of his company, which had been destroyed by fire, and from papers he received from his company relating to plaintiff's claim. In some instances he assumed certain facts. He had but little knowledge of the matter, and his statements were not altogether consistent. The court found for the plaintiff for the value of the goods alleged to have been lost, and defendant appealed.

The defendant tried the case upon the theory that if the goods arrived at their original destination at Lexington, and were rebilled at the request of plaintiffs to Holden, Mo., they were not liable for their nondelivery at said place. The court, sitting as a jury, adopted the theory of defendant in its declarations of the law. There was, then, no error of law so far as defendant was concerned, and the question for the court was one of fact. The plaintiffs made out a prima facie case. They showed that the goods were shipped on defendant's road, to be delivered at Lexington, and that afterwards it was directed to rebill and reship them to Holden. The goods not having been delivered at either place, it devolved upon the defendant to justify the nondelivery. It attempted to do so as shown by the foregoing statement. The question was one for the court sitting as a jury, whose duty it was to weigh the testimony and to pass upon the credibility of the witnesses, but in doing so had no right to arbitrarily reject competent and credible evidence. We are justified in presuming that the court, in weighing the testimony, was not satisfied that the evidence of the witness Loomis, which was mainly a detail of what was contained in certain memorandums, was accurate and was of such a reliable character as ought to prevail against plaintiffs' prima facie case. Besides, the court may not have given full credit to the said witness, as he was somewhat contradictory in his statements. It is held in *Bank v. Hainline*, 67 Mo. App. 483, that: "In a case where the evidence, so far as appears by the record, was uncontradicted and the trial court refuses the peremptory instructions, the appellate court will assume that the trial court saw something in the manner of the witnesses to impair their testimony, and will not interfere with the verdict." *Vincent v. Means*, 184 Mo. 327, 82 S. W. 96; *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795. The court committed no error in refusing defendant's declaration that under the

evidence the plaintiff was not entitled to recover.

For the reason given, the cause is affirmed. All concur.

**HAMMETT & KATTER v. WABASH R. CO.**  
(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by Hammett & Katter against the Wabash Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. F. Millan, for appellant. C. E. Murrell and Campbell & Ellison, for respondents.

**BROADDUS, P. J.** The law governing this case is determined in case 8,091 of the same title. 108 S. W. 1106.

For the reasons therein given, the cause is affirmed. All concur.

**MORRIS et al. v. McDANIEL.**  
(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

**BROKERS—ACTION FOR COMMISSION—EVIDENCE.**

Evidence in an action for a real estate broker's commission for selling land *held* to sustain a judgment for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116-120.]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by W. T. Morris and another against J. E. McDaniel for a real estate broker's commission. From a judgment for plaintiffs, defendant appeals. Affirmed.

Bente & Wilson, for appellant. W. D. Steele, for respondents.

**ELLISON, J.** Plaintiffs are real estate agents, and this action was brought by them to recover a commission for the sale of defendant's farm in Pettis county, effected, as plaintiffs claim, through an employment by defendant and a sale afterwards through their instrumentality. Plaintiffs recovered judgment in the trial court.

It appears that defendant owned a farm of 145 acres which, in the winter of 1902 and 1903, he placed in plaintiffs' hands for sale at \$5,000, he, the defendant, residing in Nebraska. It seems that there were negotiations between plaintiffs and Dr. Gibson for the sale of the farm, but the latter refused to pay the price. A few months afterwards, in the summer of 1903, defendant came to Sedalla from Nebraska, and told plaintiffs he would not sell at that price, but, on plaintiffs suggesting that they had been negotiating with Gibson, he concluded that they could sell to him, but they were not to price it to

any other person at that sum. Plaintiffs wrote to Gibson that defendant was in Sedalla, and would probably be out, and they could look over the place together. They urged him to buy and gave reasons why he should. Defendant did go out, and he and the doctor entered into negotiations resulting in the sale at a price which aggregated something above \$5,000. Defendant and Dr. Gibson then entered into an agreement reciting that plaintiffs would probably claim a commission, and if they did, and defendant had it to pay, that Gibson would pay him. In other words, if a commission was found to be due plaintiffs, Gibson was to save defendant harmless. In the fall of 1903, defendant wrote to plaintiffs that, if any commission was due them, "Dr. Gibson will settle with you." He also wrote to the doctor as follows: "Herewith hand you letter from Morris Bros., relative to commission for sale of the farm I sold you. Please look into this matter, and adjust it satisfactorily with them." There was evidence further tending to show that afterwards defendant was again in Sedalla and called upon plaintiffs, admitting that he owed the commission, but stating that Gibson was to pay it.

We have gone over the entire record, and fail to find any good reason for disturbing the judgment. There was evidence in defendant's behalf that he had withdrawn the farm from plaintiffs, and that the sale was made without their aid. But there was such abundant evidence in plaintiffs' behalf in support of the verdict that there is no ground upon which we could interfere. The instructions for plaintiffs were plain and unexceptionable. There was one given for defendant which embodied his theory of withdrawal of the farm. There were others offered and refused by the court which contained some correct abstract propositions of law, but none of them were applicable to the case made, except those that contained what was embodied in the one given. Authorities will be found in the briefs of the respective counsel wherein the law concerning sales of real estate by agents is set forth. But as the instructions which were given put before the jury every phase of the case which the record justifies, it is needless to enter upon a discussion of principles of agency now so well understood.

The judgment being manifestly for the right party is affirmed. All concur.

**BREWER et al. v. LEPMAN et al.**  
(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

**SALES—OFFER TO BUY—ACCEPTANCE.**

Where defendants wired plaintiff an offer for a car load of eggs, subject to "prompt" acceptance by wire, plaintiff did not have a "reasonable" time in which to accept, and defendants were not bound by an acceptance wired after 2 o'clock p. m. and received by defendants at 3:30; the defendant's telegram having been delivered at plaintiff's office at 10 o'clock a. m., though he

did not receive it until 11:30, and wrote his acceptance about 12 o'clock; the further delay in the transmission of the acceptance being caused by the operator's absence from the office from about 12 until after 1 o'clock, about which time plaintiff went to dinner, after which he filed the telegram.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 46-48.]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by J. E. Brewer and others against Louis Lepiman and others. From an order granting defendants a new trial, on judgment for plaintiffs, plaintiffs appeal. Affirmed.

Meservey & German, for appellants. M. B. Aaron, for respondents.

ELLISON, J. This action is for damages for an alleged breach of contract. The judgment in the trial court was for the plaintiff. The defendants filed a motion for new trial which was sustained, and thereupon plaintiff appealed from that order.

It appears that defendants are dealers in eggs at Chicago, Ill., and that plaintiff is such dealer at Abilene, Kan.; that on February 7, 1906, defendants wishing to purchase a car load of fresh eggs at 18 cents per dozen telegraphed on that day to plaintiff as follows: "Offer eighteen delivered car fresh eggs ship today prompt wire acceptance." On the same day plaintiff telegraphed from Abilene his acceptance of the offer in these words: "Your offer eighteen accepted for todays car." On the same day defendants telegraphed back to plaintiff that his acceptance was too late, and offering to take them at a discount. The eggs had been shipped when the telegram was received, and, plaintiff refusing the offer for discount, defendants refused to accept them. The action is for the difference in value of the eggs when they arrived at Chicago and the contract price, which is alleged to be \$425. The evidence disclosed that defendants' telegram offering 18 cents and requiring prompt acceptance was delivered at plaintiff's place of business at 10:05 o'clock a. m., though not received by plaintiff personally until 11:30, as he was engaged outside of his office. At about 12 plaintiff wrote the acceptance above set out, and sent it to the telegraph office, but the operator had gone to dinner. There was but the one office in Abilene, and plaintiff sent the dispatch again, shortly after 1 o'clock. The operator had not yet returned, and plaintiff then went to his dinner and on his return, after 2 o'clock, sent it again. The operator's record at Abilene shows that it was received by her at 2:45, and it was received by defendants at Chicago at 3:31. The trial court instructed the jury that the words of the telegram requiring "prompt wire acceptance" meant that plaintiff was to telegraph acceptance as soon as he reasonably could under the circumstances in evidence—a synopsis of which we have stated. In other words, the jury were told that the words meant a reasonable time. In our opinion this was an er-

roneous construction of the telegram, and the trial court was right in so considering. The plaintiff was not only required to telegraph his acceptance, but he was required to do so promptly. The word "promptly" must have been used for some effective purpose, and courts are not at liberty to substitute some other time than that named by the offer. After an investigation of the subject in the case of Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 261, 71 S. W. 696, we held that the word "promptly" meant more expedition than reasonable time. A man has a reasonable time in which to do a thing, where no time is prescribed, without the aid of the word "promptly." So it ought to be clear that the use of that word should entitle him to something more than he would have if he had not made use of it.

In James v. Fruit Jar Co., 69 Mo. App. 207, 218, the words of a telegram conveying an offer were "wire instantly," and this court held, in an opinion by Judge Smith, that such expression did not give a reasonable time for answering, and that the telegram, though received at 10 p. m., should have been answered that night.

In Bank v. Miller, 106 N. C. 347, 11 S. E. 321, a proposition was made by telegram which added, "Must have reply early tomorrow," and it was held that there was no contract unless the reply was so made, and that a reply the following evening would not do. In Metropolitan Land Co. v. Manning, supra, will be found collected a number of authorities in further elucidation of this subject, which we believe, when taken in connection with those herein cited, abundantly sustain the court in regarding the instruction as erroneous.

Defendants' proposition was conditioned that the telegram of acceptance should be sent promptly. It ought to be manifest that plaintiff's inability (if he was unable) to comply with such condition should not prejudice defendants. Plaintiff's inability to respond promptly as required was not unlike if he had been unable to buy at the price offered. The time of response was as much a condition as the price. And even if he had had an excuse, in that it had been impossible for him to respond, that should be his misfortune and not defendants'. Suppose the telegraph office had burned immediately upon receipt of the dispatch to him, or the wires had been destroyed by a storm, and he had been unable to respond for a week, would that misfortune have affected defendants, or their proposition? We think not.

Plaintiff considered some explanation of his delay to be necessary, and so he said in a letter to defendants that (*italics ours*): "There was no unnecessary delay on my part in accepting your offer, and what *seeming* delay that did occur could not *very well* be avoided. Your first wire was received between 10 and 11 o'clock when I was out assisting the men in looking after the loading

of the car, and when *I got around to answer it I found the lady operator out to dinner, and had locked up the office, which she always does during the noon hours.* I wrote the acceptance, and sent it to the office again about one o'clock, and the operator was still out to dinner, and *as soon as I returned from dinner myself I sent the message again, and she forwarded the same to you.*" It thus appears that plaintiff's idea is that the mishap of his being out of the office when the telegram was received should be visited upon defendants; and that although he knew the telegraph office would close at the noon hour, and he delayed sending the acceptance to the office until that hour, and even then rather than send for the operator to come to the office he made no request of her but chose to go to his own dinner and let defendants wait; that these matters of mere trivial convenience to him should outweigh the contractual rights of defendants. He took more than 4½ hours in accepting an offer which should not have required more than a few minutes. Plaintiff asks if it should be expected that he would be at the telegraph office when a dispatch is received and make instant answer. We answer no; that there should be reason in all things, and that it should no more be expected that he would answer literally the instant the dispatch was received than that he should dally with it, as he did, for more than half of a business day.

The authorities cited by plaintiff are not applicable, and, in our opinion, the record discloses that his case is built on a foundation which has wholly ignored defendants' rights in the premises.

The judgment is affirmed. All concur.

### NICHOLS v. HICKLIN.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

#### 1. JUSTICES OF THE PEACE — PLEADING — AMENDED PLEADINGS.

A statement, filed with a justice of the peace, except the words appearing in quotations, that plaintiff and another orally contracted that such other was to have the use of land "for two years," in consideration that he sprout the land as well as break the same, that such other took possession of the land, broke it, and tended it in corn "for one year," and cut the sprouts for that year, that thereafter defendant, with plaintiff's consent, bought the interest of such other, and agreed with plaintiff and such other to carry out his contract, "that is, agreed to cut sprouts on said land twice during the summer of 1905, as part consideration for the use of the land," that defendant took possession but failed to sprout the land to plaintiff's damage, was a sufficient basis for an amended statement embracing the identical allegations and the words appearing in quotation marks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 328.]

#### 2. SAME—MOTION TO STRIKE OUT—SUFFICIENCY.

Grounds of a motion to strike out the amended statement that no statement had been

filed before the justice on which to base an amendment, and that the amended statement did not state a cause of action, were insufficient to raise the objection that the statement before the justice was not signed.

#### 3. APPEAL—PRESENTATION AND RESERVATION OF ERROR—MATTERS NOT CONSIDERED.

The objection that the statement, filed before the justice, was not signed, is not available on review, where not raised in the circuit court on appeal from the justice's court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1374-1381.]

#### 4. LANDLORD AND TENANT — PAROL LEASE — TENANCY FROM YEAR TO YEAR.

A parol lease for two years followed by possession of the lessee and payment of rent becomes a tenancy from year to year by operation of law, and the statute of frauds does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 374.]

Appeal from Circuit Court, Bates County: Chas. A. Denton, Judge.

Action by Lee Nichols against Chas. Hicklin in justice's court. From a judgment for defendant on appeal by him to the circuit court from the judgment in the justice's court for plaintiff, plaintiff appeals. Reversed and remanded.

W. O. Jackson, for appellant. Silvers & Silvers, for respondent.

ELLISON, J. This action was begun before a justice of the peace, where, after a jury trial, plaintiff had judgment, and defendant appealed to the circuit court. In the latter court defendant moved to strike out the statement, which said motion was sustained, and plaintiff has brought the case here.

It appears that plaintiff was the owner of a few acres of ground, which had been cleared of timber and brush, and was then what is termed "plough land." Plaintiff then agreed with one Clark that the latter should have the land for cultivation, and was to have the crop raised, except the "stalks" left in the field. For this he was to sprout the land twice a year. This was done one year, and after the beginning of a new year Clark, with plaintiff's consent, sold to defendant. The three agreed that defendant would take the land as Clark had it, and that he would sprout it twice a year. It is charged that defendant failed to sprout the land as agreed, whereby plaintiff claims that he is damaged in the sum of \$15. This statement will suffice for an understanding of the disposition of the case made by the circuit court, and of our conclusions.

The record shows that on June 21, 1906, plaintiff filed an account with the justice, who thereupon issued a summons for defendant returnable July 2d; that the writ was duly served. It then shows that a "jury was summoned by request of defendant," and on June 29th (before day of trial) both parties asked that the cause be continued until July 16, 1906, which was granted: The record then shows as follows: "Now on the 16th day of



June (July) 1906, the plaintiff filed a statement, and afterwards the defendant files a motion to dismiss, which is overruled, and the case coming on for trial, the plaintiff and defendant each announce ready for trial, and the defendant having asked for a jury, a jury was impaneled as follows," etc. The statement thus referred to as being filed with the justice on July 16, is as follows, except the words in italics: "The plaintiff, for amended statement, says that on or about the — day of March, 1904, he and D. L. Clark entered into an oral contract, whereby it was agreed that D. L. Clark was to have the use of a tract of five or six acres of land in Homer township, Bates county, Missouri, for two years, which was stump land of the plaintiff ready for the plow, and the said D. L. Clark as consideration was to sprout the said five or six acre tract twice a year, as well as to break the same, and was to have all of the crop grown on the same by him, except the stalk field, which the said plaintiff reserved in said contract for himself, and that the said Clark took possession of said land and broke it and tended it in corn for one year, and cut the sprouts on said land for that year, and gave the plaintiff the stalk field; that about the 1st of March, 1905, the defendant, with the consent of the plaintiff, bought out the interest of the said Clark, and agreed with the plaintiff and Clark to carry out his (Clark's) contract, *that is, agreed to cut sprouts on said land twice during the summer of 1905, as part consideration for the use of the land*; that the defendant took possession of said land under said purchase contract with plaintiff and Clark, and tended it in corn, and received all of the crop, except a part of the stalk field, but failed to sprout the land twice as agreed by him for that year; that by reason of the defendant's failure to sprout the land the plaintiff is damaged in the sum of fifteen dollars, for which he asks judgment."

In the circuit court defendant moved that the case be dismissed, for the reason that no sufficient statement of a cause of action was filed before the justice. Before this motion was acted on plaintiff filed an amended statement, the amendment being made up of the words in the statement just set out which are in italics. Defendant then filed a motion to strike out the amended statement on the ground that no statement had been filed before the justice upon which to base an amendment, and that the amended statement did not state a cause of action. The motion was sustained. The record shows that a statement was filed before the justice, and the question is, was it such an one as afforded grounds for amendment? The defendant contends that there was nothing therein upon which to base an amendment, and likens the case to that of *Brashears v. Strock*, 46 Mo. 221. The cases are altogether different. That case is no authority for the disposition made of this case. It is too manifest for argument

that the statement before the justice was a sufficient base for the amended statement. But it is suggested that the statement before the justice was not signed. Such objection does not appear to have been made in the trial court. No attention was called to it in the motion. The general expressions in the motion were not sufficient. The objection is of no avail now. The statute of frauds does not apply to the case. The contract was followed by possession of the lessee and payment of the contract rent. It became a tenancy from year to year by operation of law. A new year was entered with defendant as the substituted lessee. There is no room for application of the statute. *Hosli v. Yokel*, 58 Mo. App. 169; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212.

The judgment is reversed, and the cause is remanded. All concur.

#### RUOFF v. FITZGERALD.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908.)

##### 1. JUSTICES OF THE PEACE—JUDGMENT—REVIVAL.

Where the docket of a justice of the peace showed in the margin "Judgment \$16.00," and in the body of the docket "defendant confesses judgment for \$16.00," and that execution was issued, the record was sufficient to support a revival as against an objection that the docket failed to show that a judgment was given; *Rev. St. 1899, § 4031* [Ann. St. 1906, p. 2196], providing that no judgment of a justice shall be deemed invalid, or affected on account of an informality in entering or giving it, unless the informality is prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 397.]

##### 2. EVIDENCE—JUSTICE'S DOCKET—RECITALS—IMPEACHMENT BY PAROL.

The affirmative recitals of the docket of a justice of the peace showing an appearance and confession of judgment may not be impeached by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1680.]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Scire facias by Julia B. Ruoff against James Fitzgerald to revive a judgment of a justice of the peace. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Frank A. C. McManus, for appellant. Fredk. A. Wind and Henry E. Haas, for respondent.

GOODE, J. Scire facias to revive a judgment rendered by a justice of the peace October 24, 1902. The judgment was entered in a landlord and tenant case, and was for \$16 rent and \$5.25 costs. The revivor proceeding was instituted before the same justice of the peace who had rendered the judgment, and resulted in a judgment of revivor. An appeal was taken to the circuit court, and on a hearing there the same result was reached. Defendant then appealed to this court.

The original judgment sought to be revived was in the following form:

Before William J. Hanley, Justice of the Peace within and for the Eighth District, City of St. Louis, Missouri.

Julia B. Ruoff, Plaintiff,  
v. J. J. Fitzgerald,  
Defendant.

Landlord summons. Demand \$16.00.

October 17, 1902. Affidavit filed and summons issued to Constable J. F. Hannaman, returnable October 24, 1902, at 7 o'clock a. m. Summons returned duly executed. Now on last-named day at the hour of trial comes the plaintiff and defendant and the cause being called the parties announce themselves ready for trial. The defendant confesses judgment for \$16.00 rent.

October 27, 1902. Execution and restitution issued to Constable J. F. Hannaman, returnable in 90 and 5 days.

Judgment ..... \$16.00  
Justice Hanley.. 2.10  
Constable J. F.  
Hannaman .... 2.15

The chief proposition of the defendant is that the justice's docket fails to show a judgment was given, and therefore there can be no revivor. The justice's record consists of minutes and memoranda rather than a full narrative of the proceedings; but it does import that a judgment for \$16 was rendered in favor of plaintiff and costs amounting to \$5.25. These facts are shown by minutes on the margin of the record containing the principal minutes of the case; and in the other memoranda of the record it is recited that plaintiff and defendant appeared and defendant confessed judgment for \$16 rent. Further, that an execution and (writ of) restitution were issued to the constable. This record of the justice is very similar to, and at least as full and complete as, the one held by the Supreme Court in *Fransé v. Owens*, 25 Mo. 329, to be sufficient to uphold an execution sale of real estate. That was an ejectment case for land. A transcript of the judgment of the justice had been filed in the office of the clerk of the circuit court, and an execution issued from said office under which the land was sold. The plaintiff in the action was the purchaser at the execution sale, and, having instituted an ejectment proceeding to recover the land, he offered the justice's docket in evidence; but on the objection of the defendant it was excluded as insufficient. Judge Scott said that in *Rutherford v. Wim*, 3 Mo. 12, the Supreme Court had held that the force and effect of a judgment would be given to a verdict rendered in a justice's court, even though no judgment was rendered on the verdict, and went on to say that, though no formal judgment was entered on the defendant's confession, the entry was sufficient to support an execution. In the present case the record indicates affirmatively that a judgment was rendered by the justice pursuant to the defendant's confession. Our statutes provide that no judgment of a justice shall be deemed invalid, stayed, or affected on ac-

count of an informality in entering or giving it, unless the informality is prejudicial. Rev. St. 1899, § 4031 [Ann. St. 1906, p. 2196]. We think the justice's record was sufficient to show a judgment had been rendered, and to support a second judgment reviving the first one.

Defendant offered to testify he was not in the state on the date when the justice heard the cause, and hence could not have appeared and confessed judgment. The court below excluded this testimony, and error is assigned on account of the ruling. It was a direct attempt to impeach the affirmative recitals of the justice's entries by parol testimony, and was incompetent. *State, to Use, v. Orahood*, 27 Mo. App. 496; *State v. Stinebaker*, 90 Mo. App. 286.

The judgment is affirmed. All concur.

### STATE v. LANDRUM.

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908.)

#### 1. WITNESSES—COMPETENCY—CONVICTION OF CRIME.

One convicted of burglary and larceny in Missouri while Gen. St. 1865, c. 201, § 66, declaring that one convicted of burglary or larceny shall be incompetent to be sworn as a witness, was in force, is not rendered competent to testify by Rev. St. 1879, § 1378, and the act of 1896, embodied in Rev. St. 1899, § 4680 [Ann. St. 1906, p. 2549], permitting one convicted of a criminal offense to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–115.]

#### 2. SAME.

One convicted of burglary and larceny in a sister state while Gen. St. 1865, c. 201, § 66, providing that one convicted of burglary or larceny shall be incompetent to testify, was in force, is not thereby rendered incompetent, since the act applies only to convictions for offenses against the laws of Missouri, and since any disqualifying statute of the sister state had no extraterritorial force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–115.]

#### 3. CRIMINAL LAW—PROOF OF OTHER OFFENSES—ADMISSIBILITY.

On a trial for playing a game of chance in violation of Rev. St. 1899, § 2212 [Ann. St. 1906, p. 1410], the testimony of a witness that accused sold him and other players poker chips, and was in charge of the room in which the gambling was being conducted, was admissible, though it supported a charge founded on section 2197 [page 1406], punishing a keeper of a gambling house.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822–834.]

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

J. G. Landrum was convicted of playing a game of chance, and he appeals. Affirmed.

O. S. Barton, for appellant. R. M. Bagby and A. W. Walker, for respondent.

JOHNSON, J. On information of the prosecuting attorney defendant was convicted before a justice of the peace for an offense defined in section 2212, Rev. St. 1899 [Ann. St.

1906, p. 1410]. He appealed to the circuit court, where he was tried, convicted, and fined \$25. The information charged: "That J. G. Landrum, the defendant, John Grady, and Dave Malory, on the 16th day of June, 1906, at the said county of Howard, did then and there unlawfully play at a game of chance, commonly called 'Poker,' for money, property, and gain, with a gambling device, to wit, a pack of cards, used and adapted for the purpose of playing games of chance for money, property, and gain. It appears from the evidence introduced by the state that a policeman of Fayette and a deputy constable, suspecting that a gambling game was being played in a room in an upper story of a certain building, were enabled, by ascending to the roof of an adjoining building, to look into the suspected room through a window. They saw the persons named in the information, and two others who were strangers to them, seated at a table, playing a game in which cards and poker chips were being used. During the time they watched no money was on the table, nor was any passed among the players. Before the trial in the circuit court one of the players (John Grady) pleaded guilty to the charge contained in the information, and paid the fine assessed against him. He was introduced by the state as a witness against the other defendants, and on his testimony the conviction was obtained. He testified, in substance, that the persons in the rooms were playing poker for money, and that defendant acted as dealer in selling and redeeming the chips used by the other players. After he was sworn, and before he testified concerning the facts of the occurrence, counsel for defendant interrogated him as follows: "Q. Is it not a fact that from March, 1878, until the latter part of February, 1880, you served a term in the penitentiary of Indiana at Jeffersonville, Ind., for larceny and burglary? A. Yes, sir." Thereupon counsel for defendant objected to the witness on the ground "that, at the time he was sentenced to the penitentiary and served his sentence, he was, under the law, disqualified from testifying, as a part of his sentence; and he had been convicted and served his sentence prior to the passage of the act of 1895 permitting parties who had been convicted of a felony to testify." The objection was overruled, and this action of the court is urged by defendant as a ground for the reversal of the judgment. In disposing of the questions thus arising we shall assume, for argument, without so deciding, that the evidence before us is competent to show that the witness was convicted in Indiana in 1878 of the crime of burglary and larceny, was sentenced to the penitentiary for a term of two years, and served his sentence, and from this standpoint the first question to arise is whether he would have been disqualified from testifying had his conviction and sentence occurred in this state instead of in Indiana. The law in force at that time relating to the subject is

contained in section 66, c. 201, Gen. St. Mo. 1865, which is as follows: "Every person who shall be convicted of arson, burglary, robbery or larceny, in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions in this chapter, shall be incompetent to be sworn as a witness or serve as a juror in any cause, and shall be forever disqualified from voting at any election, or from holding any office of honor, trust or profit within this state."

In the Revision of 1879, § 1378, the statute was amended by the omission of the words "to be sworn as a witness," and it is conceded that the effect of the amendment was to exempt a person thereafter convicted of an infamous crime from the disqualification of incompetency to give testimony. In 1895 the Legislature enacted the statute now appearing as section 4680, Rev. St. 1899 [Ann. St. 1906, p. 2549], as follows: "Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer." The manifest purpose of this enactment was threefold: First, to remove the disability from persons convicted of past offenses against the criminal law; second, to permit the fact of the conviction of a criminal to be proved for the purpose of affecting his credibility as a witness; and, third, to permit that fact to be proved by the witness' own testimony. But the power of the Legislature to restore, to persons convicted of crimes, rights and privileges of citizenship forfeited under the law in force at the time of the conviction, was unequivocally denied by the Supreme Court in the case of *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, where the effect on past convictions of the amendment appearing in section 1378, Rev. St. 1879, was exhaustively discussed and fully determined. While it was held in the opinion that the amendment was not intended by the Legislature to operate retrospectively, the court did not content itself with denying the witness offered the right to testify on that ground alone, but held, further, that as the disqualification of a convicted criminal to testify as a witness was in the nature of a penalty for the crime—was, in fact, a part of the sentence—the Legislature neither directly nor indirectly could exercise the pardoning power by relieving him of a part of the punishment imposed on him by the sentence of the court. We refer to the opinion in that case for a comprehensive presentation of the principles and authorities supporting the conclusion stated, which compels us to hold, in the present case, that neither the amendment of section 1378, Rev. St. 1879, nor the subsequent enactment of section 4680,

Rev. St. 1899 [Ann. St. 1906, p. 2549], should be given a retrospective effect, and therefore had the witness been convicted in 1878, in this state, for the crime of burglary and larceny, his resultant disabilities would not have been affected by subsequent legislation.

But no sound reason has been given for holding that the conviction of the witness in Indiana of an offense against the criminal laws of that state should, of itself, disable him from testifying as a witness in the courts of this state. The record does not disclose whether the laws of Indiana deprived him of this right of citizenship, nor do we consider that fact material. An analysis of the provisions of section 66, c. 201, Gen. St. Mo. 1865, demonstrates, beyond dispute, that they were intended to apply only to convictions for offenses committed against the criminal laws of this state, and not to those committed in other states of the Union or in foreign countries. And, had it been made to appear that a similar statute existed in Indiana at the time the witness was convicted and sentenced, such statute should not be given effect beyond the territorial limits of that state. "The weight of modern opinion seems to be that personal disqualifications arising, not from the law of nature, but from the positive laws of the country, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated." Greenleaf on Evidence, § 876; Story, Conflict of Laws, §§ 92, 104; Sims v. Sims, 75 N. Y. 466. Commenting on this rule, the Court of Appeals of New York observed in the case just cited: "I think this doctrine applicable to the question now in hand, and that there is nothing in the Constitution of the United States which prevents such application, or requires that the personal disabilities, such as incompetence to testify or to vote, which may be imposed upon a person convicted of a crime in one state, should follow him and be enforced in all the others. If such were the operation of the constitutional provision, the qualifications of witnesses called in our courts and voters at our elections might be made to depend upon the laws of other states instead of our own." As the penal statutes of the state of Indiana could not operate extra-territorially, and as no statute existed in this state in 1878 which disqualified a witness convicted in another state from testifying in our courts, it must follow that the witness in the case in hand at no time suffered under the disability now urged against him. What we have said sufficiently disposes of the question adversely to the contention of defendant, and is sustained by authority. *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Commonwealth v. Green*, 17 Mass. 515; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Railway v. Johnson*, 98 Tex. 76, 81 S. W. 4; *Commonwealth v. Gorman*, 99 Mass. 420.

Further objection is made by defendant to

the action of the trial court in permitting the witness Grady to testify that defendant sold him and the other players the poker chips, and was in charge of the room in which the gambling was being conducted. It is true, as argued, that these facts would tend to support a charge founded on a different section of the statute (section 2197, Rev. St. 1899 [Ann. St. 1906, p. 1406]), but they also directly tended to sustain the charge that defendant was guilty of the offense defined in section 2212, and therefore were clearly admissible in evidence.

The judgment is affirmed. All concur.

#### ARMELIO v. WHITMAN et al.

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908.)

##### 1. ACTION—FORM — CONTRACT OR TORT — ACTION IN TORT.

Where a complaint alleged that defendants were engaged in raising plaintiff's house by reason of a contract, and that by reason of defendants' "negligence" and "lack of skill" it fell, etc., objections that there was a failure of proof, in that while there were allegations of contract in the petition there was no evidence of the contracts between the parties as to raising the house, and that a contract was offered different from that pleaded, were of no merit, as the action was not on contract, but for negligence, the allegations of contract being mere inducement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 164.]

##### 2. PLEADING—"INDUCEMENT."

Matter of inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 123.]

For other definitions, see Words and Phrases, vol. 4, pp. 3568, 3569.]

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

Action by Vincenzo Armelio against G. O. Whitman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. T. Latham, for appellants. Hughes & Whitsett, for respondent.

ELLISON, J. The plaintiff's action is for damages resulting from the destruction of plaintiff's house. The judgment was for him in the trial court.

The petition charges that defendants "were engaged in the work of elevating the house \* \* \* for the purpose of putting a foundation and basement rooms underneath the same, and while so doing carelessly and negligently and unskillfully propped up, underpinned, and attempted to secure the same with weak, insufficient, and unskillfully and improperly arranged underpinning and material, so that said house, by reason of the negligence, carelessness, and lack of skill of defendants, collapsed and fell, and was thereby completely destroyed." It appears that plaintiffs employed defendant Albines to raise the house, place foundation thereunder,

etc. Albines engaged one Simmons to raise the house and do the carpenter work, and the latter, in turn, employed defendant Whitman, a house raiser by business, to raise the house. The latter entered upon the work, and propped the house up on cribs. When the foundation wall was built on the south side, the cribs were taken out, and the house rested on the wall on that side. But Whitman took out cribs on other sides, and placed in their stead pieces of heavy timber set on end on jack screws in such manner as to set out from the building at the bottom and leaning towards it until the top was under the side. There was evidence tending to show that this support of the building was put up and placed in such negligent manner as to cause the building to fall. It did fall, and was destroyed.

Defendant insists that there was a failure of proof, in that while there were allegations of contract in the petition, there was no evidence of the contracts between the parties as to raising the house. A perusal of the petition leaves it manifest that defendant is in error in supposing the suit to be upon the contract. The petition is quite short, and the only reference to a contract between the parties is simply that the defendants were engaged in raising the house by reason of a contract. There are no terms of a contract stated, and no attempt to state a case under a contract. It is only mentioned at all as a mere incident by way of inducement showing why defendants came to be engaged at the work. "Inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it." *Bouvier's Law Dictionary*, quoted in *St. Lo. Con. Coal Co. v. Peers*, 97 Ill. App. 188; *Cyc.* 22, p. 498, tit. "Inducement." The case is simply negligence in performance of work, and was so tried. Whatever defect (if any) there may have been, it is evident that it did not lie in the direction of a failure to prove a contract, since none was alleged. If no case could be stated without it be made on the contract and its breach, that matter of objection was not made. The objection was not that the case was not on the contract, but that being on the contract, it was not proven. So the objection to the evidence that a contract was offered different from that pleaded is based on the same idea that a contract had been sued upon. We think it not well taken. A breach of contract was not the basis of the action, notwithstanding defendants assuming that it was. If it should have been and was not, the objection should have been so entered. There was no legal ground for the claim that no proof of ownership was made of the property.

There was ample evidence to support the charge of negligence, and we have only to ascertain if the jury was properly instructed as to the law of the case. Instruction No.

1 seems to be plain, and is easily understood. We think it proper, and the objection thereto as hypercritical. Instruction No. 8 on the measure of damages is said to be too general. But it is good so far as it goes into the matter, and if defendants thought it should be more specific they should have asked for instructions of that character. *Browning v. Railway Company*, 124 Mo. 55, 27 S. W. 644. The action of the court on the instructions offered by defendant was correct. As offered the court gave those numbered 5 and 6. The former really embraced all that was necessary to the defense. It informed the jury that defendant Whitman was not an insurer of the safety of the building, and that he was only bound to use ordinary care, that is, such care as an ordinary prudent person would exercise in the same circumstances. Those given by the court of its own motion embodied all that was proper in those offered by defendant and refused. When all the instructions are read as a series, as they should be, it is apparent that the whole case was fully and clearly stated to the jury in hypotheses that embraced every issue. The verdict had ample evidence to sustain it.

There was no error substantially affecting the merits of the action, and in such case it is our duty under the statute (section 865, Rev. St. 1899 [Ann. St. 1906, p. 812]) to affirm the judgment, and it is so ordered. All concur.

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STATE ex rel. CONWAY v. BINNEY et al.  
(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1907.)

ATTACHMENT—ABANDONMENT BEFORE EXECUTION—LIABILITY ON ATTACHMENT BOND.

Where no property was levied upon either under an attachment or garnishment, and the attachment plaintiff dismissed the case before issues were made under the attachment, or interrogatories filed under the garnishment, recovery may not be had in an action on the attachment bond for fees to be paid an attorney to defend the attachment suit, since no property was disturbed by that suit, and the employment of counsel to defend it was unnecessary.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 5, Attachment, § 1294.]

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by the state of Missouri, on the relation of Nora Conway, against Lincoln Binney and others. From a judgment in favor of defendants, plaintiff appeals. Judgment affirmed.

H. A. Kerr, for appellant. J. C. Wilson, for respondents.

ELLISON, J. This is an action on an attachment bond. The defendant demurred to plaintiff's petition on the ground that it did not state a cause of action. The demurrer was sustained, and plaintiff appealed.

It appears from the petition that defendant brought suit against the plaintiff before a justice of the peace with an attachment in

aid. An attachment writ was issued, but no property levied upon. A notice of garnishment was served; but the party garnished had no property or effects of this plaintiff, the defendant in that cause. This defendant, as plaintiff in that case, dismissed the case before either an answer or plea in abatement or interrogatories were filed. The petition alleged that plaintiff was damaged by employing an attorney to defend the attachment to whom he is obligated for a fee, and that he "lost time and expended money by reason of said attachment." The statute (section 3880, Rev. St. 1899 [Ann. St. 1906, p. 2149]) provides for issues to be made before a justice "in all cases where property or effects shall be attached." The attachment was dismissed before any issues were made, for the reason that no property was seized. The statute (sections 3461-3463 [Ann. St. 1906, pp. 1986, 1987]) provides for issues before the justice on garnishment. But no interrogatories were filed, as the party garnished had nothing of plaintiff's and it is not alleged that he had, and, as just stated, the attachment was dismissed.

In our opinion no damages accrued to plaintiff. Nothing occurred to put him on his defense. His property was not disturbed, by either attachment or garnishment. If he employed an attorney it was premature, in so far as his right to an action on the bond is concerned. He is in no better position to maintain such action than if this defendant had said, and he had heard, that an attachment writ was to be sued out, and had thereupon employed an attorney. The fact that the writ of attachment was issued is of no consequence, if it was not executed. The employment of an attorney made in the principal case on the merits would, of course, give no right of action on the attachment bond. The serving of the writ as to the garnishment was an empty proceeding, as no property was in the hands of the party garnished, and the attachment was dismissed before any issue was made; and, if there had been, it would have been the garnishee's privilege to have employed an attorney upon the one side and the plaintiff in the attachment upon the other. If something out of the usual course made it necessary for this plaintiff, as defendant in that case, to have employed counsel in the matter of the garnishment or the writ of attachment, it is not alleged.

The judgment should be affirmed. All concur.

#### HOLBROOK-BLACKWELDER REAL ESTATE & TRUST CO. v. HARTMAN et al.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908. Rehearing Denied Jan. 21, 1908.)

#### 1. BROKERS—SALE OF LAND — WRITTEN AUTHORITY—SUFFICIENCY OF EVIDENCE.

Laws 1903, p. 161 [Ann. St. 1906, § 1993-1], provides that in cities of 300,000 inhabitants

or more any person who shall offer for sale any real property without the written authority of the owner of such property, etc., shall be deemed guilty of a misdemeanor. Defendants, husband and wife, at plaintiff's request, delivered to plaintiff a written option prepared by it, whereby they offered to sell certain property for a given price, and on the day following defendant wife, the owner of the property, offered in writing to pay plaintiff a certain commission on a sale at the price named. *Held*, that the two writings when construed together authorized plaintiff to sell the property.

#### 2. SAME—REVOCATION OF AUTHORITY—SUFFICIENCY OF EVIDENCE.

In an action by a broker to recover commissions on the sale of land, evidence held to support a finding that an option authorizing plaintiff to sell the land had not expired before the sale.

#### 3. APPEAL — REVIEW — FINDINGS OF COURT — CONCLUSIVENESS.

A finding on trial to the court on conflicting evidence is binding on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Holbrook-Blackwelder Real Estate & Trust Company against Minnie Hartman and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Plaintiff is a Missouri corporation, and maintains an office in the city of St. Louis. Defendants are residents of said city. In 1905 defendant Minnie Hartman owned a tract of vacant ground in block 2355, city of St. Louis, which had a frontage of 603 feet and a few inches on the south line of North Market street by a depth of 247 feet to Magazine street, bounded on the east by Leffingwell and on the west by Glasgow avenues. Mrs. Hartman wanted to sell the piece of ground, and in November or December, 1905, her husband verbally authorized plaintiff to offer it for sale, and plaintiff put "For Sale" signs upon the property, and a few days afterwards defendant C. A. Hartman and Messrs. Holbrook and Blackwelder, of the Holbrook-Blackwelder Real Estate & Trust Company, went upon the property and looked it over with the view of placing a value upon it. Learning that the city of St. Louis wanted a piece of ground in that neighborhood, plaintiff interviewed Mr. James Player, city comptroller, and on April 25, 1906, procured from defendants the following option on the property:

"Mr. James Y. Player, City Comptroller, City Hall, City—Dear Sir: For and in consideration of one dollar to me in hand paid, receipt of which is hereby acknowledged, I hereby agree to sell to the city of St. Louis, for park purposes, city block number 2,355, having a front of 603 feet 2¼ inches, more or less, on the south line of North Market street, by a depth southwardly of 247 feet, more or less, to Magazine street, being bounded east by Leffingwell avenue, and west by Glasgow avenue, for the sum of forty thousand dollars (\$40,000) to be paid in cash on delivery of a good and sufficient warranty deed, free and clear of all liens and incum-

branches except taxes for the year 1906, and thereafter, special or general. Provided that said sum of forty thousand dollars (\$40,000) is paid to me prior to July first, 1906. Very truly yours, Charles A. Hartman. Minnie Hartman.

"We hereby extend the above option to and including August 31, 1906. Charles A. Hartman. Minnie Hartman."

On the next day plaintiff received the following letter from Mrs. Hartman:

"St. Louis, Mo., April 28, 1906.

"Holbrook-Blackwelder Real Estate Trust Co., St. Louis, Mo.—Gentlemen: If the city purchases the property on North Market and Glasgow avenue for \$40,000, we will pay you a commission of \$1,000 for making this sale. Yours truly, Minnie Hartman."

On June 28, 1906, Ordinance No. 22,418 was passed and approved by the mayor. This ordinance authorized the mayor and comptroller to purchase a piece of ground in the vicinity of the Hartman tract for a city park. The mayor and comptroller advertised for sealed proposals under the ordinance, to be opened on September 17, 1906. On September 7th plaintiff received the following communication from Mr. Player:

"Holbrook-Blackwelder Real Estate Trust Company, Eighth and Olive streets, St. Louis, Mo.—Gentlemen: Through you I was given an option by Mr. Charles A. Hartman and wife for the purchase of property in city block 2355, having a frontage of 603 feet 2½ inches, more or less, on the south line of North Market street, by a depth of 247 feet. The option gives us the privilege to purchase the property for forty thousand dollars (\$40,000). Since the option was given an ordinance was passed by the municipal assembly authorizing the purchase of a lot or lots of ground within the district in which the lot above named is comprised, and appropriated \$40,000 therefor. Inclosed herewith you will find a copy of the advertisement, and I would advise, in order to avoid complication, that you forward to me in a sealed envelope, as required by the advertisement, a formal proposition for the sale of the property to the city at whatever amount you care to stipulate. Very truly yours, James Y. Player, Comptroller."

On the same day plaintiff handed defendants a form of bid or proposal to sell, and advised them to sign it and file it with the comptroller. On September 13th defendants wrote plaintiff as follows:

"Holbrook-Blackwelder Real Estate Trust Co., 812 Olive street, City—Dear Sirs: Answering yours of the seventh inst., will say we have decided to submit a sealed proposal to the city of St. Louis, therefore will not require your services in the matter. Yours very truly, Chas. A. Hartman. Minnie Hartman."

On the 17th of September, 1906, defendants filed the following proposal, a copy of the form furnished them by plaintiff:

"City of St. Louis, State of Missouri. We hereby agree to sell to the city of St. Louis, for park purposes, city block number 2355, having a front of 603 feet 2½ inches, more or less, on the south line of North Market street, by a depth southwardly of 247 feet 10 inches, more or less, to Magazine street, being bounded east by Leffingwell avenue and west by Glasgow avenue, for the sum of forty thousand dollars, to be paid in cash on delivery of a good and sufficient warranty deed, free and clear from all liens and incumbrances except taxes for the year 1906 and thereafter, special and general. Very truly yours, Charles A. Hartman. Minnie Hartman."

Plaintiff offered evidence tending to show that on August 31st, the day the extension period of the option expired, defendant C. A. Hartman called several times at plaintiff's office to see about the sale of the property to the city, and that Mrs. Hartman about September 8th or 9th stated to one of plaintiff's agents that there was no doubt plaintiff had earned a commission, and they (defendants) were willing to pay for the work plaintiff had done in trying to sell the property, but did not think plaintiff was entitled to \$1,000. C. A. Hartman testified that plaintiff never told him or his wife that the city ordinance had been passed, and that he told plaintiff after the expiration of the option that they (defendants) would withdraw the property from the market, and on September 7th, after learning the ordinance had been passed, he told plaintiff he would make the sale of the property himself as the ordinance had been passed, and denied he used the form of proposal furnished him by plaintiff.

Defendants were out of the city during the summer of 1906, and did not return until early in September. The question of purchasing property for park purposes in the vicinity was brought up in the house of delegates by Hon. O'Brien, representing the ward where the property is situated. He suggested to Mr. Player another tract, but was told by him that it was not suitable for a park for the reason it was filled ground, and suggested getting an option on another tract. Player testified that plaintiff first called his attention to the Hartman tract.

The issues were submitted to the court without the intervention of a jury. No declarations of law were asked or given. The court found the issues for plaintiff, and rendered judgment in its favor for \$1,000, from which defendants appealed.

T. J. Rowe & Son, for appellants. E. W. Banister, for respondent.

BLAND, P. J. (after stating the facts as above). Defendants rely upon two points for a reversal of the judgment: First, that they had no agreement in writing with plaintiff appointing it their agent to sell the ground, and invoke the law of 1903 requiring such contracts to be in writing. Laws 1903, p. 161. In the case of Rothwell v. Gibson, 98 S. W.

301, we had occasion to discuss the act of 1903, and on the authority of *Downing v. Ringer*, 7 Mo. 585, and the Missouri cases which have followed it, held that the act of 1903 made void all verbal contracts with real estate brokers for the sale of real property in cities of 300,000 inhabitants and over, and when a broker sought to recover commission for making a sale of real estate in such cities it was essential to his right to recover that he produce the written authority of the owner to make such sale. But we think the evidence in this case is sufficient to show plaintiff had authority in writing from Minnie Hartman, the owner, to make the sale. On April 24th Mrs. Hartman and her husband, at plaintiff's request, signed and delivered to plaintiff an option prepared by it, in which they offered to sell the property (describing it) to the city for \$40,000, and on the following day Mrs. Hartman offered, in writing, to pay plaintiff \$1,000, if the city of St. Louis should buy the property for \$40,000. These two writings should be construed together, and when taken together they clearly authorize plaintiff to sell the property to the city for \$40,000. The second point is that the option authorizing plaintiff to sell the property expired before the sale was actually made, and that the sale was afterwards made by defendants in person. The option as extended expired August 31st. The sale was not made until in September following, but plaintiff's evidence tends to show it furnished defendants with a form of proposal to the city authorities for the sale of the property; that defendants retained this form, copied it, and submitted the copy; and that Charles A. Hartman called at plaintiff's office and talked about the sale of the property with plaintiff's agent after the expiration of the option, and that Mrs. Hartman acknowledged plaintiff had worked up the sale. This evidence, we think, tends to show defendants did not revoke the authority of plaintiff to make the sale, but continued plaintiff as their agent after the expiration of the option. It is true he notified plaintiff that its agency was at an end and defendants would make the sale themselves. It was for the court, sitting as a jury, to weigh this conflicting evidence and determine the issue of fact raised thereby. It found in favor of plaintiff, and that finding is binding on us.

The judgment is affirmed. All concur.

**DOWNS v. HAMMOND PACKING CO.**  
(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1908. Rehearing Denied  
Jan. 22, 1908.)

**APPEAL—RECORD—MATTERS TO BE SHOWN—PROCEEDINGS INCLUDED IN BILL OF EXCEPTIONS.**

An appeal from an order overruling a motion to set aside a nonsuit and grant a new trial will be dismissed, where the record proper does not show that such motion was ever filed, or that a bill of exceptions was filed, or

that a judgment was rendered, or an affidavit for appeal made, or an appeal granted, even though those proceedings are shown in the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2306.]

**Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.**

Action by Heber Downs against the Hammond Packing Company. From an order overruling a motion to set aside a nonsuit and grant a new trial, plaintiff appeals. Appeal dismissed.

W. B. Pistole and W. K. Amick, for appellant. Vinton Pike, for respondent.

ELLISON, J. This action was brought to recover damages for personal injuries alleged to have been received by plaintiff through the negligence of defendant's servants. At the close of the evidence in plaintiff's behalf the trial court sustained a demurrer thereto, whereupon plaintiff took a nonsuit with leave. Afterwards, as shown by the bill of exceptions, the motion to set aside the nonsuit and grant a new trial was overruled, and plaintiff appealed.

The record proper, as shown by the abstract, only contains the appointment of a next friend and the pleadings in the cause. The record proper does not show that any motion to set aside the nonsuit and grant a new trial was ever filed. Nor does it show that a bill of exceptions was filed, or that a judgment was rendered, or that an affidavit for appeal was made, or that an appeal was granted. These things are shown in the bill of exceptions. But they are not matters of exception, and are not proven by a statement in the bill. They should have been made to appear in the record proper. This has been ruled so frequently and uniformly by the Supreme Court and each of the courts of appeal that it is not necessary to do more than to state the defects.

The appeal will be dismissed. All concur.

**SCIENTIFIC AMERICAN CLUB v. HORCHITZ.**

(St. Louis Court of Appeals. Missouri. Dec. 17, 1907.)

**1. CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO SUE—NONCOMPLIANCE WITH STATUTE—DEFENSE.**

A motion by the defendant to dismiss an action by a foreign corporation, made pending an appeal from a justice's judgment against him, based on the ground that the corporation has not complied with the requirements of the statutes to entitle it to maintain the action, must be denied, since the defense, to be available, must be pleaded in the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2645-2648.]

**2. SAME—PRESUMPTION.**

A compliance with the law by a foreign corporation suing in the courts of the state will be presumed, and noncompliance is available only as a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2650.]



### 8. JUSTICES OF THE PEACE—APPEAL—REQUISITES.

Where an appeal is taken from the judgment of a justice on a day after its rendition, and no notice of the appeal is served on the adverse party, the court on motion must affirm the judgment, under Rev. St. 1899, § 4076 [Ann. St. 1906, p. 2221], providing that, where appellant fails to give notice, the judgment shall be affirmed or the appeal dismissed at the option of the appellee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 585.]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by the Scientific American Club against Louis Horchitz. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank K. Ryan, for appellant. Bishop & Cobbs, for respondent.

BLAND, P. J. The action was begun before J. J. Spaulding, Esq., a justice of the peace, in the city of St. Louis. An answer was filed to the complaint and the issues were tried by the justice on May 28, 1906, resulting in a judgment for plaintiff. On June 9, 1906 (seven days after the judgment was rendered by the justice), defendant took an appeal to the circuit court. No notice of the appeal was ever served on plaintiff. After the lapse of three terms of the circuit court, to wit, the June, October, and December terms, 1906, plaintiff at the February term, 1907, filed its motion to affirm the judgment of the justice, for the reason no notice of the appeal had been given. At the same term defendant filed the following motion (omitting caption), which was supported by an affidavit: "Now comes Louis Horchitz, defendant in the above-entitled cause, and moves to dismiss the proceedings herein for the reason that the plaintiff was a foreign corporation organized under the laws of the state of New York, and resident in this state and doing business herein at the times mentioned in plaintiff's petition herein, and that the transactions alleged in said petition were had in this state; the plaintiff had not previously complied with the provisions of sections 1023, 1026, Rev. St. Mo. 1899 [Ann. St. 1906, pp. 888-890]; that it had not filed in the office of the Secretary of State a copy of its charter or certificate of incorporation, nor made a sworn statement of the proportion of its capital stock represented by property located, or business transacted, in the state of Missouri, nor paid its incorporating fees as required by law, and had no capacity to make contracts in this state, or a right to sue for the matters and things set forth in its said petition or cause of action herein." On motion of plaintiff defendant's motion was stricken from the files, the motion to affirm the judgment of the justice was sustained, and the judgment affirmed. After taking the proper steps to preserve his exceptions, defendant appealed.

His contention is the circuit court had jurisdiction to hear the motion to dismiss the

suit, notwithstanding no notice of the appeal was given. This would be so if it appeared on the face of the proceedings in the justice's court that he had no jurisdiction over the subject-matter of the suit, or that plaintiff was incapacitated to prosecute the suit. Nothing of the kind, however, appears upon the proceedings before the justice. The motion filed by defendant to dismiss the suit was therefore a collateral attack upon the judgment of the justice, and not upon matters appearing on the face of the proceedings, or set up as a defense in the answer filed before the justice, and hence rests entirely in pais. It attacked the capacity of the plaintiff to prosecute the action in the courts of this state. To be available as a defense, plaintiff's incapacity to sue should have been pleaded in the answer. The cases cited by defendant's learned counsel have no application to the situation in this case. It is true the complaint alleges plaintiff is a New York corporation, and does not allege compliance by it with the laws of this state to entitle it to make contracts and enforce them in the courts of this state, but compliance with the laws of the state will be presumed and failure to comply is purely a matter of defense. *American Ins. Co. v. Smith*, 73 Mo., loc. cit. 371; *Parlin & Orendorff Co. v. Boatman*, 84 Mo. App., loc. cit. 72. Where an appeal is taken from the judgment of a justice on a day after the judgment was rendered, and no notice of the appeal is served on the opposite party, the statute (section 4076, Rev. St. 1899 [Ann. St. 1906, p. 2221]) is mandatory that the circuit court affirm the judgment. *Butler v. Pierce*, 115 Mo. App., loc. cit. 41, 90 S. W. 425, and cases cited.

The judgment is affirmed. All concur.

### EHRHARDT et al. v. STEVENSON.

(St. Louis Court of Appeals. Missouri. Nov. 19, 1907. Rehearing Denied Jan. 21, 1908.)

#### 1. PARTNERSHIP—LIABILITY OF PARTNERS.

An owner of a building and a showman and a third person agreed to form a partnership; the owner agreeing to furnish the building, the showman his time and experience, and the third person \$5,000 in cash and his time. The third person was authorized to put the building in condition for the business. The agreement between the parties provided that the contract should not become operative until the third person paid his cash contribution. *Held*, that the parties were liable for the work done on the building, though the third person had not advanced the \$5,000 to the firm.

#### 2. SAME—EVIDENCE.

Where, in an action for work done on a building, it appeared that defendant, on agreeing to form a partnership, represented that the building was his property, and agreed that he would contribute the building for the firm business, it was proper to show that defendant was the true owner together with his statements, if against interest, in reference to the work done thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 788, 1105-1107.]

**3. TRIAL—EVIDENCE—REFUSAL TO PERMIT PARTY TO OFFER EVIDENCE.**

It is error to refuse to permit a party to state what he expects to prove by a witness on objections to questions asked the witness being made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 118.]

**4. WITNESSES—PRIVILEGED COMMUNICATIONS.**

It is for the client, and not the attorney, to claim that a communication made by the client to the attorney is privileged, so that the attorney cannot testify thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 780.]

**5. SAME—INCOMPETENCY—WAIVER.**

Objection that a witness is incompetent is waived unless taken at the first opportunity, and a party cannot take the benefit of the evidence of an incompetent witness and at the same time object to evidence which is against him on the ground of incompetency.

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by William Ehrhardt and another against William Stevenson. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Earl M. Pirkey, for appellants. Daniel Dillon, for respondent.

BLAND, P. J. In the fall of 1903 Thomas R. Pullis and Thomas G. Scott were looking for a house, in the city of St. Louis, for amusement purposes, with the view of producing winter circuses and other amusements during the Louisiana Purchase Exposition. They were discovered by the defendant, William Stevenson, making an examination of No. 3,218 Olive street. Stevenson inquired what their business was, and why they were looking at the house. They informed him they were looking for a place to fit up for amusement purposes. After several consultations, under some kind of an arrangement with Stevenson, Pullis and Scott got possession of the house, and Pullis, in the name of the Auditorium Amusement Company, entered into a written contract with plaintiffs to furnish certain material, and make certain repairs on the building, and also to do some painting, for which they were to be paid the sum of \$462.60. The contract was signed: "Auditorium Amusement Company, by Pullis, Secretary and Treasurer." Pullis also guaranteed payment of the contract price. Plaintiffs furnished the material and did the work, but were not paid, and brought suit against Pullis and Scott, as partners, doing business in the name of the Auditorium Amusement Company, and recovered judgment, but the judgment has never been paid. The present action was commenced before a justice of the peace, and was, in due course, appealed to the circuit court, where on a trial de novo plaintiffs were forced to take a nonsuit. Their motion to set aside the nonsuit proved of no avail, and they appealed to this court.

The ground upon which plaintiffs seek to hold defendant for the account sued upon is that he was a partner with Pullis and Scott

in the amusement enterprise. Plaintiffs proved the account and stated as an excuse for not making defendant a party to the suit against Pullis and Scott that they did not know at that time he was a partner, and did not find it out until after judgment was rendered. Plaintiffs introduced Pullis as a witness, who testified in respect to the partnership that several conferences were had by himself and Scott with defendant in regard to the building and the amusement enterprise; that defendant told them he owned the building, but had put the title in the Empire Building Company to protect it from his creditors. Witness also said: "We talked about the amusement feature, and we submitted a plan, stating that we wanted to organize a corporate company or copartnership for amusement purposes, and we were looking at his building and he showed us through his building, took us through himself. \* \* \* He said that he was perfectly willing to join in the transaction; that he owned the building; that he would give up possession of the building, and did give up possession of the building, and we went on with the enterprise." Witness further testified that the partnership was to be called the "Auditorium Amusement Company," which was afterwards done; that the agreement was that Scott, who was an old showman, was to contribute his time and experience to the partnership, that witness was to contribute \$5,000 in cash and his time, and Stevenson was to contribute the use of the building free of rent to the partnership; and it was understood that witness was to act as secretary and treasurer of the company. He testified he was authorized to put the building in condition as a show building, and that possession was delivered to him for that purpose; that he immediately proceeded to have the building renovated and put in order and made the contract with plaintiffs for the work they performed and for which the suit was brought; that it was agreed each partner should receive one-third of the profits realized from the show business. On cross-examination Pullis testified he never put a dollar in the partnership; that he failed to raise the money he expected to, and the agreement was that the partnership should remain in abeyance until he raised the money. His evidence also shows he made a verbal contract with Stevenson to lease the property of the Empire Building Company at a rental of \$400 per month, and in a short time after making this contract he entered into a written contract with Stevenson, as the agent of the Empire Building Company, to purchase the property for \$55,000. Pullis testified he failed to pay rent, to pay the purchase price or any part of it, or to furnish the \$5,000 he agreed to put in the partnership, and was about January 1, 1904, forcibly ejected from the building by Stevenson. There is no other evidence in the record tending to prove a partnership was formed. The most favorable construction

that can be reasonably given to Pullis' testimony as a whole is that he, Scott, and defendant agreed to form a partnership to be known as the Auditorium Amusement Company for the purpose of giving shows at No. 3218 Olive street, and that Scott was to contribute his experience and talent as a showman, Pullis was to contribute \$5,000 in cash and his time to the show business, and Stevenson was to furnish the building rent free, but that this arrangement was to be held in abeyance; in other words, the agreement was not to become operative until Pullis should come forward with \$5,000 cash. Pullis failed to raise the money, or any part of it, and hence the agreement, if ever made, to form a partnership, was never effectuated, and no partnership, in fact, was ever formed. But the evidence of Pullis in chief, to the effect that, after the terms of the contract had been agreed upon, he was put in possession of the premises by defendant and authorized by him to have the house renovated and fitted up for amusement purposes, was not shaken by his cross-examination, nor contradicted by any evidence in the record. On this evidence, notwithstanding the contract of partnership was, as between the parties thereto, held in abeyance, the parties to the contract were liable for such work as Pullis contracted to have done for the renovation of the house, for the work was not done for Pullis alone, but for the benefit of the three parties to the contract of partnership and by their direction, and with the understanding that it was at the expense of the partnership.

2. Clinton L. Caldwell, an attorney at law, who testified he had been defendant's attorney from 1901 to August, 1905, swore, without objection, that he had several conversations with defendant about the property and its sale to Pullis, and about the amusement company, but that defendant told him nothing about the partnership. In his examination the following took place: "Mr. Pirkey: When did you quit acting as attorney for Mr. Stevenson? A. In August, 1905. Q. Well, after this work was done, this painting and work on that building, did Mr. Stevenson have any conversation with you in regard to it? Mr. Dillon: I object. That doesn't grow out of the cross-examination. It is part of the examination in chief, certainly, if it is any part at all. The Court: It is part of the examination in chief, if at all; but, if counsel has omitted it for any reason, he may ask it. Mr. Pirkey: Yes, sir; I want to take that up now. (Question read.) The Court: I don't remember that having been asked him before. You may ask the question. A. Yes, sir. Mr. Pirkey: What did he say in that conversation? Mr. Dillon: I object to opening up this whole case again. The Court: Well, if the objection is put upon the ground, Judge, that it is merely permitting him to open that branch of the case again, it will be overruled, giving you an opportunity, of course, to cross-examine. Mr. Pirkey: Answer the question.

(Question read.) A. I take it that is a privileged communication, and I decline to answer it, with all due respect to the court. Mr. Dillon: We make the objection on behalf of Mr. Stevenson that it is a privileged communication between attorney and client. (Objection sustained, to which ruling of the court plaintiffs then and there duly excepted.) Mr. Pirkey: Did he say anything to you in regard to what he would do about paying the bill at the time the work was being done? (Same objection and ruling to which ruling of the court plaintiffs then and there duly excepted.)" Plaintiffs attempted to make an offer of what they expected to prove by the witness. In view of Pullis' evidence in respect to defendant's statements to him about the ownership of the property, and the circumstances under which the work was done by plaintiffs, we think it was competent to show as a matter of fact that defendant was the true owner of the property; and also his statements, if against his interest in regard to the work being done on the building. What the witness would have testified in regard to these matters is not in the record, for the reason the court refused to permit plaintiffs to state what they expected to prove. This was error; and it was error to exclude the evidence on the ground that the communications were confidential. The witness, at the threshold, disclosed his relations to Stevenson, and claimed Stevenson's communications were privileged because made to witness as his attorney. The court properly ruled that it was for Stevenson, nor his attorney, to claim the privilege. Stevenson declined to make the claim, and Caldwell's examination and cross-examination, covering 10 pages of the printed record, proceeded before the objection was made. The general rule is that the right to object to any witness as incompetent is waived unless the objection is taken at the first opportunity. A party cannot take the benefit of the evidence of an incompetent witness, and at the same time object to evidence that is against him on the ground of his incompetency. *Imboden v. Trust Co.*, 111 Mo. App., loc. cit. 232, 86 S. W. 263, and cases cited.

For errors noted, the judgment is reversed and the cause remanded. All concur.

#### WATERS v. NEW YORK LIFE INS. CO.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908. Rehearing Denied Jan. 22, 1908.)

#### 1. JUDGMENT—DEFAULT—VACATING JUDGMENT—JURISDICTIONAL MATTER.

Defendant insurance company cannot have vacated a default judgment in an action by an administrator on a policy on the life of his intestate, on the claim that insured died in Iowa and that his residence was there; plaintiff claiming that deceased was a resident of Missouri and that letters of administration were properly issued to plaintiff, and this being a matter that should have been contested before

judgment, and not one affecting the jurisdiction of the trial court.

## 2. SAME.

An insurance company, jurisdiction of which was obtained by service on the superintendent of the insurance department under Rev. St. 1899, § 7901 [Ann. St. 1906, p. 3799], cannot have vacated a default judgment on a life policy obtained by the administrator of insured on the ground that plaintiff's petition did not allege that the cause of action accrued in the county where action was brought, or that defendant had any office or agent in the county, or that it had complied with the laws of the state in reference to foreign insurance companies doing business in the state, or that a permit had been granted it to do business in the state, or that it had designated a person on whom service could be had in the state; these matters not going to the jurisdiction of the court.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by W. H. Waters against the New York Life Insurance Company. The court refused to vacate a default judgment against defendant, and defendant appeals. Affirmed.

Thomas & Hackney, for appellant. H. L. Shannon, for respondent.

ELLISON, J. Plaintiff, as administrator of the estate of Francis O'Connor, recovered judgment on a policy of insurance issued by defendant on the life of O'Connor payable at his death to Mildred and Harry O'Connor. There was a judgment by default against defendant, which was made final. At a subsequent term defendant instituted the present proceeding by motion to vacate the judgment. The trial court refused to do so, and defendant appealed.

It appears that the policy provided that the insured could change the beneficiary, and it is said that he did so by making it payable to his estate. He died in Iowa, and Mildred and Harry O'Connor, denying that there was a change of beneficiary, brought their action against defendant in that state. Defendant became aware of the claim of this plaintiff as administrator of the estate in this state, and asked of the Iowa court that the plaintiffs in the suit there and the administrator interplead. This was granted, and this plaintiff, being out of the jurisdiction of that court, refused to do so. An administrator was then appointed in Iowa, and he did interplead and make claim for the money. That case was tried, and the Iowa court decided in favor of the plaintiffs O'Connor. In the meantime this plaintiff, having been appointed administrator of the estate in this state, brought his action and obtained judgment by default as already stated. Jurisdiction of defendant was obtained by service on W. D. Vandiver, Superintendent of Insurance Department for Missouri. Section 7901, Rev. St. 1899 [Ann. St. 1906, p. 3799].

Objections to the action of the trial court in refusing to vacate the judgment are in great part attacks on the validity of that judgment. Most of these objections are of

such character as should have been made before the case was closed by the judgment, and are too late now. It is claimed by defendant that the insured died in Iowa and that his residence was there; but plaintiff claims deceased was a resident of this state and that letters of administration were properly issued to him. This was a matter that should have been contested before judgment. It did not affect the jurisdiction of the trial court.

But defendant questions the sufficiency of plaintiff's petition to give jurisdiction to the Missouri court, "in that it does not allege that the plaintiff's cause of action accrued in Jasper county, it does not state that the defendant had any office or agent in Jasper county, and in fact defendant had no office or agent in Jasper county, and it does not state that the defendant had complied with the laws of the state of Missouri in reference to foreign insurance corporations doing business in the state of Missouri, and it does not allege that a permit to do business as an insurance corporation [in] the state of Missouri had ever been granted defendant by the Secretary of State of Missouri, and it does not allege that the said company had designated any person upon whom service of process could be had on the defendant in the state of Missouri." We do not consider that these objections went to the extent of destroying the jurisdiction of the trial court. A party litigant, suffering judgment to go against him by default, cannot be allowed, after it has become final, to bring up objections which should have been interposed before judgment. There was jurisdiction of plaintiff's cause of action and of defendant's body in the trial court, and we do not see where it is entitled to any relief now, unless it be on the ground of fraud, and of that there is no evidence.

The judgment should be affirmed. All concur.

## INDEPENDENT PACKING CO. v. BARTH.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908.)

### 1. FRAUDULENT CONVEYANCES—HINDERING OR DELAYING CREDITORS—CHATTEL MORTGAGES.

A chattel mortgage to a trustee for a creditor named, and other creditors as beneficiaries, but which does not show who such other creditors are, nor the amount due any one, tends to hinder and delay creditors, and is fraudulent as to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 67-71.]

### 2. CHATTEL MORTGAGES—FRAUD AS TO CREDITORS—RETENTION OF POSSESSION BY MORTGAGOR—DISPOSITION OF PROCEEDS OF PROPERTY.

A chattel mortgage conveying saloon fixtures and liquors, providing that the mortgagor shall retain possession of the property with full enjoyment of the same, but shall not remove it from the place without the written consent of the creditors secured, gives the mortgagor per-

mission to sell the liquors described and retain the proceeds, and is fraudulent as to creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 393-401.]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by the Independent Packing Company against Edward P. Barth. From an order of the circuit court granting plaintiff a new trial, defendant appeals. Affirmed and remanded.

Jas. P. Maginn and D. S. O'Keefe, for appellant. H. M. Wilcox and H. B. Davis, for respondent.

BLAND, P. J. The action was by attachment commenced before a justice of the peace, and in due course was appealed to the circuit court. The grounds alleged in the affidavit for the attachment are as follows: "Defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors. That he has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors. That he is about to fraudulently convey or assign his property or effects so as to hinder or delay his creditors. That he is about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors." A plea in abatement was filed by defendant, and the issues raised by it in the circuit court were tried by a jury, who found for defendant. Plaintiff filed a motion for new trial on the plea in abatement, which the court sustained, and granted a new trial. From this order defendant appealed. To sustain the attachment plaintiff offered in evidence the following chattel mortgage:

"This deed, made and entered into this twenty-third day of March, 1904, by and between Edward P. Barth and ——— Barth, his wife, of the city of St. Louis and state of Missouri, party of the first part, and D. J. O'Keefe of the city of St. Louis and state of Missouri, party of the second part and Lynch & Co., and other creditors of the city of St. Louis and state of Missouri, party of the third part. Witnesseth: That the said party of the first part, in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and of the debt and trust hereinafter created, does by these presents grant, bargain, sell and convey unto the said party of the second part the following described personal property and effects located: Store and saloon at No. 2745 Cass avenue, St. Louis, as follows, to wit: 1 stock butcher box, 1 butcher counter, 1 butcher rack, 2 meat blocks, 2 small meat racks, 3 butcher cleavers, 3 butcher knives, 2 meat saws, 1 steel, 1 sausage machine, 1 sorrel mare, 1 set single harness, 1 delivery wagon, 1 platform counter scale, 1 counter scale, 1 Enterprise coffee mill, 1

butter box, 1 grocery counter, all wall fixtures, 1 gas stove, 1 hot water tank, 2 electric fans, 1 gasoline stove, 1 cash register, 2 money drawers, an assortment of bar glassware, all faucets, measures, casks, barrels and receptacles of every description in bar room, 1 arch electric lamp, 2 oil tanks, 1 candy case, 6 tea cans, 4 coffee cans, 2 paper cutters and all other fixtures, receptacles and utensils not herein specifically mentioned, located at above address, all wines, liquors and cigars in stock in barroom and cellar and all groceries, can goods of every description in stock in grocery store at above address. To have and to hold unto the said party of the second part and his successors in this trust forever. In trust, however, for the following reasons, to wit: Whereas, the said party of the first part is indebted to the said Lynch & Co., and others party of the third part, in the sum of three hundred and fifty and no/100 dollars for value received, payable on demand. Now if said debt shall be well and truly paid when due and payable, then this deed shall be void and of no effect, and shall be released at the expense of the said party of the first part. But if said debt, or any part thereof, shall not be paid when due, according to the true effect and tenor thereof, then this deed shall remain in full force, and the said party of the second part or his successor—or in case of his death, absence from the state, or refusal or disability to act—the sheriff of the city of St. Louis shall, at the request of the holder of said debt, take possession of the property hereby conveyed and described, and for that purpose authority is given to enter upon the premises of the said party of the first part or any other place where the property may at the time be, and proceed to sell the same at public vendue to the highest bidder for cash, at city of St. Louis, first giving a reasonable number of days notice of the time, place and terms of sale, in some newspaper printed at the city of St. Louis and state of Missouri, and out of the proceeds shall pay, first, the cost and expense of executing this trust, including reasonable compensation to said trustee for his services; second, the amount or amounts, both principal and interest, due and unpaid of said debt, and the remainder, if any, he shall pay over to the said party of the first part or his legal representative or assigns. And until default be made as aforesaid, said party of the first part shall retain possession of the aforesaid property with full enjoyment of same, but said property shall not be removed from the place where it now is without the consent in writing of the said third party. In witness whereof, said party of the first part has hereunto set his hand the day and year first above written."

The mortgage was duly acknowledged and recorded. The learned trial judge sustained the motion for new trial, for the reason he was of opinion he should have instructed the jury that the mortgage as to creditors of

defendant was fraudulent, and have directed the jury to return a verdict for plaintiff. We concur in this view. Lynch & Co. and other creditors are named in the mortgage as beneficiaries. It does not appear from the mortgage who the other creditors are, nor is the sum due any one creditor stated, so that an attaching creditor could not determine from the face of the mortgage to whom or what sum of money should be paid defendant's creditors to secure a release of the property mortgaged, as he would have a right to do. For this reason, and because the creditors to be secured beside Lynch & Co. are left to the selection of the trustee, the mortgage had the effect to hinder and delay creditors, and as to them is fraudulent. *Seger's Sons v. Thomas Bros.*, 107 Mo. 635, 18 S. W. 33; *Jones on Chattel Mortgages*, § 79. It is also fraudulent as to creditors for the following reason: Saloon fixtures and liquors are conveyed by the mortgage, yet in the last clause of the instrument it is provided that the mortgagor "shall retain possession of the aforesaid property with full enjoyment of same, but said property shall not be removed from the place where it now is without the consent in writing of the said third party." Defendant testified that at the time he executed the mortgage he was engaged in the retail butcher, grocery, and saloon business. On this evidence it is clear he was given permission to sell the liquors described in the mortgage over his bar, and pocket the proceeds, and was allowed to use all the other property conveyed in his business.

The judgment is affirmed, and cause remanded. All concur.

### NORTHRUP v. DIGGS.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908.)

#### 1. WITNESSES—EXAMINATION—SCOPE OF REDIRECT EXAMINATION.

In an action for commission for selling a lease, it is not error to permit plaintiff to testify on his redirect examination that defendant had offered to sell him the lease for a certain sum, where defendant in cross-examination of plaintiff brought out the subject of an offer by defendant to plaintiff to sell the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50. Witnesses, §§ 994-1000.]

#### 2. APPEAL—HARMLESS ERROR—EXAMINATION OF WITNESS—LEADING QUESTIONS.

Though it is permissible to ask a witness, when called to contradict another, whether certain words were used, refusal to allow such questions is not ground of reversal when the witness's testimony shows a positive denial of the expressions attributed to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4140-4145.]

#### 3. BROKERS — COMPENSATION—NEGOTIATIONS THROUGH OTHER AGENTS.

In an action for commissions for negotiating the sale of a lease for defendant, where it appeared that plaintiff offered to sell the lease for a certain amount, and the offer was refused, defendant would not be liable to plaintiff for commission, where he afterwards made

the sale for that price to the same party through a different agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 82-84.]

#### 4. SAME — ACTIONS FOR COMPENSATION — TRIAL—INSTRUCTIONS.

In an action for commission for sale of a lease, where the petition alleged that plaintiff negotiated the sale of the lease, and after reaching an agreement whereby the purchaser agreed to pay a certain price for the lease the purchaser paid that amount to the defendant an instruction based on the theory that plaintiff had found a purchaser ready, willing, and able to buy the lease and brought him into communication with defendant is erroneous, because outside the scope of the petition.

#### 5. SAME — SUFFICIENCY OF PERFORMANCE OF SERVICES.

One employed by the owner of a lease to negotiate a sale thereof, who begins the negotiations which finally result in a sale as authorized, may recover the compensation agreed on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 73-84.]

#### 6. SAME—"NEGOTIATE."

In an action for commission for sale of a lease, in the petition, which alleges that defendant authorized plaintiff to negotiate a sale, the word "negotiate" should be construed to mean conversation in arranging the terms of a contract.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4771-4772.]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by Frank B. Northrup against W. P. Diggs. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

On November 1, 1902, defendant had a lease, to run about two years and two months, on premises No. 316 N. Main street, in city block No. 11, city of St. Louis. The petition alleges, in substance, that on November 1, 1902, defendant, being desirous of selling his leasehold interest in said property, authorized plaintiff to negotiate a sale of it for \$1,000, agreeing to pay plaintiff for his services whatever sum he might receive over and above \$1,000; that plaintiff entered upon negotiations with the Mississippi Valley Trust Company, agent for the purchase of the property for the Terminal Railroad Company, which terminated in the sale of said lease for \$2,000, which sum was paid to defendant by said trust company, agent of the Terminal Railroad Company, for said lease, but that defendant has failed and refused to pay plaintiff the sum of \$1,000 for his services as he agreed to do. The answer was a general denial. Verdict and judgment for plaintiff for \$1,000, from which defendant appealed. The evidence shows that the Terminal Railroad Company in 1902 wanted to acquire the property leased by defendant and other property in the neighborhood, for the purpose of building an elevated railroad over it, and had appointed the Mississippi Valley Trust Company its agent to acquire title to the property. The fact that the Terminal Railroad Company wanted the property was known to both plaintiff and defendant, and also to

others, and its desire to acquire the property was a matter of common notoriety. Plaintiff was a tenant of defendant from month to month, and occupied the basement of the building, and had desk room in the office, his desk and plaintiff's setting back to back, only three or four feet apart. Plaintiff testified there was some talk between him and defendant about the sale of the lease, and he told defendant he would sell the lease for him and guarantee that he would get \$1,000 for it; that defendant said he could have all he could get over \$1,000, and to go out and sell it; that he started out to sell the lease, went first to the Terminal Railroad people, who directed him to the Mississippi Valley Trust Company as its agent; that he then called at said trust company, and was introduced to Mr. Benoist, the real estate officer of the trust company, and represented to him that he owned the lease and offered to sell it for \$2,000; that Benoist said it was too much, and made no offer for the lease, stating he was not ready to take the matter up; that he saw Benoist about a dozen times afterwards in respect to the sale of the lease, but never got an offer from him, and reported the result of his conversation with Benoist to defendant, and told him he had asked \$2,000 for the lease. It appears that about the 15th of January, 1903, Benoist, representing the Mississippi Valley Trust Company, and Mr. O'Fallon, the owner of the property, and defendant, met in the same office; that Benoist and O'Fallon agreed upon the purchase price for the fee in the property, and Benoist was shown a copy of defendant's lease, and was requested by O'Fallon to treat him fair in the purchase thereof; that Benoist then inquired about plaintiff's interest in the property as a lessee, and learning he had no interest, turned the matter of acquiring defendant's interest over to Mr. Walsh, real estate agent for the trust company. Beginning at an offer of \$100 for the lease, Walsh finally bought it for \$2,000, less a commission of \$50, which he charged defendant. Plaintiff was not known to Walsh, and took no part in the negotiations between Walsh and defendant which resulted in the purchase of the lease. Defendant denied most emphatically that he ever authorized plaintiff to sell the lease on any terms whatever.

W. F. Smith and John A. Gilliam, for appellant. B. Greenfelder and Abbott & Edwards, for respondent.

BLAND, P. J. (after stating the facts as above). 1. On his redirect examination plaintiff, over the objection of defendant, was permitted to testify that prior to the time defendant authorized him to sell the lease defendant offered it to him for \$1,000, and he had a letter or memorandum of the contract to that effect typewritten, but defendant refused to sign it. The admission

of this evidence would have been error but for the fact that defendant's counsel, in his cross-examination of plaintiff, brought out the subject of an offer to sell the lease by defendant to plaintiff.

2. Error is assigned in the permission of the court for plaintiff to amend his petition and change his cause of action. There is but one petition in the abstract, and it does not purport to be an amended petition, nor is there any statement in the abstract that an amended petition was filed at all, nor does the record show one was filed.

3. In defendant's examination his counsel attempted to meet and deny categorically plaintiff's evidence of statements made to him by defendant in respect to the contract for the sale of the lease. On objections of plaintiff's counsel this course of examination of defendant was denied. Greenleaf says: "In some cases, however, leading questions are permitted, even in a direct examination." Among the instances where this may be done he mentions this one: "Where a witness is called to contradict another, who has stated that such and such expressions were used, or the like, counsel are sometimes permitted to ask whether those particular expressions were used, or those things said, instead of asking the witness to state what was said." 1 Greenleaf on Evidence (Lewis Ed.) § 435. The justice of this ruling, we think, is self-evident; but its nonobservance does not call for a reversal of a judgment when the witness' testimony, as does defendant's, shows a clear, positive, and unequivocal denial of the expressions attributed to him by plaintiff.

4. Error is assigned in the giving of the following instructions for plaintiff: "(1) The court instructs the jury that, if you believe from the evidence that the defendant, W. P. Diggs, was occupying the premises on Main street, in the city of St. Louis, Mo., as the tenant of John J. O'Fallon, on or about the 1st day of November, 1902, and that the defendant was desirous of disposing of and selling his interest in said lease, and authorized the plaintiff, Frank B. Northrup, to negotiate the sale of the same for the sum of \$1,000, and agreed to pay the said Frank B. Northrup for his said services whatever sum the defendant received above the sum of \$1,000, and that the plaintiff, acting upon the representations and authority of the defendant, effected an agreement for a sale of said leasehold interest for the sum of \$2,000, and that said agreement was effected through the representations and efforts of said Northrup, then your verdict should be for the plaintiff in the sum of \$1,000, though the transaction was finally closed between the defendant owner, and the purchaser. (2) The court instructs the jury that, if you believe from the evidence that the plaintiff was requested by the defendant to find a purchaser for defendant's lease, and assist defendant in the sale of his lease to the premises on Main street,

city of St. Louis, Mo., and the defendant agreed to pay the plaintiff whatever sum the defendant received over and above \$1,000 for the sale of said lease, and that the plaintiff, relying upon the representations and agreement of the defendant, secured for the defendant a purchaser of said lease for the sum of \$2,000, and said lease was sold by the defendant for the sum of \$2,000 to the purchaser so secured by the plaintiff, then your verdict shall be for the plaintiff in the sum of \$1,000, though the transfer and assignment of the lease was made directly between the defendant owner and the purchaser." The petition alleges that through negotiations of plaintiff with the Mississippi Valley Trust Company said company, as agent of the Terminal Railroad Company, agreed to pay plaintiff the sum of \$2,000 for the lease. Plaintiff's evidence shows that he offered the lease to Benoist, real estate officer of the Trust Company, for \$2,000, but his offer was not accepted by Benoist, and his negotiations, if they can be called negotiations, begun and terminated with an offer of the lease for \$2,000. The uncontradicted evidence also shows that the negotiations which terminated in the sale of the lease were carried on between Walsh and defendant in person, and that plaintiff took no part in, or even had knowledge of, these negotiations. Therefore there is no evidence upon which to predicate instruction No. 1, and it should not have been given.

5. The second instruction is based upon the theory that plaintiff found a party ready, willing, and able to buy the lease, and brought that party into communication with defendant. The gist of the action, as stated in the petition, is that plaintiff negotiated the sale of the lease for \$2,000, and after an agreement had been reached between him and the trust company whereby the latter agreed to pay \$2,000 for the lease the trust company paid over the money to defendant. The instruction is therefore outside the scope of the petition, and for this reason is erroneous. The evidence offered by plaintiff, including his own and that of Benoist, only shows that plaintiff offered the lease to the Mississippi Valley Trust Company, the agent of the Terminal Railroad Company, for \$2,000; that Benoist told him it was too much, and he was not ready to take the matter up, and would not be until he could ascertain what the fee to the property could be bought for. If this transaction can be dignified as negotiations, then plaintiff began the negotiations for the sale of the lease which finally terminated in its sale for \$2,000, and he is entitled to recover, provided he was employed by defendant to make the sale. The term "negotiate" as used in the petition we think should be construed to mean "conversation in arranging the terms of a contract," and as plaintiff's conversation with Benoist had reference to a sale of the lease and the terms upon which it could be bought a jury might be authorized

to find that plaintiff began the negotiations which finally resulted in the sale.

For errors noted, the judgment is reversed, and the cause remanded. All concur.

# WEINSTEIN v. TOLEDO, ST. L. & W. R. CO.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908.)

## 1. RAILROADS — STATUTORY REGULATION — CROSSING ACCIDENT — NEGLIGENCE — FAILURE TO GIVE SIGNAL.

Under Starr & C. Ann. St. Ill. 1896, c. 114, par. 74, requiring that a bell be rung and a whistle blown for a highway crossing, it was negligence for a train to approach a crossing without the giving of the required signals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1002.]

## 2. NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

A verdict may be set aside if the trial court deems it against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 137.]

## 3. RAILROADS—CROSSING ACCIDENT — QUESTION FOR JURY.

In an action for injuries to plaintiff in a collision between his vehicle and a train at a crossing, *held*, that the question of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1166-1187.]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Max Weinstein against the Toledo, St. Louis & Western Railroad Company. From an order granting a new trial after a verdict for defendant, it appeals. Affirmed.

Chas. A. Schmettau and Jas. R. Van Slyke, for appellant. Albert C. Hausman, for respondent.

GOODE, J. This plaintiff was injured in a collision with one of defendant's trains. The accident occurred in St. Clair county, Ill., immediately north of the city of East St. Louis, at about 1:30 o'clock in the afternoon of January 22, 1906. At the point of the accident the highroad crosses three railroad tracks, which run parallel with each other. The tracks run north and south, and the highway crosses them at an acute angle, running northeast and southwest. The easternmost of the railroad tracks is that of the St. Louis, Troy & Eastern Railroad. The middle one is defendant's track, and the western one is the Chicago, St. Louis & Peoria Railroad Company's. These tracks stand on an embankment considerably higher than the surrounding country, and defendant's track is the highest of the three. Plaintiff was driving a closed one-horse spring wagon. He testified there was a dense fog prevailing, and as he approached the first track from the southwest, or south, as he said, he stopped when close to the tracks, and looked about to see if a train was approaching, but neither saw nor heard a train. After waiting two or three minutes, he drove across the first track;



the movement of his wagon causing no noise, he said. There was a depression between that track and defendant's, and plaintiff swore the distance between the two was about 40 feet. He drove on, and, as his horse was passing defendant's track, he saw nothing, but immediately afterwards saw something strike the rear wheels of the wagon, then the horse ran away, and that was the last thing he knew. What struck the wagon and injured plaintiff was a train of 22 cars belonging to defendant, which was being backed along the track. Plaintiff testified that on a clear day, when there was no fog, you could see the tracks for a distance of 2,000 feet; that a little house stood at the northeast corner of the track, but it was so foggy he could not see the house, though he was within 25 feet of it; that the train which struck him came from the east. He further testified he heard no sound of whistle or bell, nor any noise from the movement of the train. The petition pleads a statute of the state of Illinois requiring every railroad corporation to keep a bell of at least 30 pounds weight and a steam whistle on each locomotive, and cause the bell to be rung or the whistle blown at a distance of eighty rods from any highway, and keep up the ringing or whistling until the highway is reached. *Starr & C. Ann. St. Ill. 1896, c. 114, par. 74, § 6.* Another witness testified to seeing plaintiff drive on the track, and that there was a light fog, not very thick. He testified he was 25 feet or more from the track when he saw plaintiff. Another witness testified while crossing the tracks he met plaintiff between the middle and the last track, that the witness saw the train coming, and hallooed to plaintiff, who was looking out of the wagon. This witness also testified he did not hear anything; that is to say, the noise of the train. Another witness for plaintiff, who was a switchman in the employ of defendant, testified the day was sleety, and it had been snowing a little, but there was no fog; that he saw plaintiff approaching the crossing on the Chicago, Peoria & St. Louis Railroad track, the north one of the three tracks; that he saw plaintiff when the train was within 150 or 200 feet of the crossing, or, rather, saw his wagon; that plaintiff was going at a slow walk. This witness swore vigorous efforts were made by shouting to warn plaintiff and prevent him from going on the track, but his attention could not be attracted either by shouts or gestures; that there was no fog sufficient to interfere with vision. The testimony of plaintiff's witnesses tended to contradict his statement that he stopped to look and listen before venturing on the tracks. At the conclusion of the testimony for plaintiff the court directed a verdict for defendant, stating as a reason that the testimony convinced the court that, if a verdict were returned in plaintiff's favor, it would have to be set aside because two of plaintiff's witnesses contradicted him so directly as to ren-

der his story impossible. Subsequently the court set the verdict aside, and defendant appealed from that order.

It is manifest that, if the plaintiff's testimony was true about the fog, the testimony of his witnesses was false. The tendency of one witness was to corroborate him about the movement of the train not being audible to one on the crossing. A jury must weigh the evidence in the case but their verdict may be set aside if the court thinks it is opposed to the weight of the evidence. There was proof that neither the bell nor whistle was sounded, and this was negligence on the part of defendant.

The judgment is affirmed. All concur.

#### RUTLEDGE & KILPATRICK REALTY CO. v. GARTSIDE et al.

(St. Louis Court of Appeals. Missouri. Jan. 7, 1908. Rehearing Denied Jan. 21, 1908.)

#### 1. WORK AND LABOR—SERVICES RENDERED—SUFFICIENCY OF EVIDENCE.

In an action for services rendered defendants in settling an indebtedness against a third party, evidence examined, and *held* to support a judgment for plaintiffs.

#### 2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action for services rendered defendants in settling an indebtedness due by a third party, an instruction that in determining the value of plaintiff's services, the nature of the employment, etc., and the skill required of plaintiff, so far as skill was "possessed" by it should be considered, was complained of as authorizing the jury to consider the skill required, without reference to whether skill was used or not. *Held* that, though the word "possessed" was inapt, and the word "used" or "employed" would have been better, such inaccuracy was unlikely to mislead the jury, and the evidence admitting of no conclusion but that skill was exhibited by plaintiff, a judgment in its favor would not be reversed.

#### 3. WORK AND LABOR—SERVICES RENDERED—ACTIONS—SUBMISSION TO JURY.

In an action for services rendered defendants in settling an indebtedness due by a third person, evidence *held* to warrant the submission to the jury of the question of defendant's ratification of plaintiff's action in surrendering certain notes.

#### 4. SAME—INSTRUCTIONS.

In an action for services rendered defendants in settling an indebtedness due by a third party, an instruction that the burden of proving plaintiff's case, and what the services were reasonably worth, rested on plaintiff, and it was bound to prove those matters to the jury's satisfaction by a preponderance of the evidence, and that by preponderance of the evidence was meant its greater weight with respect of credibility, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, §§ 47-49.

For other definitions, see Words and Phrases, vol. 6, pp. 5516-5518; vol. 8, p. 7761.]

#### 5. SAME.

Where, in an action for services rendered defendants in settling an indebtedness due by a third party, it appeared that the settlement was fully approved by defendants after they thoroughly understood it, and had taken independent counsel, an instruction precluding plaintiff from recovering if it did not use skill in the business, and damage resulted to defendants, was properly refused.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by the Rutledge & Kilpatrick Realty Company against Julia Gartside and another. Judgment for plaintiff, and defendants appeal. To be affirmed if plaintiff within 10 days remits certain interest from the judgment. Otherwise to be reversed, and the cause remanded.

Thompson & Campbell and Chas. S. Reber, for appellants. Thos. G. Rutledge, for respondent.

GOODE, J. Plaintiff is an incorporated company engaged in the real estate and financial business in the city of St. Louis, and in acting as financial and business agent for clients in negotiating loans and settlements and collecting money. This action was instituted to recover compensation for services rendered defendants in effecting the settlement of an extensive indebtedness they held against Joseph A. Duffy. The two defendants are sisters, and appear to have possessed a fortune, but to have been lacking in experience and knowledge of business affairs. One of them so testified. Duffy was their brother-in-law, and had been in charge of their affairs and an extensive borrower of money from them. They made him various loans at different dates, which are not given; but by September 20, 1904, when plaintiff was employed to effect a settlement with him, these loans amounted to between \$100,000 and \$110,000, and were supposed to be secured by deeds of trust on real estate in the city of St. Louis, sufficient in each instance to make the loan safe. In fact a considerable portion of the indebtedness was not thus secured. It is true each loan purported to have a deed of trust back of it; but in some instances there was no title to the property in the grantor who executed the security, and in others there were such heavy prior incumbrances that defendants' security was worthless. Duffy was in every instance the borrower, but he did not always give his own notes for the debt. There were notes in the names of these makers: Erker, Jacobs, Weber, Jordan, O'Connell, Newman, Wellington R. E. Co., and perhaps others. The defendants did not know until the fact was discovered and told to them by plaintiff that Duffy was the borrower in the instances where the notes and deeds of trust were executed by other persons; and, as stated, in some of those instances there was no title in the borrower to the property which had been mortgaged to secure the loan. About September 20, 1904, the defendants put in plaintiff's charge for foreclosure a deed of trust executed by one Newman. The defendants had no certificate of title to the property covered by the deed of trust, and in other respects the loan appeared to be badly secured. Robert Rutledge, general manager of the plain-

tiff company, called their attention to these circumstances, and asked them if they had any more such papers. The conversation led to defendants placing in the hands of plaintiff for attention, during the latter part of September and early in October, 1904, the documents and papers relating to all the loans made to Duffy, or nominally to other persons, when he was the real borrower. The evidence shows these papers and securities were in disorder, and that defendants knew but little about their business relations with Duffy. In fact Mr. Rutledge got the papers from them from time to time, as his investigation of some loan would lead him to believe there were still others. Defendants kept minutes of their transactions with Duffy on loose scraps of paper, and in a wholly irregular way. However, as said, all the indebtedness of Duffy was finally put into Robert Rutledge's hands for settlement and collection. He took the matter up, and appears to have conducted it with skill and diligence, running down the titles to the different pieces of property on which defendants had deeds of trust, or supposed they had, ascertaining what titles were good and what were not, whether there were prior incumbrances, and in general doing all things necessary to ascertain the exact condition of each loan and how it was secured. In the course of this work he procured abstracts of title from a firm of title abstracters, sometimes certificates of title, and sometimes neither a formal abstract nor certificate, but a pencil memorandum sufficient to enable him to investigate the security. Mr. Rutledge gave a large portion of his time to the defendants' business from the date when their matters were first placed in his charge (September 20, 1904) to the execution of the first contract of settlement between defendants and Duffy on October 26, 1904.

As we gather, the defendants held against Duffy 30 or more notes and other evidences of debt growing out of transactions which extended over 10 years. There were 80 or 40 pieces of real estate involved in the loan transactions, and plaintiff had to investigate the titles to all these pieces. The defendants supposed Duffy was in good circumstances, but it developed that he was greatly in debt, and was on the verge of bankruptcy. Indeed he was threatening to go into voluntary bankruptcy. After ascertaining the amount of the indebtedness, getting together the notes and other evidences of debt and securities the defendants held, and posting himself regarding the titles of the various properties involved, Mr. Rutledge began a negotiation with Duffy for a settlement. The preliminary investigations and the negotiation with Duffy were continued from September 20 to November 10, 1904. During this period Rutledge had many interviews with the defendants themselves regarding their business, and laid before them such knowledge as he had de-

rived from his investigations. He likewise had numerous interviews with Duffy and the latter's attorney, Mr. E. W. Bannister, in the negotiation for a settlement of the indebtedness. These meetings were sometimes of a disagreeable and contentious character. Duffy would insist that many of the claims of defendants were wrong, that he had paid certain notes held by them and preferred against him; that others of the notes were given as renewals, and he was entitled to credits which he had not received. It not infrequently turned out he was in the right about those differences. In truth, when plaintiff was employed, the defendants knew little about the state of their business with Duffy, or how much he owed them. Another difficulty in the settlement was that the only resource Duffy had for paying was to turn over to defendants pieces of real estate which he held equities in, and he wished to appraise the equities at exorbitant prices in the settlement. Disputes over the prices at which the properties should be taken by defendants ran high and continued for days, Rutledge insisting on lower valuations than Duffy would concede, and the latter threatening to go into bankruptcy if his figures were not accepted. During the course of the negotiation the rental value of the properties, the prices of them, and all the details of the business were laid before defendants. Under date of October 26, 1904, a written contract, which was executed about November 10th, was entered into between the parties, by which four tracts of land were conveyed by Duffy to defendants at certain valuations. All these tracts were improved with buildings, and yielded rent. The first one was on Forest Park boulevard, and had a frontage of 125 feet, which was taken at a valuation of \$55,000, subject to an incumbrance of \$19,000, leaving an equity of \$36,000. The second tract was 225 feet on Finney avenue. It was taken at a valuation of \$60,000, subject to an incumbrance of \$21,000, leaving an equity of \$39,000. The third was 185 feet on Fairfax avenue, and was taken at \$40,000, subject to an incumbrance of \$13,500, leaving an equity of \$26,500. The fourth was a tract on Cook avenue, taken at \$22,500, subject to an incumbrance of \$11,000, leaving an equity of \$11,500. There were some other provisions in the contract which need not be stated, but it was provided that if, on a careful auditing of the accounts between the parties, it should be found the value of the several parcels of land, less the total amount of the incumbrances on them, did not equal the indebtedness of Duffy to defendants, he should make up the deficiency either by conveying real estate or a payment in cash, and if it should be found the net value of the parcels of real estate was in excess of Duffy's indebtedness, defendants should pay the difference. The auditing was to occur as soon as the deeds to the real estate should be ready for delivery.

After the preparation of this agreement, but before its execution, a new indebtedness of \$6,000 or \$8,500 was discovered, and this required a rearrangement of the settlement. The defendants took the property subject to the incumbrances and the arrearage of taxes thereon, which arrearages amounted to about \$7,000. Subsequently there was a reauditing of the various transactions, and another contract entered into, which altered the first one in some details, and finally settled the differences between the parties. This contract was executed January 19, 1905. It recited the previous contract of October 26, 1904, and that the latter provided for a further valuation of the property to be conveyed to defendants, and an auditing of the accounts between them and Duffy, and that such accounting having been had, it was found the values of the property turned over to defendants did not differ materially from the agreed values of the first contract. Some details of the first agreement not material to the present controversy were altered, and the January contract was declared to be a final settlement of all matters in dispute between the parties. It seems the alterations from the October contract were largely in favor of Duffy, as it turned out he was entitled to credits which had not been allowed him in the October settlement. It was in consideration of this fact that some shares of stock in two corporations were transferred to Duffy by defendants, and an equity in a piece of real estate conveyed to his wife. In the settlement Duffy's indebtedness was fixed at \$109,982.42, divided as follows: To Julia Gartside, \$33,450.82; to Emma Gartside, \$76,531.60. As the equities in the property aggregated, according to the appraised values, more than the indebtedness, three notes secured by deeds of trust were turned over by defendants to Duffy; to wit, notes and deeds of trust designated as the O'Connell, Jacobs, and Erker loans, and aggregating \$2,900. As has been stated the contract of January, 1905, altered in some particulars the one previously made on account of later discoveries of the state of business between Duffy and the defendants. We have stated the evidence according to the testimony for the plaintiff, but there was not much disagreement among the witnesses, or between the parties, except on three points—one was the value of the equities in the properties turned over to defendants by Duffy, another was as to the authority of plaintiff to surrender to Duffy the O'Connell, Jacobs, and Erker notes, and the third was as to the reasonableness of plaintiff's charge. The testimony for the plaintiff tended to show the value of the equities was, as already said, upwards of \$113,000, whereas the testimony introduced by defendants put their value lower.

The overwhelming weight of the testimony, if not all of it, is that defendants expressly authorized the three notes mention-

ed to be turned over to Duffy, and the evidence is conclusive that they knew it had been done when they accepted the fruits of the settlement. Indeed Duffy offered to undo the settlement after it had been consummated, but defendants refused his offer, and resolved to hold what they had received. It should be stated in this connection that not only were the defendants advised all along of what plaintiff was doing, and of the terms of settlement, but they took independent advice on the subject, consulted another attorney about the settlement, and other persons about the values of the real estate they were accepting. According to Miss Julia Gartside's testimony about the relinquishment to Duffy of the Erker, O'Connell, and Jacobs notes in order to equalize the indebtedness of Duffy and the equities he was to convey to defendants, when Mr. Rutledge first informed her the notes had been surrendered, she said the act was done without authority, and ordered Rutledge to get the notes back. He started to leave his office to get them from Bannister or Duffy, when his associate, Mr. Kilpatrick, said to Miss Gartside, that he disliked to see her and her sister lose their money, and advised her to consult an attorney before she repudiated the arrangement for a settlement. On this suggestion she took counsel with Paul F. Coste, an attorney, who strongly urged her to stand by the arrangement Rutledge had made, including the surrender of the three notes, as otherwise there would be protracted litigation with Duffy, which would have to be heard by a referee. Miss Julia Gartside swore that after receiving this advice she did not further insist on a return of the notes, but indorsed them to Duffy, which before she had refused to do. The evidence shows conclusively that Duffy was insolvent. He owed perhaps \$200,000 to persons other than defendants. The evidence shows too that the settlement effected by plaintiff resulted in defendants getting all the property he owned for what he owed them. The attorney with whom defendants consulted between the time of the first contract in October and the final one in January strongly advised the defendants to go forward with the settlement, with which it seems at that time they felt dissatisfied. After the business was closed defendants offered to pay plaintiff \$500 for its services; but plaintiff demanded \$1,500, and would take no less. There is testimony that plaintiff agreed to waive its charge in consideration of being allowed to attend to defendants' business, but this is disputed. The petition is in two counts, the first one for the reasonable value of the services, and the other on an account stated. There is evidence tending to support both counts. Much testimony was adduced that plaintiff's services were worth a great deal more than \$1,500, the amount demanded, and beyond ques-

tion the issues on both counts were for the jury. The verdict was in favor of plaintiff on the first count of the petition for \$1,400, with 6 per cent. interest from December 3, 1904, on the second count in favor of defendants, and on defendants' counterclaim in favor of plaintiff. It should be stated that this counterclaim was preferred to recover the value of the three notes alleged by defendants to have been relinquished to Duffy without authority. Inasmuch as one of the defendants herself testified the notes were voluntarily relinquished after the defendants had taken independent advice about doing so, we do not perceive any basis for the counterclaim, but it was left to the jury by the court below. The preponderance of the evidence is in favor of plaintiff on all the issues, and the verdict is satisfactory. Plaintiff rendered defendants a most valuable service in securing the settlement of Duffy's indebtedness, which was in an extremely precarious state; and whether the equities they received in payment were worth as much as they were estimated at in the settlement, or not, suffice to say defendants got all Duffy had, to the exclusion of his other creditors, and what they got was of large value in any view of the evidence. This result was due to the meritorious services of plaintiff, through its officer, Mr. Robert Rutledge. We do not see how the settlement of defendants' affairs with Duffy, complicated as they were, and threatening a heavy loss, could have been conducted so as to yield a better result. The defendants were not imposed on or taken advantage of in any way by plaintiff, but the attention given to their business was marked with fidelity and diligence.

Certain rulings on instructions are complained of on this appeal. One of the complaints is that the court instructed the jury that in determining the value of plaintiff's services, the nature of the employment, magnitude of the settlement, and amount of indebtedness involved, the skill and time required of plaintiff's officer in preparing for the settlement, and in the negotiation leading to its consummation, so far as skill was possessed by plaintiff, together with all the facts and circumstances, should be taken into consideration. The criticism of this instruction is that it authorized the jury to consider the skill required to perform the services, without reference to whether skill was brought to bear in its performance or not. What the instruction means is that, in determining the value of plaintiff's services, the jury should take account of the skill which plaintiff had used in the performance; and such consideration might result in defendants' favor as well as plaintiff's, if, perchance, the jury thought proper skill was not exhibited in handling the business. The word "possessed" in the phrase "so far as possessed by plaintiff" was inapt, and "us-

ed" or "employed" would have been a better word. But this flaw was very unlikely to mislead the jury. As the evidence admits no conclusion save that skill and efficiency were exhibited by plaintiff, the judgment ought not to be reversed because of a slight inaccuracy. The court instructed the jury that even though they believed plaintiff was not authorized prior to the first settlement to turn over to Duffy the O'Connell, Erker, and Jacobs notes, aggregating \$2,900, yet if the jury further believed that after defendants learned of said fact they agreed to the settlement and accepted the fruits of it, or did certain other predicated acts, defendants were not entitled to recover on their counterclaim. The objection to said charge is that it let the jury pass on the ratification of a previously unauthorized act, whereas ratification was not pleaded by plaintiff. The theory of a ratification by defendants of the surrender of said notes is as inappropriate under the evidence as the counterclaim asserted in consequence of their surrender is baseless. The defendants in person indorsed the notes to Duffy, and consented to his having them after they knew all the facts of the settlement. Moreover the settlement of October, 1904 (executed November 10th), in which the notes were surrendered, was provisional and not final, and in the final settlement defendants abided by their previous action, and did so after Duffy had offered to rescind the entire settlement and resume the negotiation. The defendants executed the settlement with full knowledge of all its terms, and accepted the fruits thereof, and took possession of and retained the property conveyed to them by Duffy. The assignment of error, based on the submission to the jury of the question of ratification, is overruled. The court instructed, in substance, that the burden of proving plaintiff's case, and what the services rendered were reasonably worth, rested on plaintiff, and it was bound to prove those matters to the jury's satisfaction by a preponderance of the evidence, and that by preponderance of the evidence was meant its greater weight with respect of credibility. We find no fault with said instruction,

though it is criticised. Complaint is made of the court's refusal to instruct that plaintiff, in undertaking to act as agent for defendants, impliedly represented that it (plaintiff) possessed reasonable skill and knowledge in the business of the agency, and would use them in attending to defendants' affairs, and if the jury believed plaintiff, or its officer who transacted defendants' business, failed to possess such knowledge and skill, or to conduct the matter with reasonable judgment and care, and in consequence a settlement was effected which was prejudicial to defendants' interests, plaintiff could not recover. The settlement in all its terms was fully approved by defendants after they thoroughly understood it and had taken independent counsel. Hence it is dubious if any instruction predicating a lack of skill and judgment could properly have been given. Certainly the one asked could not, for it cut plaintiff off from a recovery if it did not use skill in the business and damage resulted to defendants. At most plaintiff would be liable only for the amount of loss suffered by defendants from plaintiff's lack of skill, and would not, in the absence of bad faith, be deprived of all compensation, if its services were worth more than the amount of the loss. *Wills v. Wolff*, 7 Mo. App. 593.

We have gone over this voluminous record with care, but find no assignment of error which possesses merit, except that the verdict is excessive, in that the interest was computed on plaintiff's demand from December 3, 1904, instead of from November 15, 1905, as the court directed. This error occurred from a misapprehension by the jury of the court's instruction. The matter was urged in the motion for new trial. If the plaintiff will remit from the judgment the sum in excess of the true amount in 10 days from the delivery of this opinion, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded. We hold that under the circumstances of this case it is but just that the true amount of the judgment, less the excess of interest found by the jury, should bear interest from the date it was rendered. All concur.

**JOHNSON COUNTY SAVINGS BANK v. MIDKIFF & CAUDLE.**

(Court of Civil Appeals of Texas. Jan. 15, 1908.)

**JUSTICES OF THE PEACE—APPEAL—BOND.**

Where a judgment is rendered against a plaintiff in a justice court, it is not required to give a bond on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 550, 551.]

Appeal from Crockett County Court; Chas. E. Davidson, Judge.

Action by the Johnson County Savings Bank against Midkiff & Caudle. Judgment for defendants, and plaintiff appeals. Reversed, and remanded for trial on the merits.

J. A. Thomas and Montgomery & Shlig, for appellant.

NEILL, J. The appellant sued appellees in the justice court for \$200. The defendants having denied their liability, the case was tried in that court, and judgment was rendered in their favor. From the judgment the plaintiff appealed to the county court without giving an appeal bond, where, on motion of defendants, the appeal was dismissed on the ground that the court was without jurisdiction, and costs adjudged against the bank, from which judgment this appeal is prosecuted.

The county court erred in dismissing the appeal; for, as the judgment in the justice court was against the plaintiff, it was not essential that it should file an appeal bond in order to prosecute the appeal. *Houston & Tex. Cent. Ry. Co. v. Red Cross Stock Farm*, 91 Tex. 628, 45 S. W. 375; *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792; *Albritton v. First Nat. Bank* (Tex. Civ. App.) 85 S. W. 1008; *Feagan v. Barton* (Tex. Civ. App.) 93 S. W. 1076.

The judgment is reversed, and the cause remanded for trial on its merits.

**HARPOLD v. MOSS et al. \***

(Court of Civil Appeals of Texas. Nov. 9, 1907. On Rehearing. Jan. 4, 1908. Second Rehearing Denied Jan. 18, 1908.)

**1. TRIAL—DIRECTING VERDICT—PROPRIETY.**

To authorize a directed verdict, there must be no evidence for the party against whom the verdict is directed, or the probative force of the evidence must be so weak that it only raises a suspicion of the existence of the fact sought to be established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376-395.]

**2. CANCELLATION OF INSTRUMENTS — EVIDENCE—BURDEN OF PROOF.**

In a suit to cancel notes alleged to have been given under agreement that the amounts thereof should be credited upon the payee's debt to the maker (plaintiff), to dissolve a joint-stock company, and for an accounting, on the ground that defendants had ejected plaintiff from their business and refused to account, the burden was upon him to prove his allegations.

\*Writ of error granted by Supreme Court.

**3. APPEAL—HARMLESS ERROR—OVERRULING EXCEPTION TO ANSWER.**

Any error in overruling plaintiff's exception to allegations of the answer was harmless, where the issue raised by such allegations was ignored in the instructions, and treated in the judgment as a nullity.

On Rehearing.

**4. BILLS AND NOTES—ACTION ON NOTES—DIRECTED VERDICT.**

Under the evidence, in an action on notes, held proper to direct a verdict for plaintiff.

Error from District Court, Johnson County; O. L. Lockett, Judge.

Consolidated actions by S. E. Moss against Clay Harpold, and by Clay Harpold against S. E. Moss and others. From the judgment, Harpold brings error. Affirmed.

J. M. Moore, for plaintiff in error. Poin-dexter & Padelford, for defendants in error.

RAINEY, C. J. This is an appeal from a judgment rendered by the court in two causes that were consolidated. S. E. Moss brought suit against Clay Harpold to recover on two notes executed by Harpold, one for \$1,500, given for a lot of land, and the other for \$715, for money loaned and secured by a lien on shares of stock in the Texas Johnson Grass Exterminating Company. A foreclosure was sought as to the liens. The other suit was brought by Clay Harpold against S. E. Moss, W. O. Poff, Charles Ferguson, and F. P. West, alleging, in substance: That Harpold had discovered a process for exterminating Johnson grass, and had applied for a patent. In order to utilize such process he entered into a contract with S. E. Moss, by which said Moss, in consideration for an interest therein, agreed to pay him \$5,000 in cash, and to organize a joint-stock company, and put therein \$20,000 for advertising and promoting said discovery, and further that he was to be given \$100 per month, said salary to continue until the profits of the business would be sufficient for his interest to yield that sum. That S. E. Moss agreed that when the notes were given they should be a credit on the \$5,000. That he wanted the notes to keep his business straight. That said company was organized, but in drawing the contract said S. E. Moss fraudulently or by mistake left out the real terms of the agreement. That he was inexperienced in business, and, having confidence in Moss, relied upon him to put their transaction in legal form. That after the organization of said stock company the patent to said discovery was issued. That said company was composed of S. E. Moss, W. O. Poff, and Clay Harpold, the plaintiff, and thereafter S. E. Moss sold to Charles Ferguson and F. P. West an interest in said company, and since then the said Moss, Ferguson, and West have managed and controlled the said business. That large sales of the patent right have been made for large sums of money, and, the expenses being small, the profits have amount-

ed to \$10,000 annually, and aggregate \$50,000. The defendants by force and intimidation ejected plaintiff from said business, and denied him the right and privilege of assisting in the operation and conducting of same, and refuse to account to him for his interest in such business, to his damage \$20,500. That S. E. Moss has failed to comply with his contract in reference to the \$5,000 and the \$20,000 except as to the lot sold him and the \$715 advanced, to his damage \$5,000. He prays for the cancellation of the \$1,500 and \$715 notes, that the stock company be dissolved, for an accounting, for judgment for the sums appropriated, and for general relief. Defendants in reply deny the alleged contract by Harpold as to the payment of \$5,000 and the \$20,000; that Harpold assigned the patent to said discovery to the Texas Johnson Grass Exterminating Company; that Moss advanced money to keep said concern going; that the business had been prudently and economically conducted; that there were heavy expenditures necessary in its operation, and it was now indebted to Moss and Ferguson; that the only agreement in reference to said patent entered into was reduced to writing, by the terms of which the business was to be managed by a board of directors; and that Harpold was never denied participation in the management of said business, except according to contract and by-laws of said company, etc. On the trial a judgment was instructed for defendants, and Harpold prosecutes this writ of error. The lower court instructed the jury to return a verdict for S. E. Moss against Clay Harpold for the amount of the two notes and foreclosure of the liens on the lot of land and the 205 shares of stock, and judgment was rendered accordingly.

Clay Harpold testified, in substance, on direct examination: That in his first interview with Moss, it was agreed and understood between them that in consideration of 51 per cent. interest in the patent Moss was to give plaintiff \$5,000 in cash, and put \$20,000 into the company's treasury. That after the foregoing transaction Moss sold plaintiff a house and lot in Cleburne, the price to go as a credit on the \$5,000 cash Moss was to pay. When he executed the deed to said place and retained a vendor's lien, and "I kicked about it, and he said it would suit his convenience to keep his business straight, and I didn't know any better, and I took it and gave a note for it. He was to give me credit on the \$5,000, and therefore the note was out of place. He said the note had to go." On cross-examination he testified, as shown by the following questions and answers, to wit: "Q. On the 25th day of November how is it that you did not require Moss to pay you the balance of the \$5,000? A. I have to refresh my memory on that question. Q. Why didn't he pay it? A. He didn't intend to pay. He told me that he didn't intend to pay it. Q. He told you at the time you executed this

note that he didn't intend to pay this \$5,000? A. Yes, sir. Q. Didn't agree to give you a credit for the \$1,500 on the \$5,000 at that time? A. No, sir; he said he had given —, had gone back on that, and didn't intend to give me anything. Q. Still you signed that note? A. I couldn't help it. I was made to do it. Q. How? A. I was in the house there, and had nothing but the prospect of business to hold me up and \$100 per month. He hadn't even given me the \$100 then. If I didn't sign it, I would have nothing to go on, and signed it. He said he would take the note out of my receipts. Q. At the time you executed this note he said he would take it out of your receipts? A. Yes, sir; in the Johnson Grass Company. Q. You agreed when you signed the note? A. I agreed to nothing. Q. You understood it would be paid out of your profits in the Johnson Grass Company? A. I couldn't help myself. Q. You understood at the time you signed the note that it would be paid out of your share of the profits in the Johnson Grass Company? A. At that time that is all I expected of him." The notes were renewed by Harpold, and a few days thereafter he executed the mortgage on 205 shares of stock.

Moss' testimony as to his agreeing to pay the \$5,000 and the \$20,000, and as to his agreeing to give Harpold a credit on the \$5,000, was in direct conflict with Harpold's evidence. The testimony of Poff and Corley, who were present at the time Harpold says the agreement as to the \$5,000 and \$20,000 was made, is in direct conflict with Harpold's testimony on these points.

In order to authorize the court to instruct a verdict for or against either party there must be no evidence in favor of the party against whom a verdict is instructed, or the probative force of the evidence must be so weak that it only raises a surmise or suspicion of the existence of the fact sought to be established. In other words, the evidence must be so conclusively one way that the minds of ordinarily intelligent men would not differ as to the conclusion to be reached. *Joske v. Irvine*, 91 Tex. 575, 44 S. W. 1059. Can it be said that this is such a case? Or is the evidence such that the court, under the law, was required to submit it to the jury for their determination? Harpold had sworn positively to the agreement of Moss to pay \$5,000. It is true Harpold swears that at the time he executed the notes Moss told him he did not intend to pay it, and that he expected it to be paid out of the receipts derived from his patent. It is also true that he executed the notes and afterwards renewed them, and then gave a mortgage on his 205 shares of stock to secure the notes. It is also true that Harpold was contradicted by Moss, Poff, and Corley, but all these were matters or circumstances to be weighed by the jury in determining what credit to be given the testimony of Harpold. We think

the evidence on this branch of the case was such that the case should have gone to the jury for their determination.

On the other branch of the case the burden was on Harpold, and the evidence was such that the court did not err in instructing a verdict for Moss. No injury resulted to Harpold from the court's overruling his exception to the allegations of the defendants' answer in reference to the sale of Harpold's shares of stock under the judgment in favor of F. Q. Rast, as said issue was ignored in the charge to the jury, and treated in the judgment as a nullity by the court in foreclosing the lien claimed by Moss on the stock.

No other error is pointed out, and the judgment is reversed, and cause remanded.

#### On Rehearing.

On a further consideration of this case we are satisfied we erred in reversing and remanding, but that it should have been affirmed. We fully appreciate the functions delegated to the jury by our law, and we have no inclination to invade the jury's province in passing upon the weight of evidence. Our Supreme Court has marked out the line to follow in this respect. See *Joske v. Irvine*, 91 Tex. 575, 44 S. W. 1059. Keeping this line in view, let us see if the testimony of Harpold, upon which his case rests, is of such probative force as to require the case to be submitted to the jury. At the time Harpold had the agreement, as he claims, with Moss, he had applied for a patent for a process to exterminate Johnson grass, but no patent had been issued. The process for exterminating Johnson grass was new and generally unknown and practically untried. The undertaking of its development was an untried venture, and it had no market value. In this condition Harpold was advised by one Poff to get Moss to take an interest in it, and upon this suggestion Harpold gave to Poff \$4,000 in stock in consideration of Poff's introducing Harpold to Moss, which Poff did. It was at this meeting, in the presence of Poff and one Corley, that Harpold testified that Moss agreed, in consideration of a controlling interest in the process, to give Harpold \$5,000 in cash, put \$20,000 in the business in order to develop it, and pay Harpold for his services \$100 per month until the profits arising from Harpold's interest would amount to that much. Moss, Poff, and Corley all deny that any such agreement was made. Harpold admits buying from Moss the house and lot on which the vendor's lien was reserved, and for which the \$1,500 note was executed. When the note was presented for his signature, he says he kicked about it, but Moss said it would suit his convenience to keep his business straight, and he did not know any better, and that Moss was to give him credit on the \$5,000, and therefore the \$1,500 note was out of place. On cross-examination he testified that Moss repudiated the agreement at the time the \$1,500 note was given,

and that he expected said note to be paid out of his share of the profits in the Johnson Grass Company. Harpold admitted that soon after moving into the house he told witness Hosack that he had bought the house from Moss, and expected to pay for it out of his earnings from the Johnson Grass Company. After the organization of the Johnson Grass Company Moss loaned Harpold the sums of \$450 and \$200, for which Harpold executed his two notes respectively, and in about 12 months these notes were renewed. Harpold executing his notes for \$715, which included said amounts, principal, and interest thereon. Afterwards Ferguson (Moss' agent) called on Harpold to pay the \$1,500 note. Harpold being unable to comply asked for further time. Ferguson demanded further security and Harpold gave him a lien on his 205 shares of stock in the Johnson Grass Company to secure the \$715, and as additional security for the \$1,500 note. On October 8, 1900, which was after Harpold claims the agreement with Moss was made, the Johnson Grass Company was organized, and this agreement is nowhere mentioned or referred to in the articles of incorporation. Nor is it mentioned or referred to in any written agreement between the parties. Nor was it mentioned or referred to by any witness, except Harpold, until nearly six months after these suits were brought in September, 1905, when Harpold, by amendment, set it up. Harpold says he never called on Moss for the \$5,000 or in any way mentioned it to him, except at the time he executed the \$1,500 note, which Moss denies. Nor does he claim to have mentioned it to any other person, except Ferguson, when the security was given, and Ferguson denies this.

Is the testimony of Harpold, under the circumstances, of sufficient probative force, such as required the trial court to submit the issues to the jury? We think not. Here we have the unsupported evidence of Harpold that Moss agreed to invest over \$25,000 in an undertaking which had never been tested, and the stock of which was not known to be of any value, whose testimony is self-contradictory, and which is flatly contradicted by four or five witnesses, whose credibility is not shown to have been attacked, who executed a note payable for land and received a deed conditioned upon its payment, giving other notes, renewing the same, and mortgaging property to secure their payment, and who remained silent for nearly six years and never demanded payment of same after his claim had been repudiated by Moss according to his (Harpold's) own statement. It is true he says the renewal of the notes was done because suit was threatened and he was afraid he would lose his place. But such an excuse is frivolous. Had his cause been just, no reason for such fear could have existed, and no such length of time would have elapsed without his demanding a settlement of Moss. Under these facts we consider the evi-



dence in favor of Harpold so weak as not to amount to any evidence, and such that it is inconceivable that any other verdict than the one directed by the court could have been legally rendered.

On the other branch of the case, the parties having accounted for the receipts and expenditures of the association, and having shown that the business had been prudently and fairly managed, and Harpold having failed to show to the contrary, a verdict was justly directed by the court.

The motion for rehearing is granted, and the judgment is affirmed.

#### WEST BROS. v. THOMPSON & GREER.

(Court of Civil Appeals of Texas. Jan. 8, 1908.)

##### 1. BROKERS—REAL ESTATE—COMMISSIONS—RIGHT TO.

A real estate broker is entitled to a commission for effecting a sale, where he is the efficient cause of the sale by bringing the parties together for negotiation, though the sale is afterwards concluded by the owner himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 65-74, 85-89.]

##### 2. APPEAL—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding of the court upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3983-3989.]

##### 3. SAME—MOTION FOR NEW TRIAL—NECESSITY FOR.

No motion for a new trial for the insufficiency of evidence to sustain a judgment is necessary to enable the court on appeal from a judgment in a case tried without a jury to review the case upon the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1727-1735.]

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by Thompson & Greer against West Bros., for a real estate brokerage commission. From a judgment for plaintiffs, defendants appeal. Affirmed.

Taylor & Frink and Jos. Spence, Jr., for appellants. W. A. Anderson, for appellees.

**RICE, J.** This is a suit brought by the appellees, plaintiffs in the court below, against appellants, defendants in the court below, to recover the sum of \$250 as commissions claimed to be due them as land agents in procuring a purchaser for a house and lot situated in the city of San Angelo. Plaintiffs alleged that on the 15th of September, 1906, they were engaged in the real estate business, and that the defendants, West Bros., were the owners of certain lots in the town of San Angelo, and that on or about said time defendants authorized, contracted, and agreed with plaintiffs that if plaintiffs would sell said property for defendants, or procure a buyer for same, they would pay plaintiffs

the usual commission of 5 per cent. of the selling price of said property; that in pursuance of such agreement and contract plaintiffs did, about the 15th of September, 1906, enter into negotiations with one W. R. Moore, with a view of selling him said property, which sale was afterwards consummated by the defendants selling said Moore said property on or about the 29th of October, 1906. Plaintiffs alleged that they procured said purchaser for defendants, and that upon completion of the sale by defendants they became justly indebted to plaintiffs for 5 per cent. commission on the selling price of said property, to wit, \$5,000. Defendants answered by general demurrer, general denial, and specially that in the month of August or early part of September, 1906, they did agree with plaintiffs that if they would sell the property for the sum of \$5,000 cash, and would consummate the sale within the next three or four days, they, the defendants, would allow and pay the plaintiffs the 5 per cent. commission thereon; that their purpose in thus offering to employ plaintiffs to negotiate a sale was for the express purpose of procuring \$4,750 in cash, which they needed to pay off certain debts then owing by them; that at the time of said negotiations they expressly desired the sale to be made at once and for cash, to enable them to pay off certain notes which they owed, but plaintiffs failed to consummate a sale for cash within the time specified, or within a reasonable time thereafter; that the proposed purchaser (Moore) at the time of said negotiations declined to purchase said property at any price; that the plaintiffs never consummated any sale of defendants' property, nor were they instrumental in the sale of the property, nor had they any authority, after the failure of the first negotiations, to negotiate any other or further sale of defendants' property; that the only agency or authority that plaintiffs ever had to sell defendants' property was the specific and special authority to sell the property at once and for cash within a reasonable time, which contract they failed to comply with. This answer was sworn to. Trial before the court without a jury resulted in a judgment in favor of the plaintiffs for \$250, from which judgment this appeal is prosecuted.

By appellants' first assignment of error it is claimed that the court erred in rendering judgment in favor of appellees on the facts proven, because the testimony, taken together, shows that plaintiffs did not negotiate a sale of defendants' property, and were not instrumental in negotiating or consummating a sale, but that defendants negotiated a sale of their own land without the aid of plaintiffs in any manner. It appears from the evidence in this case that the appellees were instrumental in bringing about the sale. They brought the parties together, and had negotiations with the purchaser concerning

the sale. It is true that, subsequent to this time, the defendants made the sale to the proposed purchaser themselves without plaintiffs' knowledge, and plaintiffs did not participate in the sale as actually made. But we think it is the settled law that an agent is entitled to his commissions if he is the efficient cause of the sale, and where he brings the parties together for the purpose of negotiating a sale, he is entitled to his commissions, notwithstanding the fact the sale is afterwards concluded by the principal himself. *Graves et al. v. Baines et al.*, 78 Tex. 92, 14 S. W. 256; *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157, and authorities there cited. We therefore overrule said assignment.

By their second assignment of error appellants contend that the court erred in rendering judgment in favor of plaintiffs under the facts proven, because the testimony shows that, if plaintiffs at any time contracted with defendants for the sale of the property, said contract was a special one, by which plaintiffs were authorized to sell this land for cash and within a limited time, or within a reasonable time, and that plaintiffs did not, in pursuance of said contract, negotiate any sale of defendants' land for cash within such limited time or within a reasonable time thereafter, and did not comply with the contract as pleaded or proven. We think as to this assignment that it is sufficient to say that while there is a conflict in the evidence as to what the terms of the proposed sale may have been, yet the court found in favor of plaintiffs' contention on the facts, and as there is evidence amply sufficient to sustain it we are not willing to disturb the finding of the trial court in this regard, and therefore overrule this assignment.

By their third assignment appellants assert the insufficiency of the evidence to sustain the judgment of the court below; but appellees contend that appellants are not entitled to have said assignment considered by this court, because no motion for new trial was made in the court below by appellants calling the trial court's attention to that fact, or asking for a new trial, based upon the insufficiency of the evidence, citing in support of said contention *Foster v. Smith*, 1 Tex. 70; *Wetz v. Wetz*, 27 Tex. Civ. App. 597, 66 S. W. 869, and *Black v. Black* (Tex. Civ. App.) 67 S. W. 929. This case was tried by the court without a jury, and since the decision of the cases above cited the Supreme Court in the case of *Greer et al. v. Featherstone*, 95 Tex. 654, 69 S. W. 69, held that, where the trial was by the court without a jury, the appellate court had the right to review the case upon the facts.

After a full consideration of the record, we are inclined to believe that there is ample evidence to support the judgment, and therefore affirm the same.

Affirmed.

# EDGAR et al. v. McDONALD et al.

(Court of Civil Appeals of Texas. Jan. 4, 1908.)

## 1. APPEAL—REVIEW—IMMATERIAL QUESTIONS.

Where pending an appeal from a judgment dismissing a suit to restrain prosecutions for violations of the local option law on the ground of the invalidity of the election adopting the law until final decision of a pending contest of that election, the suit contesting the election was finally decided in favor of the validity of the election, the judgment of dismissal will not be disturbed, though the petition on its face showed a cause of action, and the court erred in its decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3122, 3331-3341.]

## 2. EVIDENCE—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS—RECORDS.

The Court of Civil Appeals will take judicial cognizance of its own records and judgments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 62-65.]

## 3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LOCAL OPTION LAW—PROHIBITION.

The absolute prohibition of the sale of intoxicating liquors within any prescribed territory of the state is a lawful exercise of the police power of the state, and does not deprive a liquor dealer owning a stock of liquor and conducting a business within the prohibited territory of his property or rights without due course of law in violation of the state and federal Constitutions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 841.]

Appeal from District Court, Henderson County; B. H. Gardner, Judge.

Action by W. E. Edgar and others against J. S. McDonald and others. From a decree of dismissal entered on sustaining a general demurrer to the petition, plaintiffs appeal. Affirmed.

W. W. Ballew, for appellants.

TALBOT, J. This suit was instituted October 25, 1906, by appellants to restrain the appellees, by injunction, from instituting and prosecuting against them criminal prosecutions for violations of the local option law in justice precinct No. 1, of Henderson county, Tex. The petition alleges, in substance, that appellants were regularly licensed liquor dealers, owning valuable stocks of liquors, wines, etc., and conducting their business according to law in said precinct No. 1 of Henderson county; that an election was held in said precinct on September 1, 1906, to determine whether or not the sale of intoxicating liquors should be prohibited in said justice precinct, and that said election, upon the face of the returns, showed a majority of 17 votes in favor of prohibition, but that this result was brought about by irregularities and wrongful acts committed by the judges of said election in denying legal voters the privilege of voting and in permitting illegal voters to vote, etc.; that if said election had been fairly and legally conducted and the illegal votes excluded, it would have resulted in a majority against

prohibition. It was also alleged that said election was void because J. T. Deen, the presiding judge at voting precinct No. 2, was disqualified to act for the reason that he held an office of trust, to wit, the office of chairman of the executive committee of the Democratic Party in Henderson county, Tex., and because said Deen as presiding judge of said election did not write his name or signature upon any of the ballots that were cast at said voting precinct No. 2, there being 476 votes cast at said box; that the result of the said election was duly and legally declared by the commissioners' court of Henderson county in favor of prohibition by a majority of 17 votes, and due publication made thereof as required by law; that appellees as officers of said county are threatening to file complaints against each and all of the appellants for alleged violations of said local option law, and to arrest them, unless they closed up their places of business and refrained from engaging therein; that if said law is enforced it will deprive appellants of their liberty of buying and selling intoxicating liquors, and of their property rights, etc., to their irreparable loss and damage. It was further alleged that on account of the foregoing facts appellants had on the 20th day of September, 1906, filed in the district court of Henderson county, Tex., a contest of said local option election, making J. A. Mobley as county attorney of Henderson county the defendant therein. Appellants further alleged, in effect, that the local option law, attempted to be adopted, was void for the reason that it absolutely prohibited the sale of their property, worked a confiscation of it without compensation, and without due process of law, in direct violation of sections 3, 15, 16, 17, and 19 of the Bill of Rights of this state. The prayer of the petition is that appellees be enjoined from filing any complaints or informations, or procuring any indictments against any of the appellants, until the contest of said election is finally determined, or in any manner instituting or prosecuting any criminal proceedings against them for alleged violations of the local option law of precinct No. 1 of Henderson county. The writ of injunction as prayed for was granted; but when the case was called for trial the court sustained a general demurrer and certain special exceptions urged to the petition, and appellants declining to amend, the injunction was dissolved, and the suit dismissed. From this action of the court appellants have appealed, and under the single assignment of error presented, which is to the effect that the trial court erred in sustaining appellees' general demurrer, and in dissolving the injunction and dismissing the cause, urge several propositions. The substance of which may be stated as follows: (1) A court of equity will enjoin the attempt to enforce a law making certain acts a criminal offense, and imposing a punishment, when such law

is invalid, and its enforcement will injure or destroy the plaintiff's property rights, or operates upon his business, and thereby causes him material and irreparable loss; (2) that when a suit is already pending to test the validity of the law in such a case, a court of equity, in order to protect its prior jurisdiction, may compel the abandonment of a criminal prosecution for a violation of such law until a final determination of the matter in the civil court; (3) that if the election in question here was valid, the law would as to appellants be unconstitutional and void, because it deprives them of their property and property rights without compensation, and without due process of law, impairs the obligation of contracts, and is in direct violation of sections 15, 16, 17, and 19 of article 1 of the state Constitution, and the fifth and fourteenth amendments to the Constitution of the United States.

In view of the present attitude of the case, we do not find it necessary to determine whether or not the facts alleged in appellants' petition were sufficient to authorize a court of equity to interfere and enjoin the threatened criminal prosecutions alleged, and shall not therefore enter upon a discussion of that question, or of the correctness of appellants' first and second propositions as applicable to any state of facts. If it should be conceded, however, that appellants' petition upon its face showed a cause of action, and that the court erred in sustaining appellees' general demurrer at the time his ruling was made, still we think, in view of the subsequent trial of the suit contesting the local option election, and the result thereof, this case should not be reversed. The injunction sued out in this suit had for its object the staying of all criminal prosecutions against appellants for a violation of the local option law in precinct No. 1 of Henderson county until the validity of the election by which such law was put in force and operation was determined by the contest filed, and was merely ancillary thereto. The suit contesting the election was, after the dissolution of the injunction in this case and its dismissal, tried in the district court of Henderson county upon an agreed statement of facts, and resulted in a judgment sustaining the election and declaring it legal and valid. An appeal was taken from that judgment by the contestants (who are the appellants here), and the same was by this court, after certifying the questions involved to the Supreme Court for decision, in all things affirmed on the 2d day of November, 1907. See *Walker v. Mobley*, 105 S. W. 61, 19 Tex. Ct. Rep. 751. In the agreed statement of facts upon which the contest was tried and determined it was admitted that the election resulted in favor of prohibition by a majority of 17 votes, and no contention was made that any of the votes polled were illegal, or that any legal votes against prohibition were excluded.

The validity of the election was attacked upon the grounds: (1) That J. T. Deen, one of the judges, held an office of trust, namely, the office of chairman of the executive committee of the Democratic Party, and under the provision of what is known as the Terrell election law was disqualified to serve; (2) that said Deen as the presiding judge of said election did not write his name or signature on the ballots cast at said election, and therefore said ballots were illegal, and should not have been counted. Both of these contentions were decided against appellants, the election upheld, and its validity established by the final adjudications of the courts of last resort. These are all matters appearing by the records and judgments of this court, and of which we take judicial cognizance, and leave nothing to be litigated and determined in this suit that would authorize the relief sought. This being true, the judgment of the lower court should be affirmed, and the litigation ended.

Touching the proposition that, if the election was valid, the local option law would be violative of the provisions of the Constitution of this state and of the fifth and fourteenth amendments to the Constitution of the United States and therefore void, it is sufficient to say that the absolute prohibition of the sale or manufacture of intoxicating liquors within any prescribed territory of this state is clearly the lawful exercise of its police powers, and does not, within the contemplation of the provisions of either of the Constitutions referred to, deprive appellants of their property or property rights without due course of law. So clear and firmly established is this view of the matter we deem the citation of authorities unnecessary.

The judgment of the court below is affirmed.

#### LITTLER et al. v. DIELMANN.\*

(Court of Civil Appeals of Texas. Jan. 8, 1908.  
Rehearing Denied Jan. 29, 1908.)

##### 1. WILLS—CONDITIONS—MARRIAGE.

Where a will gave testator's property to his wife, a provision that so much of the property as should not have been consumed by her should in case of her marriage vest in his children was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1533-1534.]

##### 2. SAME.

Where a husband's will gave his property to the wife absolutely, with the provision that in case of her marriage such part of the estate as had not been consumed by her should vest in the husband's children, and with intent to defeat the will she conveyed the property to a man who reconveyed it to her, and then married her, on the marriage the property vested in the children.

##### 3. COURTS—STARE DECISIS.

A holding by the Supreme Court was not within the principle of stare decisis, where the

holding was not necessary to a decision of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 335.]

##### 4. WITNESSES—LEADING QUESTIONS.

Where a witness appears to be unwilling to testify, on his direct examination the court may properly allow counsel for the party calling him to ask him leading questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 848.]

##### 5. EVIDENCE—ADMISSIONS—TESTIMONY ON FORMER TRIAL.

Testimony of a party on a former trial is admissible as an admission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 739.]

##### 6. HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE.

Where it did not appear that a mortgage given by a married woman and her husband on her land was to secure a debt incurred for the benefit of her separate estate, a judgment in favor of the surety in the mortgage over against the wife was erroneous.

Appeal from District Court, Bexar County; J. L. Oamp, Judge.

Partition by John C. Dielmann against Amalie Littler and others. From a judgment in favor of plaintiff, defendants appeal. Modified and affirmed.

Shook & Vanderhoeven, for appellants. R. J. Boyle, J. R. Davis, and W. F. Ezell, for appellee.

FLY, J. This suit was instituted by John C. Dielmann against Amalie Littler, Geo. F. Littler, Henry C. Pauly, Edmund B. Pauly, Irma A. Pauly, and D. & A. Oppenheimer, for the purpose of procuring the partition of a certain lot or parcel of land on East Commerce street, which he alleged was in the joint ownership and possession of himself and Henry C. Pauly until the death of the latter, which occurred on January 28, 1902. It was alleged that there survived said Henry C. Pauly, his wife, Amalie Pauly, who had become Amalie Littler by intermarriage with George F. Littler, and three children, Henry C., Edmund B., and Irma A. Pauly, and that he had left a will in which he bequeathed his entire estate to his wife, absolutely and in fee simple, with the provision that in case of her remarriage all such part of the estate as had not been consumed by his wife or remained in her hands should pass to and vest in all the children, share and share alike; that the will was probated; and that on May 8, 1903, Amalie Pauly conveyed the one-half interest held by her in the property to Geo. F. Littler, who on May 9, 1903, reconveyed the property to Amalie Pauly, and on May 10, 1903, married her. It was further alleged that the children of Henry C. Pauly were claiming an interest in the land under the terms of their father's will, contending that the conveyances between Littler and Amalie Pauly were void; that the Littlers had given a deed of trust to D. & A. Oppenheimer on an undivided one-half interest in the

\*Writ of error denied by Supreme Court.

property on September 1, 1906, to secure a loan of \$8,000. There was a prayer for a receiver, for adjustment of the equities among the parties, that the property be sold, and a proper distribution of the proceeds be made. Henry C., Edmund B., and Irma A. Pauly answered, the latter by her guardian, alleging that the deeds by and between Littler and his intended wife were executed for the purpose of defeating the terms of their father's will, and for the purpose of defrauding the children out of their interest in the property, and that they were entitled to their interest in the property. They also alleged a conversion of the rents by their mother, and prayed for an accounting, for a judgment for their share of the rents, for a cancellation of the deeds, and for one-fourth of the property. Littler and wife answered, setting up the will and the right of Amalie Pauly to sell the land to Littler, and that his reconveyance to her vested the title in her to one-half the property. D. & A. Oppenheimer answered that they had a deed of trust on one-half the property executed to them by Littler and his wife and Henry C. Pauly, and asked that their lien be fixed thereon, and if a sale of the land was decreed that the indebtedness of the Littlers to them be paid off in full. At the request of the Paulys the court presented the case on special issues, which, together with the answers of the jury, are as follows:

"(1) Did Amalie Pauly, now defendant Amalie Littler, intend to part with the title to the property in controversy when she executed the deed of May 8, 1903, to Geo. F. Littler? Answer, 'Yes' or 'No.' Answer: No.

"(2) Was it understood and agreed between Geo. F. Littler and Amalie Pauly at and before the execution of the deed of May 8, 1903, from Amalie Pauly to Geo. F. Littler that he should reconvey said property to Amalie Pauly prior to their marriage? Answer this question 'Yes' or 'No.' Answer: Yes.

"(3) Were the conveyances of May 8, 1903, from Amalie Pauly to Geo. F. Littler, and May 9, 1903, from Geo. F. Littler to Amalie Pauly, made with the purpose and intent on the part of Geo. F. Littler and Amalie Pauly of fraudulently defeating the rights of defendants Irma Pauly, Henry C. Pauly, and Edmund Pauly in and to the property in controversy, under the will of Henry Pauly, deceased? Answer this question 'Yes' or 'No.' Answer: Yes.

"(4) What was the reasonable rental value of the downstairs and basement of the building, warehouse, stable, and yard, of the property in controversy from May 10, 1903, to May 10, 1906? Answer: \$70 per month.

"(5) What was the reasonable rental value of the upstairs of the store building situated on the property in controversy, from May 10, 1903, to May 10, 1906? Answer: \$45 per month.

"(6) At the time of the marriage of Mrs. Amalie Pauly to Geo. F. Littler did Mrs. Pauly have the property in this controversy 'on hand and undisposed of'? Answer this question 'Yes' or 'No.' Answer: Yes."

Upon the answers the court adjudged one-half the property to John C. Dielmann, one-fourth to Amalie Littler, and one-twelfth each to Henry C., Edmund B., and Irma A. Pauly, subjecting the interest of Amalie Littler and Henry C. Pauly to the deed of trust of D. & A. Oppenheimer, finding the property incapable of partition, and ordering a sale by Geo. B. Tallafarro, who was appointed receiver. Appeals from the judgment have been perfected by Amalie Littler and D. & A. Oppenheimer.

Henry Pauly died on January 28, 1902, leaving surviving him his wife, Amalie, and three children, Henry C., Edmund B., and Irma A. Pauly. In his will, which was duly probated, were the following provisions: "I do hereby give, will and bequeath unto my beloved wife, Amalie Pauly, all the estate that I shall leave or die possessed of, including real, personal and mixed property, leaving the same to her absolutely and in fee simple; provided, however, that if my said wife should remarry, then immediately upon her remarriage all such part of my estate as may not have been consumed by my wife, or remain in her hands, shall pass to and vest in all of my children, share and share alike, absolutely and in fee simple. This provision shall in no manner prevent my wife from selling and disposing of, or using my estate as she sees fit, so long as she remains unmarried." Amalie Pauly was appointed independent executrix of the will, and duly qualified in that capacity, and on May 8, 1903, she executed, acknowledged, and delivered to Geo. F. Littler a deed of conveyance to said premises, whereby she conveyed for the consideration of \$1 paid by him a number of lots or parcels of land, among the number being the property in controversy. On the following day (May 9, 1903) the same property for a consideration of \$1 was conveyed by George F. Littler to Amalie Pauly by a deed which was duly acknowledged, delivered, and recorded. Amalie Littler admitted that her conveyance of the property to Littler was made with the agreement that he should reconvey to her, and that the conveyances were made for the purpose of preventing that part of the will in connection with her remarriage from "taking effect so far as the children were concerned." She was asked if the conveyances were not made "to prevent them from taking under the will" and answered, "Yes, sir." George F. Littler swore that he and Amalie Pauly intended to marry; that they read the will, and before they married went to a lawyer to consult as to the proper procedure for them to take to vest the title of the property in Amalie Pauly, and that, under advice of the lawyer, the two deeds.

were executed; that the deeds were executed for the purpose of preventing the children from getting the property; and that was the sole purpose of the transaction. They married the next day after the execution of the deed by Littler to Amalie Pauly.

We do not question the correctness of the proposition that the will of Henry Pauly placed the title to all his property in his wife, Amalie Pauly, and that she had the absolute power and authority to sell, dispose of, or use it as she saw fit, so long as she remained a widow; but it is equally clear that by the terms of the will all such part of the estate "as may not have been consumed" by the wife, or that remained in her hands when she married George F. Littler, passed to and vested in the children of Henry Pauly. The evident intention of the testator was to place all his property in the hands of his wife for her maintenance, use, and support, coupled with the power of alienation or disposition of it as she might deem fit. He was providing for her comfort and support alone just so long as she remained a widow; but he desired to preserve the benefits arising from his property to his wife alone, and did not desire to have the property used for the maintenance and support of another husband. The object and purpose of the widow and the man she was preparing to marry was to defeat the will and intention of the testator, and the plan of passing deeds between themselves was chosen for the purpose of defeating the will and preventing the children of the dead husband from coming into their own, and the prime issue in this case is as to whether the courts of Texas will place their approval upon the scheme concocted for that purpose. The district judge has answered that question in the negative. The demand for a reversal of the judgment of the district court must be based on the proposition that the deed of Amalie Pauly to Littler was a sale, disposition, or use contemplated by the will of Henry Pauly, and that in spite of the evidence that its execution and manual delivery to Littler was not intended by the parties to pass the title, but was a device and subterfuge to defeat the terms of the will, it did pass the title to all the property that had belonged to Henry Pauly and divested the children of all interest therein. That is to say that the mere manual delivery of a deed and the payment and acceptance of \$1 for property worth thousands of dollars passed title to the property no matter what the intention of the parties may have been in executing and delivering the deed, and though the whole scheme was founded on a conspiracy to defeat the rights of the children, and thwart the intention of their father as expressed in his will.

We have seen no authorities which sustain appellants' propositions, unless it be the case of *Hanna v. Ladewig*, 73 Tex. 37, 11 S. W. 133, and the case of *Barnet v. De Turk*, 43 Pa. 92, cited therein. The facts in the Texas

case were that Walter Hinkly died in 1852, leaving a will in which he bequeathed to his wife all of his property with absolute power to dispose of the same, "and sell and convey or will and bequeath the same according to her pleasure." That language was followed by a provision that the residue of the estate that might remain undisposed of by Mrs. Hinkly at her death should be vested in her four children. In 1865 Mrs. Hinkly conveyed two tracts of land to a child of hers, not named in the will, for a recited consideration of \$14,000. The title so remained until it was reconveyed to the mother by the son to whom she had conveyed it three years before. The mother made a will which bequeathed the land to certain of her children, not by Hinkly, but a former husband. The contentions of the plaintiffs, who were some of the children of Mrs. Hinkly, were that the will left only a life estate to their mother in the land, with power of disposition; that upon her death the property passed to them; and that the land in litigation had not been disposed of at the death of their mother, in execution of the power given in the will, and therefore was vested in the plaintiffs. The court said: "The rights of the plaintiffs depend on the fact whether Mrs. Hinkly ever executed the power conferred upon her by the will of her husband; and in disposing of that question, as it will be the most favorable position for appellants, we will assume that under the will of her husband Mrs. Hinkly only took a life estate in her husband's interest in the two tracts of land, with absolute power to dispose of them during his life by deed, and at death by will." The contention of the defendants was that the power conferred on Mrs. Hinkly by the will was executed by her deed to her son, Z. N. Hanna, before mentioned, and the court so held; but the plaintiffs contended that the deed was made without consideration, with intent to defraud the creditors of Mrs. Hinkly, and offered to prove that there was no consideration for the deed. It was not claimed that the deed was made to Z. N. Hanna to defraud the children, but to defeat the claims of creditors, to which class the children did not belong. The court held that Mrs. Hinkly had power to dispose of the property by will, and it would seem immaterial whether the deed to Z. N. Hanna was without consideration or not; for if that deed had been null and void, it merely left the property in the hands of Mrs. Hinkly, with power to dispose of it by will, which she did. Under the broad terms of the will Mrs. Hinkly had the power to give the land to one of her children, and the children could not have objected. The facts of that case are quite different from the facts in this. In that case it was not claimed that Mrs. Hinkly intended by her conveyance to defeat the intention of her testator. In this case the conveyance was to all intents and purposes made by Mrs. Pauly to herself; Littler being used merely as a medium through whom she

could obtain title to the property, thwart her dead husband's will, and deprive her children of their property. However much the cases differ, the court in the case of *Hanna v. Ladewig* went out of its way to impliedly indorse the case of *Barnet v. De Turk*, 43 Pa. 92, which would sustain the contention of appellants. It was unnecessary for the Supreme Court under the facts in the *Hanna-Ladewig* Case to go to the extent of a full approval of the Pennsylvania case, and we are not disposed to follow it to that extent. It would make a mockery of the wills of deceased persons, if they could be defeated and rendered nugatory by such palpable, fraudulent devices as those which appear in this and the Pennsylvania case. The implied indorsement of it by the Texas Supreme Court was uncalled for by the facts, and its approval was therefore merely obiter dictum. It follows from a review of the *Hanna-Ladewig* Case that the doctrine of *stare decisis* cannot avail appellants in this case. The Supreme Court in that case, nor in any other, has held that a deliberate scheme to possess the property of an estate and defeat the will of a testator by pretended conveyances can be justified, and if it had been so held in the case mentioned it would not be *stare decisis*, because not called for by the facts developed therein. *Hart v. Gibbons*, 14 Tex. 213. No such state of facts as appear in the case now under consideration has been found in any decision, unless it be in the Pennsylvania case, which cannot form the basis for *stare decisis* in this state, even when commended by the Supreme Court of Texas in a case where such commendation was not necessary to a decision of the case presented.

The provision in the will as to the property that remained at the time of the marriage of Mrs. Pauly was valid under the authorities in this state as well as others. *Laval v. Staffel*, 64 Tex. 370; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Lockridge v. McCommon*, 90 Tex. 234, 38 S. W. 33; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *Underhill. Wills*, § 506. And it could not be defeated by conveyances, which if upheld would nullify the provision and substitute the wish and desire of the wife in its stead. As said by the Court of Civil Appeals of the First District in the case of *Gibony v. Hutcherson*, 20 Tex. Civ. App. 531, 50 S. W. 648, Mrs. Pauly had given the "power to manage, sell, and dispose of the fee for her own benefit, but of course she would not have under this power the right to make a fraudulent disposition of the property for the purpose of defeating the rights of the residuary legatees and devisees." That was the object of Mrs. Pauly in making the deed to Littler and obtaining his reconveyance just upon the eve of the happening of a contingency provided for in the will, which would invest in the children the title to all of the property of the testator that had not "been consumed," or that remained in her hands. It may be that

the rights of the children by the will of Henry Pauly were, to use the language of the court in *Hanna v. Ladewig*, "dependent on the volition, pleasure, and act of his wife," but they were not dependent upon the execution of fraudulent conveyances having no other purpose than the defeat of those rights. The property occupied the same position after the reconveyance by Littler that it did before it was conveyed to him, and the interest of the children attached upon the consummation of the marriage between George F. Littler and Amalie Pauly.

George F. Littler was used as a witness by appellees, and clearly evinced a desire to evade answering questions propounded to him, as stated by the court in a qualification of the bill of exceptions, and was unwilling to testify to matters about which he was asked, and the court properly allowed counsel to ask him leading questions. The evidence was admissible as tending to prove fraud in the conveyance made by Amalie Pauly and the reconveyance made by Littler.

The evidence of Littler and wife upon a former trial was competent as admissions on their part. They testified to practically the same matters on this trial, and the admission of the evidence could not have damaged them had it been improperly admitted.

It was not pleaded nor proved that the mortgage was given to D. & A. Oppenheimer to secure a debt incurred for the benefit of the separate estate of Mrs. Littler, and the judgment in favor of Henry C. Pauly, who signed the mortgage as a surety, over against Mrs. Littler, cannot be sustained. The court did not err in refusing to allow Jesse D. Oppenheimer, cashier and agent for D. & A. Oppenheimer, to testify that he relied upon the decision in *Hanna v. Ladewig* and the advice of his attorney in making the loan to Littler and wife. The case did not reach the facts in this case, and the doctrine of *stare decisis* did not have any pertinency or application. The pleadings and evidence do not raise an issue as to D. & A. Oppenheimer being innocent lienholders, but the fact that they acted on the decision in *Hanna v. Ladewig* showed that the circumstances under which the deeds were executed by and between Littler and Amalie Pauly must have been known to them.

With the judgment amended so as to leave out that portion which gave a recovery to Henry C. Pauly as against Mrs. Littler and her husband for any amount taken out of his part of the estate in the suretyship matter, the judgment will be affirmed.

#### GULF, C. & S. F. RY. CO. v. BLAKENEY-STEVENS-JACKSON CO.

(Court of Civil Appeals of Texas. Jan. 9, 1908.)

#### 1. RAILROADS—SETTING OUT FIRES—ACTIONS—PRESUMPTION.

Evidence that a fire started up within a reasonable distance from a railroad track very

soon after the passing of a train, and that there was no fire on the premises or in the vicinity before, and that there was no other apparent cause for a fire, is sufficient to warrant an inference that the fire was emitted from the railway company's passing engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1713.]

## 2. SAME—BURDEN OF PROOF.

Where plaintiff has proved that a fire was set out by defendant's locomotive, the burden is upon defendant to show that there was no negligence on its part causing the fire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1713.]

## 3. SAME—PROOF OF PROPER CONSTRUCTION OF ENGINE.

Proof that a railroad company's locomotives are properly constructed, in good order, and properly equipped with suitable contrivances, generally approved, and that reasonable care was exercised at the time in operating the engine, excludes the legal presumption of negligence arising from the mere fact that a fire has been occasioned by sparks from its engines.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1714.]

## 4. SAME—NEGLIGENCE.

Where plaintiff proves that his property was destroyed by fire originating from sparks from defendant's locomotive, and defendant proves such proper equipment and construction of the locomotive and proper handling as to tend to show absence of negligence, the burden of proof is on plaintiff to make out a case of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1714.]

## 5. SAME—BURDEN OF PROOF—NEGATING NEGLIGENCE.

A railroad company, in disproving negligence presumably established by the setting out of fire by its locomotive, must negative every fact the proof of which would justify a finding of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1714.]

## 6. SAME—EVIDENCE.

Evidence examined, and held to sustain a finding that a locomotive which caused a fire by emitting sparks was negligently operated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1730-1736.]

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Action by the Blakeney-Stevens-Jackson Company against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Terry and Thurmond & Steger, for appellant. McGrady & McMahon, for appellee.

LEVY, J. Appellee brought this suit against the railroad company to recover the value of certain personal property which was burned while located in a barn just outside the right of way of the company, alleged to have been destroyed by reason of sparks or live cinders that negligently escaped from one of the engines of the appellant. The case was tried before the court without a jury, and verdict and judgment were rendered in favor of the appellee for the value of the goods burned, which the appellant seeks to have reversed for errors assigned upon the findings of the court.

The appellant complains in its first and second assignments of error that there is no evidence sufficient to support the findings by the court that sparks or live cinders escaped from the engine of appellant, nor that the employees operating the engine were negligent in handling the engine at the time of the alleged fire. The finding of the trial court which the appellant complains of is as follows: "On February 12, 1904, plaintiff owned and had stored in a barn and lot on which it was situated in the town of Ladonia, owned by C. S. McFarland, certain personal property as described in its petition, and on that day fire, sparks, and live cinders were communicated to said barn and its contents at about 11:35 a. m., which fire escaped from one of defendant's locomotive engines, to wit, engine No. 201, while said engine was being operated on the defendant's railroad track in said town in defendant's business by its employees near said barn, to wit, about 195 feet therefrom, and the fire so escaping was carried by the wind to said barn and contents, and such fire consumed and destroyed said barn and its contents, and that such burning and escape of fire from the engine was proximately caused by the negligence of the defendant in these things, to wit: (1) The employees operating said engine were negligent, and did not handle such engine with ordinary care to prevent the escape of sparks and live cinders, but they carelessly and unnecessarily caused said engine to give off loud exhausts thereby throwing more fire and throwing fire further than it would have done if the engine had been operated with ordinary care on the occasion in question, and if the engine had been operated with ordinary care it would not have fired said barn and contents; (2) that the spark arrester on said engine was not in good repair for preventing the escape of fire on the occasion in question, but that defendant had used ordinary care to have the same in good repair."

Looking to the statement of facts in this case, there does not appear that direct proof was made of the fact that sparks or live cinders escaped from the engine and burned the barn, though circumstantial evidence was resorted to for the purpose, and that on this character of evidence the trial judge found that the fire was set out by sparks from the appellant's engine, and through the negligence of appellant. To determine the correctness of the court's findings we take the weightiest facts in the record as testified to by the several witnesses for the appellee. The barn which was burned, and which contained the property sued for, was situated a little west of north from the appellant's depot in the town of Ladonia, 195 feet from the defendant's main track. It had a shingle roof, the comb extending east and west, practically parallel with the appellant's track. The roof was rather old with holes in it, some an inch wide and several inches long. The loft next to the roof was filled with dry



hay, some loose and some baled. The weather was dry, and the wind blowing hard from the direction of the depot towards the barn. The lower part of the barn contained live stock, harness, implements, and agricultural products. There were sheds to the barn on either side. From 5 to 15 minutes before the fire broke out the witness Jake Brown entered the east door of the barn, and led his cow out around to the west end of the barn, and watered her at a trough, then took the cow to a grass lot 150 feet west and turned her in, and came back to the sidewalk on the street, which was about 50 feet east of the barn, and was standing there when the fire alarm was first given. The witness Wright was the first to give the fire alarm. The witness Brown then looked and saw the barn burning in the south end of the roof of the barn. Smoke was coming out through this roof, and possibly a little blaze. Other parts of the barn were not then burning. The material was combustible, and the fire spread rapidly, consuming the barn and its contents. No fire was in the barn when the witness Brown was in there. He neither saw nor smelled any fire or smoke. No one was seen about the barn except Brown when he was there, nor was anybody seen there after he was, though the barn was in plain view of several persons near by who testified that no one was there. At the time Brown was there he had no fire about him. So far as the record shows the only other person except Brown who had been in or around the barn was the delivery boy of the appellee, Covington, who was there early in the morning. It was proven that no other person had any occasion or business in or around the barn, and that Brown was only about the west end of the barn, and when there the appellant's engine, shown to be No. 201 pulling an extra freight, pulled in from the direction of Dallas, Tex. The engine stopped about the west end of the depot, and cut loose two cars, started up very suddenly and rapidly in making a quick switch, doing at the time very hard and unusually loud puffing, which attracted the attention of both Brown and Wright and the other witnesses who lived in Ladonia and testified they were accustomed to trains. The appellee's witnesses testified that from 5 to 15 minutes after this engine pulled in, and after it did this hard puffing, the fire broke out. It was proven that there were no furnaces, fires, chimneys, or other means that could have fired the barn other than the appellant's engine. The nearest place having a fire was the stove in the appellant's depot 180 feet distant. The engine came in to the depot at about 11:35 a. m., and the fire was discovered by the witnesses some minutes before 12, variously estimated to be, as stated, from 5 to 15 minutes after the quick switching was done. It was shown that at other times within a few weeks of this fire live sparks thrown from the defendant's engine had been seen to travel at night a greater distance than from the barn

to the depot, with the wind not so high. The appellant's engine was a coal burner. The appellant offered evidence showing that the engine was equipped with the most approved spark arrester in use, and that the engine was examined by competent persons on February 2d, 7th, 9th, and 11th, and the spark arrester, as well as all other parts of the engine, was in good condition on each of the days examined; that the engine was not working steam when it approached the depot, but drifted into town gradually, slowing down to a stop; that no sparks were escaping at the time or prior to the stopping; that in a minute or two after arrival at the depot of this engine the barn was discovered by the train crew to be on fire, the conductor saying that he went out and looked at the fire; that the engine was not throwing sparks or cinders as it went into town; that the engineer was competent and cautious, and handled the engine carefully; that the engine did no hard puffing or made no loud noise at Ladonia; that this train remained 15 minutes at Ladonia, arriving at 11:35, and leaving at 11:50 a. m. It was shown on cross-examination of these witnesses that they had orders to meet a freight train at Ladonia which was about due, that this engine switched two cars, and made an effort to get the train on a passing track before that train would arrive. The witness Daniel said it would take a hard wind to have carried sparks from this engine to the barn; that an engine throws sparks further when doing hard puffing than when not puffing; that this was the first trip the engineer ever made with this engine; that all coal-burning engines throw sparks and cinders more or less while working, the amount of cinders being governed by the heaviness of the work; that a spark arrester in good repair will not throw sparks as large as a pea 200 feet. It appears from this evidence that there is a conflict in the testimony as to whether the barn was on fire before engine No. 201 pulled in and stopped, and as to whether this engine did hard puffing about the depot. The trial court decided the conflict against appellant, and we assume the correctness of the finding.

We bear in mind in passing upon the sufficiency of these facts offered that every case must and will depend more or less upon the collection of circumstances disclosed by the evidence of the given case. It is laid down as a rule that evidence that the fire started up (1) immediately, or very soon after the passing of the train, and (2) there was no fire on the premises or vicinity of the premises before, and (3) there was no other apparent cause for a fire, is sufficient to warrant an inference of fact that the fire was emitted from the railway company's passing engine. 2 Thompson's Com. on Law of Neg. (2d Ed.) p. 909, § 2368; 13 A. & E. Ency. p. 513. In *Railway v. De Busk*, 12 Colo. 204, 20 Pac. 753, 3 L. R. A. 350, 13 Am. St. Rep. 221, it was said by the court in passing on like

proof: "From the nature and circumstances of such cases considerable latitude must be allowed to the introduction of testimony, and in the drawing of inferences as to the origin of the fire." This rule obtains as well where the fire starts a reasonable distance from and beyond the track. *Greenfield v. Railway*, 83 Iowa, 270, 49 N. W. 95; *Dean v. Railway*, 39 Minn. 413, 40 N. W. 270, 12 Am. St. Rep. 659. In the case of *Karsen v. Railway*, 29 Minn. 12, 11 N. W. 122, there was no direct proof that the hay was ignited by an engine. It was shown there was quite a stiff breeze, and the fire started a few minutes after the train passed, and there was no other fire nor any other person in the vicinity at the time, or other probable explanation of the fire than that of the passing engine. While in the case of *Railway v. Morgan*, 28 Tex. Civ. App. 848, 67 S. W. 425, the evidence showed that there was other probable explanation of the fire than that of the passing engine, and a recovery was denied in this case. In the light of the rule, and looking to the record in this case, there was sufficient fact established as to the origin of the fire being the appellant's passing engine. The established rule in this state is, where it has been shown by the plaintiff that fire was set out by the railway engine, then the burden is upon the railway company to show that there was in fact no negligence on its part causing the fire. *Railway v. Timmermann*, 61 Tex. 660, and the rule reaffirmed in *Gulf, C. & S. F. Ry. Co. v. Benson*, 69 Tex. 407, 5 S. W. 823, 5 Am. St. Rep. 74; *Galveston, H. & S. A. Ry. Co. v. Horne*, 69 Tex. 643, 9 S. W. 442; *Texas Elevator & Compress Co. v. Mitchell*, 78 Tex. 64, 14 S. W. 276; *Campbell v. Goodwin*, 87 Tex. 273, 28 S. W. 273; *Texas Midland Ry. Co. v. Juniper*, 24 Tex. Civ. App. 671, 60 S. W. 797. Having its engines properly constructed, in good order, and properly equipped with suitable contrivances, generally approved and used as the best means of preventing the escape of sparks or live cinders, and reasonable care and prudence exercised at the time in operating the engine, might be said in a given case to exclude the legal presumption of negligence by the mere fact that a fire has been occasioned by sparks from its engines. Such a conclusion in a proper case on that kind of proof could be reached because the railway company has a licensed right as a means of public utility to use fire to operate its engines, and upon the doctrine of law that a party is not answerable in damages for the reasonable exercise of a lawful right. However, it is a general ruling that, where there is proof on the part of the plaintiff that his property was destroyed by fire originating from sparks from the engine, and on the other hand there is a state of proof by the railway company of such proper equipment and construction of the en-

gine, and proper handling, tending to establish against the existence of negligence, the court must determine the question of negligence in every given case upon the whole evidence. As said in the opinion of the Supreme Court in the case of *Railway v. Levine*, 87 Tex. 437, 29 S. W. 466: "Consequently the question as to negligence or not becomes a question of fact to be determined upon the evidence. The credibility of the witnesses and the weight to be given to their evidence are matters to be decided by the jury." Yet in passing upon the whole evidence of the case it must be borne in mind that these rules are rules of evidence and not of liability, and that the general burden of proof to make out a case of negligence rests upon the plaintiff, and he cannot sustain his suit without there is proof of negligence. *Daly v. Railway*, 43 Minn. 319, 45 N. W. 611; *Railway v. Reese*, 7 Am. St. Rep. 661; *Railway v. Benson*, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; *Railway v. Horne*, 69 Tex. 643, 9 S. W. 440; *Railway v. Stafford*, (Tex. Civ. App.) 31 S. W. 319.

In passing upon the whole evidence of the case to determine whether there is any evidence to support the finding of negligence by the trial court, we bear in mind the rule laid down in the case of *Greenfield v. Railway*, 83 Iowa, 270, 49 N. W. 96, which is a kindred case: "Negligence being presumptively established has for its support every fact by which it might have been established, upon proof; or, in other words, a party disproving negligence must negative every fact the proof of which would justify a finding of negligence." Looking to the record, we find these salient facts: That the fire started 195 feet from the track, and that a spark arrester in good repair will not throw sparks as large as a pea 200 feet. That sparks from the defendant's engines within a few weeks before had thrown sparks further than this distance with less wind. That a heavy wind was blowing at the time. Quick switching and loud puffing of the engine. An engine throws sparks further when doing loud puffing. These facts are sufficient to warrant the court's finding of negligent operation. *Railway v. Rice*, 24 Tex. Civ. App. 374, 59 S. W. 833; *Railway v. O'Kelleher*, 21 Tex. Civ. App. 96, 51 S. W. 54; *Railway v. Coombs*, 76 Ark. 132, 88 S. W. 595; *Scott v. Railway*, 93 Tex. 625, 57 S. W. 801. As bearing upon negligence the fact that fire was thrown 160 feet from the track makes a conflict with evidence of proper equipment and proper care in operation. *Hagan v. Railway*, 86 Mich. 615, 49 N. W. 510. That the sparks were thrown 45 feet to the cotton tends to show that it was caused either by defective spark arrester or by careless operation of the engine. *Railway v. Levine* (Tex. Civ. App.) 29 S. W. 514.

The case is ordered affirmed.

**GULF, C. & S. F. RY. CO. v. MCFARLAND.**

(Court of Civil Appeals of Texas. Jan. 13, 1908.)

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Action by C. S. McFarland against the Gulf, Colorado &amp; Sante Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Terry and Thurmond &amp; Steger, for appellant. McGrady &amp; McMahon, for appellee.

**WILSON, C. J.** The suit was by appellee to recover the value of a certain frame building situated in the town of Ladonia, in Fannin county, and the value of certain personal property alleged to have been in the building, and with it to have been destroyed by fire as the result of appellant's negligence. A former trial of the case in the county court of Fannin county resulted in a judgment for appellant, which, on appeal, was reversed. 88 S. W. 450. The last trial resulted in the judgment in favor of appellee from which this appeal is perfected. Situated within the building at the time it was destroyed was certain property belonging to Blakeney-Stevens-Jackson Company, also destroyed by fire. The Blakeney-Stevens-Jackson Company on practically the same pleadings and the same evidence, as shown by the record in this case, recovered of appellant a judgment for the value of its property so destroyed, and that judgment has just been by us affirmed. As the assignments of error and propositions urged under them are identical in the two cases, and rest upon the same evidence and findings of the trial judge, the conclusion reached as to the proper disposition to be made of this appeal necessarily is the same as that reached in the Blakeney-Stevens-Jackson Company Case, 106 S. W. 1140.

The judgment is affirmed.

**HARRIS v. JACKSON.**

(Court of Civil Appeals of Texas. Nov. 21, 1907. Rehearing Denied Jan. 16, 1908.)

**1. TRIAL—INSTRUCTIONS—REQUEST.**

It is not error to refuse a special charge, the subject of which is sufficiently covered by the charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

**2. APPEAL—HARMLESS ERROR—INSTRUCTIONS—PREJUDICE.**

An instruction assuming that certain of the services sued for were performed without charge was not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

**3. TRIAL—INSTRUCTIONS—ASSUMED FACTS.**

Where, in an action for services, defendant did not dispute that plaintiff rendered services to her generally about her property, but only claimed that certain services so rendered were voluntary and for plaintiff's benefit, without charge to her, the court was warranted as against

defendant in assuming that such services were performed without charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

**4. APPEAL—HARMLESS ERROR—SUBMISSION OF ISSUES—PREJUDICE.**

Defendant was not prejudiced by the erroneous submission of an issue to the jury, where no damages were found with reference thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4212-4217.]

**5. TRIAL—INSTRUCTIONS—SUBMISSION OF ISSUES—CONFORMITY TO PLEADINGS.**

An assignment of error that an item of rent pleaded in a counterclaim was not passed on by the jury is not sustained, where the court submitted to the jury the issue of rents generally, and there was a general verdict against defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

Appeal from Harrison County Court; H. T. Lyttleton, Judge.

Action by Artie Jackson against Mrs. Henrietta Harris. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Harrison, Davidson &amp; Burkhart, for appellant. M. P. McGee and M. B. Parchman, for appellee.

**LEVY, J.** The appellee instituted this suit in the county court against the appellant to enforce payment of alleged personal services rendered and for debts due him by appellant. The appellant answered by entering a general denial and specially averring an agreement or contract, as follows: The appellee was to reside with his family in defendant's house, located at Henrietta Lake, to keep trespassers away from the lake, and was to receive as his compensation therefor his house rent, no particular work or services being required or expected of him, and that subsequent to this agreement appellee was permitted, at his own solicitation, to sell wood off the lake premises, paying one-half of the net profits to the appellant for the use of appellant's wood and teams and wagons, but was to handle the wood business as his own, and to make the same self-sustaining; and set up counterclaim for other indebtedness, and prayed for an accounting of the sales of the wood, and judgment for all indebtedness due her by the appellee. Trial was before a jury, and resulted in a verdict and judgment in favor of the appellee, from which the appellant appeals to this court.

We are of the opinion that there was no error in refusing the special charge, because the main charge of the court had sufficiently instructed the jury on the matter offered in special charge as applicable to the facts and pleadings. That portion of the court's charge assailed in the third assignment of error may be subject to the criticism that it assumes the performance of services without charge, but the error is in the appellant's favor; and, further, the court was

warranted in assuming these facts, because the appellant did not dispute that the appellee did render to her services generally about her property, but only claimed in her evidence that these particular services so rendered were voluntary, and for his benefit, without charge to her.

That portion of the charge assailed in the seventh assignment of error, referring to the following portion thereof: "You will find for plaintiff for the cost of cutting any wood left unmarked"—was not properly an issue in this case, because plaintiff testified, as this record shows, that he hauled all the wood left after the five mules were taken from him, yet the jury did not find anything for him upon that issue, and hence the error of submitting an item of damage not required by the proof would, in this case, not be a reversible one.

All the assignments of error directed to the charge of the court are overruled.

The assignment which complains of the item of house rent of the lake house, pleaded as a counterclaim by the appellant, from February 19, 1906, to August 15, 1906, not being passed on by the jury, is not well taken, because the court in the last clause of its charge submitted to the jury the general issue of rents, and the general verdict of the jury was equivalent to a finding against appellant.

In the tenth assignment of error the appellant contends that the verdict of the jury was against the evidence as to the amount of the credit allowed her on account of the wood sales. As we read and understand the evidence in the record, this assignment should be sustained.

The jury in their verdict returned an item of store account, \$86.25, and the value of one hog, \$15, against the appellee; but there is not an item of testimony in this record justifying the awarding of that counterclaim.

Because the verdict is contrary to the evidence, the cause is ordered reversed and remanded.

# RANGER MERCANTILE CO. v. TERRETT et al.

(Court of Civil Appeals of Texas. Dec. 5, 1907.  
Rehearing Denied Jan. 23, 1908.)

## 1. LANDLORD AND TENANT—RENT AND ADVANCES—RIGHT OF LANDLORD AS SURETY FOR TENANT.

A landlord who has not himself furnished supplies necessary to enable his tenant to make a crop, but, instead, has merely become surety for the payment of the debt incurred by his tenant for such supplies, has not as against the tenant's creditors a lien on the tenant's crop for the value of the supplies so furnished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 989.]

## 2. CHATTEL MORTGAGES—TRANSFER OF PROPERTY BY MORTGAGOR—LIABILITY OF PURCHASER.

One who purchases mortgaged property from the mortgagor with notice of the mortgagee's

rights, and appropriates it to his own use, is liable for the value of the property if less than the debt secured, and, if more, to the amount of the debt, and hence where a merchant in payment for goods furnished a tenant, mortgagor, received from him mortgaged cotton subject also to a landlord's lien for supplies furnished the tenant, which the merchant paid, and the merchant had knowledge of the mortgagee's lien, which was less than the value of the goods, he is liable to the mortgagee for the amount of his lien less the amount of the landlord's lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 468-471.]

## 3. SAME—RIGHT TO FORECLOSURE.

Where a chattel mortgagor has sold the mortgaged property to one with notice of the lien, the mortgagee is not compelled to accept a personal judgment against the mortgagor, but is entitled to foreclosure of the mortgage as against both the mortgagor and purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 468-471.]

Appeal from Eastland County Court; A. E. Hill, Judge.

Action by the Ranger Mercantile Company against J. S. Terrett, E. M. Hunt, and another. From a judgment granting insufficient relief, plaintiff appeals. Affirmed as to defendant Hunt, and reversed as to the other defendants.

Earl Conner, for appellant. J. R. Frost, for appellees.

WILLSON, C. J. By its suit commenced in a justice court appellant sought a recovery against the appellee Terrett on his promissory note in its favor, dated February 8, 1906, and due September 1, 1906, for the sum of \$86.67, 10 per cent. interest thereon from the maturity thereof, and 10 per cent. additional as attorney's fees. It also sought as against Terrett and as against the appellee L. A. Bedford a foreclosure of the lien of a chattel mortgage made by Terrett to secure the payment of the note on three-fourths of three bales of cotton, alleged to be of the value of \$180, grown by Terrett on one E. M. Hunt's farm in Eastland county, and a recovery against Bedford for the value of three-fourths of two of said three bales of cotton, alleged to be the sum of \$120, on the ground that said Bedford had wrongfully purchased the same from Terrett, and converted the same to his own use, in disregard of its lien thereon by virtue of said mortgage. By a supplemental petition appellant charged that, after the filing of its suit, Bedford had purchased and converted to his own use the other of said three bales of cotton, alleged to be of the value of \$50.49, and it prayed as in its original pleading for judgment against him. In his answer Bedford denied that he purchased the two bales of cotton first referred to above from Terrett, and averred that he purchased same from said E. M. Hunt, whom he asked to be made a party, and against whom he prayed for a judgment for any sum the mercantile company might recover against him. Hunt made himself a party to the suit, and in his answer alleged

that the two bales of cotton were grown on his farm by Terrett, his tenant, and that he had purchased same from Terrett "by virtue of his lien as landlord." Terrett in his answer admitted that he was due appellant the indebtedness it claimed against him, adopted the pleading of Bedford and Hunt as to the two bales of cotton purchased by the former, admitted that after appellant's suit was filed he had sold to Bedford the other of the three bales, and averred that as the proceeds of such sale, "after paying for ginning and picking" the same, he had deposited in the court \$20.60 for appellant's use and benefit. A trial in the justice court resulted in a judgment declaring an indebtedness in the sum of \$97.70 to exist in favor of appellant against appellee Terrett, directing the \$20.60 in the registry of the court to be paid to appellant, and decreeing a recovery by appellant against said Terrett in the sum of \$77.10 and costs of suit. In its further effect the judgment was in favor of appellees Bedford and Hunt against appellant for costs. An appeal from this judgment was prosecuted by the mercantile company to the county court of Eastland county, where on a trial had January 12, 1907, a like judgment was rendered.

The evidence established beyond controversy that Hunt rented land to Terrett on which to grow a crop during the year 1906; that Terrett was to pay as rent one-fourth of the cotton and one-third of all the other crops he might grow on the land; that after he had rented the land, to secure the note sued upon, Terrett executed and delivered to appellant a mortgage covering the cotton in question; that the mortgage was a valid one, and created a lien in appellant's favor on a three-fourth's undivided interest in the cotton in question; that appellee Hunt owned the remaining undivided interest of one-fourth in said cotton; that appellee Terrett was indebted to appellee Hunt in the sum of \$4.10 on account of supplies Hunt had furnished him to enable him to make a crop on the rented land; that Terrett applied to appellee Bedford, a merchant, to sell him on a credit goods, wares, and merchandise needed by him while he was engaged in making a crop on Hunt's land; that Bedford refused to do so, unless Terrett's landlord, Hunt, would "stand for" the payment of the indebtedness so proposed by Terrett to be created; that appellee Hunt agreed to "stand for" such an indebtedness in the sum of \$50; that thereafter, on the faith of Hunt's agreement, Bedford sold to Terrett goods, etc., amounting in value to \$43.38, to be paid for in the fall of 1906; that Bedford purchased of Terrett and Hunt, the owners thereof, the cotton in question, and in part paid the sum due Terrett on account of his interest in same by crediting against the purchase price thereof the \$43.38 due to him from Terrett; that at the time he so purchased the cotton Bedford had notice by reason of the registration of appel-

lant's mortgage, and actual notice, also, of appellant's lien on Terrett's part thereof; that the market value of one of the two bales of cotton first purchased by Bedford was the sum of \$56.88, and that of the other of said two bales was the sum of \$50.21; that the market value of Terrett's three-fourths interest therein subject to appellant's mortgage was the sum of \$81.49; that the market value of the other bale of cotton was \$50.49; that the market value of Terrett's interest in the same, subject to the mortgage was \$37.87; and that Bedford paid to Hunt out of the proceeds of the cotton the \$4.10 due to Hunt from Terrett on account of the supplies Hunt had furnished to him. The testimony further shows that the third bale of cotton was sold pending the suit with appellant's consent, with the understanding that the proceeds of the sale should be deposited in the court. The record does not show whether it was agreed between the parties that the \$20.60 deposited in the registry of the court was to be treated as the whole of the proceeds of such sale or not.

The law being that a landlord who has not himself furnished the supplies necessary to enable his tenant to make a crop, but, instead, has merely become surety for the payment of the debt incurred by his tenant for such supplies, has not as against the tenant's creditors a lien for the value of the supplies so furnished on the tenant's crop (*England v. Brinson*, 1 W. & W. § 321; *Kelley v. King*, 18 Tex. Civ. App. 360, 44 S. W. 915; *Kelley v. King* [Tex. Civ. App.] 50 S. W. 629), and the law also being that one who purchases from the mortgagor and appropriates to his own use the mortgaged property, with notice of the right the mortgage confers on the mortgagee, is liable for the value of the property so purchased if less than the debt secured, and, if more, to the amount of the debt (*Fouts v. Ayres*, 11 Tex. Civ. App. 338, 32 S. W. 435; *McCown v. Kitchen* [Tex. Civ. App.] 52 S. W. 801)—it follows from the facts recited that the judgment complained of is erroneous in so far as it fails to adjudge as against appellee Terrett a foreclosure of appellant's mortgage, and in so far as it fails to adjudge as against appellee Bedford the amount of said debt due by appellee Terrett less the sum of \$4.10 paid by him to appellee Hunt on account of supplies furnished by him to Terrett, and in so far as it fails as against said Bedford to adjudge a foreclosure of appellant's mortgage.

The judgment of the county court, therefore, will be affirmed as to appellee Hunt and reversed as to appellees Terrett and Bedford; and, the record before us making it proper to do so, a judgment will be rendered in favor of appellant against appellee Terrett for the sum of \$97.70, and interest thereon at the rate of 10 per cent. per annum from January 12, 1907, against appellee Bedford in favor of appellant for the sum of \$93.60, and interest thereon at the rate of 6 per cent. per

annum from November 16, 1906, and against both appellees Terrett and Bedford for the costs which have accrued in this court, in the county court and in the justice court, foreclosing as against them the lien of appellant's mortgage, directing the sale of the two bales of cotton first purchased by appellee Bedford in satisfaction of the judgment, after crediting it with the \$20.60 as the proceeds of the other bale of cotton paid into the registry of the county court. The judgment will provide that an execution shall not be issued on it as against appellee Bedford, if the two bales of cotton first purchased by him are found in his possession and subjected to the order of sale it will direct to be issued.

WESTERN UNION TELEGRAPH CO. v.  
BELL.\*

(Court of Civil Appeals of Texas. Dec. 11, 1907.  
Rehearing Denied Jan. 22, 1908.)

1. TRIAL—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where there was no evidence in support of certain items of damage claimed in the petition, it was proper to refuse a requested instruction that the jury should not consider such items.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587, 596.]

2. SAME—ERROR CURED BY INSTRUCTIONS.

Where, in an action against a telegraph company for failure to deliver a message sent by plaintiff to her brother announcing the death of their mother, the court erroneously admitted evidence that, if the brother had been advised of the death, he would have provided a suitable burial for his mother, so that she would not have been buried by the public authorities, but subsequently the court instructed the jury not to consider such evidence, and told the jury that they could only allow damages for plaintiff's mental pain or anguish directly resulting from the absence of her brother at the funeral, the error was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

3. APPEAL — REVIEW — QUESTIONS OF FACT — VERDICT.

A verdict based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

4. TELEGRAPHS — FAILURE TO DELIVER MESSAGE — EXCESSIVE DAMAGES — MENTAL ANGUISH.

In an action against a telegraph company for failure to deliver a message, whereby plaintiff's brother was not present at the funeral of their mother, a verdict for \$400.25 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 74.]

Appeal from District Court, Travis County; V. L. Brooks, Judge.

Action by C. J. Bell against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

See 90 S. W. 714.

Geo. H. Fearons and L. A. Hill, for appellant. D. W. Doom and D. H. Doom, for appellee.

\*Writ of error denied by Supreme Court.

RICE, J. Appellee, plaintiff below, sued appellant for the alleged failure to promptly transmit and deliver to H. A. Jernigan, her brother, the following telegram: "Austin, Texas, August 23d, 1905. H. A. Jernigan, 1706 Live Oak Street, Houston, Texas. Your mother is dying. Come at once. [Signed] Callie." Among other allegations in plaintiff's petition it is averred that H. A. Jernigan was plaintiff's brother, and Mrs. C. M. Jernigan, referred to in said telegram as "mother," was the mother of both plaintiff and H. A. Jernigan; that the said Mrs. C. M. Jernigan died on the evening of August 23, 1903; that she left no estate nor money with which to purchase a burial lot or defray her funeral expenses; that she, appellee, was poor, without means, and herself unable to do so; that her brother, H. A. Jernigan, was financially able and willing to purchase a burial lot, and defray the funeral expenses of their said mother, and, if said telegram had been promptly delivered to him at any time before 9 o'clock on the evening of the 23d of August, 1903, he could and would have reached Austin in time to have been present at the burial of his mother, and could and would have procured a cemetery lot and defrayed all expenses of her burial; that, by reason of the negligent failure of appellant to deliver said telegram, appellee was compelled in her distress, on account of her poverty and the failure of her brother to come, to allow her mother to be buried by the public authorities in a pauper's grave, without coffin or hearse, to her great humiliation, and for which she seeks to recover damages. Defendant answered by general and special exceptions and general denial, and specially pleaded by demurrer and in bar that said telegram by its language did not give defendant notice of any such facts or damages as pleaded by plaintiff, and that no such damages were in contemplation of the parties at the time of entering into the contract, and that the said telegram, or the substance of same, had been delivered to the addressee, H. A. Jernigan, within a few minutes after the receipt thereof at its Houston office by calling the said Jernigan over a phone, and reading the said telegram to him. There was a trial by jury and verdict, and judgment for plaintiff for \$400.25.

On a former appeal of this case (Western Union Tel. Co. v. Bell [Tex. Civ. App.] 90 S. W. 715) it was reversed and remanded because the trial court permitted plaintiff to introduce evidence in support of the above allegations of her petition; this court thereby on said appeal sustaining appellant's contention to the effect that the telegram set out gave no notice to appellant of these facts as above pleaded. But on the trial of the present case the court below followed the decision of this court on this subject, and excluded all evidence offered in support of the allegations of the plaintiff's petition in this respect. However, appellant insists by its

first assignment of error that the court erred in refusing to give in charge to the jury its fourth special charge, which, in effect, instructed the jury not to consider the issues raised by said pleading, and to disregard said pleading, as no testimony had been admitted in proof of said allegations; and by its second assignment of error complained of the action of the trial court in refusing to give its fourth special charge, because it was further contended that appellant was entitled to an affirmative charge concerning said issues, and, further, that said special charge should have been given because the court had admitted the testimony by deposition of the witness H. A. Jernigan that, had said telegram been promptly delivered to him, he had the means and would at once have come to Austin and have provided a suitable burial lot and coffin for his mother, which answers of the witness, however, it appears from appellant's said assignment were afterwards withdrawn from the consideration of the jury by the court. But it is contended that, having once been admitted, it was likely to do appellant injury, unless the jury were instructed in the court's charge to disregard all of said issues, as no testimony was before them concerning the same.

It will be seen that appellant's contention in the first assignment is that these matters having been set out in plaintiff's petition, but no testimony having been offered in support of them, it was entitled to have the court tell the jury not to consider plaintiff's pleadings. We do not concur in appellant's contention. Unless evidence be offered in support of a pleading, there is no issue to be considered by the jury, and it was not necessary for the court to have referred to this matter in its charge. In passing upon the objection raised by appellant's second assignment of error, we deem it sufficient to say that while it is true the court permitted appellee at first, over objection of appellant, to read in evidence the deposition of H. A. Jernigan in support of the allegations of her petition to the effect that, if he had received the telegram in time, he could and would have gone to Austin and provided a suitable burial lot and defrayed the funeral expenses of his mother, still, upon further objection to said testimony by appellant, the court excluded the same from the consideration of the jury, and verbally instructed the jury to disregard the testimony of said Jernigan in this respect. Besides this, the court in its main charge, in the fifth paragraph thereof, eliminated this phase of the case from the consideration of the jury by expressly charging the jury as follows, to wit: "(5) If you find in plaintiff's favor under the foregoing instructions, you will, in arriving at the amount of her damages, allow her 25 cents, and such additional sum, if any, as will be necessary to fairly and reasonably compensate her for any additional mental pain or anguish, if any, that was caused plaintiff as the direct, natural,

and proximate result of the failure of H. A. Jernigan to be present at the burial of their mother. You will not, however, if you return a verdict for plaintiff, allow her anything on account of the alleged cost of reinterring the body of her mother, or on account of the mental pain and anguish that plaintiff would have suffered from the death and burial of her mother, even if H. A. Jernigan had been present at the time, or on account of anything else than the two items of damage submitted for your consideration in this paragraph of this charge." Appellant did not object to the action of the trial court in verbally instructing the jury not to consider the testimony of H. A. Jernigan, and there is no assignment of error in this court upon said subject. We think if there was any error committed, under the circumstances, in the first admission of the testimony of Jernigan, that the same was cured by the withdrawal of said testimony on the part of the court from the jury, and by the verbal instruction of the court at the time to the jury not to consider said testimony for any purpose; and especially is this true when the court in its main charge to the jury eliminates this phase of the case from their consideration. A charge requested which is covered by instructions given is properly refused; and a charge requested which is not supported by the evidence is likewise properly refused. *H. & T. C. R. R. Co. v. Cluck* (Tex. Sup.) 87 S. W. 817, and authorities there cited.

Appellant's third assignment of error complains of the action of the trial court in overruling its motion for a new trial, because it alleges that the verdict of the jury is against the overwhelming weight and preponderance of the evidence in this case, and because the evidence showed that the telegram was promptly transmitted from Austin to Houston, and thereafter, in a few minutes, delivered to the addressee Jernigan by phone, and that he understood the contents of said message or the substance of the same. It is only necessary to say, relative to this assignment, that there is a conflict of testimony on this issue, and that there is sufficient evidence to support the finding of the jury thereon. This being the case, this court is not called upon to disturb the verdict of the jury upon a question of fact.

Appellant's fourth assignment of error complains that the verdict of the jury is excessive. We do not concur with appellant in this contention, because in this class of cases there is no certain or definite rule limiting the judgment or discretion of the jury as to the amount of their verdict. We think, under the facts and circumstances in evidence, the verdict is not excessive, and ought not to be disturbed for this reason.

Finding no error in the proceedings of the court below, and believing the evidence amply sufficient to sustain the judgment, the same is in all things affirmed.

Affirmed.

**CURRIE v. MISSOURI, K. & T. RY. CO. OF TEXAS.\***

(Court of Civil Appeals of Texas. Nov. 27, 1907. Rehearing Denied Jan. 22, 1908.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

Where an experienced railroad man who had often used a certain turntable knew that, by reason of defects therein, occasionally it stopped suddenly while being turned, he assumed the risk of injury sustained by reason of the sudden stopping of the table while he was assisting in turning it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

**2. SAME—ACTION—ISSUES AND PROOF.**

Where, in an action for injuries to a brakeman owing to the sudden stopping of a turntable while he was assisting in turning it, the petition alleged negligence consisting of an alleged defective construction and condition of the table, whereby it occasionally stopped suddenly while being turned, plaintiff was not entitled to recover on evidence tending to show negligence consisting of using the table to turn larger engines than the table was adequate to accommodate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 861-876.]

**3. APPEAL—HARMLESS ERROR—ERROR CURED BY VERDICT.**

Errors in instructions are harmless where the verdict rendered was the only one warranted by the pleadings and evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4225-4230.]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by J. S. Currie against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Morrow & Smithdeal, for appellant. Coke, Miller & Coke and Ramsey & Odell, for appellee.

**RICE J.** This was a suit for damages for personal injuries resulting in verdict and judgment for the defendant, from which this appeal is prosecuted.

It was alleged by the appellant that at the time of his injury he was employed by the appellee as a brakeman, and that, in the discharge of his duties as such, it became necessary for him to assist in turning an engine on a turntable in Waco, and that in undertaking to do so the said table stopped suddenly, causing great strain upon the appellant's legs, resulting in the injury complained of. The negligence alleged is as follows: "That said turntable was defective in its construction, so that it would sometimes stop suddenly when being turned; that the said turntable was out of repair, so that it would sometimes stop suddenly when it was being turned; that it was defective in its construction and was out of repair, in that the ends of the table where it joined on to the tracks leading to and from the same were too long, and there was not sufficient space for said table to turn all the way round, and the ends of said table or turning part thereof were

defective in construction and out of repair, so that, when the said table was being turned, they would catch and hang against the sides of the table; that a more accurate description of the defects in the construction of said turntable, and the parts of said table that were out of repair, and a more accurate description of the defective condition of the same, cannot be given, because plaintiff is not informed thereof, and because of want of opportunity to inspect said table after his injuries." Appellee, after a general demurrer and general denial, relied on the defense of contributory negligence and assumed risk, and alleged under said latter plea that the defects and the danger incident to the use of said table in said condition were open, patent, and visible and well known to plaintiff, and, in the ordinary discharge of his duties as an employé of defendant, must necessarily have been known to him, and were as easily ascertained by him as by the defendant, and that by continuing in the performance of said work with said knowledge and means of knowledge the plaintiff assumed the risk of any injury to himself, and was guilty of negligence approximately contributing to such injuries. Appellant testified: That he was 48 years old. That in June, 1906, he was engaged as a brakeman in the employ of appellee. That he knew that appellee had a turntable in Waco, and knew where it was located. During the time he was braking on a freight train for this company engines were, within his knowledge, turned on that turntable, and that he, as brakeman, assisted in turning engines thereon. That about the 12th or 13th of June, 1906, he assisted twice in turning an engine on that table, other parties aiding him in so doing. That on the 12th of June he succeeded in turning the table, but did not remember whether it was day or night, but thought it was in the daytime. That on the 13th of June, the next day thereafter, he succeeded in turning the table with two brakemen and the fireman, and that it was getting so hard that the engineer got down and helped them. That on this occasion, while pushing it, everybody halloaing "push," and while he was doing all he could standing on the bottom, the turntable stopped all at once. That he did not remember whether the turntable got all the way round before it stopped. That it was dark, and he was unable to see in what position the turntable was. That the table had to be turned before the engine could be gotten off. That he did not know it was going to stop that way. That the turntable was usually turned by the train crew. When the turntable stopped that night, his leg was hurt. That he was pushing it hard, and was on a strain when the table stopped. That after that his leg had a "kind" of dead feeling, the leg felt heavy, and he could not get about as he usually did. That he did not report the injury to the company. That he had been engaged as a brakeman from 20 to 25 years,



and had much experience in railroading, and was familiar and acquainted with the duties of a brakeman. That at the time he was hurt he had been in the employ of appellee since 1901, and had been running from Hillsboro to Waco since May, 1901, on appellee's road. That he saw the turntable frequently at Waco, and used it occasionally, but did not recall the number of times that he had used it, but had used it whenever his business required its use, and had known of the turntable being there since 1901. That after the injury he continued to work for the company until the 25th of September, 1905. That what caused the table to stop it had gotten old and out of fix, or something, and it was dark. That the cause of his leg being hurt was on account of pushing so hard. That he was not struck by anything. That not a drop of blood was spilled, and that nothing touched him. He was simply pushing away, and the thing stopped and afterwards his leg was hurt. That he knew that the table was hard to push, and shortly afterwards it was all right. That before this, many years ago, while working for a railroad in Mississippi, he had been run over by a loaded coal car, and this same leg was injured above the knee—a large hole was knocked in it. That soon after the injury complained of in this case he began to suffer from his leg, and had what is called "varicose veins."

Graham, conductor of the train in question, and also a witness for plaintiff, testified that he was acquainted with the defendant's turntable at Waco, and had experience turning engines on it, and had seen it work quite often. That about June, 1905, the turntable was a little hard to turn; that it was built for smaller engines, and later on, when they got larger ones, it was considerably heavier a part of the time, and sometimes stopped while being turned. "By being hard to turn, I mean it took more pressure. If the engine was balanced perfectly on the table, it was not as hard as if not balanced perfectly. The fact of its being hard to turn was easily discovered or discoverable by anybody who tried to look at it. A brakeman there trying to turn it around would soon discover the fact that he could not turn it, or, if hard to turn, he would discover that, and a man who was at work could not keep from noticing whether it was easier or heavier." It was the duty of the brakeman to assist in turning the engine on this turntable. It was a fact that, when the engine did stop, it was due to the fact of its not being properly balanced. It was the duty of the brakeman who was undertaking to move the table to see whether or not it was properly balanced. He was in a situation so that he could see whether it was properly balanced. The engineer in moving the engine acts upon the signals from the brakeman, who tells him where to stop. The engineer is away up where he cannot see where to place the engine. The brakeman stands at one end of the turntable or the other, and

gives the signals to the engineer when the engine is properly placed on the table. They are the only men to see where to stop and place the engine, and to place the same where it would turn easily, and they can see better than any one else whether it is placed on the table all right. If the brakeman does his duty and the engine is properly balanced, there is no difficulty, except that it is a little harder to turn. If it is perfectly balanced, there is no difficulty in turning the engine at the same time. The table has always turned harder than ordinary, and this is the only defect. It turned all right, but was hard to turn, and the brakeman could tell in the night whether the engine was properly balanced or not. The above is substantially all of the evidence upon the issues raised by this appeal, and which we find to be true.

Appellant's first and second assignments of error complain of the action of the trial court in giving two special charges at the instance of the defendant, which, in substance, told the jury that if appellant was injured while attempting to turn an engine on the turntable in question, and they should further believe that the turntable was defective, and by reason of which defect it was caused suddenly to stop, but they should further believe that the condition of said table and the amount of force and strength necessary to turn or move the same were known to the plaintiff, or in the ordinary discharge of his duties as an employé of defendant must necessarily have been known to him, then, in such event, they could find for defendant. Under the facts in evidence in this case, we think there was no error in giving these charges, because the evidence showed that appellant was an old experienced railroad man, had frequently seen and often used the table in question, and knew that it was hard to turn. The defects in it, if any, were obvious and open, and could have been easily known to him, and that he used the same with such knowledge. While it is true the law requires the employer to furnish safe appliances for his employes, still, if an employé, with knowledge of the fact that any machinery or instrumentality he is using in his work is defective or insufficient, continues to use the same, this knowledge will exonerate the company from liability if any injury should occur to the servant by reason thereof, and the servant will be held to have assumed the risk of injury in such cases.

In the case of *Texas & Pacific Railway Co. v. Bradford*, 66 Tex. 734, 2 S. W. 598, 59 Am. Rep. 639, in treating upon this subject, Judge Stayton says: "The liability of the master to the servant for injuries resulting from the use of defective implements arises from the fact that it is the duty of the master to furnish implements not defective, and a servant, unless the defect be patent, may assume that the master in this respect has performed his duty; but, when he has knowledge that the master has not done so, if he

continues in the employment in which such defective implements are used, he must ordinarily be held to assume the risks incident to the service as it is attempted to be carried on, and not to assume only the risks incident to such service when carried on with implements not defective of their kind and suitable to the work undertaken. It is frequently said that the servant must establish three propositions to entitle him to recover from the master for an injury received in the master's business: First, that the appliance is defective; second, that the master had notice thereof, or ought to have had; and, third, that the servant did not know of the defect and had not equal means of knowing with the master. *Wood on Master & Servant*, 414." See, also, *M., K. & T. Ry. Co. v. Hannig*, 91 Tex. 351, 43 S. W. 508; *I. & G. N. R. R. Co. v. McCarthy*, 64 Tex. 632; *Railway Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; *Green v. Cross*, 79 Tex. 180, 15 S. W. 220; 20 *Amer. & Eng. Ency. Law* (2d Ed.) p. 112, note, and authorities collated thereunder. It will be seen in this case that no assignment of negligence was based upon the insufficiency or inadequacy of the turntable to be used as such, but the negligence, in fact, complained of was an alleged defective construction and condition of the table. The evidence in this respect, we think, fails to show that the table was defectively constructed, as alleged by appellant, but that the cause of the sudden stopping of the table was due to the fact that larger engines were being used upon it than it was originally designed to accommodate. It is a familiar and elementary principle of law that a plaintiff must plead the facts upon which he relies for a recovery, and is only entitled to judgment upon the case as made in his pleadings, and that a cause of action not pleaded will not support a judgment in his favor. Having failed in this case to plead that the table was insufficient or inadequate for the accommodation of the larger engines, such as were being used at the time of the alleged injury, and having failed to allege that the use by appellee of the table in question for the turning of such large engines was negligence on the part of appellee, we are of opinion that appellant can predicate no right of recovery upon such evidence when offered. We say this without intending to intimate that our judgment would have been different, under the facts of this case, even if the pleadings had justified the admission of such evidence.

There are other assignments of error complaining of the charge of the court, as well as the refusal to give special charges requested by appellant, all of which we overrule without discussing in detail, because we believe, under the facts in evidence, that no other verdict or judgment except the one rendered could have been rendered by the jury or allowed to stand by the court; and, where such is the case, it is ordinarily immaterial

whether or not the court may have committed error in charging the jury or in failing to give special charges requested, because such error, if any, could not affect the result and would be regarded as harmless. *Gaston v. Dashiell*, 55 Tex. 519; *Lee v. Welborne*, 71 Tex. 502, 9 S. W. 471; *Hussey v. Moore*, 70 Tex. 45, 7 S. W. 606; *Galveston v. Morton*, 58 Tex. 409.

Finding no such error in the proceedings of the trial court as requires a reversal of its judgment, the same is in all things affirmed. Affirmed.

### JOLLEY v. OLIVER.

(Court of Civil Appeals of Texas. Jan. 15, 1908.)

#### 1. PARTIES—NEW PARTIES—JOINDER—AMENDMENT.

Under *Sayles' Ann. Civ. St.* 1897, art. 1188, authorizing amendment of pleadings by leave of court, plaintiff was entitled to bring in a new defendant by amended original petition at any time while the cause was pending between plaintiff and the original defendants.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 37, Parties, §§ 76-87.]

#### 2. SAME—DISCLAIMER.

It was no objection to such amendment that the original defendants had filed a disclaimer, which had been called to the court's attention, the case not having been disposed of, and no judgment having been rendered on the disclaimer.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 37, Parties, §§ 76-87.]

#### 3. PLEADING—DISCLAIMER—WITHDRAWAL.

Defendants having disclaimed, and their disclaimer having been brought to the attention of the court, but no judgment having been rendered on the disclaimer, they were entitled to amend or withdraw it.

#### 4. PARTIES—BRINGING IN NEW PARTIES—RIGHT TO OBJECT.

Where original defendants had filed a disclaimer, they could not object that plaintiff's second amended petition bringing in a new party defendant on the eve of the trial, was a surprise to them, and therefore not allowable, as provided by *Sayles' Ann. Civ. St.* 1897, art. 1189.

Appeal from Schleicher County Court; J. W. Timmins, Judge.

Action by W. C. Jolley against E. Oliver and another. From a judgment for defendant E. Oliver, plaintiff appeals. Reversed and remanded.

Brightman & Upton, for appellant.

JAMES, C. J. W. C. Jolley, on March 8, 1907, sued F. Oliver and E. Oliver in trespass to try title for a tract of land. On April 6th he filed the following pleading, indorsed "Plaintiff's Second Supplemental Petition": "W. C. Jolley v. E. Oliver et al., No. 139. In the District Court of Schleicher County, Texas. Now comes the plaintiff, W. C. Jolley, in the above-entitled and numbered cause, and files this his second supplemental petition for the purpose of making new parties to this suit, and says that A. Oliver is also a proper

party to this suit; that he resides in Schleicher county, Texas. Wherefore, plaintiff prays that citation issue to the said A. Oliver as required by law, and that on final hearing of this cause, he have judgment for the title and possession of the land described in plaintiff's original petition, and for general relief. L. H. Brightman, Attorney for plaintiff." On April 30, 1907, F. Oliver and E. Oliver filed a disclaimer. Also on April 30th A. Oliver answered, excepting specially to the above supplemental petition, because (1) said pleading was not sufficient to institute a suit against him, because he could not be made a party by a supplemental petition; (2) because said pleading does not contain any of the requisites of a petition in trespass to try title, does not show whether it is an attempt to make him a party plaintiff or party defendant, and because it asks no judgment against said A. Oliver, and asked that the suit be dismissed as against him. This answer then proceeded to plead not guilty, etc. On same day the court gave judgment against the original defendants upon their disclaimer, and by another order sustained all of A. Oliver's demurrers to said supplemental petition, to which ruling plaintiff excepted, and also asked leave to file a second amended original petition, which was granted. On same day plaintiff filed a second amended original petition in the form of a petition in trespass to try title against all three defendants, and as to A. Oliver, prayed that he be cited to answer at the next term. And thereupon A. Oliver moves the court to strike this out, and to have the cause dismissed as to him for the reason "that prior to the filing of the same the defendants E. Oliver and F. Oliver had disclaimed any title to the land sued for, and filed said disclaimer in the court, and upon this case being called for trial on this morning the court's attention was called to said disclaimer, and that said second amended answer (petition) was not filed until in the afternoon, after said disclaimer had been called to the attention of the court; that by reason of said disclaimer there was no suit against any defendant except this defendant, A. Oliver; that he was sought to be made a party to a supplemental petition and not by amendment; that said supplemental petition was not sufficient to make the defendant a party to this suit for the reasons set forth in defendant A. Oliver's demurrers as contained in his original answer, to which reference is made for defendants' exceptions to the same; that the court announced from the bench prior to the filing of said second amended original answer (petition) that he sustained said exceptions to said second supplemental petition, and to permit plaintiff to file said second amended original petition at this time would be in effect permitting the plaintiff to file an original suit by an amended petition to a supplemental petition." On same day the court sustained the motion in all things, and struck the second amended

original petition from the record, and dismissed the cause as to A. Oliver.

Plaintiff had the right by amended original petition to bring in a new defendant. Sayles' Ann. Civ. St. 1897, art. 1188. This he could do at any time while the cause was pending between plaintiff and the original defendants. When the second amended original petition was filed, it would appear from the record before us that the original defendants had filed a disclaimer, and that such disclaimer had been "called to the attention of the court"; but evidently the case was not disposed of, and the court had rendered no judgment on the disclaimer. The case was open because the court had given plaintiff leave to amend. At the time this amended petition was filed the original defendants still had the right to amend and withdraw their disclaimer. The second amended original petition did not profess to be an amendment of the "supplemental" petition, but an amendment of the petition itself. It asked for citation to the next term of A. Oliver, and in fact A. Oliver appeared and answered. It may be that the original defendants would have had the right to object to the filing of the second amended petition upon the ground that, coming as it did on the eve of a trial, it operated as a surprise to them. Sayles' Ann. Civ. St. 1897, art. 1189. But as they had on file a disclaimer, they had no interest that would be prejudiced by the making of the new party.

We think the pleading should not have been stricken out.

Reversed and remanded.

#### WILSON v. ELLIS.

(Court of Civil Appeals of Texas. Jan. 8, 1908.)

#### 1. BROKERS — REAL ESTATE — COMMISSION — RIGHT TO.

Where a real estate broker's right to a commission depended upon a sale, he was not entitled to it upon the execution of a contract giving a prospective purchaser secured by the broker an option to purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 70-72.]

#### 2. CONTRACTS — MODIFICATION — CONSIDERATION.

Where a real estate broker's right to a commission depended upon a sale, the owner's promise after the execution of a contract giving a prospective purchaser secured by the broker an option to purchase that he would pay the commission before the consummation of the sale is not enforceable, being without consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1119.]

#### 3. BROKERS — ACTION FOR COMMISSIONS — PLEADING.

Where, in an action for a real estate broker's commission to be paid for securing a purchaser, plaintiff relied upon an agreement for a sale made by the owner with a prospective purchaser secured by the broker, it was not necessary for the owner to plead that the

contract was not consummated by a sale, his general denial putting in issue the fact of a sale.

Appeal from District Court, Frio County; Hon. J. F. Mullaly, Judge.

Action by George I. Wilson against W. W. Ellis for a real estate broker's commission. From a judgment for defendant, plaintiff appeals. **Affirmed.**

R. W. Hudson, for appellant. John T. Bivens and A. C. Bullitt, for appellee.

JAMES, C. J. Plaintiff, George I. Wilson, was the agent of W. W. Ellis to sell certain land. He found one J. B. Ewell, who agreed to buy the land at the price fixed by Ellis, and he drew up, and they signed, a contract, which was as follows: "Know all men by these presents, this December 23, 1906, that we W. W. Ellis of the first part and J. B. Ewell of the second part, does agree to the following trade to wit: W. W. Ellis of the first part does agree to sell and convey to J. B. Ewell of Knox county, Tex., all of his farm containing seven hundred and twelve (712) acres, for and in consideration of \$4,272, four thousand two hundred and seventy-two dollars, paid and to be paid as follows: \$200 cash to operate as a forfeiture in case of failure to comply with the terms of this trade by said J. B. Ewell; in the event of compliance with the terms of the trade, the two hundred dollars is to be a credit on cash payment of two thousand which is to be paid by J. B. Ewell within thirty days or by January 23, 1906, and assumption of payment to the state for a tract of school land 555 acres or \$555 and two promissory notes, to be paid as follows, one for \$717, seven hundred and seventeen, to bear interest at rate of 7 per cent. per annum from January 1, 1906, and payable January 1, 1911, or before, and \$1,000, one thousand dollars, to bear 7 per cent. interest from January 1, 1906, payable January 1, 1916, or before, W. W. Ellis to furnish abstract of this land and J. B. Ewell is to pay for land when examined and passed upon favorably by some one selected by J. B. Ewell, and W. W. Ellis to give possession on compliance with the terms of this trade by J. B. Ewell and in case of failure to comply with the terms of this trade by W. W. Ellis, he is to forfeit to J. B. Ewell, \$200 (two hundred dollars)." Plaintiff testified that after said contract was signed Ellis asked him what his commission was, and plaintiff told him that he charged him 5 per cent. of the sum the property sold for, which amounted to \$213.60, the sum sued for. That defendant made no objection, and said he would leave the sum due plaintiff with whoever plaintiff left the contract with in the town of Pearsall, but that he preferred that he leave it with Judge Pranglin. The next day they came to Pearsall, and plaintiff left the contract with him. Plaintiff told Prang-

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lin that Mr. Ellis was to leave his commission with him, and he promised to send it to plaintiff. That it had never been paid, etc. Plaintiff testified that Ellis had placed the property in his hands for sale. Ewell failed to buy the property. Upon these facts the trial judge instructed the jury to return a verdict for the defendant.

The instruction was correct. Plaintiff effected no sale. What he did entitled him to the commission in the event the contract resulted in a sale. Defendant was clearly not obligated to pay the commission when the contract was entered into, and if what plaintiff testified to about defendant agreeing to leave the same with Pranglin should be taken to mean that he promised to pay it then and there, there was no consideration for such a promise. Appellant's first assignment of error is overruled, as plaintiff's right to compensation depended upon a sale, not the execution of a contract, which in this case was a mere option, as it gave the purchaser the right to refuse to buy. It was not necessary for defendant to plead that the contract was not consummated by purchaser. The general denial put in issue the fact of a sale. We may state in addition that we think it was necessary for plaintiff to show, in addition to the making of the contract, that it had resulted in sale. We overrule the second assignment, for the reason that the contract did not obligate the purchaser to buy the property. We overrule also the third assignment, as we can see no consideration to support a promise by defendant to pay the commission without reference to whether or not the contract matured into a sale.

The judgment is affirmed.

#### BURKETT & BARNES v. MILLER.

(Court of Civil Appeals of Texas. Jan. 8, 1908.)

##### 1. GUARANTY—PARTIES.

Where, in an action on a promise of defendants to pay for supplies to be advanced to a third person, the evidence showed that defendants had a contract with the third person to supply them with materials, and that it was with reference to such contract that defendants agreed to pay for supplies furnished by plaintiff, he was entitled to recover, though one of the defendants testified that the contract was with the third person in connection with a firm, and though the supplies were advanced on orders signed by the firm with the consent of the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 30-32.]

##### 2. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

Where the evidence was conflicting as to whether defendant was indebted to plaintiff, and the court charged to find for plaintiff, if they found from a preponderance of the evidence the fact as claimed by him, a charge to find for defendant if they found the contrary from a preponderance of the evidence was not erroneous as requiring defendant to prove by the preponderance of the evidence that he did owe the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 549, 550.]

Appeal from District Court, Orange County; W. B. Powell, Judge.

Action by L. Miller against A. M. H. Stark and others. From a judgment for plaintiff, defendants Burkett and Barnes appeal. Affirmed.

Adams & Huggins, for appellants.

JAMES, C. J. This action was by Miller to recover of A. M. H. Stark and Burkett & Barnes an account for items furnished Stark, which he alleged Burkett & Barnes specially agreed to pay for prior to the furnishing of the items, and as a special inducement and consideration for supplying them. There was a verdict for plaintiff against all defendants for the amount of the account. Burkett & Barnes appeal.

Under assignments of error 1 to 5 appellants make these propositions: "(1) An agreement to become liable for the account of another person is confined to the liability for the account of such person alone, and does not comprehend liability for the accounts of copartnership firms of which such person may be a member. (2) A suit brought upon the petition of A. against B. & C. upon the account of B. with A., alleging that C. has undertaken to become liable for same, is at variance with and not supported by proof of items composing said account incurred by copartnership firms of B. & D., B. & E., and B. & F." If these propositions, as applied to the evidence in this record, show error, the error was very pronounced, because the court charged the jury as follows: "It is immaterial who got the goods and articles charged on the account from L. Miller, provided they were obtained by the consent of the said A. M. H. Stark and under the agreement made, if any, between the said Burkett & Barnes and Miller to let the said Stark have the same." Whatever merit the propositions would have in a proper case, we think the law is with the court's charge on the facts of this case. Burkett & Barnes had a contract with Stark to supply them with ties. This was undisputed, and it was with reference to this contract with Stark that they agreed with Miller to be liable for supplies furnished by Miller. The testimony of Barnes himself shows that the contract that Burkett & Barnes had for the ties was not with Stark alone. He testified he had no contract with Stark individually, never dealt with him individually, but only with him in connection with a firm. This being so, supplies furnished by Miller in pursuance of such contract, through orders given under the direction or consent of Stark, would be within Burkett and Miller's agreement, although some or all of the orders were signed in the name of a firm of which Stark was a member. There was no variance between the allegations and proof. The judgment in this case was affirmed some weeks ago, because of the state of appellants' briefs; but

appellants have shown in their motion for rehearing that we labored under a mistake in so doing, and the above opinion is to take the place of the one now on file, which is withdrawn.

There is a sixth assignment of error, which we also overrule. The issue whether or not Burkett & Barnes promised to pay for the supplies, etc., advanced by Miller to Stark before the account was opened, was supported either way by conflicting testimony. The court charged the jury by the third paragraph to find for the plaintiff against them, if they found from the preponderance of the evidence that they had so agreed, and in the fourth paragraph to find for Burkett & Barnes, if they found from a preponderance of the evidence that they had not so agreed. The assignment contends that the fourth paragraph required Burkett & Barnes to prove by a preponderance of evidence that they did not owe the debt, when the burden of proof was on plaintiff to prove that they owed it. A charge on a contested issue of fact is properly determined either way according to the preponderance of the testimony, and this is all the court told the jury.

Affirmed.

#### EPPS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### CRIMINAL LAW—APPEAL—RECORD.

On appeal in a criminal case the question whether the verdict is contrary to the law and the evidence cannot be reviewed, in the absence of a statement of facts or bill of exceptions.

Appeal from Tarrant County Court; John L. Terrell, Judge.

W. C. Epps was convicted of a criminal offense, and he appeals. Affirmed.

F. J. McCoord, Asst. Atty. Gen., for the State.

RAMSEY, J. In this case it is complained that the verdict of the jury is contrary to the law and to the evidence. There is no other matter complained of in the motion for a new trial. The record as submitted contains no statement of facts or bill of exceptions. The indictment is valid and regular, and distinctly charges the offense of which appellant is convicted.

This being true, as presented to us, there is no error in the conviction; and the sentence of the court below is affirmed.

#### ADEN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### CRIMINAL LAW—APPEAL—RECORD — MATTERS TO BE SHOWN.

Where the record contains no order authorizing the filing of a bill of exceptions and statement of facts after adjournment of the court, and they were so filed, they cannot be considered.

Appeal from Tarrant County Court; John L. Terrell, Judge.

Jim Aden was convicted of violating the Sunday law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the Sunday law, the punishment assessed being a fine of \$100 and 60 days' confinement in the county jail.

Court adjourned on the 31st of August. The statement of facts and bill of exceptions were filed on the 16th of September. The record does not contain an order authorizing the filing of said bill of exceptions and statement of facts after adjournment of the court. They, therefore, cannot be considered. In the absence of a statement of facts and bill of exceptions, the matters set up in motion for a new trial cannot be revised.

The judgment is affirmed.

#### BLACKMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### CRIMINAL LAW—APPEAL—RECOGNIZANCE.

Where the judgment assessed punishment at a certain sum as a fine and confinement for a certain period and the recognizance on appeal recited only the imprisonment as the punishment, the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2711.]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Jim Blackman was convicted of a criminal offense, and he appeals. Appeal dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Motion of the Assistant Attorney General is made to dismiss the appeal because the recognizance is not sufficient. The judgment assessed the punishment at \$50 as a fine and 60 days' confinement in the county jail. The recognizance recites the punishment only as being 60 days' imprisonment. This is not sufficient. The motion is well taken.

The appeal is dismissed.

#### GADDIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

Evidence on a trial for the violation of the local option law held not to support a conviction.

Appeal from Wood County Court; J. O. Rouse, Judge.

W. M. Gaddis was convicted of a violation of the local option law, and he appeals. Reversed and remanded.

Bozeman & Campbell and Mounts & Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The information charges that appellant sold intoxicating liquor to B. F. Stephens in violation of the local option law.

Stephens was placed on the stand and testified that he bought a half pint of whisky from R. T. Irvington on March 12, 1907, about 9 or 10 o'clock in the morning, and paid him 25 cents for it, and carried the bottle of whisky to Mrs. Smith's hotel and put it in his grip. This bottle was handed to Mr. Cain, justice of the peace at Alba, Tex., on one evening in March. This bottle was identified by reason of some marks or hieroglyphics placed on it for the purpose of identifying it. This witness further testified: "I have never bought any intoxicating liquor from the defendant, W. M. Gaddis, and W. M. Gaddis was not present when I bought the whisky from R. T. Irvington. I never saw him at Irvington's place of business at any time."

A. S. Cain testified that he knew the witness Stephens; knew the defendant and R. T. Irvington; that Stephens brought a bottle of whisky to his house in his grip; that it was a half pint bottle; and witness identified a bottle as the one upon which he placed a label on which he had written. Cain testified that he did not know the character of business run by R. T. Irvington, etc.

R. T. Irvington testified for the state that during the month of March he (witness) was running a business in the J. D. Hill house at Alba; that up to about the 15th of the month of March appellant owned the business in the house where he (Irvington) was working; that at the time Gaddis bought these fixtures there were a few cigars, fruit, and some soda water in the house, besides the fixtures; that he (Irvington) was to take charge of it, for which he was to receive \$35, his board and barber bill. He further states: "There was no agreement with Gaddis, more than I was to get same as with Holmes & Lloyd. He told me to stay in the house and work as I had been doing. I was working for C. O. (Kit) Holmes when he owned the business and when he sold it. He sold it to Allen Lloyd, and I worked for Mr. Lloyd while he owned the business. Allen Lloyd sold the fixtures and business to W. M. Gaddis. W. M. Gaddis gave me a note in payment for the fixtures, etc., for the sum of \$125, dated February 18, 1907. I indorsed the note to J. D. Hill. (Witness identified the note that he indorsed to Hill.) I had whisky shipped to me after W. M. Gaddis bought the stock, and I sold some whisky. I do not know that W. M. Gaddis knew that I was buying whisky. I never told him that I was; but he knew I was running the business for him. I got nothing but my wages. \* \* \* When W. M. Gaddis bought the fix-

tures and stock that I was running, he told me that I could stay in there and run the business, and that he was going to sell it right away. He told me not to sell any intoxicating liquor to anybody. There was no intoxicating liquor in stock when W. M. Gaddis, the defendant, bought same. There were some revenue licenses posted up in the house I am running that I had taken out myself when C. C. (Kit) Holmes and I were running the business. They were in the name of R. T. Irvington and C. C. Holmes. There was no revenue license in this house in the name of W. M. Gaddis, and there was no other license except in my name and Holmes'. Mr. Gaddis had formerly been in the cold drink business in Alba at another house up the street; but I understood that he had sold out about the middle of January, 1907. He is now in the wholesale grocery business in the town of Alba, with Wylie & Co. I made the orders for the whisky without asking Mr. Gaddis, and paid for the same, and did it all in my name. I don't suppose he knew anything about it. He came around about the 14th day of March, 1907, and told me he had sold out. When I sold any whisky, W. M. Gaddis was not present, and I don't suppose knew anything about it. I sold it of my own accord, and without his suggestion. I did not sell any whisky to B. F. Stephens on March 12, 1907, or at any other time. I never did sell him one-half pint of whisky."

Holmes testified, for the state, that appellant had been over to his warehouse some time during the month of March and told the witness that the boys, referring to Richard Irvington, said they "have run out of stuff (meaning whisky) and told me to let the boys (Irvington) have some stuff (meaning whisky) and he would see it paid for"; that he had presented a bill to appellant, and he had refused to pay for it. This conversation occurred after appellant was arrested in this case, and the evidence shows that appellant was arrested on the 16th day of March; and this sale should have occurred on the 12th. Another witness testified that he had seen appellant in the particular house a few times, but not often. This is the substance of the evidence.

There are quite a number of bills of exception, several of which present clearly reversible error, and which we deem it unnecessary to discuss, because we are of opinion that this evidence does not make out a case. The state placed Irvington on the stand and vouches for his testimony, and his evidence excludes the idea of a participancy in the sale by appellant, and excludes the idea that Irvington had any authority from appellant to sell whisky, but, on the contrary, that he had his express orders not to do so. Stephens testifies that he bought the whisky

from Irvington, and appellant was not present. This witness also testifies, in regard to his connection with this and several other cases, that he had been sent over from Winnboro to Alba by one of the state's counsel for the purpose of buying whisky and getting up cases, and was told if he would do so that his pistol case might be lighter on him. It seems that this witness had a pistol case pending against him in the county court, and that it is yet pending against him. This witness further testified that Mr. Carlock gave him \$10 with which to defray his expenses in going to Alba, and while there trying to buy whisky from parties. He further testified that he was convicted at the last term of the county court and fined \$100 in his pistol case; that the costs in the case was about \$200; and that he secured a new trial in his case. Then he says: "I went to Alba to get some cases, if I could, against the boys, and believed and yet believe it will be dismissed. That is why I am swearing in this case; to get my case dismissed. Mr. Cain let me have some money while in Alba to pay some of my expenses."

To say the least of it, this testimony comes in very questionable shape, and yet it does not make out a case against appellant. In fact, it excludes the idea that appellant sold witness any whisky. The question suggested by the bills of exception are not discussed, because of the fact that we believe the state has failed to make a case.

The judgment is reversed, and the cause remanded.

### McGULLUS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

CRIMINAL LAW — APPEAL — BILL OF EXCEPTIONS OR STATEMENT OF FACTS—NECESSITY FOR.

On a criminal appeal the question whether the verdict is contrary to the law and against the weight of the evidence cannot be reviewed, where there is neither statement of facts nor bill of exceptions.

Appeal from Tarrant County Court; John L. Terrell, Judge.

Sam McGullus was convicted of a public offense, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record contains neither statement of facts nor bill of exceptions. The only question presented in the motion for a new trial was that the verdict is contrary to the law and against the weight and preponderance of the evidence. In the absence of the testimony this question cannot be revised.

The judgment is affirmed.

**MIMS v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**1. CRIMINAL LAW—APPEAL—RECORD.**

Alleged error in refusing a continuance cannot be reviewed on appeal, where no application to continue appears in the record and the transcript contains no bill of exceptions to the action of the court in overruling the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2926.]

**2. SAME.**

In the absence of the facts, the question whether an instruction should have been given on aggravated assault on a prosecution for assault with intent to murder cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2940-2942.]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Elim Mims was convicted of assault with intention to murder, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault to murder, and his punishment assessed at confinement in the penitentiary for a term of five years. The record is before us without a bill of exceptions or statement of facts.

The indictment is attacked because it did not have the correct name of the defendant, and did not charge malice and intent to murder on the part of "Elon Mims," but did charge that there was malice and intent to murder on the part of "Elim." The indictment charges the offense throughout as against "Elim Mims." We do not find the name "Elon" contained in it.

It is contended the court erred in not granting a continuance. If an application to continue was made, it is not in the record; nor does the transcript contain a bill of exceptions to the action of the court overruling it.

We are unable to revise the question as to whether the court should or should not have charged on aggravated assault, as the facts are not before us.

As the record is presented, the judgment will be affirmed; and it is so ordered.

**FARRELL v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**CRIMINAL LAW—APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY FOR.**

Whether a verdict is contrary to the evidence and the charge cannot be reviewed, in the absence of a statement of facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2933.]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Bert Farrell was convicted of theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

There is neither statement of facts nor bill of exceptions in the record. The issues raised by motion for a new trial are to the effect that the verdict of the jury is contrary to the evidence and to the charge of the court. In the absence of a statement of facts questions of this character cannot be reviewed, and the judgment is therefore affirmed. Taylor v. State (Tex. Cr. App.) 57 S. W. 821, and Moore v. State (Tex. Cr. App.) 50 S. W. 355.

**BLUE v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 18, 1907. Rehearing Denied Jan. 22, 1908.)

**1. CRIMINAL LAW—CONTINUANCE—MOTION FOR—SUFFICIENCY.**

A motion for a continuance because of the absence of a witness by whom defendant expected to prove that he acted in self-defense, that he was attacked by prosecuting witness, who made a demonstration as if to draw a pistol, that such demonstration was accompanied with words and acts indicating an immediate intention by prosecuting witness to inflict on him death or serious bodily injury, and that defendant was at the time doing nothing and disturbing nobody, was too general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1349-1355.]

**2. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Where a witness, having testified to the good reputation of defendant as being a quiet, law-abiding citizen, was asked on cross-examination if he had not heard of a difficulty between defendant and another wherein defendant drew a gun, to which he answered that he had heard of it for the first time at the trial, error, if any, in his cross-examination, in that it was hearsay, was not reversible.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

George Blue was convicted of a crime, and he appeals. Affirmed.

V. B. Hudson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant moved to continue the case on account of the absence of a witness named Green, by whom he expected to prove that he "acted in his own self-defense; that this defendant was attacked by the said Sol Ellis, who made demonstration as if to draw a pistol from his pocket; that said demonstration was accompanied with words, acts, and the manner of the said prosecuting witness, Sol Ellis, indicating an immediate intention upon the part of the said Sol Ellis to inflict upon the defendant death or serious bodily injury." And he recites, further, that he (appellant) was at the time doing nothing and disturbing nobody. The state's theory was that appellant made an unnecessary assault upon Ellis; that Ellis



fied, and appellant shot him as he ran away; and the evidence is conclusive that he was shot from behind. Quite a number of witnesses testified to the immediate facts, among them, several in behalf of the defendant. The allegations in the motion as to the facts expected to be proved are very general indeed, and hardly sufficient to have authorized the court to continue. Viewing this entire record, we are of opinion that the testimony of this absent witness, even if he was expected to swear, would probably not be regarded as true. Be this as it may, we are of opinion that the motion is too general.

Henry Mitchell, in behalf of appellant, testified to the good reputation of appellant as being a quiet, law-abiding citizen. On cross-examination he was asked if he had not heard of the defendant on one occasion having a difficulty with a white man by the name of Phillips and drawing a gun on him. Witness replied that he had heard of it for the first time at the trial of this case. Objection was urged that it was hearsay, immaterial, irrelevant, and shed no light upon the case, and tended to prejudice the right of the defendant, etc. As this was presented, we do not believe it was error, and, if so, not of sufficient importance to require a reversal of the judgment. The reputation of appellant had been presented to the jury at his instigation, and it was shown to be that of a quiet, law-abiding citizen. General reputation is in the nature of hearsay. If this witness had heard anything derogatory to appellant's character, he could be crossed about it; for he had testified to the fact that his reputation was good. He stated, however, that he never heard of the transaction until he came to this trial. As this is presented, even if error, it is not of sufficient importance to require a reversal of the judgment.

We think there is no sufficient reason shown why the judgment should be reversed. The judgment is affirmed.

HENDERSON, J., absent.

#### MCCRIMMON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907. On Rehearing, Jan. 22, 1908.)

#### 1. CRIMINAL LAW—CONTINUANCE—NECESSITY OF DILIGENCE.

The diligence required in obtaining process for the presence of witnesses is much more strict on an application for a second continuance than on the application for the first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1314.]

#### 2. SAME.

Where, on an application for a second continuance, it appeared that the moving party had asked for no process to compel the attendance of the witnesses in question and made no effort to secure such attendance, the motion was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1314, 1338.]

#### On Rehearing.

#### 3. SAME — APPEAL — BILL OF EXCEPTIONS — QUALIFICATIONS.

Qualifications of the trial judge to a bill of exceptions will control statements in the main portion of the bill, in the absence of a contest by appellant in the form of a bill by bystanders.

Appeal from Cherokee County Court; R. L. Robinson, Judge.

Jesse McCrimmon was convicted of unlawfully carrying a pistol, and he appeals. Affirmed, and motion for rehearing overruled.

Bennett B. Perkins, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for unlawfully carrying a pistol. Appellant applied for a continuance on account of the absence of three witnesses, which was refused by the court. This was the second application for a continuance. The case was set for trial on October 14th for October 28th. On said last date the case was again set over to the afternoon of the 29th, and when that time was reached it was reset for October 30th. The witnesses Gregory, Crews, and Clemmie Muse were present on neither the 28th nor 29th, which was known to appellant and his counsel. They asked for no process to compel their attendance and made no effort to secure such attendance. The parties lived within from 6 to 14 miles of the courthouse. No application for attachment for any of the witnesses was asked at any time. At the time of the trial it was stated Muse, a woman, was on account of recent birth of a child unable to attend court.

The testimony of McGee, introduced during the trial, was that he was near appellant, and had better opportunity to see appellant at the time he should have had the pistol than either Gregory or Crews, and their testimony was simply cumulative and circumstantial. The witness Muse was not present at the time appellant should have had the pistol. It was expected to be proved by the absent witness Muse that she was living in the same house with appellant, and that he had but one pistol, and she saw it in his room on the morning it was claimed by the state that he had the pistol with him. By Gregory and Crews it was expected to be shown that they were with appellant several hours before Bothwell, the state's witness, claims to have seen defendant with a pistol, and that he was without a coat and had on a small vest, unbuttoned; that he had been helping them to rope and drive cattle for several hours before the time when the state's witness claims to have seen the pistol on defendant. The state's evidence is positive that appellant had the pistol, so far as the evidence of witness Bothwell is concerned. McGee was close by, but could not tell whether appellant had a pistol or not, for he was so standing that a horse was between them; but McGee testified, when the

difficulty came up between Bothwell and appellant, Bothwell made a remark to the effect that appellant had a pistol, and Bothwell, on account of said pistol, desisted from further difficulty with him. This, as before stated, is the second application, and the testimony sought of Gregory and Crews, as well as Muse, is cumulative. The diligence for obtaining process for the presence of the witnesses is much more strict than that under an application for the first continuance. The diligence, as we understand this record, is totally wanting. We are therefore of opinion that the court did not err in refusing to continue the case.

The remaining two grounds of the motion for a new trial attack the sufficiency of the evidence to support the conviction. Bothwell's testimony makes the case. He testifies to seeing the pistol. McGee did not see the pistol; but he corroborates Bothwell in regard to the statements made by Bothwell in regard to appellant having a pistol at the time, which, so far as the state's evidence was concerned, was not denied. Appellant swore to the contrary. This court is not authorized to reverse a judgment for want of sufficient evidence, if the facts show a case. That is a matter for the jury.

As the record is presented, we think the judgment ought to be affirmed; and it is accordingly so ordered.

HENDERSON, J., absent.

#### On Motion for Rehearing.

DAVIDSON, P. J. At the Tyler term the judgment in this case was affirmed. Motion for rehearing has been filed, and a reconsideration of the case requested.

It seems that the errors claimed to have been made by the court in affirming the case largely grew out of the fact that the application for continuance was treated as a second, and not a first, application, and contention is made that the opinion is incorrect in so treating the case, and that as a fact it was a first application. We have reviewed that question, and are still of the opinion that it is a second application, as is made to appear by the transcript, bills of exceptions, and qualifications of the judge. It is true appellant states in his application that it is a first application for a continuance. Finishing the application as to the substantial matters, it is thus closed before being sworn to by appellant: "The premises considered, this defendant prays the court and now moves the court to grant this, his first application for continuance, which application he makes with all the requirements which are embraced in a second application, and which he asks the court to consider as a second application, should it hold that he is

chargeable with any continuance heretofore, and the defendant prays and moves the court to continue this cause to the next term of this honorable court." This is an excerpt from the closing part of defendant's application. The court, signing this, qualifies it as follows: "This was the second application for continuance of this case by the defendant; the court not being a party to any contract, understanding, or agreement defendant's counsel may have had with the county attorney outside of court or elsewhere. This case was set for trial on October 14th for October 28th. On said last date same was set over to afternoon of the 29th. At this date case was reset for the 30th. Witnesses Gregory and Crews and negro girl, Clemmie Muse, were present in court neither on Monday, 28th, nor on the 29th. Although defendant's counsel and defendant both knew of said witnesses' absence, they asked for no process to compel their attendance, and made no effort to get them, or either of them. Witnesses resided, Clemmie Muse within 6 or 7 miles of courthouse, and Gregory and Crews about 13 or 14 miles of same. No application was made for attachment for these witnesses at any time. Testimony of witness McGee shows that he was near defendant and had better opportunity to see defendant at the time he is charged with having the pistol than either of the witnesses Gregory or Crews. Their testimony would be simply cumulative and circumstantial." Signed by the county judge.

The witness Muse was not present at the time and place where the pistol should have been exhibited, and her testimony was expected to show that appellant's pistol was at home, where he and she resided at the time appellant should have had the pistol at the point designated by the state's testimony. In the absence of the statement or qualification of the trial judge, it is somewhat doubtful as to whether this would have been a first or second application; but the judge qualifies it, making it a second application. The qualification of a judge to a bill of exceptions will control, in the absence of a contest by appellant in the form of a bill by bystanders. Whenever a bill of exceptions is accepted by the party taking it as qualified by the judge, the qualifications will be considered as controlling the statement in the main portion of the bill. We therefore are still of the opinion, as this record presents this matter, the application was a second, and not the first, application. The second application is governed by entirely different rules from that with reference to the first. Viewing this in the light of the record, we are still of the opinion that the testimony is cumulative, and, as stated heretofore, rather circumstantial.

The motion for rehearing is overruled.

**ZIMMERMAN v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**CRIMINAL LAW—APPEAL—RECORD.**

Where the affidavit and information charged the offense, and the charge of the court, so far as can be ascertained in the absence of a statement of facts, was not subject to objection, the conviction must be affirmed.

Appeal from Tarrant County Court; John L. Terrell, Judge.

Gus Zimmerman was convicted of a criminal offense, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** In this case there is no statement of facts nor bill of exceptions. The affidavit and information charge the offense of which appellant is convicted. The charge of the court, so far as we can tell in the absence of statement of facts, is not subject to objection, and the only special charge requested by appellant was given by the court.

In this condition of the record, the judgment must of necessity be affirmed.

**HOLMES v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**CRIMINAL LAW—EVIDENCE—STATEMENT BY THIRD PERSON IN ABSENCE OF ACCUSED.**

In a prosecution for illegal sale of intoxicating liquor, testimony by a witness that he told a justice of the peace to whom he gave a bottle of whisky that he bought it from defendant, and by the justice to the same effect, such statement having been made in the absence of defendant, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 950.]

Appeal from Wood County Court; J. O. Rouse, Judge.

C. C. Holmes was convicted of crime, and appeals. Reversed and remanded.

Bozeman & Campbell and Mounts & Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** The affidavit in this case was by J. L. Shoemaker, charging that appellant sold intoxicating liquor to B. F. Stephens. Stephens testified that he had bought a half pint of whisky from appellant on the 12th of March and paid him 25 cents for it; that the purchase was made about 9 or 10 o'clock in the morning in appellant's place of business. Appellant testified that he did not sell whisky to the said Stephens, as did Bush. So there was a square issue on the question of sale vel non.

The witness Stephens was permitted to testify that he bought a half pint of whisky from appellant on the 12th of March, and that after he bought it he carried it to Cain, justice of the peace, and gave it to him, who

put some writing on it. When the witness gave Cain the bottle, he told Cain whom he bought it from, and that he bought it from appellant, informing Cain of the date of the purchase; that after the label had been put upon the bottle the witness took the bottle, carried it to Winnsboro, and gave it to Mr. Carlock. Exception was reserved. His statement to the justice of the peace as from whom he had bought the whisky was inadmissible. By Cain, over appellant's objection, it was shown that Stephens brought him a bottle of whisky and told him at the time that he had bought it from appellant on the 12th of March. This statement was inadmissible as to the matters occurring between Cain and Stephens in the absence of appellant. Cain testifies that there was nobody present but him and Stephens. This was not impeachment evidence as presented in this case.

For the reasons indicated, the judgment is reversed, and the cause remanded.

**HOLMES v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**1. JURY—COMPETENCY—PRIOR SERVICE IN SAME CAUSE.**

In a criminal prosecution, defendant, although he had exhausted his peremptory challenges, was entitled to have jurors who had sat on the jury in a similar prosecution of the same defendant excluded for cause, where he presented his objection orally at the proper time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Jury, §§ 423, 429.]

**2. WITNESSES—CORROBORATION OF UNIMPEACHED WITNESS.**

In the absence of direct effort by accused to prove that a witness had made statements contradictory to that testified to on trial, statements made out of court corroborative of the one made in court cannot be introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1084-1086.]

Appeal from Wood County Court; J. O. Rouse, Judge.

C. C. Holmes was convicted of violating the local option law, and appeals. Reversed and remanded.

Bozeman & Campbell and Mounts & Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$100 and 60 days' imprisonment in the county jail.

Bill of exceptions No. 3 shows the following: After announcing ready in this cause, while counsel for appellant were examining the jury for the week upon their voir dire, the jurors Floyd Williams, James Corbitt, J. S. Bird, and B. S. Smith testified that they had sat upon the jury in cause No. 3,083 in this court, wherein the state of Texas was plaintiff and this defendant was the defendant (supra), wherein this defendant

was charged with violating the local option law; that the jury in said cause No. 3,083 had found this defendant guilty of said charge, and that they had assessed his punishment at a fine of \$100 and 60 days' confinement in the county jail; that said cause No. 3,083 was tried to-day; that all of said jurors testified that they had formed an opinion on said cause No. 3,083; that the jurors O. A. Cain, J. L. Anderson, and S. J. Benton testified that they had heard all of the testimony and argument of counsel in cause No. 3,083, and that they had formed an opinion as to the guilt of defendant in said numbered cause, and that said opinion had been formed from having heard the testimony and argument of counsel in said cause. Whereupon the defendant presented a motion and asked that all of said jurors be excused for cause. Among other things, after setting up the above facts, appellant insists in his motion, which is embodied in the bill of exceptions, that the prosecuting witness in each case, B. S. Smith, had been employed as detective to file, and did file, these prosecutions against appellant. The court overruled the motion, and appellant, after exhausting all of his peremptory challenges, was required to take said jurors. The bill is approved with this qualification: "That none of said jurors mentioned testified that they had formed any opinion in this case, but they each testified that the opinion formed in the other cause would not in any way affect them in the trial of this cause, and that the evidence and argument of counsel heard in the other case would not affect them in this case; that they had no opinion whatever in this case, and that anything they heard or any opinion that they might have formed in cause No. 3,083 would not in any manner affect their verdict in this case." And the court further certifies that the challenge for cause was entered verbally by the defendant's counsel at the time, and overruled by the court, and that the instrument of writing purporting to be a challenge to the jurors was never called to the attention of the court until this bill of exceptions was presented.

We do not think it material that the challenge for cause was made verbally, and the reasons therefor subsequently embodied in the motion, which motion was further embodied in the bill of exceptions, the substance of which is above cited. Suffice it to say, we think the reasons, whether oral or written, required of the trial court to discharge the jury and award appellant a trial by a fair and impartial jury. The Constitution guarantees appellant such a jury when he asserts said right at the proper time. This, we understand appellant has done in this case. We cannot believe that this jury could sit and listen to the trial of a local option case against appellant, with practically the same testimony in another case, and not have an opinion previously formed, which opinion would influence their action in finding a verdict. If

they believed appellant guilty in the first instance, there is no rational basis for concluding that they would not believe him guilty in the second instance. If the witness swore appellant sold him whisky once, and they believed that fact, we know of no process of reasoning by which they could discard the fact and disbelieve the statement when the witness swore appellant sold him (witness) whisky the second time. It follows, therefore, that the court erred in not setting the jurors aside and awarding appellant another jury.

We would say, that in the trial of every case no evidence should be introduced of a hearsay character, nor should there be an effort to bolster up a witness by proving statements made out of court corroborative of the one in court, unless there has been a previous direct effort made by appellant to prove said witness had made contradictory statements to that testified on the trial.

For the error pointed out, the judgment is reversed, and the cause is remanded.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### 1. INDICTMENT — GROUNDS FOR QUASHING — COPY OF INDICTMENT—VARIANCE.

The fact that an indictment charged "Dove" Smith with committing the offense, and the copy of the indictment served on defendant, Dave Smith, showed that a person of that name was charged with the offense, was no ground for quashing the indictment.

#### 2. SAME—SERVICE OF COPY OF INDICTMENT—GROUNDS FOR QUASHING.

An objection that the indictment charged "Dove" Smith with committing the offense, and the copy of the indictment served on defendant, Dave Smith, gave his right name, was no ground for quashing the copy, where the pleader, while not making a plain "a" in the word "Dave," made a letter which might be read as "a."

#### 3. WITNESSES—RE-EXAMINATION.

Where, on a prosecution for rape, it appeared that prosecutrix's husband, who had married her after the alleged crime, had written defendant a letter demanding that he convey all his property to the writer, and prosecutrix had been cross-examined as to her participation in writing the letter, it was proper to permit the state to prove on her re-examination that she was not testifying for the land, but was telling the truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 994-1000.]

#### 4. SAME.

Where, on a prosecution for rape on defendant's daughter, he sought to show, on cross-examination of prosecutrix, that when she first told her husband, who had married her after the alleged crime, about the assault, she and her husband were laughing and joking, it was proper to permit the state to ask her on re-examination if, after she told her husband about it, she ceased to laugh and joke with him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 994-1000.]

#### 5. RAPE—EVIDENCE—ADMISSIBILITY.

On a prosecution for rape on defendant's minor daughter, it was proper to permit the state to show that prosecutrix did not make any

outcry at the time of the crime because she was afraid that defendant would whip her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 70.]

6. SAME.

It was proper to permit the state to prove what defendant said to her after the completion of the offense as to the means that she should take to prevent conception.

7. SAME.

On a prosecution for rape, it was proper to permit a witness who had married her after the alleged crime to testify that he had discovered that she was not a virgin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 65.]

8. WITNESSES—RE-EXAMINATION.

On a prosecution for rape on defendant's daughter, where a witness who had married prosecutrix after the alleged crime was cross-examined as to a letter he had written defendant, demanding that he convey land to the writer, *held*, that it was competent for the state to then prove by such witness that he wrote the letter as a means of reconciliation, and to avoid trouble and disgrace.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1000.]

9. CRIMINAL LAW—EVIDENCE—ADMISSIONS.

It was competent to prove by a witness that he approached defendant as a Mason, and asked him on his Masonic honor to deny the charge if he was not guilty, and that defendant stated that he wanted the matter investigated, since the statement was made while accused was not under arrest, and the fact that he had been approached as a Mason was no grounds for excluding the testimony.

10. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—REBUTTAL.

On a prosecution for rape on defendant's daughter, where defendant testified on his direct examination that, when one who had married his daughter after the alleged crime first approached him in regard to the alleged crime, the husband began to cry, and defendant sought to show on the cross-examination of prosecutrix that, when she first told her husband about the assault she and her husband were both laughing and joking, *held*, that there was no error in permitting the state to then prove that on one occasion when defendant came home after the time when the daughter had informed her husband as to the assault the daughter was sitting in her husband's lap, and that they were both crying.

11. CRIMINAL LAW—MISCONDUCT OF JURY.

A verdict of conviction will not be set aside because of the fact that the jury discussed a former trial or a former conviction where the conviction is supported by the evidence, unless it clearly appears that accused was prejudiced by the misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2055.]

12. SAME.

Where the only effect of a discussion of a former trial and verdict by the jury caused 2 jurors who were in favor of the death penalty to agree with the other 10 in the imposition of a life sentence, the misconduct on the part of the jury was no ground for reversal.

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Dave Smith was convicted of rape, and he appeals. Affirmed.

M. D. Carlock, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of rape of his daughter, and his punishment as-

essed by the jury at imprisonment in the penitentiary for life.

The case was before this court on former appeal, and was reversed. 100 S. W. 924. The facts are essentially the same on the present trial as on the former appeal, and no good or useful purpose could be served by a repetition of the horrible details of the crime alleged. Appellant made a motion for a change of venue on the ground of prejudice and a formidable combination adverse to him in the county where he was being tried. There were no compurgators in connection with the motion, and it was not incumbent on the court to consider same. However, the court did entertain the motion, which was contested by the state, and heard proof on the subject. The court overruled the motion, and we think correctly.

A motion was made to quash the service of a copy of the indictment which was served on appellant, or to quash the indictment itself—it is difficult to understand which—on the ground that the indictment charged that "Dove" Smith committed the offense, and the copy served on appellant showed that it was "Dave" Smith. The court certified that in his opinion the pleader, while not making a plain "a" in spelling the word "Dave," the same could be read "a" so as to make it "Dave" Smith. At first it looks very much like an "o," but in subsequent allegations it appears more like an "a," and, as the court states, could be so read without doing violence to the chirography. If this be considered as a motion to quash the indictment, we do not think it is well taken, even if it be conceded that the pleader alleged "Dove," instead of "Dave." This would merely amount to a suggestion that the name of appellant as given in the indictment was wrong, and that it should have been "Dave." If it was a motion to quash the service of a copy, we believe the court's explanation was sufficient. He stated that he read it "Dave." An inspection of the original indictment shows that it can be read "Dave," and we should be inclined so to read it, and the court below did not err in so holding.

We think, under the circumstances, it was allowable on re-examination by the state to prove by the witness Sadie Culpepper that she was not testifying for the land, but telling the truth. She had been rigidly cross-examined about her participation in writing the letter to appellant in regard to his surrendering the land, and leaving the country, and on re-examination the state sought to prove, and was permitted to prove, by her that she was not testifying for the land. This was but another way of permitting the witness to affirm the truthfulness of the statement made by her. It was also allowable to ask this witness if, after she told her husband about the way her father had done her, she ceased to laugh and joke with him. We also believe it was allowable, under the circumstances, to prove by the wit-

ness Sadie Culpepper that she did not cry out on the night her father copulated with her because she was afraid he would whip her. Considering the tender years of the prosecuting witness, her subjection to her father's will, this testimony does not seem objectionable. Nor do we believe it was error to permit the state to prove under the circumstances what her father said to her after the completion of the connection as to what she should do to prevent conception.

It was also permissible to prove by the witness B. B. Culpepper that he found, after sleeping with his wife, that she was not a virgin as a reason for his questioning her in regard to the matter. It may be questioned whether it was wholly relevant or material to prove by the witness Tedley that he had advised Culpepper, husband of prosecutrix, to take appellant's land and settle the outrage in that way, and that it would be best for the family to keep down disgrace, etc. But, as explained by the court as to how this testimony was elicited, we do not believe it was reversible error. We also believe, as explained by the court, that it was competent to ask the witness Culpepper whether he wrote the letter to get the defendant's property, or for some other motive, eliciting a reply from him: "It was done to save disgrace and exposure of his wife, and for the good of the defendant and the children, and that was the only motive." The court explains how this matter came up in the re-examination of the witness Culpepper, after he had been rigidly cross-examined in regard to said letter, demanding said land of appellant, and imputing by necessary implication a conspiracy or purpose on his part to extort a conveyance of appellant's land to prosecutrix. We therefore believe and hold that, under the circumstances, it was competent to prove by the witness Culpepper that he wrote the letter, not for the purpose of getting the old man's land as the price of his silence, but as a means of reconciliation and to avoid trouble. The court explains that in the cross-examination of said witness appellant sought by various questions to show that writing the letter was a blackmailing scheme in order to get appellant's land, and that he permitted the cross-examination of the witness under the circumstances in order to show the witness' motives.

We also hold that it was competent to prove by the witness G. M. Houston, as was done, that he approached appellant as a Mason, and asked him to tell him upon his honor as a Mason if he was guilty of the offense charged against him; that he told him if he was not guilty to tell him, and, if it was true, he did not expect him to answer, but if he was not guilty to say so; and that appellant replied, "I want it investigated." This was a statement made by appellant when he was not under arrest, and the fact that Houston approached him as a Mason should not exclude the testimony. Whatever their relation

of friendship or fraternal association might be, the rule upon which the statement should be admitted is not changed. The statement could be used by the state or defendant for whatever it was worth, either party or the jury drawing their own conclusion from it.

The state was also permitted to prove by the witness Sadie Culpepper that when her father returned from his visit to his brother Newt Smith, at Winnsboro, he came back home on Thursday evening, and that she and her husband were at home when he came. The state was then permitted to prove that at the time her father came home she was sitting in her husband's lap, and they were both crying. This testimony was most strenuously objected to, and the objection is strongly urged by appellant's counsel in their brief. In passing on the objection it should be stated that it was sought to be shown on cross-examination of the prosecuting witness by strict and vigorous cross-examination that when she first told her husband of the assault by her father that she was in the pea patch, and that she and her husband were both laughing and joking, seeking in this way and by such demeanor to discredit the statement of the prosecuting witness, in that her deportment was wholly inconsistent and at variance with the natural conduct to be expected from one who had been so cruelly outraged and abused. Again, it was sought to be shown, and the imputation against both prosecuting witness and her husband was made, that the accusation against appellant was a scheme of blackmail, and in pursuance and furtherance of an effort to compel appellant to deed certain lands to his daughter. With the defense so made, and in view of this testimony, it seems to us that it was wholly proper to show by any one who might attest the fact that after the outrage and the time when such information was imparted to her husband the conduct of the prosecuting witness and her husband was not inconsistent with what might reasonably be expected of persons so circumstanced. Besides, it was testified by appellant that, when the witness Culpepper first approached him in respect to a wrong done his then wife, Culpepper commenced crying. This testimony was given on appellant's direct examination and presumably in response to questions asked by his own counsel. We cannot, therefore, concede that the testimony objected to was inadmissible; besides, we think that, in view of the testimony on the subject adduced by appellant without objection, the matter complained of could not in any event be deemed material, even if it be conceded that it was improperly admitted.

The only other substantial question raised is as to the misconduct of the jury in discussing the former conviction of appellant. In order that this matter may fairly appear, we quote all the testimony adduced on this subject, as follows: Mr. Wm. Rose, being duly sworn and introduced by the defendant,

testified as follows: "I was a member of the jury that tried Dave Smith. The charge was given us in the case about 9 o'clock Wednesday night, and we returned a verdict in court in the case about 9 o'clock Friday morning. Q. Mr. Rose, after the jury retired to consider of their verdict in that case, was there any discussion of a former trial of the defendant, and was there anything said about him having been convicted by another jury? A. There was no discussion of a former trial, but the fact of him having been tried by another jury was mentioned in the jury room. I think it was mentioned several times, but the first I heard it mentioned I think was yesterday evening (Thursday). I think that Mr. Brock was the first man that mentioned it, and at the time I first heard it mentioned there was ten men of the jury in favor of a life sentence in the penitentiary and two for death penalty. Q. How were you divided when you first went out to consider your verdict? A. Five and 7, 5 for death and 7 for life, or from 25 or 30 years; but said that they would not hang the jury either way, and would agree to life term if it would reach a verdict. One of the seven, Mr. Harpole, was for 30 years; and one, I think Mr. Brock, for 50 years. There were Crumpley, Thompson, Donahoe, and myself for the death penalty. After we had considered the matter, until yesterday morning (Thursday) some time before noon, we then stood four for the death sentence and eight for the life sentence. The two that were for the death punishment went over to the eight, making ten to two, and we were standing that way until Thursday evening, when I first heard of this former trial. I think it was yesterday (Thursday) evening when I first heard it mentioned. Q. Who did you first hear speak of it, and what was said? A. Mr. Brock said: 'Mr. Rose, you are putting your judgment against 22 men.' I think some one else spoke of it after that, but every time it was spoken of some one would speak up, and say, 'It has nothing to do with us.' This was all that Mr. Brock said, but I understand he meant that the 12 men who tried defendant before gave him 99 years or life, and 10 on this jury were for same thing, making 22 men. The only change that was made after subject was mentioned was Mr. Pope and I changed from death penalty to life sentence. I thought Mr. Pope was for the death penalty from the start, but I think he talked on both sides. He (Pope) stated that there was some doubt in his mind as to his guilt, but said that, if there was no question about his guilt, he deserved the death penalty, and said that a majority of the jury being satisfied of his guilt convinced him that he was guilty, and, if so, he deserved death penalty. The mention of the verdict of the other jury was not for the purpose of trying to raise the punishment. It had no effect on me what was said. The subject was never mentioned, but some one

suppressed it by saying that we have nothing to do with that."

Mr. Harpole, a witness, testified: "I was a member of the jury that tried Dave Smith, defendant. We rendered a verdict this morning, Friday. When we first retired to consider our verdict, I was for 25 years sentence. I think Mr. Brock was for 50 years at first. Another juror, Mr. Buffington, was for 30 years. I am not right sure, but think I heard it mentioned in the jury room that the other jury gave him 99 years. I agreed to a life term sentence Thursday morning. I never heard the mention of the other verdict until Thursday evening, and at that time all had agreed to a life sentence, except those who were for the death penalty. It was just mentioned then, and then some one said that it has got nothing to do with us. It was not argued at all, was just mentioned. We went out late Wednesday afternoon, and I agreed to a life term Wednesday night or Thursday morning before I heard anything about another trial."

Mr. Buffington testified: "I was a member of the jury that tried defendant. We went out to consider our verdict Wednesday evening about 9 o'clock. When we first went out, I was for 30 years' sentence. I changed next morning, Thursday morning, to a life sentence. We then stood eight for life and four for death penalty. In the afternoon yesterday (Thursday) we stood ten for life and two for death penalty. I think I heard a little something said about another verdict Thursday evening; don't remember that it was mentioned more than once; heard some one say that we have nothing to do with that. There was one juror, Mr. Pope, that I was under the impression was for the death penalty. He said that he believed the man guilty, and, if he was, he deserved death, but had some little doubt, and would agree to life. The way it came up about the other verdict some one was discussing whether 99 years and life sentence was the same, and I asked Mr. Rose if he ever heard of a man being hung for a crime like this, and he said 'No,' and finally some one just remarked that our decision was something like the other sentence; another said 'No,' that was for 99 years, and it was asked if that was not the same as life sentence, and we then got the charge and read it. At this time all had agreed to life sentence but Mr. Rose and Pope, and they were for death. I think some one said that the evidence showed that he had something to do with the girl more than once, but it was not used as a reason for giving him a larger penalty. This was said in discussing argument of lawyers, one of whom said the circumstances showed it was not the first time."

Mr. Pope testified: "I was a member of the jury that tried defendant. I was for the death penalty until this morning. When it was brought up about other verdict, I stood for death at that time, and had been for

death penalty all the time. I can say positively that those who were for the death penalty at the time the other verdict was mentioned were for life sentence. My best recollection is that while we were divided between death and life sentence, and in discussion of life sentence, some juror said the other jury only gave him 99 years, and a man rose up and said that we have nothing to do with that. I was the last man to come over from the death penalty to the life sentence. I remember that some one said that it dropped out in the evidence that he had something to do with his other girl. I think I heard something said in the argument about that."

Mr. Brock testified: "I was a member of the jury that tried defendant. At first I was for life sentence, and never changed. I think I mentioned it first about the other jury. All then were for life sentence except two, Mr. Rose and Mr. Pope. They were for death, and I said to Mr. Rose, who was for death penalty, 'You certainly will not hold out against 22 men.' This was all I said or heard said. I had referred to the 10 men on this jury and the 12 men on the other jury. The only change that was made after this was a change by those from the death penalty to a life sentence. I sorter think it was mentioned at another time; think it was in the morning, won't be positive, but know I never heard it mentioned until after all had agreed to a life sentence except two, and they were for the death penalty."

John Thompson testified: "Before I went on the jury in the Dave Smith case, I knew what the other jury had done for him at the last term of the court. I knew that they had convicted him, and gave him 99 years in the penitentiary. I know Hess Harrold, Oscar Lee, and Jim Cook. I might have said in their presence before I was taken on this jury that the other jury gave him 99 years, but I know that I did not say that they should have hung him, so we would not be bothered. I might have said something about 99 years for I knew it, but I did not say that. Nothing was asked me in my examination upon said trial about what I knew about the other jury, or whether I had ever expressed an opinion in the case, but I had not. There was something said in the jury room about the other, but it was suppressed. I heard nothing about it until all had agreed on a life term but two, and they were for death. At the time I went into the jury box I had no opinion as to the defendant's guilt, and made my verdict alone from the evidence in the case."

Article 823 of the Code of Criminal Procedure of 1895 is as follows: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." It has been held in this state that this article extends to and includes any argument or dis-

cussion of a former conviction by the jury in the jury room. *Horn v. State*, 97 S. W. 822, 17 Tex. Ct. Rep. 271. But it has also been held that a mere and casual reference or incidental allusion to the former conviction will not necessarily afford cause for reversal. See *Gaines v. State*, 77 S. W. 10, 8 Tex. Ct. Rep. 616. The question has been before this court in many cases, and each case seems to have been disposed of somewhat in accordance with the particular facts. We think the true rule is that where, as in this case, the testimony supports the verdict, and the charge of the court properly submits the case to the jury, that a verdict ought not to be set aside for every incidental and casual mention of a former trial or a former conviction, and that in no case should it be set aside in a case tried according to law where the conviction is supported by the testimony, unless the court may fairly and reasonably see in the light of all the circumstances that such reference and discussion did or might have prejudiced the appellant's case. It is possible that there is some language in some of the decisions not wholly in accord with the views here expressed, but, on full consideration, this is believed to be the correct rule, and tested by this rule we believe appellant is without just ground of complaint. Here it is manifest, as we believe, that the only effect of the discussion of the former verdict inured to the benefit of appellant. It caused 2 jurors who were in favor of the death penalty to go over to the 10, and to give appellant a life sentence. Indeed, the only discussion had was addressed by a juror favoring a life sentence to one of the two jurors standing out for a death penalty, and whatever effect it may have had or did have was to mitigate the sentence and inure to the benefit of appellant. Under all the evidence fairly considered, we hold that reference in the jury room to former trial furnishes no ground for reversal:

Finding no error in the record, the judgment of the court below is affirmed.

#### HOLMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

#### RAPE — ASSAULT TO RAPE — EVIDENCE — INSTRUCTIONS.

On a trial for assault to rape, the failure to charge on aggravated assault held not erroneous under the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 99.]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

May Holman was convicted of assault to rape, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.



**DAVIDSON, P. J.** This conviction was for assault to rape; the punishment being two years in the penitentiary.

The record is before us without a statement of facts. Bill of exceptions was reserved to the failure of the court to charge the law with reference to an aggravated assault. The bill recites that Maudie Benton, testifying for the state, stated: "The defendant got off of Willie May Fleming and immediately got on her (Maudie Benton); that he stuck his thing in her and said, 'That is good;' that he did not do anything to Willie May, as she was the one he (appellant) wanted all the time." This is all the evidence that we have before us in regard to what the testimony was with reference to this phase of the case. As this matter is presented, we are of opinion that it was not error for the court to have failed to charge the law of aggravated assault. The testimony set out in the bill is entirely too meager to require a reversal for the failure of the court to charge the law applicable to aggravated assault. This is the only question presented.

The judgment is affirmed.

#### HOLMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

May Holman was convicted of crime, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of assault to rape, and his punishment assessed at three years' confinement in the penitentiary.

We find neither bills of exceptions, nor statement of facts in the record. Therefore the questions cannot be revised.

Finding no error, the judgment is affirmed.

#### YATES et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**CRIMINAL LAW—APPEAL—SEVERAL APPELLANTS—SEPARATE RECOGNIZANCES—NECESSITY.**

An appeal by several persons from a criminal conviction must be dismissed, where the recognizance is a joint obligation; each being required to give a separate recognizance.

Appeal from Tarrant County Court; John L. Terrell, Judge.

J. F. Yates and another were convicted of a public offense, and they appeal. Appeal dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** These parties were each assessed a fine, and appeal.

The recognizance is a joint, and not a separate, obligation. Under the unbroken line of authorities the recognizance is entirely insufficient. A separate recognizance should have been given each of the appellants.

Motion of the Assistant Attorney General to dismiss the appeal is sustained, and the appeal is dismissed.

#### SUMNERS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

**CRIMINAL LAW—APPEAL—RECORD.**

In the absence of the evidence or any bill of exceptions in relation to rulings on evidence, alleged errors in refusing to charge on the defense of alibi, or on the subject of circumstantial evidence, and in the admission and rejection of evidence, cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2940-2945.]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Lee Sumners was convicted of robbery, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This was a conviction for robbery; the punishment assessed being 10 years' confinement in the penitentiary.

The case comes before us without a bill of exceptions or statement of facts. Appellant's motion for a new trial complains that the verdict is contrary to the evidence, and he also complains of the refusal of the court to charge on the defense of alibi, on the subject of circumstantial evidence, and other matters arising on the trial. It also contains a general complaint and assignment that the court erred in the admission and rejection of certain evidence, which, it is stated, will more fully appear in the stenographer's report of the case. No stenographer's report accompanies the record, nor is there any bill of exceptions evidencing the action of the court in respect to the admission or rejection of any testimony.

In this state of record, none of these matters can be reviewed, and the case, therefore, under repeated decisions of this court, must be affirmed.

#### WALKER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1907. On Rehearing, Jan. 22, 1908.)

**WEAPONS—CARRYING PISTOL—INDICTMENT—VARIANCE BETWEEN ALLEGATION AND PROOF.**

Where defendant was convicted of carrying a pistol, the fact that the evidence showed the pistol was carried at a public gathering would not constitute a variance between the evidence and indictment; it being immaterial that his act constituted the further offense of

carrying a pistol at a public assembly, since he was not indicted for that offense.

Appeal from Brazos County Court; A. G. Board, Judge.

Bill Davis was convicted for carrying a pistol, and he appeals. Affirmed.

V. B. Hudson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for carrying a pistol. The evidence shows that quite a crowd of negroes had gathered at a frolic or festival of some sort on Christmas; that among others present was the defendant and a negro named Billups; that Billups was standing in the yard at night talking to a negro woman, and appellant shot him with a pistol. On this evidence the state relied for a conviction.

It is contended that, as there was a public gathering in the house near which this trouble occurred, appellant should have been charged with carrying a pistol at a public assembly, or in a place where people had assembled, and that, as he was convicted under an ordinary indictment charging unlawfully carrying on or about his person a pistol, there is a variance between the evidence and the allegation. There is no merit in this proposition. It is no reason that appellant should have been acquitted under the charge in this indictment because he was seen with a pistol at the place where people were assembled under the circumstances detailed in this record. He was not charged with carrying a pistol at a public assembly and convicted under the other statute prohibiting carrying pistols, but was charged directly with carrying a pistol, omitting the allegation with reference to assemblies, places of amusement, etc. Appellant cannot complain that the state sought to obtain a conviction with the less punishment.

In regard to the application for continuance, in our opinion there is no merit in it.

The judgment is affirmed.

HENDERSON, J., absent.

On Motion for Rehearing.

DAVIDSON, P. J. The judgment in this case was affirmed at Tyler, and is before us now on motion for rehearing. The original opinion we think sufficiently states the case.

Appellant now claims that his contention was misunderstood, and makes this excerpt from the closing of the opinion as the basis of his contention: "Appellant cannot complain that the state sought to obtain a conviction with the less punishment." That was rather an incidental remark at the close of the opinion. We understood then, as we understand now, that appellant's contention was that there was a variance between the evidence and the allegations, and the basis of this contention is that he should have been charged with carrying a pistol at a public

assembly, or in a place where people had assembled, etc., and that he was convicted under an ordinary indictment charging him with unlawfully carrying on or about his person a pistol, and the original opinion so states the proposition. Appellant's contention may be stated in another form in this manner: That inasmuch as the state showed that he had the pistol in the yard, or somewhere in the neighborhood of the house, at the time people were assembled in the house, therefore he should have been charged under the statute with reference to carrying a pistol into such house, etc., where people were assembled, and that inasmuch as he was charged under the other statute, simply for carrying a pistol on or about his person, he was entitled to an acquittal because the facts showed, in his judgment, that he was at a place where people were assembled. We do not believe this contention is correct. The fact that the state charged under one statute for carrying a pistol does not necessarily prevent a conviction because appellant may have had the pistol at a public assembly, under the doctrine of carving. Where the state sought to punish for simply carrying the pistol, and where the punishment may have been much greater for carrying it at a house where people were assembled, this would not afford a ground, in our judgment, for setting aside the conviction. The court was not finessing on the exact amount of punishment that might be prescribed under either statute in the original opinion, but was simply holding that, where the state charged carrying a pistol, appellant could be convicted under such charge, although he may have carried it near or at a place where people had assembled, even if the state could have punished him under a proper pleading for having carried the pistol to the public assembly.

We see no legal reason why this motion should be granted, and it is therefore overruled.

## WHITE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1907. On Rehearing, Jan. 15, 1908.)

### 1. CRIMINAL LAW — STATEMENT OF FACTS — NECESSITY FOR.

A charge cannot be reviewed, in the absence of statement of facts in the record.

#### On Rehearing.

### 2. SAME — PRESUMPTIONS.

On appeal it will be presumed, in the absence from the record of the testimony, that the charge was correct and applicable to the facts.

### 3. SAME — INSUFFICIENT MOTION FOR NEW TRIAL.

A motion for a new trial on a conviction of obtaining property fraudulently, on the ground that the charge as a whole was prejudicial to defendant, only charging the law in the abstract, and that the court should have charged that the testimony showed conclusively that the prosecuting witness knew that the title to the lot in exchange for which defendant obtained the

prosecuting witness' property was in another, and that the jury should acquit, is insufficient to present for review an objection that the charge failed to instruct that, though defendant did not have the right to dispose of the lot, he should be acquitted if he believed he had such right, and an objection that the charge failed to instruct that, though the prosecuting witness believed defendant's statement as to his title, if by exercising due diligence he could have ascertained that defendant did not have title, the defendant should be acquitted.

#### 4. SAME—BILL OF EXCEPTIONS.

Under Code Cr. Proc. 1895, art. 723, providing that, where the record upon defendant's appeal shows that requirements of the eight preceding articles relating to the charge have been disregarded, the judgment should be reversed if the error is excepted to at the time of the trial, an error respecting a charge, though fundamental, cannot be reviewed unless objection is reserved by a bill of exceptions or in the motion for new trial.

Appeal from Jefferson County Court; Jas. A. Harrison, Judge.

E. A. White was convicted of obtaining property fraudulently, and he appeals. Affirmed.

E. A. White, in pro. per. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record has neither statement of facts nor bills of exceptions. The first and second grounds of the motion for new trial relate to the testimony and cannot be revised. The third ground complains of the remarks of the county attorney and refers to the bill of exceptions, which is not in the record. The two remaining grounds are with reference to the charge, and, of course, cannot be revised, in the absence of the statement of facts.

The judgment is affirmed.

HENDERSON, J., absent.

#### On Motion for Rehearing.

DAVIDSON, P. J. The judgment in this case was affirmed at the recent Tyler term, and is now before us on motion for rehearing.

Appellant sets up two grounds upon which he bases his motion for rehearing, both of which relate to the charge of the court. The first excerpt of the charge is as follows: "However, if you believe from the evidence, or have reasonable doubt thereof, that said E. A. White was the owner of said lot, or had a right to dispose of the same at the time he made said representation, if any, you will acquit the defendant." The objection to this charge is it fails to instruct the jury that, although appellant did not have the right to dispose of the property, yet, if he thought or believed he had such right, he should be acquitted.

The second excerpt of the charge is as follows: "You are further instructed that although said representations, if any, were false, and known to be false by defendant, yet to authorize a conviction said J. H. Brady must have been deceived thereby; and if you believe from the evidence, or have a reasonable doubt thereof, that said Brady, before he delivered said wood and money, knew that said White did not have a right to dispose of the land, then you will acquit defendant." The criticism of this portion of the charge is the court should have instructed the jury that, though Brady did believe White's statement as to his right to dispose of said lot, yet if, by the exercise of such diligence as a prudent man should, he could have ascertained that White did not have such right of disposition, then he should be acquitted. The criticism in the motion for a new trial of the court's charge does not raise these issues. Copying from the motion for a new trial in this connection, we find this: "Because the charge of the court as a whole is prejudicial to defendant, only charging the law in the abstract; because the court should have charged the jury that the testimony conclusively showed that said Brady knew that the title to said lot was in one Lawyer, and should acquit defendant." As stated in the original opinion, the evidence is not before the court, and we therefore are unable to say whether these questions were issues to be charged to the jury. In the absence of the testimony we will presume that the charge is given correctly, and as applicable to the facts.

We further state that under the grounds of the motion above quoted these questions are not suggested. The grounds of the motion for a new trial are not specific, did not point out the matters complained of in the motion for rehearing, and to meet this attitude of the case appellant contends that these propositions are of "fundamental" character. Under the decisions of this court construing article 723 of the Code of Criminal Procedure of 1895, it would seem there are no fundamental errors on appeal, except those reserved by bill of exceptions or in the motion for a new trial. We therefore hold that no sufficient reason is given why the rehearing should be granted, first, because the testimony is not before us, and we are unable, therefore, to say whether these charges were applicable or not; second, the grounds were not specifically pointed out in motion for a new trial; and, third, it is too late to raise these questions for the first time on appeal.

There is no sufficient reason shown why this motion should be granted, and it is therefore overruled.

## DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 15, 1908.)

## CRIMINAL LAW—APPEAL—DEFECTIVE RECOGNIZANCE—DISMISSAL.

Where defendant was convicted of aggravated assault, and the penalty was a fine of \$400 and 4 months' confinement in the county jail, and the recognizance recited that he was convicted of a misdemeanor, and his punishment assessed at a fine of \$50 and imprisonment in the county jail for 90 days, the variance rendered the recognizance fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2711.]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Bob Davis was convicted of aggravated assault, and he appeals. Appeal dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$400 and 4 months' confinement in the county jail.

The recognizance recites that appellant was convicted of a misdemeanor, and his punishment assessed at a fine of \$50 and imprisonment for 90 days in the county jail. This variance makes the recognizance fatally defective.

The motion of the Assistant Attorney General is sustained, and the appeal is dismissed.

## BEARDSLEY et al. v. HILL et al.

(Supreme Court of Arkansas. Dec. 23, 1907.)

## 1. ADVERSE POSSESSION—TIME.

Adverse possession for more than seven years prior to suit brought under a deed void on its face for want of a proper description is sufficient to vest title.

## 2. QUIETING TITLE—CLOUD ON TITLE—DEEDS—DESCRIPTION.

A tax deed containing a description the "Mid. ¼ Pt. S. E. NW. Sec. 26 Tp. 9 S. R. 27 West, 13½ acres, Mid. ¼ Pt. S. W. N. E. Sec. 26 Tp. 9 S. R. 27 West 22/100 acres W. Mid. ¼ Pt. S. E. M. E. S. E. sec. 26 Tp. 9, S. R. 27 West 6 acres," was void on its face as describing no land, and was therefore ineffective to constitute a cloud on title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quietting Title, §§ 14-33.]

## 3. SAME—REMOVAL OF CLOUD—INJUNCTION.

Where a tax deed was void on its face for want of a proper description, so that the holder of the title in possession would not be required to introduce any evidence in order to sustain his title against such deed, equity would not interfere to set aside the deed as a cloud on title, nor to enjoin the holder from making an attempted transfer of his interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quietting Title, §§ 14-33.]

## 4. EJECTMENT — POSSESSION — BURDEN OF PROOF.

As plaintiff in ejectment and other real actions can recover only on the strength of his own title, and possession is prima facie evidence of ownership, a plaintiff claiming under a tax deed void on its face for want of a proper de-

scription by proving the deed could not establish a prima facie case against the defendant in possession, requiring the latter to introduce proof of his title.

Appeal from Howard Chancery Court; Jas. D. Shaver, Chancellor.

Suit by Catherine A. Beardsley and another against J. B. Hill and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

W. C. Rodgers, for appellants. Sain & Sain, Jno. S. Lake, and W. S. McCain, for appellees.

BATTLE, J. "This is a suit by Catherine A. Beardsley and W. C. Rodgers" to enjoin and restrain "J. B. Hill and others" from conveying, selling, incumbering, or otherwise interfering with the title and rights of the "plaintiffs in and to certain lands, to quiet the title of plaintiffs thereto, and for all other proper relief."

Lands were forfeited to the state of Arkansas for the nonpayment of taxes for the year 1893 by the following descriptions: "Mid. ¼ Pt. S. E. NW. Sec. 26 Tp. 9 S. R. 27 West, 13½ acres, Mid. ¼ Pt. S. W. N. E. Sec. 26 Tp. 9 S. R. 27 West 22/100 acres W. Mid. ¼ Pt. S. E. M. E. S. E. sec. 26 Tp. 9, S. R. 27 West 6 acres. The defendant J. B. Hill purchased land according to such description from the state of Arkansas, and the state land commissioner conveyed the same to him by the same description. The defendants claim the land in controversy under such deed. This is the cloud plaintiffs seek to remove.

The court, upon hearing, found that there was no equity in the plaintiffs' complaint and dismissed the same, and plaintiffs appealed.

There is no relief sought against the defendants, except J. B. Hill and his wife. Appellants deny that they have been in possession. If it be conceded that the evidence adduced at the hearing shows that they have been in possession, we think it shows that they have acquired title by adverse possession for more than seven years before the bringing of this suit; for, if they had possession, it continued more than seven years, and all the concomitant circumstances show it was adverse. In saying what we have we do not decide that Hill or his wife is in possession, or has been.

But they, appellants, are not seeking to recover possession of the lands in this suit. They ask the court to quiet their title by canceling the deed of the state to J. B. Hill, and to enjoin and restrain him from casting cloud upon their title by selling the land.

The deed of the state to Hill is void upon its face on account of a defective description of the lands. It describes no land, and is no cloud upon title. *Doe v. Porter*, 3 Ark. 18, 57, 36 Am. Dec. 448; *Hershey v. Thompson*, 50 Ark. 484, 491, 8 S. W. 689; *Dickinson v. Improvement Co.*, 77 Ark. 570, 576, 92 S. W.

21, 113 Am. St. Rep. 170; *Gannon v. Moore*, 104 S. W. 139; *Woodall v. Edwards*, 104 S. W. 129; *Beardsley v. Hill*, 71 Ark. 215, 72 S. W. 372; *Cooper v. Lee*, 59 Ark. 460, 463, 27 S. W. 970; *Rhodes v. Covington*, 69 Ark. 357, 359, 63 S. W. 799.

"It is not an apparent title, nor does it prima facie create a right which the true owner, or even an occupant without title, of land, must bring forward evidence to rebut." *Haggart v. Chapman & Dewey Land Company*, 77 Ark. 527, 92 S. W. 792, and cases cited.

The deed not being a cloud upon the title, a court of equity will not interfere to set it aside. See cases cited above. Neither will a court of equity interfere to enjoin the sale of the land by Hill under such title to prevent a cloud. High on Injunctions says: "It is difficult to establish any exact test which will be applicable in all cases to determine what constitutes such a cloud upon title as to authorize a court of equity to interfere for its prevention. It has been held, however, that, if the sale or conveyance which it is sought to restrain is such that in an action of ejectment brought thereunder the real owner of the property would be obliged to offer evidence to defeat a recovery, then such a cloud would be raised as to warrant the interference of equity. Upon the other hand, if under the levy and sale a purchaser would not acquire even an apparent title to the premises, the execution being against one who had no title, so that the purchaser in an action of ejectment could not recover upon his own showing and defendant in ejectment would not be put to proof to defeat the action, an injunction will not lie." High on Injunctions (4th Ed.) § 373, and the following cases cited by appellant to the same effect: *Pixley v. Huggins*, 15 Cal. 127; *Lick v. Ray*, 43 Cal. 83; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853; *Chase v. Treasurer*, 122 Cal. 540, 55 Pac. 414; *Rea v. Longstreet*, 54 Ala. 291; *Gregg v. Sandford*, 65 Fed. 151, 12 C. C. A. 525; *McConaughy v. Pennoyer* (D. C.) 43 Fed. 339.

To apply the test in this case, suppose the appellants were in possession of the lands in controversy, and a purchaser from Hill, appellee, should bring an action of ejectment against them to recover the land, would it be necessary for them to adduce evidence to defeat a recovery? Certainly not. Plaintiffs in actions of ejectment or other real actions can recover only upon the strength of their own titles, and not upon the weakness of their adversary's; for possession is always prima facie evidence of title, and a party cannot be deprived of his possession by any person, but the rightful owner, who has the jus possessionis. The defendants, therefore, need not show any title in himself until the plaintiff has shown some right to disturb his possession. *Dawson v. Parham*, 47 Ark. 215, 218, 1 S. W. 72; *Apel v. Kelsey*, 47 Ark. 413, 418, 2 S. W. 102; *Nix v. Pfeifer*, 73 Ark. 199,

201, 83 S. W. 951; *Beardsley v. Hill*, 77 Ark. 246, 91 S. W. 757.

This he could not do in the case supposed; for to do so he must, at least, show that his grantor held prima facie evidence of title; that is to say, the deed under which he holds is prima facie evidence of title. This he could not do, and the appellants would not be required to adduce any evidence of title, unless other and independent evidence of right to possession should be adduced by the plaintiff.

So upon the whole case we conclude that the decree of the chancery court should be affirmed; and it is so ordered.

#### WALKER et al. v. HELMS et al.

(Supreme Court of Arkansas. Dec. 23, 1907.)

##### 1. ADVERSE POSSESSION—TIME.

Actual possession of land under a tax deed for five years invested the occupant with title by limitation.

##### 2. DEEDS—QUITCLAIM—EFFECT.

Where S. had acquired complete title to land in controversy by adverse possession under a tax deed, the validity of which was not questioned when the former owner executed a quitclaim deed of the land to the wife of S., the quitclaim deed conveyed nothing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 395.]

##### 3. ESTOPPEL—TITLE TO LAND—EVIDENCE.

S. having acquired title to certain land by possession under a tax deed, the former owner executed a quitclaim to the wife of S. of a portion of the tract, and S. and wife quitclaimed to him the balance of the tract. Held, that the transaction was merely a purchase of peace by S. In the absence of evidence that S. intended to settle the title to the land retained on his wife, the heirs of S. were not estopped to assert as against the heirs of the wife that such transaction did not divest him of the title to the land.

Appeal from Monroe Chancery Court; John M. Elliott, Chancellor.

Action by Sibbie Stevens Helms and another against Maude Walker and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

H. A. Parker, for appellants. Thomas & Lee, for appellees.

**McCULLOCH, J.** This action was commenced at law to recover possession of a tract of land in Monroe county containing 60 acres, and, by consent of all parties, the cause was transferred to the chancery court, where it proceeded to final decree in favor of the plaintiff for recovery of the land sued for.

The case involves a controversy concerning the title to the land between the appellees, Sibbie Stevens Helms and Lecl Stevens, children of W. F. Stevens and his first wife, Mary I. Stevens, both deceased, and the appellants, Maude Walker, widow of said W. F. Stevens, and Oliver Stevens, the offspring of her intermarriage with Stevens. Appellees claim that the title to the land was in their mother, Mary I. Stevens, and that they inherited it from her, and appellants claim that

the title was in W. F. Stevens; that it was his homestead at the time of his death; that his widow is entitled to her homestead rights therein; and that the title in fee descended to the three children of W. F. Stevens. The pleadings and evidence establish the following as the facts of the case, there being no dispute over the facts: The quarter section of land of which the 60 acres in controversy formed a part was originally owned by Thomas Hoard, of Murfreesboro, Tenn., who received a patent for it in 1861, and it was sold for taxes in 1877 and purchased by J. Cole Davis, who in due time, the land not being redeemed within the time prescribed by law, received a deed in proper form from the county clerk of Monroe county conveying the land to him pursuant to the tax sale. Davis conveyed the land to W. F. Stevens in 1881. The latter at once entered into actual possession, and cleared up, put a part of it in cultivation and built a house on it, and occupied it as his homestead from then until his death. All the improvements were on the 60 acres in controversy. In 1886 T. E. Hoard, sole heir of Thomas Hoard, executed a deed to Mary I. Stevens, quitclaiming to her all his interest in the land in controversy, and at the same time W. F. Stevens and wife, Mary I., executed to Hoard a deed, quitclaiming to him all their interest in the other 100 acres in the quarter section. Each of these deeds recited a consideration of \$1 in money and the execution of the quitclaim from each to the other. The quitclaim deed from Hoard was by W. F. Stevens during the lifetime of his wife, Mary, delivered to his sister, Mrs. Hill, with instructions to keep it until he called for it. He never called for it, and two years after his death one of the appellees procured it from Mrs. Hill, and caused it to be placed of record. Mary I. Stevens died in 1892. Subsequently W. F. Stevens intermarried with appellant Maude (now Mrs. Walker), and he died in 1901, leaving surviving his widow and three children named above.

The title to the land in controversy was undoubtedly in W. F. Stevens. His grantor, Davis, purchased it at tax sale, and no attack is made, either in the pleadings or proof, on the validity of the sale. The deed is exhibited with appellant's pleadings and was introduced in evidence, and its validity was not questioned. Besides, W. F. Stevens had been in actual possession of the land under the tax title for about five years when the Hoard quitclaim was executed, and this operated as a complete investiture of title by limitation. *Hudson v. Stillwell*, 80 Ark. 575, 98 S. W. 356; *Jacks v. Chaffin*, 34 Ark. 541. The title being in W. F. Stevens, the quitclaim of Hoard to Mary I. Stevens conveyed nothing. Hoard had nothing to convey. There is no evidence or indication on the part of W. F. Stevens that he intended to settle the title to the land upon his wife, and the quitclaim itself was ineffectual for that pur-

pose. The authorities cited by counsel for appellees reciting instances where the husband or wife have in various methods conveyed or caused to be conveyed lands to the other as gifts or settlements do not apply here. Nor is there any element in the conduct of W. F. Stevens which would estop him or his heirs to assert that the title was vested in him and remained in him up to the time of his death. It is evident that in the transaction with Hoard he merely "purchased his peace" by quitclaiming his interest in 100 acres of his land, and that Hoard in return quitclaimed to Mrs. Stevens his interest, which amounted to nothing, in the 60 acres in controversy. This did not change in any wise the status of the title to the land in controversy.

We find nothing, therefore, in the record to sustain the decree, and the same is reversed and remanded, with directions to enter a decree in accordance with this opinion. It is so ordered.

#### AYER v. JONES & MERRILL.

(Supreme Court of Arkansas. Dec. 23, 1907.)

##### 1. COSTS—OFFER OF JUDGMENT—TENDER.

Where defendant's attorney merely expressed a willingness to confess judgment for the amount shown to be due by plaintiff's books, but did not offer to confess judgment for a certain amount, it was error to tax the costs against plaintiff, who was successful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 137-143.]

##### 2. SAME—WAIVER.

A tender of judgment before a justice of the peace was insufficient to entitle defendant to have costs taxed against the successful plaintiff, where defendant appealed from the judgment and thus failed to keep the tender good.

Appeal from Circuit Court, Howard County; W. V. Tompkins, Special Judge.

Action by F. T. Ayer against Jones & Merrill. From a judgment taxing all the costs against plaintiff, he appeals. Reversed and remanded.

W. P. Feazel, for appellant. Sain & Sain, for appellees.

BATTLE, J. F. T. Ayer commenced an action against Jones & Merrill before a justice of the peace, W. L. Shofner, on an account for \$50. He filed an affidavit with the justice, stating that his claim against the defendants, Jones & Merrill, was for money due on open account for logs furnished the defendants at their request; that it was a just claim, and that he ought to recover thereon the sum of \$30; and that the defendants had sold, conveyed, or otherwise disposed of their property, with the fraudulent intent to cheat, hinder, and delay their creditors, or that they were about to sell or dispose of their property with such intent. Upon this affidavit what is called by the plaintiff an attachment was issued, directed to a constable, which was returned by him duly served. On

the return day of the writ and summons Jones & Merrill filed an affidavit for change of venue, which was granted, and the cause was transferred to W. O. Dorsey, justice of the peace of another township. On the 21st day of September, 1906, the cause coming on for trial the justice of the peace rendered judgment in favor of the plaintiff and against the defendant for \$32.50, and dissolved the attachment. On the 14th of October, 1906, Jones & Merrill took an appeal to the circuit court, filing an affidavit and supersedeas bond for that purpose. On the 21st of February, 1907, in the trial of the issues in the case in the circuit court, judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$32.79. On the same day Jones & Merrill moved the court to retax the costs in the case by adjudging all the costs against the plaintiff for the reason that they (defendants) had offered to confess judgment in his favor for as much as he had recovered, \$32.79. Upon this motion the following testimony was introduced:

D. B. Sain, the attorney for Jones & Merrill, testified that in going into trial before the justice of the peace he stated to the court that they, defendants, were willing to confess judgment in favor of the plaintiff for the amount they owed him as shown by their books.

W. O. Dorsey, the justice before whom the trial was had, testified that D. B. Sain said to him that he expected judgment to be rendered against the defendants.

W. D. Lee, the attorney of plaintiff, testified that he heard the statement of D. B. Sain to the jury (that was before the justice of the peace), and his recollection is that the statement was that they were willing to concede that the defendants owed plaintiff as much as shown by their books.

The record in this case fails to show any offer to confess judgment.

The books of the defendants showed that they owed plaintiff \$32.79.

The circuit court taxed the plaintiff with all the costs in the case, and he appealed.

Appellees, Jones & Merrill, did not offer to confess judgment. Their attorney, in his statement of their case to the jury, expressed a willingness to confess judgment for the amount shown by their books to be due the appellants, or, as the justice before whom the issues in the case were tried stated it, he expected judgment to be rendered against them for that amount. A mere willingness or expectation is not sufficient. There must be an offer to confess judgment for a certain amount.

Then, again, if they made such a tender, they failed to "keep it good" by appealing from the judgment, which they say they offered to confess, to the circuit court. If they had offered to confess judgment, they thereby abandoned it. Their conduct is inconsistent with their contention.

Reverse and remand, with directions to the court to render judgment in accordance with this opinion.

### HOLLENBERG MUSIC CO. v. BERRY.

(Supreme Court of Arkansas. Dec. 23, 1907.)

#### 1. SALES—LEGALITY—PUBLIC POLICY.

Though plaintiff sold defendant a piano, knowing that she intended to place it in her bawdy house, and use it to take in money by the nickel-in-the-slot process, such knowledge did not render the contract illegal, in the absence of proof that the contract provided that the piano was to be used in connection with the keeping of such house, or that the seller knew that its use by the buyer was inseparable from her business, or that the seller knowingly was to derive some benefit from such use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 107.]

#### 2. CONTRACTS—VALIDITY—ILLEGAL PURPOSE.

A contract entered into by one of the parties for an illegal purpose is not thereby rendered illegal as to the other, though he had knowledge of such purpose, provided he did nothing in furtherance thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 689.]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by the Hollenberg Music Company against Maggie Berry. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Appellant brought suit in replevin for a piano, alleging in its complaint that it had contracted to sell to the appellee a certain piano under a written contract, on the installment plan, with retention of title; that there was a default in the payment at maturity of certain of the installments, whereupon the appellant was entitled to possession and damages for the retention of the instrument. The usual allegations in replevin were made. Appellee answered, admitting execution of the contract, denying right of possession, and setting up divers violations by appellant of its warranty, and counterclaiming for money already paid. At the time of the purchase of this piano it was a fact, known to appellant's selling agents, that for several years appellee had owned a home in North Jonesboro where she had for a number of years conducted a bawdy house, and that it was her intention to place the piano in her bawdy house, and to use it for the purpose of taking in money by the nickel-in-the-slot process. The court instructed the jury as follows: "If the plaintiff or its selling agent, at the time of the execution of the contract for the purchase of the piano, knew that the defendant was a keeper of a bawdy house, and that it was her intention to keep and use the piano in her said bawdy house, the plaintiff could not recover in this action." Appellant asked, and the court refused, the following: "Mere knowledge on the part of the plaintiff or its selling agent of the character of the defendant, and that

she intended to use the piano in her bawdy house, was not of itself sufficient to avoid the contract, but that, before they would be justified in finding the contract void, they must find from the evidence that plaintiff in some measure participated in the unlawful conduct of the defendant in running a bawdy house, or that her wrongful conduct was a part of the consideration inducing the plaintiff to sell her the piano." Exceptions were duly saved to ruling of the court in giving and refusing requests for instructions. The verdict and judgment were for appellee, and appellant duly prosecutes this appeal.

Mathes & Westbrooke and C. P. Harnwell, for appellant.

WOOD, J. (after stating the facts as above). The only question here is whether mere knowledge on the part of the seller that the buyer intends to put the thing sold to an unlawful use, or, as in this case, to use it in the same place where an unlawful or immoral business is carried on, avoids the contract on grounds of public policy. In the absence of proof that the piano was used or to be used by the terms of the contract in connection with the illegal business of keeping the bawdy house, or that the use of the piano by appellee was inseparable from the business, which fact appellant knew, or that appellant knowingly was to derive some benefit from the use of the piano in the bawdy house, the instruction was erroneous. The rule supported by the weight of authority and approved by this court is "that, though the contract is entered into by one of the parties for the furtherance of an illegal purpose, the contract will not be rendered illegal as to the other party, though he had knowledge of such illegal purpose, provided he does nothing in furtherance thereof." *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. 527; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. See, also, *McMurtry v. Ramsey*, 25 Ark. 350; *Ruddell, Ex'r, v. Landers*, 25 Ark. 238, 94 Am. Dec. 719; *Tajum v. Keeley*, 25 Ark. 209, 94 Am. Dec. 717. See *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 182, and *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Anheuser Brewing Ass'n v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580. It follows that the court erred.

The judgment is therefore reversed, and the cause is remanded for new trial.

#### KELLY v. KEITH.

(Supreme Court of Arkansas. Dec. 23, 1907.)

##### 1. APPEAL—DISMISSAL—ABANDONMENT.

Where, pending an appeal, appellant concluded to abandon the same and take the money ordered to be deposited by appellee with the clerk of the court, and demanded it of the clerk, and on his failure to pay it, saying that none had been paid to him, which was true, appellant filed a supplemental complaint asking for a judgment, the filing of the supplemental complaint was an abandonment of the appeal, entitling appellee to a dismissal.

##### 2. SAME—WAIVER.

Where, appellant having abandoned his appeal, entitling appellee to a dismissal, appellee failed to move therefor, he waived the right thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 3133-3135.]

##### 3. TENDER—KEEPING GOOD—TENDER NOT ACCEPTED.

A tender having been made, it must, to preserve its legal effect, be kept good.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 55-58.]

##### 4. SAME.

Where, defendant having been ordered by the court to pay into court the amount tendered by such party to the other party, the clerk gave him a receipt on his promise to pay on demand, without being in fact paid the money, and thereafter, on the demand of the party to whom it was to be paid, the successor of the clerk was unable to pay it, since none had been paid him, his failure to pay made the tender of no effect, and entitled the party to judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 79, 82.]

Appeal from Hot Spring Chancery Court; Alphonso Curl, Chancellor.

Supplemental complaint by Martha Kelly against John W. Keith. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

E. H. Vance, Jr., for appellant. Duffie & Duffie, for appellee.

BATTLE, J. The facts in this case are stated in *Kelly v. Keith*, 77 Ark. 31, 90 S. W. 150. In that case Keith was required by an order of the chancery court of Hot Spring county, in which the suit was pending, to pay into court the amount tendered by him to Kelly. He took a receipt from John C. Ross, clerk of the Hot Spring chancery court, for \$350, with interest thereon from March 18, 1901, to December 18, 1901, at the rate of 6 per cent. per annum, amounting to \$365.75; the same being the amount tendered. Ross testified that no money was actually paid to him; that he gave the receipt because he "knew that Keith's word to him was perfectly good." Keith and T. R. McHenry testified that an arrangement was made with the Bank of Malvern by which it was understood that the amount receipted for would be paid to Ross on his check. Ross went out of office, and J. E. Young succeeded him. No money or check was received from Ross by Young. After the appeal was taken to this court, and during its pendency, Mrs. Kelly, the appellant, concluded to abandon the appeal and take the money, and demanded it of the clerk, Young; and he failed to pay it, saying that none had been paid to him for her, which was true. She then filed a supplemental complaint in the original suit, asking for a judgment for \$365.75, and 6 per cent. per annum interest from December 11, 1902, the date of Ross' receipt, and for her costs. Upon the hearing of the cause the court dismissed the supplemental complaint, and plaintiff appealed.



The filing of the supplemental complaint was an abandonment of the appeal. The appellee was entitled to a dismissal. Kirby's Dig. § 1228; Bolen v. Cumby, 53 Ark. 514, 14 S. W. 926. His failure to move the dismissal was a waiver of the right.

After a tender is duly made, it must, to preserve its legal effect, be kept good. Schearff v. Dodge, 33 Ark. 340, 347; Cole v. Moore, 34 Ark. 582, 589; Bissell v. Heyward, 96 U. S. 587, 24 L. Ed. 678; 3 Page on Contracts, § 1427; 28 Am. & Eng. Encyc. of Law (2d Ed.) pp. 38, 41, and cases cited.

"Notwithstanding the refusal of a valid tender, if the creditor subsequently demands payment and the debtor fails to pay, the tender has not been kept good; and the debtor loses the benefit of the tender." 28 Am. & Eng. Encyc. of Law (2d Ed.) p. 41, and cases cited.

In this case Mrs. Kelly made demand upon Young, the clerk, to whom the money should have been paid, to make good the tender, and he failed to do so. He was constituted the agent for that purpose. His failure made the tender of no effect; Keith having failed to supply him with the funds. The consequence is Mrs. Kelly is entitled to recover the \$365.75 and 6 per cent. per annum interest thereon from the 11th of December, 1902, the date of the clerk's receipt, less whatever amount has been paid thereon, and for all her costs.

Reverse and remand, with directions to the court to enter a decree in accordance with this opinion.

#### MATHIS v. BANK OF TAYLORSVILLE. (Court of Appeals of Kentucky. Jan. 29, 1906.)

##### PARTNERSHIP—LIABILITY OF PARTNER TO THIRD PERSON—RATIFICATION OF PARTNER'S ACT.

Though notes given for overdrafts on the son's individual account were not authorized by a power of attorney to defendant's son to execute notes in defendant's name, if the money represented by the notes was used in a business in which defendant and his son were partners, and the overdrawn account was opened on behalf of the firm, which defendant knew and approved, or should have known, defendant is liable on the notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 282, 287.]

"Not to be officially reported."

On petition for rehearing. Petition denied. For former opinion, see 105 S. W. 157.

CARROLL, J. On the trial of this case counsel for the contending parties directed their chief efforts to the issue whether or not the power of attorney was a limited or unlimited one. This seems to have been regarded as the pivotal point in the case. That it was so considered by the trial judge is apparent from the fact that he only submitted to the jury one instruction; that being directed to this issue. It is pointed out in the petition for rehearing filed by counsel for appellee that it can be shown on another trial that

H. C. Mathis was interested as a partner with C. G. Mathis in the ventures or business enterprises in which the money drawn from the bank by C. G. Mathis and that constituted his overdrafts was invested, and that the overdrafts were made with his approval and consent, and the notes executed in satisfaction of them were ratified by him.

Although in our opinion C. G. Mathis was not directly authorized to sign H. C. Mathis' name to the notes executed by him for overdrafts in his (C. G. Mathis') account, nevertheless, if H. C. Mathis was a partner of C. G. Mathis in the ventures or business enterprises in which the money drawn out on overdrafts was invested, and if the account was opened up in the name of his son with his (H. C. Mathis') knowledge and consent, and for the benefit of the firm, and he ratified and approved the notes given to satisfy the overdrafts, he should account to the bank for such sums; so that, in addition to the instruction given on the former trial, the court should further instruct the jury that, to the extent that the notes or any of them are made up in whole or in part of overdrafts in the account of C. G. Mathis, H. C. Mathis is not responsible on them, unless the jury believe from the evidence that H. C. Mathis and his son were engaged in business as partners, and the money represented by the overdrafts was borrowed for the firm in the name of the son, with the knowledge and consent of H. C. Mathis, to be used in the firm business, or that H. C. Mathis knew, or the facts known to him were such as to put a reasonable man on notice, that his son was borrowing the money on his (H. C. Mathis') credit for the business in which he was interested with his son, and H. C. Mathis, after he knew that his son had executed the notes sued on, or any of them, agreed to pay the same or approved the act of his son in signing his name. If they so believe, they should find against H. C. Mathis to the extent that the notes represent money advanced to the firm in the name of his son, with H. C. Mathis' knowledge and consent, to be used in the firm business, and to the extent of the money advanced on his credit and with his knowledge for the use of their joint business that is included in notes that he agreed to pay or approved the act of his son in signing. The converse of these instructions should be given for appellant, if requested.

We are asked by counsel for appellee to strike from the opinion certain language deemed to reflect on the business management of the bank in its dealings with the Mathises. The expressions complained of were used by the writer of the opinion solely as an argument or illustration to show why H. C. Mathis should not be held responsible for overdrafts in the account of C. G. Mathis. Unless in this respect they may be considered a criticism on the bank officials, they were not so intended.

The petition for rehearing is overruled.

**METROPOLITAN LIFE INS. CO. v.  
THOMAS.**

(Court of Appeals of Kentucky. Jan. 24, 1908.)

**1. INSURANCE—LIFE INSURANCE—SUICIDE—EFFECT ON POLICY.**

If insured, under a life policy limiting the recovery thereunder if he should die by his own act, whether sane or insane, committed suicide when so mentally deranged as to be unconscious that he was killing himself, the act will not be deemed his, but will be regarded in law as an accidental killing, authorizing full recovery under the policy; but if, though mentally deranged, he knew his act would probably cause death, and committed it intending that it should, recovery may only be had for the limited amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1159, 1160.]

**2. SAME—INSUFFICIENT PROOF—WAIVER.**

In an action on a life insurance policy limiting the recovery in case of suicide, insurer may not complain that plaintiff in her proofs of loss did not disclose that insured was insane when he committed suicide, where it denied any liability under the policy, and did not direct attention to any defect in the proofs, nor ask for further proofs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1391.]

**3. PLEADING—AMENDMENT—DISCRETION OF COURT.**

Where defendant was allowed to file an amended answer on a trial, it was within the court's sound discretion to allow plaintiff to file a reply thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 806.]

**4. WITNESSES—COMPETENCY—HUSBAND AND WIFE—ACTION ON LIFE POLICY.**

Where, in an action on a life insurance policy, insured's mental condition when he committed suicide was in issue, his wife was a competent witness to testify to the circumstances surrounding him at his death and to his mental condition; she being a proper witness to facts not coming to her from their marriage relation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 182.]

**5. INSURANCE—ACTION ON POLICY—EVIDENCE—ADMISSIBILITY.**

Where, in an action on a life insurance policy, insurer relied on a statement made by plaintiff in the proofs of loss as an estoppel, she could testify to the facts surrounding her when the statement was made.

**6. APPEAL—HARMLESS ERROR—EVIDENCE.**

Any error in admitting evidence was harmless, where the facts established thereby were abundantly shown by other evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4161-4170.]

**7. INSURANCE—LIFE—ACTION ON POLICY—EVIDENCE—SUFFICIENCY.**

Evidence in an action on a life insurance policy, defended on the ground of suicide, held to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1720.]

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

Action by Drusia B. Thomas against the Metropolitan Life Insurance Company on a life insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Jos. S. Botts and McMillan & Talbott, for appellant. Denis Dundon, for appellee.

HOBSON, J. The Metropolitan Life Insurance Company issued to Phillip A. Thomas as a policy insuring his life in the sum of \$1,000 for the benefit of his wife, Drusia B. Thomas. The policy was issued on March 31, 1904. Thomas died on March 6, 1906. The policy, among other things, contained this provision: "If the insured, within two years from the issue hereof, die by his own hand or act, whether sane or insane, the company shall not be liable for a greater sum than the premiums which have been received on this policy." This action was brought to recover upon the policy. The company defended the action on the ground that Thomas died by his own hand and within two years from the issuing of his policy. The plaintiff replied that Thomas was insane at the time that he took his own life, that he did not know what he was doing, and that his death was not due to his own act. The evidence introduced on the trial showed that there were some strains of insanity in his family; that his mother became insane, and some of his other kindred, as far back as three or four generations; that he had been acting strangely several months before his death. He died on Monday morning from taking carbolic acid. On the Saturday night before he went to a neighbor's house and stayed all night, about three or four miles from home. When he got there he cried, saying that his wife was dead. He also said he was lost. They at first could not get him to come into the house. They finally got him into the house and persuaded him to lie down. He would take spells in which he would fight them or strike at them. This went on more or less all night, although he was quieter toward the latter part of the night. One witness who was in the buggy with him as he came to this man's house said that every now and then he would stiffen out and slide out of the buggy. He seemed to have several spells of stiffening out at different times during the night. His conduct after he got home was not so wild, but was entirely unnatural. He sat around the chimney corner, noticing nobody until night, and then went to bed. The next morning, while they were getting breakfast, they heard a moan, and on going to him found that he had taken carbolic acid. That he was a maniac on Saturday night, and did not know what he was doing, was abundantly proven, and that there was no substantial change in him from that time to his death we think the evidence fairly shows. The court gave the jury these instructions: "(1) If the jury believe from the evidence that Phillip Thomas intentionally took his own life by taking carbolic acid at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his act, but will be regarded, in law, as an accidental killing; and, if the jury find from the evidence that the said Thomas so

took his own life at a time when his mind was so far gone as to render him unconscious that he was taking his own life, they should find for the plaintiff in the sum of \$1,000, the amount of the policy sued on, with 6 per cent. interest from the 6th day of March, 1906. (2) If the jury believe from the evidence that at the time said Thomas took his life, although his mind may have been deranged, he had mind enough to know that the act he was then committing would probably result in his death, and committed said act with the intention to take his own life, then the jury should find for the plaintiff in the sum of \$69.32, the amount of premiums paid to defendant company by said Thomas." The jury found for the plaintiff the amount of the policy, \$1,000, and the defendant appeals.

The instructions followed the rule laid down by this court in *Manhattan Life Insurance Co. v. Beard*, 112 Ky. 445, 66 S. W. 35. The authorities bearing on that question are collected in that opinion. It is not material that the plaintiff, by her proofs of loss, did not disclose the fact that the insured was a maniac at the time that he took his own life. The defendant denied liability altogether. It did not call attention to any defects in the plaintiff's proof, or ask for further proofs. It cannot now, therefore, insist that the proofs of loss were insufficient. The court allowed the defendant to file an amended answer on the trial, and he did not abuse a sound discretion in allowing the plaintiff then to file a reply to the amended answer.

There is no substantial error in the admission or rejection of evidence. The wife was a competent witness to testify to the circumstances surrounding her husband at his death. Facts of this sort, which did not come to her from the marital relation, she could testify to as any other witness. It was also proper to allow her to testify how much mind her husband had on the morning he took his life. She was with her husband, and saw him, and could testify as to what his mental condition was. Her evidence on this subject is altogether different from that condemned in the *Beard* Case. The court only allowed her to testify on this subject by way of explaining the statement she had made in the proof of loss. The defendant relied on the statement she made in the proofs of loss as an estoppel, and it was proper that she should be allowed to testify as to the facts surrounding her when the statement was made. Moreover, if all the objections of the defendant had been sustained, and all the evidence objected to had been excluded from the jury, it would in no wise have affected the result, for the facts were abundantly shown by other evidence.

The verdict is not palpably against the evidence. The deceased was happily situated. There was no reason for his taking his life. If the proof for the appellee, by a num-

ber of witnesses, is to be believed, he had lost his mind entirely, and did not know what he was about.

Judgment affirmed.

#### CHESAPEAKE & O. RY. CO. v. PACE.

(Court of Appeals of Kentucky. Jan. 29, 1908.)

##### 1. RAILROADS — ACCIDENTS AT CROSSINGS — QUESTIONS FOR JURY.

In an action against a railway company for injuries at a crossing, whether defendant was negligent in failing to stop the train before colliding with plaintiff's conveyance, which was drawn by a runaway team, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1160-1165.]

##### 2. APPEAL—PRESUMPTIONS—INSTRUCTIONS.

When the record on appeal does not contain the instructions given, it will be presumed that the jury was properly instructed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3749-3754.]

##### 3. RAILROADS — ACCIDENTS AT CROSSINGS — DUTY OF RAILWAY COMPANY — RUNAWAY TEAMS.

If the person in charge of an engine sees, or by the exercise of ordinary care could see, that a team on a highway is unmanageable and running off in the direction of the railroad crossing, and the situation is such as to induce a person of ordinary prudence to believe there is danger of a collision at the crossing, it is his duty to exercise ordinary care to prevent such a collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1014, 1015.]

Appeal from Circuit Court, Floyd County. "Not to be officially reported."

Action by W. H. Pace against the Chesapeake & Ohio Railway Company for injuries received at a crossing. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter S. Harkins, for appellant. Brown & Martin and W. Lee Roberts, for appellee.

CARROLL, J. The Big Sandy Division of the Chesapeake & Ohio Railway runs parallel with the Big Sandy river and follows its meanders. At a point immediately below Abbott's creek the county road, which runs parallel with the railroad and between it and the river, crosses the river and the railroad track. On the occasion complained of by appellee, he was driving along this road towards the crossing at Abbott's creek, and when within about 75 or 100 yards of the crossing the team he was driving became frightened at a freight train going in the same direction he was driving. Becoming unmanageable, the team ran off, and at the crossing the engine collided with the wagon, injuring appellee quite severely. To recover damages for the injury thus sustained this action was brought. Upon a trial before a jury, appellee recovered \$200 in damages.

The instructions are not in the record. The pleadings are sufficient to support the verdict; so that the only question before us is whether or not the peremptory instruction requested by appellant should have been granted. There is evidence conducing to

show that the persons on the engine saw appellee's team when it became unmanageable, and knew, or in the exercise of ordinary care could have known, that the team was beyond the control of appellee and was running towards the crossing. There is also some evidence that after the persons in charge of the engine knew, or by the exercise of ordinary care could have known, that appellee's team would reach the crossing about the time the engine did, and after discovering the facts mentioned and the peril in which appellee was placed, they could by the exercise of ordinary care have stopped the train, thus avoiding the collision. There was evidence sufficient to take the case to the jury, and the presumption is that they were properly instructed. If the persons in charge of the engine saw, or by the exercise of ordinary care could have seen and known, that the team appellee was driving was unmanageable and running off, going in the direction of the railroad crossing, and the situation was such as to induce a person of ordinary prudence to believe that there was danger of a collision at the crossing, it was the duty of the persons in charge of the engine to exercise ordinary care, after discovering the peril in which appellee was placed, to prevent injury to him at the crossing. *Kean v. Chenaunt*, 41 S. W. 24, 19 Ky. Law Rep. 448; *L. & N. R. Co. v. Bowen*, 39 S. W. 31, 18 Ky. Law Rep. 1101; *C. N. O. & T. P. Ry. Co. v. Bagby*, 29 S. W. 320, 16 Ky. Law Rep. 533.

Wherefore the judgment of the lower court is affirmed.

#### McCLURE'S EX'R v. CORYDON DEPOSIT BANK.

(Court of Appeals of Kentucky. Jan. 24, 1908.)

##### 1. PRINCIPAL AND AGENT—EXTENT OF AGENCY—RENEWAL OF NOTE.

A testatrix signed a note as surety, and subsequently signed various renewal notes. Afterward, and before her death, her son signed another renewal note in her name as her attorney in fact, under a power of attorney giving him the right to execute all papers for her and in her name which she could execute relating to her personal business. *Held*, that the note was binding on her estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 318.]

##### 2. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—NOTES.

If a renewal note, signed by the son of testatrix under a power of attorney, was invalid, the payee should be remitted to the former notes; hence, in a suit to settle the estate, where the original notes were filed in proof of the claim on the note signed by the son, allowance of the claim was not error.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Proceedings for allowance of a claim of the Corydon Deposit Bank against the estate of Mary H. McClure. From a judgment for the bank, the executor appeals. Affirmed.

Thomas E. Ward, for appellant. Vance & Hellbronner, for appellee.

HOBSON, J. On June 4, 1898, the Anchor Roller Mills executed to C. E. Harness a note for \$8,500, with Mary H. McClure and others as sureties; Mrs. McClure signing the note in person. The note was assigned to the Corydon Deposit Bank. It was renewed by a note executed to it for \$4,000 on October 20, 1900; \$2,500 having been paid on the debt. Mrs. McClure signed this note also herself. There were several other renewals of the note, each of which she signed in person; but the last time the note was renewed her name was signed to it by her son, H. D. McClure, as her attorney in fact. After this she died, and, the note having been allowed as a just claim against her estate, the executor appeals.

A number of technical questions as to the appeal are made by appellee; but we deem it unnecessary to consider any of them, as the judgment is right on the merits. The objection to the judgment is on the ground that the son was not authorized to sign his mother's name as surety on the note. There would be much force in this, if he had signed his mother's name as surety for a debt for which she was not already bound. But she was bound for this debt. She had herself signed the note which the bank then held, and has herself signed several other prior notes, as the renewals had been made from time to time. She was then liable to the bank for the debt, and, if the renewal had not been made, might have been forced then to pay the debt. The written power of attorney which she executed to her son, and under which he signed her name to the renewal note, is in these words: "Know all men by these presents, that I, Mary H. McClure, of Henderson county, Kentucky, do hereby name, constitute, and appoint my son, Henry D. McClure, of the same county and state, as my true, lawful, and only agent and attorney in fact, with full power, right, and authority for me and in my name to take charge of, manage, and control all of my business relating to my personal estate; that is, to sell and dispose of any personal property that I may own, wheresoever situated, and to collect and dispose of the proceeds thereof, to collect any and all debts due me, sign my name to checks on any bank account of mine, and execute and deliver any and all papers for me and in my name that I myself could execute relating to my personal business and personal estate, save and except only that under this power my said agent and attorney cannot sell and convey real estate, but he may and can under this power rent out and lease any real estate for such terms of years and upon such conditions as he may think best and to my interest, and I hereby ratify and confirm whatever my said agent and attorney may do for me in my name in the premises." As she was then liable to the bank on the note it held, the renewal of this note related to her personal business, and the getting of time on the debt

was within both the letter and the spirit of the instrument. She herself put this construction on it at the time, as shown by the proof, and so did the son, to whom the paper was given. The note was made by the agent, for her benefit, and in the course of her business. *German National Bank v. Studley*, 1 Mo. App. 260.

This was a suit to settle Mrs. McClure's estate. In the proofs of the claim the bank filed the former notes signed by her in person. If the note signed for her by her son is invalid, the bank, having accepted the renewal on the faith that the signature was valid, should be remitted to the former note, which it then held and was admittedly valid. As the proofs of the claim showed all these facts, it was properly allowed in any view of the power of attorney, and the judgment is in accordance with the justice of the matter. *Bowman v. Humphrey*, 18 Ky. Law Rep. 511, 37 S. W. 150.

Judgment affirmed.

### BALLOU et al. v. POTTER.

(Court of Appeals of Kentucky. Jan. 28, 1908.)

#### 1. MASTER AND SERVANT—INJURY TO SERVANT—COMPLAINT.

Where a petition alleged that plaintiff, relying on defendants' promise to prop the entry of a mine, continued to work in the entry, but for which promise he would not have done so, and that within a reasonable time after the promise plaintiff was injured, as alleged, the petition sufficiently charged that plaintiff only continued to work a reasonable time after defendants' promise to prop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 847.]

#### 2. PLEADING—AIDER BY VERDICT.

Where, in an action for injuries to a miner by defendants' failure to prop the entry of a mine, the question whether plaintiff continued to work more than a reasonable time after defendants' promise to prop was litigated and submitted to the jury, a verdict for plaintiff cured an alleged defect in the petition in failing to charge that plaintiff only continued to work a reasonable time after the promise to prop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451-1477.]

#### 3. MASTER AND SERVANT—INJURIES TO SERVANT—MINERS—SCOPE OF EMPLOYMENT.

Where plaintiff, a minor, employed to drive an entry in a mine, was injured while assisting a co-employee in proping a dangerous portion of the roof, which defendants, though notified, had failed to prop, and such precaution was immediately necessary in order that the work plaintiff was employed to do might be continued, it could not be claimed that plaintiff was not acting within the scope of his employment at the time of his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 153-156.]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Theodore Potter against W. R. Ballou and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sam C. Hardin, for appellants. D. K. Rawlings and C. C. Williams, for appellee.

NUNN, J. This action was instituted by appellee's next friend, for his use, against appellants, as partners, who were engaged in the business of mining coal under the name and style of Phoenix-Jeillico Coal Company, for injuries received while driving an entry in appellants' mine. He alleged, in substance, that appellants failed to prop the entry, as it was their duty to do, and as they had frequently promised to do, and by reason of their negligence he received serious injuries. Appellants controverted the pleadings of appellee, a trial was had, and the jury returned a verdict in favor of appellee for \$2,500. Appellants, in their motion for a new trial, set up many grounds; but in their brief they present only two reasons why the judgment of the lower court should be reversed.

The first is that the pleadings of appellee did not state a cause of action; that they failed to allege that appellee only continued to work a reasonable time after the promise to repair, or to prop, was made. In this counsel is mistaken, for in the second amended petition we find this language, to wit: "Plaintiff says that he, relying on said promise, continued to work in the entry, but for which promise he would not have worked in said entry, and within a reasonable time after said promise plaintiff was injured as alleged in his petition." But, if appellants were correct in this, it was cured by the verdict, because this very question was raised in the evidence and submitted to the jury by instruction, and without which it is not reasonable to presume that the jury would have rendered a verdict for appellee.

The second proposition is that appellee was not entitled to a verdict at all, for they were entitled to have the jury instructed to find for them. This necessitates the statement of the facts as shown by the testimony. Appellee, who was at the time of his injury about 19 years old, was employed to drive an entry, which was situated under the ground about 2 miles from the main entrance of the mine. This entry was to be about 7 or 8 feet wide and about 6 feet high, so that a car track could be constructed therein. The vein of coal was but little over 4 feet, so it was necessary to take slate from above it to make the entry the proper height. Appellee's father and Walter Bowers were engaged by appellant to assist in making the entry. It was proven without contradiction that it was appellants' duty to follow them up, as they progressed with their work, by setting props therein, so as to make it reasonably safe, and to keep it in a safe condition. At the time appellee received his injuries they had progressed with the entry about 300 feet, and appellants had only set a few props therein. It was proven, without much, if any, contradiction, that appellee, his father, and Bowers had repeatedly called the attention of the mine boss to the fact that the mine was in a dangerous condition and needed the props, and just as often they had promised to fur-

nish the props and have them set up, but failed to do so. The last promise was made within about three days of appellee's injuries. The slate which fell upon appellee fell from the roof of that part of the entry which had been completed, about 12 or 14 feet from the face of the coal. They had fired a shot, 5 or 6 feet from the face of the coal and in the roof of the entry, to knock down the slate to make the entry the proper height. They then pushed some cars upon the track which had been laid in the entry to this slate, and had loaded five or six of them, when Jim Potter, the father of appellee, discovered that some slate was about to fall from the roof of the entry, 12 or 14 feet from the face of the coal, which they said had not been disturbed by the shot fired by them. Jim Potter went to the place, and tapped it with his pick, and remarked that it was all right; but to be on the safe side he secured a piece of timber to use as a prop for this slate. It was too short, and Bowers found a block and passed it to appellee, which he placed on the floor on which to set the timber, so that it would prop the slate and make it safe. While he was stooping to place this block the slate fell on him and mashed him down, breaking three of his ribs from the spinal column, injuring the column, producing curvature of the spine, and injuring his kidneys, bladder, and right leg. He had not been able to labor any from the time he received the injuries to the time of the trial, which was about two years afterwards; and the physicians who testified stated that he was permanently injured and would never be able to labor.

Appellants' counsel contends that appellee should not have been permitted to recover, for the reason that at the time he received his injuries he was not performing labor for appellant within the scope of his employment, that he was engaged in setting a prop at a place where the entry had been completed and at a place where it was appellants' duty to protect the roof of the entry, and which work he had not been directed to do. This principle is technically correct; but it cannot apply to the facts of this case. Appellants had failed to perform their duty and promises. He was in the entry at his proper place and performing his work, when the necessity arose to try to protect themselves against the slate which was about to fall, and did fall, between them and the mouth of the entry and the mine. They could not know in advance the extent to which the slate would fall, whether it would cut them off from leaving the mine or not, and in addition to this they could not perform their labor and run the cars into and out from the slate which was knocked down from the roof if this slate was permitted to fall. Under these circumstances we are unwilling to say that in their effort to prevent this slate from falling they were not within the scope of their employment. It was a thing neces-

sary to be done for their own protection and to protect the property of their employer.

The amount of the verdict is small for the injuries which appellee received. The instructions were at least as favorable to appellants as they could ask.

For these reasons, the judgment of the lower court is affirmed.

#### KATTERJOHN v. NAHM et al.

(Court of Appeals of Kentucky. Jan. 23, 1908.)

##### 1. APPEAL—HARMLESS ERROR—INSTRUCTIONS—PREJUDICE.

Where the jury did not allow plaintiffs anything for attorney's fees and court costs expended in another action, defendant was not prejudiced by an instruction authorizing the jury, if they found for plaintiff, to include such fees and costs in the verdict.

##### 2. INDEMNITY—CONTRACT TO INDEMNIFY—NOTICE TO DEFEND SUIT—JUDGMENT—CONCLUSIVENESS.

Where a building contract provided that the work should not interfere with the occupation of a tenant, nor cause the tenant damage, and the landlords, on being sued by the tenant for damages alleged to have been sustained, notified the contractor to defend, which he failed to do, and the landlords were required to defend, under which they did unsuccessfully, the contractor, under his covenant, was bound by the judgment against the landlords for the damages so caused.

##### 3. CONTRACT—PROVISIONS—QUESTION FOR JURY.

Where a building contract provided that the contractor should perform all work mentioned in the specifications, etc., as set forth in "article 7 hereto attached," the court properly held as a matter of law that article 7 was a part of the original contract, and was not added thereafter, as contended by the contractor.

##### 4. INDEMNITY—CONTRACTOR'S NEGLIGENCE—ACTIONS—ISSUES.

Where a building contract bound the contractor to do the work without injury to the property of the owners' tenants, and judgment was recovered against the owners for damage done to the property of the tenants by the contractor's negligent failure to perform such stipulation, the contractor's liability, in an action by the owners to recover over against him, having been limited to the injury sustained by the tenants from the contractor's negligence alone, the question whether the tenants had given permission for the performance of the work was immaterial.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Max B. Nahm and another against F. W. Katterjohn. From a judgment for plaintiffs, defendant appeals. Affirmed.

Crice & Ross and Hendrick, Miller & Marble, for appellant. W. M. Reed and Wheeler, Hughes & Berry, for appellees.

**BARKER, J.** In 1901, the appellees were the owners of two one-story brick buildings which fronted on Broadway street, in the city of Paducah. One of these was occupied by J. C. Flournoy, who published therein the Paducah Daily News. In the other the Paducah Daily Register was published by the Register Newspaper Company. The owners

desired to construct an office building, and to do this they planned to construct another building by the side of the two above mentioned, and then raise the whole structure two stories high, so that, after being thus reconstructed, the new building would have a frontage of about 75 feet and a depth of about 115 feet. To make this improvement they entered into a contract with the appellant, Katterjohn, who was a builder of houses by profession. As both of the original houses were occupied by tenants under long leases, it was necessary either to obtain their consent to the erection of the new building or to trespass upon their lawful possession. The owners undertook to, and thought they did, obtain their lessees' consent to the making of the improvements in question. After the building was completed, the Register Newspaper Company brought suit against the owners of the property, the appellees here, charging that they had wrongfully trespassed upon its possession, and had taken off the roof of its house, and while it was in this condition violent rains fell, which washed down sand, dirt, and other debris into their machinery and type and type-setting machines, and in this way damaged its property in the sum of \$2,000. The owners, claiming that under a contract they had with Katterjohn, the appellant here, they were indemnified by him against the claim for which they were sued, gave to the contractor a written notice of the existence of the suit against them, called upon him to come in, take charge of the litigation, and defend it, and informed him that if he failed to do so they would defend the action as best they could. Katterjohn failed to pay any attention to this notice, conceiving that under his contract he was not interested in the outcome of the litigation. The owners filed an answer, denying all of the allegations of the petition, and, a trial being had before a jury, the Register Newspaper Company obtained a judgment for the sum of \$1,500 in damages. That case was appealed to this court and affirmed; the opinion therein being found in 120 Ky. 485, 87 S. W. 296, and the style of the case being *Nahm & Friedman v. Register Newspaper Company et al.* Afterwards the owners paid off the judgment of the Register Newspaper Company, which, with interest, damages, and attorney's fees, amounted to \$2,479.65, and then instituted this action against the contractor, Katterjohn, to recover of him, under his contract with them with reference to the building, the amount they had been forced to pay the Register Newspaper Company.

The claim of the appellees (who were the plaintiffs below) is, substantially, that the appellant, as builder, did the work he was employed to do in a careless and negligent manner, and negligently failed to protect the property of the Register Newspaper Company, and that by reason of this negligence it was damaged; that the Register News-  
per Company had recovered a judgment for

\$1,500 against the appellees, who, as owners of the building, were primarily liable to it; that under article 7 of the contract between appellees and appellant the latter had covenanted to indemnify them against any loss or damage that they might sustain by reason of the manner of constructing the building he was employed to erect; and also that they were entitled to recover under this covenant all costs and attorney's fees which they had expended and incurred in defending the suit. The answer denied that the injury to the Register's property was done through the negligence of the defendant (appellant), or that appellant was liable to the appellees for the judgment recovered against them, and pleaded accord and satisfaction of the claim of appellees against him, and a want of consideration for the execution by him of article 7 of the contract, and that the appellant was induced to sign article 7 by the fraudulent representations of the appellees that they had obtained the consent of the Register Newspaper Company to make the improvements which appellant contracted to do for them. These affirmative allegations were placed in issue, and the case tried out before a jury, with the result that the appellees obtained a verdict against the appellant for the sum of \$1,500, with interest from the date of the verdict until paid. To reverse the judgment predicated upon this verdict the appellant has prosecuted this appeal.

Article 7 of the contract between the appellant and appellees, and which is the only part of it directly involved in this litigation, is as follows: "The building is to be erected on Broadway on the lot next and east of the building occupied by the Register, and is to extend in the second story over the buildings occupied by the Register and the News. Alterations in the first floor of the buildings occupied by the Register and News shall be made as set forth in the plans and specifications. All work in and above the buildings occupied by the Register and News is to be done so as in no way to interfere with the business of the said Register and News, or to cause any damage whatsoever."

The notice of the pendency of the suit instituted by the Register Newspaper Company, given by appellees to appellant, is as follows: "Mr. F. W. Katterjohn will take notice that the above-entitled suit is now pending in the McCracken circuit court, wherein the Register Newspaper Company is endeavoring to recover of the defendants, Friedman & Nahm, the sum of \$2,000 in damages, claiming same were received at the time and because of the alterations and additions to the building made on Broadway street, in the city of Paducah, Kentucky, where said Register Newspaper Company was then (1901) and is now located. Therefore the said F. W. Katterjohn is notified to come forward and defend the suit because of the fact that said Friedman & Nahm have

his obligation and bond of indemnity, by the terms of which said Friedman & Nahm were held harmless from or by reason of any damages which may have been sustained by said Register Newspaper Company, or any one else, and, if any damages have been sustained by said Register Newspaper Company, then under the terms of this bond and obligation executed by said F. W. Katterjohn to the said Friedman & Keller (?) he, and not the said Friedman & Nahm, is liable for said damage. And said F. W. Katterjohn is further notified that in the event he fails or refuses to make the proper defense to this action as against Friedman & Nahm by the Register Newspaper Company, that they will then defend said action, and look to said F. W. Katterjohn for any judgment that may be rendered against them in favor of the said Register Newspaper Company therein, and will look to the said F. W. Katterjohn for all costs and expenses in defending said action. This the 28th day of December, 1902. [Signed] Joseph L. Friedman, Max B. Nahm, by Reed and Berry, Attys. for F. & N."

Upon the trial of the case, the court gave the jury three instructions, which are as follows:

"No. 1. The court instructs the jury that by the terms of the contract sued on, which the defendant admits he executed, he agreed with the plaintiffs that in the reconstruction of the building occupied by the Register Newspaper Company he would do the work in such way as not to interfere with the business of said company and not to cause it any damage whatever. If, therefore, the jury believes from the evidence that the defendant, in person or by his agents, servants, or subcontractors, in the reconstruction of said building, failed to protect the property of said company from injury resulting from their acts, and that it was thus exposed to rain and became injured by reason of water, grit, sand, dirt, or trash, and if the jury further believes from the evidence the said Register Newspaper Company instituted an action in this court against the plaintiffs as the landlord of said company to recover damages from them for such injuries occasioned by the acts aforesaid of the defendant, his agents or servants, or subcontractors, and that the said company did recover of the plaintiffs damages for such injuries to its property occasioned by the acts of the defendant, his agents or servants, in the reconstruction of said building, and if the jury further believe from the evidence that the defendant had reasonable notice of the pendency of said former action, and was requested to defend same, and failed to do so, then the law is for the plaintiffs, and the jury should find for them such damages as resulted to the property of said Register Newspaper Company by reason of the acts of defendant, his agents or servants, or subcontractors, in exposing said property to rain, grit, sand, dust, or trash; and the jury

should further find for the plaintiffs such further necessary and reasonable sums as they paid out in court costs and attorney's fees in defending said action, but in no event can they recover of defendant more than the amounts of the two judgments in favor of said company against plaintiffs rendered in this court, with interest thereon at 6 per cent. per annum from the respective dates thereof, and the reasonable and necessary costs and attorney's fees aforesaid, and in all not to exceed the amount sued for, to wit, \$2,479.65.

"No. 2. The court instructs the jury that unless they believe from the evidence the property of the Register Newspaper Company was exposed to, and injured by, water, grit, sand, dust, or trash, and that such injury resulted from the acts of the defendant, his agents or servants, in the reconstruction of said building, the law is for the defendant, and the jury should so find.

"No. 3. If the jury believe from the evidence the plaintiffs and the defendant, after the completion of the building, entered into a settlement and agreement of compromise, by the terms of which the defendant made deductions from his claims against the plaintiffs for extra work and material in the reconstruction of said building, and that in consideration of such deductions the plaintiffs released the defendant from all liability under his contract with them for damages done to the property of said Register Newspaper Company by him in the reconstruction of said building, then the law is for the defendant, and the jury should so find."

The appellant insists that the court erred in authorizing the jury to find for the plaintiffs the amount of the attorney's fees and court costs expended by them in defending the original case of Nahm & Friedman v. Register Newspaper Co. et al. We do not deem it necessary to pass on this question. Assuming, without deciding, that the court was in error as to these matters, the appellant was not injured thereby. The jury returned a verdict of \$1,500, with interest from the day of judgment until paid, the precise sum awarded against Nahm & Friedman in favor of the Register Newspaper Company, without interest, costs, or attorney's fees. Inasmuch as appellant had notice of the pendency of that suit, and was called on to defend the same, he was bound under his covenant to do so, and consequently bound by the verdict against Nahm & Friedman for the damage caused by his negligence. The amount of the verdict in this case was less than the plaintiffs were clearly entitled to; for, at the very least, they were entitled to interest on the sum paid out by them from the time of the payment.

Appellant also complains that the court failed to submit in the instructions to the jury the question whether or not article 7 of the contract for the building of the houses by Katterjohn, and which contains his cove-



nant to hold the plaintiffs harmless, was based upon a lawful consideration. Appellant's theory as to this is as follows: He claims that the contract between Nahm & Friedman and himself for the improvement of the property out of which grew this litigation originally consisted of six articles, article 7, of course, not being among the number; that long after the work was commenced, there having arisen some controversy with the Register Newspaper Company, article 7 was then drawn up, and, without any additional consideration whatever, pasted on the original contract. All this is testified to by Katterjohn and his brother, who kept his books, and is denied by Nahm & Friedman, and by Brainerd, the architect, who drew up the contract. The latter say that article 7 was a part of the contract at the time it was signed by Nahm & Friedman, and before the work was commenced. If the matter rested alone upon this testimony, we would have no difficulty in reaching the conclusion that the court erred in refusing to submit the question as to whether or not article 7 was a part of the contract as originally drawn, or whether it was afterwards agreed to and pasted on the original contract without any additional consideration therefor. An examination of the contract, which is copied into the record, shows beyond question that article 7, either actually or in the contemplation of the parties, was a part of it as originally drawn. Article 1 is as follows: "The contractor, under the direction and to the satisfaction of Brainerd, architect, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect, and all other labor and materials necessary to complete the entire building, except electric work, mantles, plumbing, steam heating, and hardware trimmings for door and windows of a building to be erected at, as set forth in article 7 hereto attached, which drawings and specifications are understood to form part and parcel of this agreement and are identified by the signatures of the parties hereto." It is admitted that article 7 was pasted on the paper which contained the contract, and the language, "as set forth in article 7 hereto attached," contained in article 1, shows conclusively that article 7 was either at that time attached to the contract, or it was contemplated that it would be attached thereto; in other words, that article 7, as contemplated by the parties, constituted a part of the original contract, and was based upon the same consideration as the other articles. Katterjohn admits that he signed the original contract, and does not claim that the language above set forth, which constitutes a part of article 1, was inserted therein either by fraud or mistake. We think he is bound, under these circumstances, by the recitation in article 1 that article 7 constituted a part of the original contract, and he cannot now be heard to say that it did not. Under these circum-

stances, we think the court correctly refused to submit to the jury a theory in favor of the defendant which was refuted by his admittedly genuine written contract.

There is no evidence in the case to sustain the claim that the appellees fraudulently concealed from appellant that they had not the permission of the Register Newspaper Company to make the improvement on the building occupied by it, or that they fraudulently induced him to believe that they had such permission. The fact is the evidence shows that they did have the permission to make the improvement, which was qualified only by the injunction that in doing so they should not injure the tenant's property; and it was for this reason, in the main, we apprehend, that they required the builder to covenant in the building contract to save them harmless from any injury he might do the property of the newspaper company in making the improvement.

In the suit by the Register Newspaper Company against Nahm & Friedman, while there was a good deal said about a technical trespass on the possession of the tenant, as a matter of fact the evidence was directed to the real damage done the property of the tenant, and the recovery was based upon that alone. In the instructions given by the court in this case the liability of the appellant was limited to the injury sustained by the newspaper company from his negligence alone; and, this being the case, the question of the permission of the newspaper company that the work might be done was an immaterial circumstance. The verdict shows that the jury understood, so far as this item was concerned, that appellant was only liable for his own negligence.

Except the question as to whether the court was correct in submitting the rights of the plaintiffs to recover court costs and attorneys' fees, which we have already decided, if error at all, was harmless, because the jury did not award either to the plaintiffs, the instructions given by the court, in our opinion, fully cover the law of the case, and were as favorable to the appellant as he was entitled, and that the appellant has no substantial complaint of the ruling of the court or the verdict of the jury.

Judgment affirmed.

READ v. SMITH et al.

(Court of Appeals of Kentucky. Jan. 22, 1908.)

MUNICIPAL CORPORATIONS — SALE OF PROPERTY.

Under Ky. St. 1903, § 3660, authorizing towns to sell, etc., property, etc., the trustees of a town owning a school building used for a high school in connection with the common school of a district embracing the town and other territory may, on the establishment of a graded common school district of the town and other territory, sell the building to the district, and where a sale is made in good faith, and at the request of about three-fourths of the citizens of the town containing about 70 per cent. of the tax-

able property of the district, the courts will not interfere on the ground of inadequacy of consideration.

Appeal from Circuit Court, Larue County.  
"Not to be officially reported."

Action by John W. Read against E. S. Smith and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Chas. F. Creal, for appellant. O. M. Math-  
er and Claude Hudgins, for appellees

NUNN, J. In the year 1895 the board of trustees of the town of Hodgenville, Ky., pursuant to a vote of the citizens of the town, issued 35 \$100 bonds and appropriated \$1,500 out of the funds of the town treasury to buy a lot and construct a school building, and in that year the lot was purchased and the building erected. A high school was conducted in the building, and the common school of Hodgenville district was run in connection with the high school. The school was under the supervision of the board of trustees of Kenyon College and the trustees of Hodgenville common school district, but the college building was at all times under the supervision and control of the trustees of the town. The Hodgenville common school district was not limited to the corporate limits of the town, but took in a great scope of the outlying rural district. In the year 1905 the Hodgenville Graded Common School District was established by a vote of the people. It took in all the corporate limits of the town and a great scope of the country around, and was almost coextensive with the old common school district. At a meeting of the board of trustees of the town of Hodgenville held on the 4th day of June, 1906, an order was entered to sell the Kenyon College building to the trustees of the Hodgenville graded common school and their successors in office for the sum of \$1,000, \$200 payable on the 5th day of June, 1908, and a like sum to be paid on the 5th day of each June thereafter until the sum of \$1,000 had been fully paid. On the 7th day of June, 1906, appellant instituted this action, and asked that the defendants and the town board of trustees be enjoined and restrained from making the conveyance as per terms of the order. Three trustees had signed and acknowledged the deed before summons or restraining order was served on them. One of the trustees and the chairman of the board refused to join in the conveyance. From a judgment dismissing appellant's petition and dissolving the injunction, this appeal is prosecuted.

Appellant contends that the deed made by the three trustees of the town to the trustees of the graded common school district is not sufficient to pass a good title, for the reason that the same is not signed and acknowledged by the chairman, or chairman pro tem, of the board, as required by section 3708 of the statutes. It is not necessary to pass upon this question; because, if the title

did not pass by the conveyance of the three trustees, we presume the chairman will not hesitate to execute the deed if it is decided that the conveyance ought to have been made in conformity to the order of the board of trustees, and, if he should refuse, there is a way provided by law to compel him to execute it. According to the testimony, this schoolhouse and lot were worth at the time of the conveyance, or attempted conveyance, from \$4,000 to \$5,000. Appellant contends that it is a waste of the public funds of the town of Hodgenville and a breach of public trust for the trustees to sell the property for the inadequate sum of \$1,000. Considering these facts by themselves, it would so appear; but, considering the surrounding facts and circumstances, it is not so apparent. It appears from the record that the trustees in making this order and attempted conveyance acted in perfectly good faith. There is not the slightest evidence that they were actuated by any fraudulent or sinister purpose. Nearly three-fourths of the citizens of the town presented a petition requesting them to sell and convey the property on the terms stated. The town had erected this schoolhouse about 11 years before that date. There had never been any income received for the use of the house from the Kenyon College or the common school district which had used the house; but, on the other hand, the town had been burdened with the expense of repairing the house for all that time, and at the time of the sale the evidence shows it would have taken \$1,000 to put it in repair. Shortly before this attempted conveyance the people of the town, in connection with the people in a territory outside of the limits of the town, had, by their votes, established a graded common school district, and they had no house in which to have the school taught, and were compelled to either buy or erect one for that purpose. The testimony shows that about 70 per cent. of the taxable property for school purposes in the graded school district is situated within the town limits and about 30 per cent. is without the limits of the town. If a tax had been levied for the purpose of buying grounds and erecting a house for school purposes, the taxes paid by the citizens of the town would, in all probability, have more than equaled the value of the schoolhouse in question, and the town would still have had its house on hands. But appellant claims that making the sale to the graded common school district, for the consideration before named, in effect made a gift of at least 30 per cent. of the value of the house above the \$1,000 purchase price to the people in the territory outside of the city limits. This is apparently true. But he overlooks the fact that the time may come when the apparent hardship or wrong may possibly be placed upon those residing in the territory outside of the city. It may not be long before the population of the town increases, and it is placed in and governed as a city of the

fourth class, which would change radically the system of governing the school. See section 4489 of the Kentucky Statutes of 1903, and the case of *Bailey v. Figely*, 51 S. W. 424, 21 Ky. Law Rep. 341, construing the section referred to, and also section 4484, with reference to establishing graded schools in rural districts and towns of the fifth and sixth classes. It appears from that case that graded common schools established in cities of the first, second, third, and fourth classes cannot include territory outside of the city limits. Such schools must be confined to the limits of the city. We do not decide the question, but it is possible that, if Hodgenville should be advanced to a fourth-class city, the taxpayers outside of the city limits would lose all they had contributed to build the schoolhouse in the town. In view of our complex system of government, it is impossible to so manage and govern each state, county, city, or town and school district so as to make taxation and other burdens fall equally upon all the people. It is necessary sometimes that changes be made in the manner of governing the state or some of its subdivisions, and this at times produces apparent injustice, which cannot always be avoided. The best that frail humanity can do is to make the burdens of government as equal upon all as possible. The board of trustees, under section 3660 of the Kentucky Statutes of 1903, had the power to sell this property, and could use their discretion as to the terms of sale. Considering all the facts and circumstances surrounding them, we are unwilling to say that they exceeded their powers in making the sale of the property on the terms stated.

For these reasons, the judgment of the lower court is affirmed.

#### LOUISVILLE & N. R. CO. v. CLARK.

(Court of Appeals of Kentucky. Jan. 22, 1908.)

##### 1. APPEAL—EXCESSIVE DAMAGES—PERSONAL INJURIES—CONFLICTING EVIDENCE.

Where the evidence is conflicting on the question of damages for personal injuries, but the verdict is not excessive under plaintiff's evidence, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3944.]

##### 2. MASTER AND SERVANT—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Whether a brakeman was injured by the falling of a piece of coal from a tender held, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

##### 3. SAME—CONTRIBUTORY NEGLIGENCE—RELiance ON CARE OF MASTER.

A brakeman, who has nothing to do with the loading of coal on a tender, has a right to presume that it is properly loaded, and may recover for injuries received from a lump falling from the tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675-677.]

##### 4. SAME—FELLOW SERVANTS—WHO ARE.

Employees of a railroad company who load tenders with coal are not such fellow servants

of a brakeman as to preclude recovery by him for injuries received from coal falling from the tender, since they are in different departments of service and the brakeman was not with them to control or advise in the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 501, 505.]

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by R. S. Clark against the Louisville & Nashville Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield, D. H. French, and L. C. Willis, for appellant. J. S. Morris, J. A. Scott, and W. O. Marshall, for appellee.

NUNN, J. This appeal is from a judgment rendered on a verdict of \$1,000 in favor of appellee as damages for injuries received by him while in the employment of appellant as flagman and rear brakeman on a freight train. The injury, as alleged, was caused by a lump of coal falling from the tender, it having been improperly and negligently loaded thereon, and striking him upon the head. It is claimed by appellant that the verdict is excessive. If appellee was injured to the extent testified to by himself and three physicians who testified in his behalf, the verdict is small; but it is excessive if the testimony of appellant's witnesses is true. The facts concerning this question were submitted to the jury, and we see no reason to disturb its finding.

In addition to the allegation that the coal was improperly and negligently loaded on the tender, by reason of which he received his injury, appellee alleged in his petition that the track of appellant, at the place where he received his injury, was improperly constructed and maintained, and, further, that the engineer in charge of the engine left his post of duty and left the engine in charge of the fireman, who was incompetent for such service, and by reason of one or all of these things a lump of coal was caused to fall upon his head, producing the injury complained of. There is a great deal said in the brief of appellant's counsel with reference to the allegations of appellee as to the improper construction and maintenance of its track at the place where the injury was received, and also with reference to the fireman acting as engineer at that time, and his alleged incompetency and negligent operation of the engine and train; but it is not necessary for us to consider these questions, as the court eliminated these matters, by its instructions, from the consideration of the jury.

The only question submitted to the jury was as to whether or not appellant's agents, whose duty it was to load the tender with coal, overloaded it or loaded it in such a manner that coal was likely to and did fall therefrom. No witness testified as to the loading of the tender; but the facts proven with reference to this point are, in substance, as follows: The freight train on which ap-

pellee was rear brakeman moved from Louisville to La Grange, where it stopped to do some switching and to get orders. The train of cars was left on a siding while the engine was used in switching other cars. The switching having been done, the engineer and conductor went into the office to get their orders, and the fireman took charge of the engine, which was on the main track. It was necessary for the switch to be thrown, so that the engine could be backed on to the siding and coupled to the train of cars. Appellee in performing his duty threw the switch, and the fireman in charge of the engine moved it back in the usual and proper manner, and as the rear end of the tender reached appellee he lifted his hands to catch hold of the bars to be carried to the place where he was to couple it to the train of cars, and just as he lifted his hands, as he stated, a lump of coal as large as his head fell from the top of the tender and struck him on the head. He stated that it knocked him down and rendered him unconscious; that when he recovered his senses he crawled to and held himself up with the switch target; that his head bled freely something near a pint; that the substance that hit him made a three-cornered hole in his hat; that he found on the ground at the place where he was struck a lump of coal and several small pieces close around; that he did not see the coal when it hit him. The fireman in charge of the engine saw him standing at the switch target, holding to it with one hand and the other upon his head, and he gave a whistle which brought out the conductor and engineer. They found him, as stated, and asked him, "What is the matter?" and he answered that a lump of coal fell off of the tender and hit him. They carried him to the depot and sent for a physician. They stated that the largest lump of coal found at the place was no larger than one's fist. Appellee stated that he is 5 feet and 4 inches tall, and that from the top of the tender to the ground is about 11 feet, leaving a space for the coal to fall through before striking him of about 6 feet.

Appellant's counsel contends that under this testimony the court erred in not giving a peremptory instruction to the jury to find for it, because no one testified to seeing the lump of coal fall from the tender; that by reason thereof he failed to establish negligence on the part of appellant; that this case is governed by the principles enunciated in the cases of *Hughes v. Railroad Company*, 91 Ky. 526, 16 S. W. 275, and *Wintuska's Adm'r v. L. & N. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579, which announce the principle that when the plaintiff in his testimony presents to the jury two or more theories as to how the accident happened, for one of which the defendant would be responsible, but for the others it would not be responsible, then in such state of case there is a failure of proof. This is unlike the case at bar. Appellee presented by his testimony

only one theory; that is, that the lump of coal fell from the tender and struck him. No other theory was presented by him, nor did appellant present any other theory of the accident. It is certain from the testimony that some heavy substance fell upon his head, that a fresh lump of coal was found at the place where he received his injury immediately after he was hurt, and that the tender was filled with coal. These circumstances presented facts which were properly submitted to the jury for its consideration.

The proof shows that it was no part of the duty of appellee to load this tender with coal, or inspect it and see whether or not it was overloaded. This duty devolved upon the company, or some one representing it. It was the duty of the company to see that the coal was properly loaded and to make it reasonably safe for those whose duty it was to work around and about it. Appellee had the right to presume that it was properly loaded and safe. See the cases of *L. & A. R. R. Co. v. Wilson*, 99 S. W. 634, 30 Ky. Law Rep. 734, *Mergenthaler-Horton Basket Co. v. Taylor*, 90 S. W. 968, 28 Ky. Law Rep. 923, *Pfisterer v. Peter*, etc., 78 S. W. 450, 25 Ky. Law Rep. 1605, and *Brents v. L. & N. R. Co.*, 104 S. W. 961, 31 Ky. Law Rep. 1216.

Appellant's counsel contends that the court erred in permitting appellee to recover for ordinary negligence on the part of appellant's servants who loaded the tender with coal, claiming that they were fellow servants with appellee. This precise question was thoroughly considered and determined in the case of *L. & N. R. Co. v. Brown*, 106 S. W. 795, the opinion in which was delivered January 9, 1908. Appellee was not in the same department of service with those who loaded the tender with coal, nor was he with them, so that he could control or advise them in the performance of their work. The case of *Gulf, C. & S. F. Co. v. Wood*, 63 S. W. 164, an opinion of the Texas Court of Civil Appeals, is like the case at bar. In that case an employé of a railroad company was injured by the falling of a lump of coal from the tender as it passed the place where he was at work, and the court said: "It is not shown in the evidence what caused the piece of coal which injured appellee to fall from appellant's passing train. According to the testimony of appellant's trainmen, the tender was properly loaded with coal when the train started on its journey, and that in taking coal from the tender to the fire box of the engine it was carefully handled. The fact that in passing the appellee a large piece of coal fell or was thrown from the train with great force is all the evidence found in the record tending to show negligence on the part of appellant. We find, in view of the principles of law hereinafter stated, which we think are applicable to this case, that such fact is of itself, under the circumstances, sufficient to support the verdict of the jury in finding that appellant was guilty of the al-

leged negligence and that such negligence was the proximate cause of appellee's injury. There is no evidence which, in our opinion, tends in the least to show that the appellee was guilty of contributory negligence, or that the cause of his injury was a risk assumed by him as an incident to his employment.

\* \* \* There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of the injury complained of. These are the instances where the doctrine '*res ipsa loquitur*' is applied. This phrase, which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident. There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by defendant, that the accident arose from want of care." See, also, the case of *Howser v. Cumberland & Pennsylvania R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, an opinion of the Maryland Court of Appeals, and the many cases therein cited.

For these reasons, the judgment of the lower court is affirmed.

#### HALL v. FRICK CO.

(Court of Appeals of Kentucky. Jan. 23, 1908.)

##### 1. SALES—PASSING OF TITLE—NECESSITY OF PAYMENT.

Defendant company sold a sawmill outfit to G. and S., to be received and settled for at their railroad station. S. refused to complete the bargain, and plaintiff, knowing the situation, agreed with G. to pay the freight on the machinery, set it up, and furnish burrs for grinding grists, for which he was to become a half owner in the property. G. failed to make the settlement provided for in the original contract, permitted defendant company to take the outfit back, and it was subsequently sold to another party. Plaintiff sued for conversion of the property. *Held*, that he could not recover from the defendant company, for the property never passed from it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 542-551.]

##### 2. SAME—RIGHTS OF PURCHASER FROM BUYER.

Plaintiff did not provide the burrs as agreed, though he had ample time, though he claimed that he was able and willing to do so. *Held*, that he could not recover in any event, since he had first broken the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 607, 608.]

Appeal from Circuit Court, Floyd County.  
"Not to be officially reported."

Action by Lee Hall against the Frick Company and another for conversion. From a

judgment for the Frick Company, plaintiff appeals. Affirmed.

James Goble, for appellant. May & May, for appellee.

O'REAR, C. J. Appellee, a manufacturer of sawmill machinery and engines, sold an outfit to Greenville Tacket and Samuel Tacket, of Floyd county, for \$1,350. The machinery was to be shipped to the purchasers' nearest railroad station, where it was to be received and settled for by them by executing notes and certain mortgages to secure the purchase price. Before it was received Samuel Tacket repented of his bargain, and refused to consummate the sale. Appellant and Greenville Tacket then agreed that appellant should pay the freight on the machinery, set it up, and furnish burrs for grinding grist, for which he was to become owner of one-half of the property and an equal partner. Greenville Tacket refused and failed to make the settlement provided for in his original contract, and, being unable and unwilling to pay for the machinery, suffered appellee to take it back. Appellee then sold the machinery to another party. This suit is by appellant against appellee and Greenville Tacket to recover damages for the conversion of his property—his interest in the mill. The circuit court dismissed his action in so far as it sought a recovery against appellee, but adjudged him the amount he expended for freight against Greenville Tacket. Tacket has not appealed, and we do not now notice the merits of that judgment. But we think the judgment in favor of appellee was right.

We rest our conclusion on two grounds: In the first place, as Tackets had never consummated their purchase, the title to the property had not passed. Appellant knew the whole situation. He bought into it with notice, therefore, and was in no sense misled by appellee. As his vendor had not title to the machinery, he could not convey title by his contract. In the second place, appellant did not comply with his bargain with Greenville Tacket. He did not provide the burrs which he agreed to do. He said he was "able and willing" to do so, but he had ample time, and failed. Having first broken the contract, he ought not to recover upon it. Nor do we think his contract one which, under all the circumstances shown in the record, a court of equity ought to enforce.

Judgment affirmed.

#### BLACKBURN'S ADM'R v. CURD.

(Court of Appeals of Kentucky. Jan. 23, 1908.)

##### 1. PHYSICIANS AND SURGEONS—MALPRACTICE—COMPLAINT.

In an action against a surgeon for malpractice in failing to properly care for intestate after removing a tumor from his head, a petition alleging that the directions given by defendant as to the care to be given the incision where the operation was performed were carefully followed by deceased and the members

of his family was not defective, as impliedly indicating that defendant gave other directions which were not followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 37.]

## 2. SAME.

Where, in an action for malpractice for a physician's failure to properly care for deceased after he had performed an operation on his head, a petition alleged that all the directions given by defendant for the care of the wound were minutely followed it was sufficient; it not being necessary to minutely allege all the directions and advice given to effect a cure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 37.]

## 3. SAME—ABILITY TO OBTAIN OTHER PHYSICIANS.

Where a petition for malpractice alleged facts showing an obligation on defendant to continue to treat deceased, and that he failed to comply therewith or render the necessary treatment, and by reason of such failure the deceased received injuries and died, the petition was not objectionable for failure to allege that another physician could not have been obtained to treat deceased when defendant failed to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 37.]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by Leon Blackburn's administrator against T. H. Curd. From a judgment dismissing plaintiff's petition on demurrer for want of facts, he appeals. Reversed and remanded.

O. V. Riley, for appellant. Sampson & Sampson, for appellee.

NUNN, J. This appeal is from a judgment rendered in the Bell circuit court, sustaining a demurrer and dismissing appellant's petition for the reason that it did not state a cause of action.

Omitting the formal parts, the petition is as follows: "Plaintiff says that the defendant, T. H. Curd, is a regular licensed and practicing physician of Bell county, Kentucky, and was such a physician at all times mentioned in this petition. Plaintiff says that said decedent (Leon Blackburn) was a stout, able-bodied person, and in good health, but had a growth upon his head, which the defendant after an examination thereof pronounced a tumor; that said growth was on the right side of the top of the head, and was about the size of an egg; that the defendant, after examining same, advised his intestate to have it removed, and assured him that the removal thereof would not endanger his life or health, or give him any trouble longer than a few days—at most not longer than two weeks; that after the said examination and assurance by the defendant his intestate in the month of July, said year, engaged the defendant to perform said operation and intrusted same to him; that the defendant performed said operation and undertook the treatment of the deceased after said operation was performed, and for that purpose had his intestate visit his office, and he visited the home of said decedent. Plaintiff says that

the directions given by the defendant as to the care and attention to be given the incision on the head of the deceased, where said operation was performed, were carefully followed by the deceased and the members of his family; that the services of the defendant in the treatment of deceased were continued and exclusively relied on by the decedent and the members of his family until the defendant failed to attend decedent when sent for for that purpose, and neglected to properly or at all to treat the decedent for several days, to wit, three days, during which time defendant was sent for to attend deceased, and was notified by the messenger sent after him that the deceased was suffering greatly and badly in need of proper attention by the defendant; that defendant failed and refused to attend or treat deceased during said three days, and because of said failure and his neglect to bestow proper and ordinary care, skill, and diligence upon the deceased after said operation was performed and during said three days his intestate got into such a condition from the effect of such failure and neglect that he was beyond any relief which other medical or surgical aid could render, and died therefrom on the 8th day of September, 1905. Plaintiff says that through and by reason of the carelessness and negligence of the defendant his intestate lost his life, to the damage of the plaintiff in the sum of \$10,000."

Appellee, by his general demurrer, admitted every material fact alleged in the petition. His counsel contends that the petition is defective and insufficient, for the reason that it was only alleged that the directions given by appellee as to the care and attention to be given the incision on the head of deceased, where the operation was performed, were carefully followed by the deceased and the members of his family; that this limited the care and attention to the wound on the head and the directions of appellee with reference thereto; that this language implies that appellee gave other directions which were not followed. In our opinion this point is not well taken. The incision on the head of deceased made by appellee was the thing to be treated by appellee, and it is to be presumed that the directions of appellee with reference to the care and attention were all given to that end, and as the effect of the allegation in the petition that those directions were followed by deceased and the members of his family it was not necessary to allege minutely all the directions and advice given to accomplish a cure.

The second proposition is that the petition is insufficient for the reason that it was not alleged that another physician could not be obtained to treat deceased when appellee failed to treat him. A contract, or such a state of facts as made it obligatory upon appellee to continue to treat deceased, were alleged, and that he failed to comply therewith and render the proper and necessary treat-

ment to the deceased, by reason of which failure deceased was injured. This stated a cause of action against him. The matter contended for may be pleaded by appellee.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent herewith.

**B. F. SCHWARTZ & CO. v. ERIE R. CO.**  
(Court of Appeals of Kentucky. Jan. 28, 1908.)

**1. CARRIERS—CARRIERS OF FREIGHT—LIABILITY.**

A carrier is not responsible for injury to apples by freezing, due to their own inherent nature and natural causes without fault on the carrier's part, or caused by the shipper's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 486.]

**2. SAME—CUSTOM.**

Under a custom that a carrier shall not open or close the ventilators of a car, or change them from the position in which placed by the shipper, unless so notified, the carrier may assume, on failure to give notice, that the shipper does not desire the ventilators changed, and is not liable for failure to do so.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by B. F. Schwartz & Co. against the Erie Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Thomas A. Barker, for appellants. Helm & Helm, Huston Quinn, and Benjamin D. Warfield, for appellee.

**HOBSON, J.** B. F. Schwartz & Co. brought this suit to recover of the Erie Railroad Company \$332.50 in damages for the freezing of a car load of apples shipped on December 9, 1902, from Honesdale, Pa., to Louisville, Ky., alleging that the apples were delivered to it in good order, and that between Honesdale, Pa., and Cincinnati, Ohio, while they were transported by it, it carelessly and negligently left open the ventilators on the car, and that by reason of this the apples were frozen and unfit for use. The defendant by its answer pleaded that it placed the car at the warehouse at Honesdale at the request and for the use of G. C. Abraham; that he accepted the car and took control of it, and undertook to load and to secure and close it in accordance with his own wishes and the necessities of the freight which he put into it; that he had access to the ventilators, and could leave them open or closed as he saw fit; that he loaded the car and notified it the car was ready; that it then accepted the car from him, subject to shipper's load and count; that while the car was in its possession the ventilators were not changed or put in a different condition from that in which he had put them; that in the bill of lading under which the car was received, and which contained the instructions given for its management, there were no directions that the venti-

lators should be closed or opened, or manipulated in any way; and that without such notice or direction it was the universal custom and practice of all railroad companies, well known, acquiesced in, and agreed to by the public, that the carrier should not open or close the ventilators, or change them from the position in which they were placed by the shipper. The plaintiffs demurred to the answer, the court overruled the demurrer, the plaintiffs stood by the demurrer, the court dismissed the action, and the plaintiffs appeal.

It is insisted for them that a carrier, in the transportation of perishable articles, is responsible for damages accruing, and that any damage resulting from a negligent act cannot be justified by custom or usage. Where the injury to the goods is due to their own inherent nature and from natural causes, such as freezing, without fault on the part of the carrier, he is not responsible. 6 Cyc. 381; Wolf v. Express, 43 Mo. 421, 97 Am. Dec. 406; McGraw v. Railroad Co., 18 W. Va. 361, 41 Am. Rep. 696; 5 Thompson on Negligence, § 6456. The carrier is also not responsible for any injury which is due to the negligence of the shipper. 6 Cyc. 379. The defense presented in the answer is not that a negligent act of the carrier may be justified by custom or usage. The defense is that the carrier was not negligent. When the shipper loaded the car and fixed the ventilators to suit his judgment, if the custom of the business, universal and well known, was that he was to inform the carrier if any change was to be made in the ventilators, and he failed to give such notice, the carrier had a right to assume that he did not wish the ventilators changed. If in such a case the carrier had changed the ventilators, and the apples had thereby been injured, it would have been liable for the loss; for the shipper could then say, "I had fixed those ventilators right, and by giving you no directions to change them, under the custom, I directed you to let them remain as they were." If the shipper had said in words to the railroad company that he had fixed the ventilators as they should remain for the safety of the freight, the legal effect of the transaction would not have been different from what it was under the custom shown. The carrier is not guilty of negligence in obeying the instructions given it when the goods are received; and when goods are loaded on ventilated cars, the shipper arranging the ventilators, it has a right to assume, under the custom above referred to, that he expects the ventilators to remain as he has put them, unless he gives notice to the contrary.

In the case at bar the apples were shipped South. It does not appear that there was any change in the temperature while they were carried. It does not appear even that the carrier knew that the car was loaded with apples, and nothing is shown to make it incumbent on the carrier to depart from the well-known usage of the business. In Dens-

more Commission Co. v. Duluth, S. S. & A. R. Co., 101 Wis. 563, 77 N. W. 904, the apples rotted because they were not ventilated. A recovery was denied. The court said: "If the plaintiff desired to have the apple department of the cars ventilated by opening the side doors at stations from time to time during transit, then it should have had such stipulation inserted in the shipping order."

Judgment affirmed.

## CAMPBELL v. SOUTHERN BITULITHIC CO. et al.

(Court of Appeals of Kentucky. Jan. 29, 1908.)

### 1. MUNICIPAL CORPORATIONS—PAVING CONTRACTS—SUFFICIENCY OF COMPETITION—PATENTED PAVEMENT.

Where an ordinance for the paving of certain streets provides for bids for the construction of a pavement out of either vitrified brick or bitulithic pavement, the two kinds of pavement are sufficiently brought into competition with each other, so that a contract for bitulithic pavement will be valid, even though it is a patented pavement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 854, 855.]

### 2. SAME—VALIDITY OF CONTRACT—AUTHORITY OF COUNCIL.

The council of a city of the fourth class may use its discretion as to the kind of pavement which should be laid, and the fact that a bid accepted is for a patented pavement, or that another kind of pavement would be cheaper, is immaterial; and where the council acts in good faith, without fraud or collusion, and there is no showing of abuse of aldermanic discretion, or a violation of the statute as to cost, the contract cannot be interfered with by the courts.

### 3. SAME—EFFECT OF SHAM BID—OTHER VALID BIDS.

Where an ordinance submits a proposition for bids on pavement to be constructed either of vitrified brick or bitulithic pavement, the fact that one of two bids for bitulithic pavement is a sham bid would not affect the validity of a contract let to the one making the other bid, if there is a competitive bidding between the successful bitulithic bidder and several bidders on brick paving.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 854, 855.]

Appeal from Circuit Court, Boyd County.

"Not to be officially reported."

Action by Mary E. Campbell against the Southern Bitulithic Company and another to enjoin execution of a paving contract. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. Furlong and S. G. Willis, for appellant. P. K. Malin, and L. F. Zerkoss, for appellees.

LASSING, J. Ashland is a city of the fourth class. By its board of council it passed an ordinance for the improvement by original construction of certain streets with vitrified brick or bitulithic pavement. The ordinance provided that the council should determine which pavement it would use after the bids had been received and examined. At the same meeting an ordinance was passed fixing the specifications for both pavements. The specifications for bitulithic pavement

called for the use of Warren Bros.' patented pavement and patented machinery for laying same. Thereafter bids for this work, under the specifications adopted, were advertised for, and several bids were received for brick pavements and two for bitulithic pavement. One of the bids for bitulithic was by the Southern Bitulithic Company and the other by Henkel & Sullivan of Cincinnati, Ohio. The bids for the brick pavement were considerably lower than those for bitulithic. After the bids were examined the council accepted the bid of the defendant the Southern Bitulithic Company, and on the 4th day of May, 1906, contracted with this company to do the proposed work. Bond was executed by the successful bidder, as required by the statute and the ordinance. On the 14th of May the contract was accepted and the bond approved. On the 23d of May appellant, Mary E. Campbell, owning property abutting on the streets proposed to be improved, in her own right and for others similarly interested, filed suit in the Boyd circuit court, seeking to enjoin the city and the contractor from carrying out this improvement as proposed, on the ground that the contract had not been let according to law and was invalid and void. Demurrers were filed by both the city and the Southern Bitulithic Company to the petition as amended. The court sustained the demurrers, and, plaintiff declining to amend further, her petition was dismissed. Because thereof she appeals.

The petition charges that, because the bitulithic pavement is patented and exclusively in the control of a single corporation, it therefore cannot be used in public improvements, for the reason that competition is required in all such work, and there can be no competition where there is but one article in a class offered for competition, and that, even if bitulithic pavement could be used, it could not be under the specifications adopted in this case, for the reason that these specifications excluded all equally good material; that the vitrified brick pavement was much cheaper, and that this was the only pavement upon which bids were received that were in fact real, bona fide, competitive bids; that the coupling of the vitrified and bitulithic pavement in the same ordinance was a sham, resorted to for the purpose of deceiving the lot owners into a belief that competition could be had; that the ordinance was void, in that it violated the provisions of the Constitution, which requires that all public improvements shall be by competitive bidding and makes no provision authorizing cities of the fourth class to contract for a patented pavement; that the contractor, the Southern Bitulithic Company, is a monopoly, and by reason of this contract that the city would be wholly within its power and without remedy in the repair of its streets, for the reason that it would be compelled to use the machinery and materials owned and manufactured by this company, and subject to such exorbi-



tant prices as the said company might see fit to charge therefor. The amended petition attacks the sufficiency of the notice and advertisement for bids. Copies of the ordinance and specifications are made a part of the pleading.

This court has held in the case of *Fineran v. Central Bitulithic Paving Company*, 116 Ky. 505, 76 S. W. 415, that a patented article may be used in the construction of streets, provided it is brought into competition by the ordinance calling for the improvement with other like or equally as good material for such purposes, and in that case the contract was held to be void because, under it, it was indispensable that the patented article should be used. In the case at bar there is no such provision in the ordinance. On the contrary, it calls for bids for the work to be constructed out of vitrified brick or bitulithic pavement. Bids were received for this construction out of both materials, and after they had been so received and opened the counsel, in the exercise of their discretion, determined that the bid of appellee company was, under all circumstances, the best. In arriving at this conclusion they took into consideration the wearing qualities, durability, cost, etc., of each material. The two kinds of pavement were thus brought into direct competition, the one with the other, and it was not and could not have been known until after they had thus been brought into competition which bid it was to the best interest of the city they should accept. It will not do to say that a patented article cannot be adopted unless it is put into competition with the same kind of material; for a patented article necessarily stands in a class by itself, and the only way competition could be had with a patented article is to require that it compete with some other kind of material used for the same purpose. Hence in the *Fineran* opinion it was said that it must be put into competition with a like or equally good material for such purpose.

The petition alleges that vitrified brick is a better material for this purpose than bitulithic; and, this being true, appellant cannot be heard to say that the bitulithic in this case was not placed in competition with material equally as good. In the case of *City of Paducah on Petition*, 89 S. W. 302, 28 Ky. Law Rep. 412, wherein the court was called upon to construe an ordinance providing for the receiving of bids on vitrified brick, bitulithic, bituminous macadam, or other improved material, as might be determined best by the Board of Public Works, the ordinance was held to be valid and in conformity with the rule laid down in the *Fineran* Case above cited. In the case of *Trapp v. City of Newport*, 115 Ky. 840, 74 S. W. 1109, an ordinance providing for the improvement of streets with either brick or bituminous macadam was held to be valid, and in that case it was announced that the city had a right to select two materials of which a public improvement may be

made and submit them for bids in the alternative. The ordinance in that case is very much like the ordinance in the case at bar, each calling for bids upon the work out of brick and bitulithic. The ordinance in each of the cases above cited was passed by council in cities of the second class, where by statutory provision it is expressly required that all public improvements of this character be made upon competitive bidding; so that, without going into a consideration of the question as to whether or not this work is required to be done by competitive bidding in cities of the fourth class, we are of opinion that it was so done in the case at bar.

Appellant also complains because council accepted the bid of a company which uses a patented article in the construction of the streets. The answer to this objection is that the statute makes no provision as to the kind of material out of which the streets shall be constructed; but this is left, as it should be, to the wisdom and judgment of the council, and so long as the council does not abuse its discretion courts have no control over their action in this particular. In the case of *Allen v. Woods*, 45 S. W. 106, 20 Ky. Law Rep. 59 it was said: "As to the claim of appellants that the last sewer was not necessary, and that the construction of a previous sewer by them and other property holders was sufficient, it seems to us, as was said in this court in the case of *Preston v. Rudd*, 84 Ky. 150, 7 Ky. Law Rep. 809, that the council, which is the governing body of the city, must, from necessity, decide whether the assessed area or tax district as an entirety will be benefited by the contemplated improvement, and its decision upon the question whether the public need demands the improvement must be regarded as final, unless the absence of benefit and public need of the improvement make it manifest that it is a spoliation, and not legitimate taxation." And in the case of *Bullitt v. Selvage*, 47 S. W. 255, 20 Ky. Law Rep. 599, in passing upon the discretionary power or right of the city government of the city of Louisville to make certain improvements, this court said: "As to the propriety or necessity of the improvement in question, it is sufficient to say that the law seems to be well settled that the city government of Louisville is the sole judge of the necessity of such improvement." And in the case of *Duker v. Barber Asphalt Paving Company* (Ky.) 74 S. W. 744, it is said: "The rule is that, while these assessments rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner shall be shown; the judgment of the city council being conclusive as to the propriety of the improvement. \* \* \* And whilst we may well doubt the necessity for substituting a Barber asphalt pavement for a macadam turnpike road upon the remote outskirts of a

city like Louisville, under the law this matter has been left to the sound discretion of the municipal authorities, and the courts, except in case of spoliation, are powerless to afford relief."

Appellant also complains because council accepted the bid of appellee company, and contracted for a bitulithic pavement, rather than a vitrified brick pavement, which could have been secured at a much lower price. This objection is fully met by the rule of this court in the case of *Trapp v. City of Newport*, above referred to, wherein it is said: "It does not follow, therefore, that because a bidder's proposal is for the least sum he is the lowest bidder. The fact as to whether he is or not depends upon a proper consideration of other questions besides the price. One class of material may make a much more desirable and satisfactory highway than another, and may be, therefore, really cheaper at a higher price than the inferior at a lower. These matters are peculiarly within the province of those vested by law with the power of making such improvements. The court should proceed with great caution when asked to interfere with the discretion conferred by law upon municipal officers in regard to such matters." In that case the court clearly recognized the right of the council to determine the character of the material that should be used in the improvement, and also to determine, all things considered, what bid was in fact the lowest and best bid, and that, in the absence of a charge of fraud or corrupt motive, courts were not authorized to interfere with municipal officers in the exercise of their judgment upon these particulars. The city council is not charged to have acted in bad faith in passing the ordinance putting these two materials in competition, nor is there any charge of fraud or collusion between the city authorities and appellee the Southern Bitulithic Company, by or through which it secured the contract to improve the streets in question. There is no allegation that there has been in this case an abuse of councilmanic discretion, or that the cost of the improvement will exceed the charter limit, to wit, 50 per cent. of the value of the ground chargeable therefor after the improvement is made, excluding the value of the buildings and other improvements thereon. This being true, we are of opinion that in all of their acts they kept clearly within their well-defined statutory powers, and we see no reason for judicial interference.

It is argued for appellant that, if courts cannot review the actions of a council, it would be vested with absolute and arbitrary power with respect to these matters, and that this power exists nowhere in this republic. This court has been repeatedly called upon to answer this question, and it has invariably held that ultimate power must be lodged in some legislative body, and that the acts of such legislative bodies, when thus vested with such ultimate power, are conclusive, un-

less tainted with fraud, or exercised with such bad faith, recklessness, or lack of discretion as to amount to spoliation. We have been unable to find an authority in any state that is not in harmony with the view as thus expressed by this court. A property holder may not complain because council, in the exercise of its discretion, has not acted as he would have acted, and the fact that it does so affords him no grounds for relief, unless he charges and can show that the council has acted corruptly or contrary to the statute, or that its act will amount to spoliation. It is true that it is charged in the petition that one of the bitulithic bids submitted was a sham bid; but it is not alleged that this fact was known to council, and, even if it were true, it would not invalidate the ordinance, nor the act of council in accepting the bid of appellee, for under the admitted facts there was competitive bidding between several vitrified brick bidders and appellee, and, even if there had been only one of each, the requirements of the statute providing for competitive bidding, even if it does so, would have been satisfied. Council may be required to advertise for and receive competitive bids; but the law does not contemplate, nor could it regulate, the number of bids upon each kind of material to be submitted.

We are of opinion that the ordinance and the proceedings throughout were in conformity to the requirements of the law, and in the absence of any showing that the acts of the council are tainted with fraud, or that there was collusion between the appellee the Southern Bitulithic Company and the council, whereby the work was done at a higher price than it could have been done, but for such fraud or collusion, we are of opinion that plaintiff, in her petition as amended, failed to state a cause of action, and the trial court was warranted in sustaining the demurrer thereto.

For the reason given, the judgment of the lower court is affirmed.

#### CLARK v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 24, 1908.)

CRIMINAL LAW — EVIDENCE — ADMISSIONS — PRELIMINARY PROOF.

The commonwealth, seeking to prove an admission of accused while in jail in a conversation with a witness confined on another floor in the jail, carried on through a pipe leading from the cell of accused to the floor occupied by the witness, may show by circumstantial evidence that it was accused who talked with the witness; and, where it does so, the testimony of the witness as to what accused said is admissible, though the witness did not see the person who talked with him and did not know his voice.

"Not to be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 105 S. W. 393.

HOBSON, J. On the original hearing, as is usual in such matters, the material parts

of the record bearing on the question to be decided were read to the court. Since the petition for rehearing was filed we have examined the record. The testimony of Blair can only be competent upon the ground that it shows a confession made by the defendant. But, to make the statement Blair heard competent against the defendant, the commonwealth must show that he made the statement. The difficulty with the proof offered on this subject is that it does not establish the fact. Blair did not see the person who talked to him through the sewer pipe, and he did not know the voice. The proof does not show that only a person in the cell downstairs in the southwest corner of the jail could talk through this sewer pipe to a person upstairs where Blair was. It does not show that Clark was confined in this cell, and that no one else had access to the sewer pipe. It is not uncommon for prisoners to be allowed to use the corridors of the jail during the day. The evidence of Blair shows this was the case upstairs where he was, and there is no proof that things went differently downstairs. The commonwealth may show by circumstantial evidence that it was Clark who talked to Blair through the sewer pipe, and if on another trial the evidence should show that Clark was confined in this cell, that no one else had access to the sewer pipe, and that no one else could talk through it to a person where Blair was, except a person in this cell, the testimony of Blair as to what was said may be admitted.

The petition for rehearing is overruled.

#### HATFIELD et al. v. HOLLOWAY.

(Court of Appeals of Kentucky. Jan. 24, 1906.)

##### 1. APPEAL—RECORD—FILING TRANSCRIPT—TIME.

Where a transcript of the record was not filed 20 days before the first day of the second term of the court next after the granting of the appeal, as required by Civ. Code Prac. § 738, the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2744.]

##### 2. COSTS—DISMISSAL OF APPEAL—DAMAGES ON.

Damages will not be awarded upon the dismissal of an appeal from a judgment merely decreeing that plaintiff receive as royalty upon a certain lease \$300 per annum during the continuance thereof, the judgment not being one for the judgment of money, which may be enforced by execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 994.]

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

Action by John Holloway against Albin Hatfield and others. From a judgment in favor of plaintiff, defendants appeal. Appeal dismissed, but plaintiff's motion for damages overruled.

York & Johnson, for appellants. Roscoe Vanover, for appellee.

SETTLE, J. Appellee moves for the dismissal of this appeal, with damages. The record was not filed in the office of the clerk of this court 20 days before the first day of the second term of the court next after the granting of the appeal by the court below. Civ. Code Prac. § 738. The appeal must therefore be dismissed. We cannot, however, award damages. The judgment appealed from is not one upon which execution may issue. It merely adjudges that appellee is to receive as royalty upon a certain lease \$300 per annum during the life of the lease. It does not in terms or by implication operate as a judgment in personam, or provide for the issue of execution.

It has uniformly been held by this court that the provisions of the Civil Code of Practice allowing damages on affirmance or dismissal of an appeal are limited in their application to judgments for the payment of money which may be enforced by execution or similar process. *Worsham v. Lancaster*, 104 Ky. 818, 48 S. W. 410, and authorities therein cited.

Appeal dismissed, but motion for damages overruled.

#### GIVENS v. GRIDLEY et al.

(Court of Appeals of Kentucky. Jan. 30, 1906.)

##### 1. PRINCIPAL AND SURETY—CONTRACT BETWEEN—VALIDITY.

A contract to pay another to become surety or to lend one his credit is not unlawful.

##### 2. SAME—CONSIDERATION.

A contract to pay another to become surety or to lend one his credit is based on a sufficient consideration.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Sam G. Givens against Minnie Gridley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

D. G. Park, for appellant. Oliver, Oliver & McGregor, for appellees.

HOBSON, J. S. G. Givens brought this suit against Minnie Gridley and her husband, C. E. Gridley, on June 10, 1905, alleging that he transferred to her 35 shares of stock, of value of \$100 a share, in the Driskill Post Hole Auger Company, which she and her husband agreed to hold as collateral security for a loan of \$2,000 which they agreed to furnish him; that they procured for him only \$800, which he had paid; and that they refused to transfer the stock to him, which was then of value \$1,750. They filed an answer, and numerous other pleadings were filed by the parties. Proof was taken, and on final hearing the circuit court dismissed the petition.

The facts of the case are these: Givens and Gridley were both interested in the Driskill Post Hole Auger Company, which had a capital stock of \$30,000 and but little money. In October, 1903, it made a contract with

Taylor & Lucas by which it issued to them 80 shares of its stock on their agreement to furnish it \$2,000 as it needed the money; the company to execute its notes to them for the money. Hughes and Oliver took from Taylor & Lucas 10 of these shares and agreed to put up \$250, which they did. This left Taylor & Lucas 70 shares and the obligation to put up \$1,750. After they had put up several hundred dollars they got dissatisfied, and Givens took their contract off their hands, paying them back what they had put up and taking the 70 shares which they held. He borrowed \$150 from Gus Smith and pledged the stock to him to secure the loan. The company needed \$800, and Smith had to be paid. So, being in a strait, he agreed with Gridley to transfer to him absolutely 85 shares of the stock if the latter would furnish or raise for him \$800. Gridley had no means, but his wife had credit, and on her credit the \$800 was borrowed, 35 shares of the stock were pledged as collateral on the note, and 35 shares were transferred to him. The note was executed to a trust company, who lent the money, and was signed by Givens and Gridley and wife. Gridley then transferred the 35 shares he held to his wife. This was done on December 2, 1903. On December 8, 1903, a writing was signed by Givens and Gridley evidencing the contract between them as above stated. The 35 shares which were placed as collateral on the note were returned to Givens when he took up the note in June, 1904. He then sold these shares to others, and in writing resigned as director of the company, stating in the writing that he had sold his stock and was no longer a stockholder. He did not then claim the other 35 shares held by Mrs. Gridley, or, so far as appears, set up claim to them until shortly before he filed this suit. In the meantime the company had done better, and its stock was bringing from \$30 to \$50 a share. In December, 1903, when the arrangement with Gridley was made, the stock had only a nominal value, say from \$3 to \$5 a share.

A contract to pay another to enter as surety for one or to lend one his credit is not unlawful. It is based upon a sufficient consideration. If there is fraud or imposition, it may be attacked on that ground; but nothing of this sort is pleaded or attempted to be proved. Whether the contract was usurious we need not consider, as the action was not based on this ground, or brought within the time allowed for the purpose. The action is based on the idea that Gridley was to furnish \$2,000 and failed to carry out the contract. The evidence is against the plaintiff on this question. The \$800 was gotten on Mrs. Gridley's credit. She had nothing to protect her in the liability she assumed but this stock, then worth less than half the amount of the debt. She took a risk which she was under no obligation to take, and which might have involved her in loss. The contract that she was to have half the stock for the risk

she took did not, perhaps, look so unreasonable then to Givens as it does now, when the uncertainty as to the future of the company has been removed. But, however this may be, Mrs. Gridley did not impose in any way on Givens. The contract was deliberately made, and even in this action he does not impeach the consideration of the contract or plead that he was imposed upon in any way. He simply stands upon the position that he did not make the contract as shown by her, but made a different contract. On this question the evidence does not sustain him.

Judgment affirmed.

## FRANKFORT & V. TRACTION CO. v. HULETTE.

(Court of Appeals of Kentucky. Jan. 24, 1908.)

### 1. STREET RAILROADS—COLLISIONS WITH VEHICLES—NEGLIGENCE—INSTRUCTIONS.

In an action to recover for injuries received by colliding with defendant's street car, the instructions to the jury examined, and held proper under the evidence.

### 2. TRIAL—PROVINCE OF JURY—INSTRUCTIONS—INFERENCE.

In an action for injuries sustained in a collision with a street car, an instruction that plaintiff had the right to drive down the street, if he did so, with his buggy wheels between the rails, was not erroneous as assuming as a fact that he did so drive down the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 420-431.]

### 3. STREET RAILROADS—COLLISION WITH VEHICLES—CONDITION OF CAR PRIOR TO ACCIDENT—PROOF.

In an action for injuries received by colliding with one of defendant's street cars, it was proper to prove by former employes of defendant who had acted as motorman on the same car until within 10 days and two months, respectively, of the collision, that the brakes were worn out so the car could not be stopped within 150 feet, and that the bell would not ring.

### 4. SAME—BURDEN OF PROOF.

Where the brakes and signal apparatus of a street car were out of order up to 10 days before an accident, the burden was on the company to show that the car was not defective at the time of the accident.

### 5. SAME—RELEVANCY OF EVIDENCE—CONDITION PRIOR TO ACCIDENT.

The admissibility of evidence showing a negligent condition existing prior to the accident depends upon the degree of probability afforded in each case that such condition continued up to the time of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 234, 235.]

### 6. SAME—CONDITION OF CAR.

Where defendant's motorman had testified that the brakes on the car by which plaintiff was injured were new and in perfect condition, a question to defendant's manager as to what was done with the car after the accident, which elicited the information that it was dismantled shortly thereafter, and the brakes and iron work sold, was proper as being in rebuttal of the motorman's testimony.

### 7. DAMAGES—COMPENSATORY DAMAGES—DOCTOR BILLS—REASONABLE AMOUNT.

In an action for personal injuries, where plaintiff testified he had been treated by two doctors and had spent a sum for medicine, but had not paid the doctor bills, and the attending physicians testified to what they had done in

their treatment, but did not state the amount of their bills, the submission of the question of doctor bills to the jury as an item of damage was proper, and they were warranted in allowing a reasonable sum therefor.

Appeal from Circuit Court, Franklin County. "Not to be officially reported."

Action by J. B. Hulette against the Frankfort & Versailles Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Hazelrigg, Chenault & Hazelrigg, for appellant. B. G. Williams and Elwood Hamilton, for appellee.

HOBSON, J. While driving west on Second street in Frankfort, Ky., on December 16, 1905, in his buggy, J. D. Hulette was run into by a street car of the Frankfort & Versailles Traction Company. His buggy was demolished, the horse ran away, and he received serious injuries. He sued the traction company to recover damages, and recovered in the circuit court a judgment for \$750. The defendant appeals.

The proof for him by himself and three or four other witnesses was in substance that he was driving in a top buggy with the top up; that he met a coal wagon, and pulled out of its way and on the street car tracks; that he then looked up and did not see any street car behind him, and drove on down the track with the buggy wheels of one side of the buggy between the rails of the track; and that just as he was going to pull off the railroad track after passing the coal wagon a street car ran into him from the rear inflicting the injuries indicated, the street car having turned into Second street a square behind him, and having run into him without any notice of its approach. On the other hand the proof by the motorman and two or three other witnesses was to the effect that the gong of the car was sounded as it approached; that the plaintiff was driving in his buggy at the side of the track where he was perfectly safe, and just before the car reached him he pulled his horse to the left and drove upon the track too close to the car for the motorman to avoid running into him. There was some evidence that the car was not equipped with sufficient brakes. On this evidence the court gave the jury these instructions:

"No. 1. The court instructs the jury that the plaintiff, Hulette, had the right to drive down Second street, if he did so, with his buggy wheels between the car rails, but it was his duty upon the approach of the car, if he had notice thereof, to have gotten off of the track as early as practicable thereafter. It was further the duty of the defendant to use reasonable care to provide for the use of its motorman cars equipped with good and sufficient brakes, and to keep them in such condition as that the speed of the cars could be properly controlled. It was further the duty of the defendant to use ordinary care

to keep a lookout for travelers and pedestrians on said car track, and to keep his car under such control as that it could be stopped within a reasonable time after the discovery of peril, if any, to such travelers; and the court instructs the jury that, if the defendant's motorman saw the plaintiff in time, or could by the exercise of ordinary care have seen him in time, to have avoided his injury, and yet did not do so, or if the defendant's motorman was carelessly and negligently running said car at such speed as that he could not and did not stop the same within a reasonable time after the discovery of the plaintiff's peril, if he did discover it, or could by the exercise of ordinary care have discovered it, or if the defendant's brakes were in such condition as that the car could not be stopped within a reasonable time after the discovery of the plaintiff's peril, if it was discovered in time to have avoided plaintiff's injury, and as the result of these facts, or any of them, the plaintiff was injured, then the jury ought to find as defined in instruction number 4."

"No. 5. The court instructs the jury that while the plaintiff had the right to use the roadway of the defendant street railway company for the travel that plaintiff was engaged in at the time of the alleged accident, still the court further instructs the jury that in such case the rights of the plaintiff were subordinate to the rights of the defendant to so use said railway, and the plaintiff was in duty bound to yield the right of way to defendant car and to keep out of the way of said car, and the court further says that the plaintiff in using said roadway for said travel must have exercised ordinary care in discovering the approaching car in question, and in keeping off of the track and out of the way of defendant's car, and if the jury believe from the evidence that plaintiff on the occasion in question failed to exercise said care, then the law is for the defendant and the jury should so find."

"No. 8. The court instructs the jury that if the defendant, its agents, or servants or employes in charge of the car in question discovered the peril of the plaintiff, if any, or by the exercise of ordinary care, could have discovered plaintiff's peril, if any, and the jury further believes that the defendant, its agents, servants, or employes then and there in charge of said car used ordinary care in preventing the injuries in question, if any, after discovering plaintiff's peril, if any, then the law is for the defendant and the jury should so find."

The defendant did not ask any other instructions than those given by the court. We cannot see that the court in instruction 1 assumed it to be a fact that the plaintiff was driving down Second street with his buggy wheels between the car rails. To do so would be to give no effect to the words "if he did so." These words could have no other meaning than to leave to the jury this ques-

tion. Not only so, but the evidence for both the plaintiff and the defendant showed that he was driving down the street with his buggy wheels between the car rails; the only difference in the evidence being that the proof for the defendant showed that he left a place of safety and drove upon the track and between the rails when the car was so close to him that it could not be stopped, while the proof for the plaintiff showed that the car was not in sight when he went on the track, and that it approached him while he was thus driving along the track, but that the wheels on one side of the buggy were between the car tracks was admitted on both sides, as the buggy was demolished. The instructions of the court are not so concisely drawn as they might be, but we cannot see that on the whole case they were prejudicial to the substantial rights of the defendant.

The plaintiff proved by one witness that he was in the employ of the defendant as a motorman until the first week of December 1905; that he knew the condition of the brakes on the car in question; that they were worn out, and in bad condition; that the bell was out of order, and would not ring, and the car could not be stopped within a distance of less than 100 or 150 feet because of the defective condition of the brakes, when it might have been stopped within 30 or 40 feet if the brakes were in order. The plaintiff also proved by another witness who had been a motorman up to two or three months prior to December, 1905, the same facts. While this proof did not show that the brakes were defective on the day of the accident, it did show that they had been defective for months before the accident, and that their defective condition continued until about 10 days before the accident, when the witness left the service of the company. The evidence was competent. A piece of machinery may be expected to operate uniformly. The witnesses were acquainted with the car which did the damage. They described the machinery. If the defendant had made changes in the car, it could have proved that fact; but when its defective condition was established and brought up until a time so near the accident, the burden was upon the defendant to show that the conditions did not exist, or that they had been remedied before the accident. No hard and fast rule can be laid down on this subject. The admissibility of the evidence in each case will depend on the degree of probability afforded by it that the condition shown continued at the time of the injury, and is a matter resting largely within the discretion of the court. 1 Wigmore on Evidence, § 437. In 1 Greenleaf on Evidence, § 41, the rule is thus stated: "Other presumptions are founded on the experienced continuance or permanency of longer and shorter duration in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things, is

once established by proof, the law presumes that the person, relation, or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." It was sufficient for the plaintiff to prove facts showing *prima facie* that the car was out of order. This he did, when he showed that the machinery of the car was worn out, and brought the proof up to so short a time before the injury.

The defendant made this proof by the motorman: "The brakes of my car were in perfect working condition, and were new brakes, and had just been put on before the car was taken from the car barns that day." This testimony was not supported by that of any other witness, and on other questions in the case the testimony of the motorman was in conflict with the weight of the evidence. The defendant's manager was asked on cross-examination what had become of the car in question, and over defendant's objection was allowed to answer as follows: "The car had been dismantled in early part of 1906, and part of it sold to Mr. Sullivan, and this part included the brakes and some other iron about the car; that the framework was down on the river bank about the company's shops." It was competent for the plaintiff to rebut the testimony of the motorman as to the brakes being new, and the fact that they had been sold as old iron early in the year 1906 was some evidence to this effect.

The court did not err in submitting the question of doctors' bills to the jury. The plaintiff testified that he had employed two doctors, and had been treated by them; that he had spent \$13.50 for medicines; that he had not paid his doctors' bills, but owed them. The doctors also testified on the trial that they had examined him and treated him, but did not state what their bills were. Still they stated what they had done, and the jury from this proof were warranted in the allowance of a reasonable sum for their services.

Judgment affirmed.

#### OWENSBORO BRICK & SEWER PIPE CO. v. GLENN.

(Court of Appeals of Kentucky. Jan. 29, 1908.)

##### 1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

It is the duty of the master to furnish his employé with a reasonably safe place to work and to instruct and warn youthful employés as to all dangers incident to the employment; and, in an action to recover damages for the death of an employé, whether or not the master performed his duty is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044-1050.]

##### 2. SAME—SAFE PLACE TO WORK—MACHINERY.

Where a bell, used as a signal to start machinery the operation of which might result disastrously to an employé if he was not aware of it starting, was so placed that it might be rung by accident, it is immaterial what force caused the bell to ring; the negligence of the

master being in so arranging the machinery and its manner of operation that the slightest accident might endanger the employé's life.

**3. APPEAL.—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

Appellant cannot complain of instructions merely because of their extreme length and number, where they are as favorable to him as he was entitled to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Master and Servant, §§ 4219-4228.]

Appeal from Circuit Court, Daviess County. "Not to be officially reported."

Action by Joseph Glenn, by his next friend, against the Owensboro Brick & Sewer Pipe Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clarence M. Finn and E. B. Anderson, for appellant. Sweeney, Ellis & Sweeney and Little & Slack, for appellee.

**BARKER, J.** The appellee, Joseph Glenn, a young man between 18 and 19 years of age, had been, for some time prior to the injury out of which grew this litigation in the employ of appellant, holding the position of "trucker," the duties of which were to load tiles after they were molded onto trucks, by means of which they were hauled away and stacked in ricks. On the day of his injury he was taken from the duties of "trucker" and placed in the position of "feeder." The duties of the "feeder" were to superintend the feeding of the wet clay into the mouth of the mold, by which it is converted into sewer pipe or tiles. The clay was carried up to the second story on an endless belt, and deposited in the mouth of the mold or press. In order that it might be properly molded the clay was required to be sufficiently wet to be soft and plastic. Among the duties of the "feeder" was the care to see that no dry lumps of clay were allowed to be carried into the mold. Appellee claims (although this is disputed by appellant) that, if by any chance clods or lumps of dry clay were deposited in the mold, it was his duty to get them out. After the molds were filled with wet clay, the "feeder" rang a small bell which hung in the room below him and which was a sign or notification to the pressman in charge of the machinery to set it in motion, so that a large "head" which fitted into the mouth of the mold was pressed down upon the clay, driving it into the mold, and thus forcing it to take the required form or shape. This "head" was suspended several feet above the mouth of the mold, and was never set in motion except in response to the ringing of the bell, which, as said before, was the signal for it to be pressed down, by force of the machinery, into the mold. A few minutes before he was hurt the appellee observed that no clay was being brought up on the belt, and spoke to the pressman on the lower floor, who was in charge of the machinery, telling him this fact in order that he might stop the machinery until a new supply of clay was obtained. When the machinery was thus stopped the ap-

pellee claims that he noticed that there were several lumps of dry clay already in the mold, and in order to take them out he got on his knees and reached down to where they were. While he was thus reaching down, by some cause wholly unexplained in the record, the signal bell rang, the pressman started the machinery, and the "head" came rapidly down into the mouth of the mold, catching appellee's hand and cutting it off above the wrist. To recover damages for this injury he instituted this action by his next friend. The petition was amended several times, and one or two theories as to the negligence complained of were put forward and afterwards withdrawn. We shall not, with any great minuteness, state the effect of the various amendments and withdrawals of allegations after demurrers were sustained; but, after a careful examination of their complexity, we are of opinion that the petition as finally amended states a cause of action predicated upon the negligence of appellant in failing to provide the infant appellee with a safe place in which to perform the work of a "feeder." The answer denied all the allegations of negligence, and pleaded contributory negligence of the plaintiff; and this in turn was placed in issue by reply. A trial before a jury resulted in a verdict in favor of the plaintiff for the sum of \$4,500, of which the defendant is now complaining.

The signal bell, which hung beneath the ceiling of the first floor of the plant, was operated by a string which came through a hole in the floor and was fastened somewhat above the place where the appellee, as "feeder," was required to sit in order to superintend the incoming clay. It ran sufficiently near him to be within easy reach of his hand, so that he could give the pressman below the proper signals. This string was entirely exposed after it entered the room where appellee was required to work, and the slightest touch would ring the bell, and thus set in motion the machinery which pressed the "head" down into the mold. Assuming it was appellee's duty to reach down into the cylinder and get out lumps of dry clay which by accident might be deposited there, it is obvious that this duty was one of direst peril to him under the existing arrangement of the cord controlling the signal bell, because, just above him, while in the act of taking out the dry clay, there was the enormous "head," which might be driven into the cylinder at any moment if the bell was rung; and it would be rung whenever the exposed cord was touched with the slightest force. The question in this case, then, narrows down to this: Did the employer furnish the infant employé with a reasonably safe place in which to perform this extremely hazardous duty? That this string could have been so insulated as not to place the employé's life or limb in jeopardy by every untoward contact of a foreign force with it goes without saying; and it seems to follow that the question as to whether this

insulation was or was not within the pale of reasonable diligence to protect the employé in the hazardous duty he was called on to perform was a question for the jury to determine. It was clearly the duty of the master to furnish the employé with a reasonably safe place in which to perform his duties, and what is a reasonably safe place under all the circumstances was eminently a question for the jury to determine.

We are not impressed with the argument that the fact that the string was exposed, so that the bell might be rung by almost any accidental force coming in contact with it, made the danger so apparent that the servant, in the exercise of a reasonable discretion, ought not to have engaged in the performance of the duties of a "feeder," and especially as the employé had not reached the years of discretion. Youth proverbially lacks discretion and foresight, and we are not able to say that the employé in this case ought to have been able to at once summon up before his mind all the hazards of an accidental ringing of the bell, and in this way reached the conclusion that the duties were too dangerous for him to perform. Ordinarily men do not conjure up in their minds unseen danger. It requires the wise foresight of age and experience to anticipate the danger of the unseen, and youth, as a rule, is not gifted with foresight in anticipating misfortune. Possibly the argument of appellant would be sound, or at least of much more plausibility than we now deem it, if it had been shown that the appellee had seen or known of the bell being rung by accident before; but nothing of this sort appears in the record, and we are not willing to say that it was so plainly the duty of the infant employé to anticipate all of the evils and dangers which might arise from an exposure of the string to the accidents of chance that he should be deemed guilty of such contributory negligence in continuing the employment as precludes a recovery on his part for the terrible misfortune which befell him. It was the duty of the employer to instruct and warn its youthful employé as to all of the dangers incident to his employment, and if it failed to do so it should be held responsible for any mishap which followed; and the question as to whether it did or did not do so, or did or did not do so with sufficient explicitness as to duly impress the mind of the young man with the danger of performing the duties incident to the employment at which he was engaged at the time he was hurt, was one for the jury to determine. *Chess & Wymond Co. v. Garland Gohagan's Guardian* (opinion filed Dec. 6, 1907) 105 S. W. 890; *Henderson Cotton Mills v. Warren's Adm'r*, 70 S. W. 658, 24 Ky. Law Rep. 1030. The fact that it was unknown what particular force, accidental or designed, caused the bell to ring, is immaterial. The negligence of the master (assuming it to be such) was in so arranging the machinery and its manner of operation that

the slightest accident might endanger the employé's life. A similar question arose in the case of *Webster, by Next Friend, v. Stewart Iron Works Co.*, 104 S. W. 708, 31 Ky. Law Rep. 1045. There the employer left a heavy iron gate standing at such an angle that it was liable to be thrown down by a very slight force, and if it did fall it would endanger the lives or limbs of its employés. The gate fell, injuring the plaintiff, an infant employé, and we there held that this was actionable negligence, although it was not known by what particular force the gate was thrown down.

Appellant complains of the extreme length and number of the instructions. Granting, for the sake of the argument, that this objection exists, appellant has no ground to complain of them; for, in giving the rules of law which govern the respective rights of the parties litigant, the court certainly was as favorable to it as it was entitled.

There are some minor objections, such as the complaint of misconduct on the part of counsel for the plaintiff in asking questions with a view to bring it before the jurors' minds that the defendant was indemnified against loss in the case at bar by an accident insurance policy. We are of opinion, after considering this question, that under all the circumstances the defendant was not prejudiced by these minor errors, and that upon the whole case there was no such substantial error done to the rights of the defendant as entitles it to a reversal of the judgment. It is therefore affirmed.

#### CITY OF LOUISVILLE v. ROBERTS & KRIEGER et al.

(Court of Appeals of Kentucky. Jan. 29, 1908.)

#### MUNICIPAL CORPORATIONS — POLICE POWER — POWER TO LICENSE.

Act approved March 21, 1906 (Acts 1906, p. 310, c. 57, §§ 5, 6), repealing Ky. St. 1903, § 3011, providing for licensing of the businesses, occupations, and professions therein named by cities of the first class, and section 3012, providing for the licensing of any business, etc., not named in section 3011, and enacting in lieu thereof that the council may provide for the licensing of any business, trade, calling, occupation, or profession, etc., does not narrow the right to license, but extends it.

"Not to be officially reported."

Modification of opinion.

For former opinion, see 105 S. W. 431.

**BARKER, J.** Our attention has been called by attorneys for the appellant to the fact that sections 3011 and 3012, Ky. St. 1903 (cities of the first class), upon which in part the opinion rests, have been repealed by an act entitled "An act to amend an act, entitled 'An act for the government of cities of the first class,' approved July first, eighteen hundred and ninety-three," approved March 21, 1906 (Acts 1906, p. 310, c. 57, §§ 5, 6). This in nowise changes the principle



announced in the opinion. The repealing act in question re-enacts the sections mentioned in different language, but, if possible, in broader terms, so that the opinion now rests upon a surer foundation than before. The repealing statute changes the verbiage of the repealed sections, but does not narrow the right of the cities to license all businesses, trades, occupations, and professions. On the contrary, however, as said before, the right so to license is extended. The opinion is therefore modified for the purpose of basing it, so far as necessary, on the amending statute.

**KENTUCKY IRON, COAL & MFG. CO. v. ADAMS et al.**

(Court of Appeals of Kentucky. Jan. 30, 1908.)

**1. SPECIFIC PERFORMANCE—GOOD FAITH AND DILIGENCE — INEQUITABLE CONDUCT OF PLAINTIFF.**

A lease for a 10-year term gave lessees the right to purchase during the term. Thereafter, on lessees filing a petition for specific performance, it was adjudged that they were entitled to a deed; but on their failure to pay the petition was dismissed. After rendition of that judgment, something over four years before expiration of the lease, lessees left the land and ceased to pay rent, and lessor took possession. Five days before expiration of the lease lessees filed a second petition for specific performance; the land having, in the meantime, risen in value. *Held*, that lessees were not entitled to specific performance under their second petition; their conduct having made it inequitable that it should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 226, 227.]

**2. EVIDENCE—JUDICIAL NOTICE—MATTERS OF CURRENT HISTORY.**

That in 1898 the country had not recovered from the panic of 1893, and all values were low and there was little market for real estate, and that in 1902 the country was rapidly recovering from the panic and prices everywhere had risen, are matters of current history, of which judicial notice will be taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 15-16.]

Appeal from Circuit Court, Boyd County.  
"Not to be officially reported."

Specific performance by Otho Adams and another against the Kentucky Iron, Coal & Manufacturing Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

Hager & Stewart and Chinn & Edelen, for appellant. Brown & Martin, R. D. Davis, and P. K. Mallin, for appellee.

**HOBSON, J.** By a written contract made on April 25, 1892, the Kentucky Iron, Coal & Manufacturing Company leased to Otho Adams and R. J. Adams certain land in Ashland for the term of ten years, in consideration of \$24 to be paid annually as rent and for certain other stipulations in the writing, among which was that the lessees were to build and operate a manufacturing plant on

the premises for a period of two years at least. The lease also contained this clause: "The parties of the second part have the privilege of buying said land at any time during this lease (ten years) at the price of four hundred (400) dollars." On September 5, 1895, Otho Adams and R. J. Adams filed their petition against the manufacturing company, asking a specific performance of the contract, and alleging that they had tendered it the \$400 and it had refused to make them a deed. The defendant filed answer, pleading that the lessee had failed to comply with the terms of the contract in certain particulars. The case was heard on February 16, 1898. The court adjudged that the lessees were entitled to the deed upon their paying the \$400; and the company thereupon tendered a deed and they failed to keep their tender good. Thereupon the court entered the following order: "The plaintiffs, in court by attorney, failing to pay to defendant the consideration aforesaid, or otherwise to make good the tender alleged by him, or offer to pay defendant for said land, it is now, on motion of defendant, adjudged that plaintiffs' petition be and hereby is dismissed, and that defendant recover of plaintiffs its costs herein accruing after the filing of its answer herein, to be taxed by the clerk, and this cause is hence dismissed."

On April 21, 1902, Otho Adams and R. J. Adams brought this suit against the manufacturing company, in which they alleged the same facts as in the former suit and sought a specific execution of the contract. The company filed an answer in which it pleaded that the defendants had failed to comply with the contract. It also pleaded the proceedings had in the former action in bar of the suit. It further alleged that after the rendition of the judgment in that case in 1898 the lessees abandoned the possession of the premises and ceased to pay rent; that thereupon it entered upon and took possession of the land, and had remained in possession of the land ever since, without any claim to it on the part of the lessees until within a few months before the filing of the suit; that at the time the land was not worth more than \$400, but that land in the vicinity had risen in value very much about the time this suit was filed, and thereupon the lessees, who had removed from Ashland, asserted their claim to the property, which from their conduct the defendant had the right to regard they had abandoned; that the present claim of the lessees is an afterthought, brought about by the change in value of the premises. The plaintiffs filed a reply, in which they denied that they had abandoned the premises, except as therein stated, and made the following affirmative allegations: "And upon the rendering of said judgment the defendant entered upon said land without right and against the will or consent of these plaintiffs, and took actual possession thereof, and since then the de-

defendant has continued said holding, and has had the use and occupation of said land, and the value of the use and occupation of said land is greater than the rents stipulated in said agreement to be paid by plaintiffs to defendants for the time the plaintiffs have not paid same, and defendant by its own wrongful acts and adverse claim thereto has prevented the plaintiffs from paying or having said rents and the use and possession of said property, and that is the only possession or holding defendant has or had of said land since the making of said contract of April 25, 1892, and during all the time thereof, and both before then and since the rendering of said judgment of February 16, 1898, the plaintiffs have always claimed and never at any time abated or abandoned their claim to said land under said contract, and all of which the defendant well knew." A rejoinder was filed, controverting the affirmative matter of the reply, and, the case being submitted without proof on either side, the court entered judgment in favor of the lessees, requiring the defendant to make a deed to them for the property; and from this judgment the defendant appeals.

We do not find it necessary to determine in this case whether the written contract contemplated that the lessees could make a series of elections to take the property, or whether the judgment dismissing the petition when they had elected to take the property concluded them from afterwards again tendering the \$400 and asking a conveyance. But we are clearly of the opinion that this case falls within the rule that the specific execution of a contract will not be decreed to a party who by his conduct has made it inequitable that this should be done. The specific execution of a contract is a matter of discretion on the part of the chancellor, and the relief will never be awarded when the party has slept on his rights and his claim is without equity. When, in 1898, the defendants left the premises, and left Ashland, and ceased to pay rent, they were bound to understand that the company, when it took possession of the property, had taken possession of it upon the idea that they had abandoned it. They allowed the company to hold possession of it in this way for something over four years before this suit was brought. In the meantime, as is a matter of common knowledge, values had changed. In 1898 the country had not recovered from the panic of 1893. All values were low, and there was

little market for real estate. In 1902 the country was rapidly recovering from the panic, and prices everywhere had risen. These are matters of current history, which the court may take judicial notice of. For the lessees to stand by for four years and allow the manufacturing company to hold the property without any steps being taken by them and with no tender of rent, and then to allow them to maintain this action for specific performance, would be entirely to disregard the maxim that equity will never adjudge specific performance to a person who has slept on his rights. The action was brought on April 20, 1902, and the written contract was made on April 25, 1892; so of the ten years allowed to them to take the property only five days remained. In other words they stood by without paying rent from 1898 until five days before their option expired, and then brought this suit. The admitted facts are sufficient to defeat the relief sought.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

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HALL et al. v. AYER & LORD TIE CO.  
PEYTON v. W. H. WHITE & SONS. W.  
H. WHITE & SONS v. AYER & LORD  
TIE CO.

(Court of Appeals of Kentucky. June 28, 1907.)

Appeals from Circuit Court, Ballard County.  
"To be officially reported."

On motion to correct the taxation of costs.  
See 103 S. W. 1199.

J. M. Nichols & Son, for appellants Hall and others. J. B. Wickliffe, for appellant White & Sons. A. C. Grassham and Greene & Van Winkle, for appellees.

HOBSON, J. In view of all the facts of the record, we conclude that White & Sons should pay one-half the costs of these appeals, and the Ayer & Lord Tie Company one-half. The Ayer & Lord Tie Company will pay cost of Hall & Roach, as taxed by the clerk, \$119.25. White & Sons will pay F. L. Peyton's cost, as taxed by the clerk, \$20.30. White & Sons will recover no cost of Peyton or Hall & Roach, but will recover of Ayer & Lord Tie Company \$10.15. In this way the total cost, \$258.80, will fall equally on White & Sons and the Ayer & Lord Tie Company.

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\*Point annotated. See syllabus.

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\*There being no law in the place where the alleged act was committed giving plaintiff right of action, no action for such wrong can be maintained here, for to hold otherwise would be to say that one state could prescribe rules, no matter how arbitrary, to govern persons and things in another state.—Chandler v. St. Louis & S. F. R. Co. (Mo. App.) 553.

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\*One may waive a trespass committed on land by another by forcibly entering on it and cutting and removing timber therefrom, and sue in assumpsit for the value of the timber.—Roberts v. Moss (Ky.) 297.

\*An action *held* one for negligence and not on contract.—Armelio v. Whitman (Mo. App.) 1113.

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**ADMISSIONS.**

As evidence in civil actions, see "Evidence," § 5.  
 As evidence in criminal prosecutions, see "Criminal Law," § 10.

Judgment on, see "Judgment," § 2.

**ADOPTION.**

Contradiction of witness as to adoption of child, see "Witnesses," § 3.

\*Under Act 1850 (Acts 1849-50, p. 36, c. 39) §§ 1, 2, regulating adoption, an instrument of adoption duly executed and filed with the proper county clerk, with intention that he immediately record it, *held* to complete the requisites for adoption, though the clerk failed to record it.—J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.) 690.

\*Under Act 1850 (Acts 1849-50, p. 36, c. 39) §§ 1, 2, regulating adoption, the filing of an instrument of adoption with the clerk of a county court, with directions not to record it, would be fatal to the adoption.—J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.) 690.

**ADULTERY.**

See "Lewdness."

\*Rev. St. 1899, § 2175 [Ann. St. 1903, p. 1395], punishing adultery, construed, and *held* to create several offenses, one of which is the living in a state of adultery by two persons, one or both of whom are married to others.—State v. Hillman (Mo. App.) 603.

On a trial for living in adultery by two persons, one or both of whom are married to others, an instruction *held* erroneous for authorizing a conviction, though the parties were married to each other.—State v. Hillman (Mo. App.) 603.

**ADVANCEMENTS.**

See "Descent and Distribution," § 2.

**ADVERSE CLAIM.**

To real property, see "Quieting Title."

**ADVERSE POSSESSION.**

See "Limitation of Actions."

Of water power privilege, see "Waters and Water Courses," § 1.

Sales of lands held adversely, see "Champerly and Maintenance."

**§ 1. Nature and requisites.**

\*Evidence *held* insufficient to show adverse possession of land by a purchaser at a void tax sale.—Files v. Jackson (Ark.) 950.

Adverse possession for more than seven years prior to suit brought under a deed void on its face is sufficient to vest title.—Beardsley v. Hill (Ark.) 1169.

Actual possession of land under a tax deed for five years invested the occupant with title by limitation.—Walker v. Helms (Ark.) 1170.

\*Where a father made a deed of certain land to his son, reserving possession of the land for

life, and not recording the deed, but afterwards placed the son in full possession and control, and he made many valuable improvements, the son's possession was adverse to the father, and was not that of a tenant.—*Cyrus v. Holbrook* (Ky.) 300.

In trespass to try title defendant *held* not entitled to judgment under the statute of limitations.—*Mars v. Morris* (Tex. Civ. App.) 430.

Title by limitation to land over which a street has been established could not be acquired against a city after July 4, 1887.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

\*One *held* to have paid taxes on a certain survey as regards the question of title by adverse possession.—*Tarbrough v. Moody* (Tex. Civ. App.) 891.

## § 2. Pleading, evidence, trial, and review.

Plaintiff, in order to establish a prima facie case of adverse possession, is not required to show that the prior owners were under no disability.—*Romine v. Littlejohn* (Tex. Civ. App.) 439.

Whether plaintiff had acquired title to land by limitation *held* under the evidence for the jury.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

## AFFIDAVITS.

See "Depositions."

*Particular proceedings or purposes.*

Appeal from judgment in justice's court, see "Justices of the Peace," § 3.

Verification of pleading, see "Pleading," § 7.

## AFTER-ACQUIRED TITLE.

Estoppel to assert, see "Estoppel," § 1.

Rights of vendee, see "Vendor and Purchaser," § 2.

## AGENCY.

See "Principal and Agent."

## AGREEMENT.

See "Contracts."

As to boundaries, see "Boundaries," § 2.

## AIDER BY VERDICT.

In civil actions, see "Pleading," § 11.

## AIDERS AND ABETTORS.

Criminal responsibility, see "Criminal Law," § 2.

## ALIBI.

Sufficiency of instructions on defense of in criminal prosecution, see "Criminal Law," § 23.

## ALIMONY.

See "Divorce," § 3.

## ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

## ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

Bona fide purchasers of altered notes, see "Bills and Notes," § 2.

\*Change of place of payment in a note by the payee after delivery and without consent makers *held* to avoid it between the parties.—*Mitchell v. Reed's Ex'r* (Ky.) 833.

\*Evidence *held* to show alteration of a note by the payee after delivery and without consent of makers.—*Mitchell v. Reed's Ex'r* (Ky.) 833.

## AMENDMENT.

Of pleading affecting limitations, see "Limitation of Actions," § 2.

Of pleading to bring in new parties, see "Parties," § 1.

*Of particular acts, instruments, or proceedings.*

See "Judgment," § 4; "Process," § 2; "Statutes," § 4.

Bond on appeal or writ of error, see "Appeal and Error," § 6.

Pleading, see "Pleading," § 6.

Record on appeal or writ of error, see "Appeal and Error," § 14.

Verdict in criminal prosecution, see "Criminal Law," § 28.

## ANCIENT DOCUMENTS.

Admissibility in evidence, see "Evidence," § 8.

## ANIMALS.

Appellate jurisdiction of Supreme Court in proceeding to enforce agister's lien, see "Courts," § 3.

Burial in cemetery, see "Cemeteries."

Carriage of live stock, see "Carriers," § 5.

Death of animal caused by electricity, see "Electricity."

Evidence of damages in action for causing death of, see "Damages," § 5.

Injuries from operation of railroads, see "Railroads," § 8.

Larceny of, see "Larceny," § 2.

Malicious shooting of, see "Malicious Mischief."

Where the only local option stock law vote in a subdivision of a county in question was taken in 1893, and Penal Law in August 1897, accused was not guilty of an offense in permitting his hogs to run at large in such subdivision of the county.—*Johnson v. State* (Tex. Cr. App.) 374.

## ANNULMENT.

Of will, see "Wills," § 3.

## ANSWER.

In pleading, see "Pleading," § 3.

## APOTHECARIES.

See "Druggists."

## APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 3.

Costs, see "Costs," § 3.

Review of proceedings of justices of the peace, see "Justices of the Peace," § 3.

\*Point annotated. See syllabus.

*Review in particular civil actions.*

For forfeiture of bail bond, see "Bail," § 1.  
To restrain liquor nuisance, see "Intoxicating Liquors," § 8.

*Review in special proceedings.*

See "Contempt," § 2.  
For allowance to surviving widow, see "Executors and Administrators," § 3.  
Probate proceedings, see "Wills," § 3.

*Review of criminal prosecutions.*

See "Criminal Law," §§ 30-43; "Homicide," § 9.

*Review of proceedings of nonjudicial officers or bodies.*

Assessors of taxes, see "Taxation," § 3.

**§ 1. Nature and form of remedy.**

\*There may be more than one appeal in the same case where orders made at different times finally dispose of the subject-matter of each particular order.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*An order appointing a receiver of a corporation, entered at the same term but subsequent to the rendition of a judgment against it, *held* reviewable either on the appeal from the judgment or on a separate appeal.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

Where judgment against several has been affirmed as to one, and she subsequently joins the others in a writ of error, the writ will be dismissed as to her.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

**§ 2. Nature and grounds of appellate jurisdiction.**

The question of jurisdiction may be raised either in the lower or appellate court by the parties or on the court's own motion.—*Cable v. Duke* (Mo.) 643.

\*Appellate jurisdiction defined.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

**§ 3. Decisions reviewable.**

Under Ky. St. 1903, § 950, the Court of Appeals *held* to have jurisdiction of an appeal from a judgment of the circuit court, on appeal from the county court, refusing to list lands for taxation on petition under Acts 1906, pp. 115, 116, c. 22, art. 3, §§ 1, 2.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

Under Rev. St. 1899, § 806 [Ann. St. 1906, p. 769], an order granting a first new trial in ejectment may be reviewed on appeal, and will be reversed if in no view of the evidence a verdict for the party in whose favor a new trial is granted can be sustained.—*Ordelheide v. Berger Land Co.* (Mo.) 620.

\*An order appointing a receiver of a corporation, entered subsequent to the rendition of a judgment against it, *held* final and reviewable in the Supreme Court, under Rev. St. 1893, art. 1383.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

An application for a writ of error may be granted to review a decision of the Court of Civil Appeals, though it reversed the judgment and remanded the cause, where the decision practically settled the controversy.—*Owens v. Cage & Crow* (Tex.) 880.

On appeal from a judgment dividing the costs, the complaining party should show what items were taxed against him.—*Rudolph v. Snyder* (Tex. Civ. App.) 763.

**§ 4. Right of review.**

\*On appeal in an action to declare a lien on logs, defendant *held* not entitled to complain that the court erred in declaring such lien when he

claimed no interest in the logs.—*Stuckey v. Lindley* (Ark.) 482.

**§ 5. Presentation and reservation in lower court of grounds of review.**

\*In an action for breach of contract for the sale of chattels, the seller *held* not entitled to raise for the first time on appeal a question not presented to the trial court by a request for instructions though the evidence warranted the giving of such instructions.—*Felsberg v. Moore* (Ark.) 197.

Objection that a corporation was sued by a wrong name, not taken in the court below, *held* not available to it on appeal from a judgment against it in the name by which it was sued.—*University of Louisville v. Hammock* (Ky.) 219.

A defendant *held* not entitled on appeal to defeat a recovery on the ground that the theory on which the action was litigated was not advanced until set forth in plaintiff's reply.—*Dodd v. Pittsburg, C., C. & St. L. R. Co.* (Ky.) 787.

The objection that no proof was given as to the plaintiff's incorporation cannot be raised for the first time on appeal.—*Combs v. Virginia Iron, Coal & Coke Co.* (Ky.) 815.

\*Where there was no motion in the trial court that a demurrer to certain paragraphs of the answer should be carried back and sustained to the petition, defendant could not allege error on appeal that such proceedings were not adopted.—*United States Fidelity & Guaranty Co. v. Paxton* (Ky.) 841.

\*A ground of motion for new trial in an action for the death of plaintiff's son, under Rev. St. 1899, § 2864 [Ann. St. 1906, p. 1637], *held* insufficient to notify the trial court, in compliance with section 640 [page 660], of a ground of objection, and insufficient to justify a review of the ground urged on appeal.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*In the absence of an objection in the trial court, defendant *held* not entitled to object on appeal that evidence which was otherwise harmless might have been prejudicial as tending to influence the jury against defendant and induce them to increase the damages.—*Hach v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 525.

\*One cannot try his case on one theory in the trial court and on another theory on appeal after his defeat in the trial court.—*Henry County v. Citizens' Bank of Windsor* (Mo.) 622; *Same v. Farmers' Bank of Windsor* (Mo.) 630.

\*Statement of grounds on motion for a new trial *held* sufficient to save the exceptions taken.—*Collier v. Catherine Lead Co.* (Mo.) 971.

\*In order to entitle appellant to a review of an objection to a hypothetical question, she is required to point out the specific objectionable features thereof.—*Holton v. Cochran* (Mo.) 1035.

\*A new trial cannot be granted because of the admission of parol evidence, where admitted without objection, and the case was tried on the theory that it was competent.—*Forest v. Rogers* (Mo. App.) 1105.

\*An objection that the statement filed before the justice was not signed is not available on review, where not raised in the circuit court on appeal.—*Nichols v. Hicklin* (Mo. App.) 1109.

An objection in the Supreme Court, to the sufficiency of an appeal bond on appeal to the Court of Civil Appeals, *held* made too late.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*Objection to the admissibility of evidence, if not made in the trial court, will not be entertained on appeal from a judgment based upon it.—*Mings v. Griggsby Const. Co.* (Tex. Civ. App.) 192.

\*Point annotated. See syllabus.



\*Rev. St. 1895, art. 1316, as amended by Laws 1903, p. 55, c. 39, made it mandatory on the court to charge the jury, but did not change the rule precluding complaint of failure to submit an issue in the absence of a special request therefor.—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

Where a judgment was rendered against a non-resident insurance company by default, it could not urge for the first time on a writ of error as ground for reversal that its default resulted from accident and that it had a good defense to the action.—*New York Life Ins. Co. v. Herbert* (Tex. Civ. App.) 421.

\*It is not necessary that an alleged error in overruling a demurrer to the petition be made a ground for a new trial in order to predicate an assignment of error thereon.—*Stockton v. Brown* (Tex. Civ. App.) 423.

\*An objection to a question not made below cannot be considered.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

A defendant held not entitled to complain of an order dismissing the action as against a co-defendant.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

\*Where plaintiff, in an action for slander, did not object to an instruction because it did not submit the case on the only theory on which she was entitled to recover, she could not object on appeal that the theory of the instruction given was incorrect.—*Laughlin v. Schnitzer* (Tex. Civ. App.) 908.

\*No motion for a new trial for the insufficiency of evidence is necessary to enable the court on appeal from a judgment in a case tried without a jury to review the case upon the facts.—*West Bros. v. Thompson & Greer* (Tex. Civ. App.) 1134.

#### § 6. Requisites and proceedings for transfer of cause.

\*Failure to give an appeal bond in a sufficient amount does not make the appeal void, because the bond, on objection in the Court of Civil Appeals, may be amended.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*The court granting an appeal under Rev. St. 1895, art. 1383, from an order appointing a receiver of a corporation, held authorized to fix the amount of the appeal bond.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*An appeal will be dismissed on failure of appellant, a resident of the county in which the judgment was rendered, to file an appeal bond within 20 days after the adjournment of the term.—*Farris v. Gilder* (Tex. Civ. App.) 806.

#### § 7. Effect of transfer of cause or proceedings therefor.

\*Injunctions and writs of supersedeas are issued by the Supreme Court to preserve the status quo pending an appeal where the justice of the case requires it, but not for the purpose of creating a temporary right.—*Nashville Lumber Co. v. Corbell* (Ark.) 677.

Where plaintiff's recovery was excessive, the filing of a remittitur of such excess in the trial court after the Court of Civil Appeals had obtained jurisdiction on writ of error was unavailable.—*New York Life Ins. Co. v. Herbert* (Tex. Civ. App.) 421.

Statement as to striking out of statement of facts by lower court after perfecting of appeal.—*Stark v. Harris* (Tex. Civ. App.) 887.

#### § 8. Supersedeas or stay of proceedings.

\*The execution of a supersedeas bond held not to stay so much of a decree as grants or dissolves an injunction.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.* (Ark.) 676.

\*Point annotated. See syllabus.

\*An order appointing a receiver of a corporation held nonenforceable pending an appeal.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*Under Rev. St. 1895, art. 1404, an order appointing a receiver held unenforceable, pending an appeal, on appellant giving the required bond.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

#### § 9. Record and proceedings not in record—Matters to be shown by record.

\*A party in a suit for a partnership accounting who appeals from the findings of the chancellor must show, separated from the items conceded to be correct, the testimony on the issue contested.—*East v. Key* (Ark.) 201.

Where the bill of exceptions contains no objection to the admission of a deed in evidence, an assignment of error therein must be overruled.—*Gardner v. Robertson* (Mo.) 645.

An assignment of error that the court erred in not passing on objections to testimony when they were made, not being predicated on anything in the bill of exceptions, is bad.—*Gardner v. Robertson* (Mo.) 645.

\*The filing of a bill of exceptions cannot be proved by the recitals of that instrument, but must be made to appear by record entry.—*In re Boeckenkamp's Estate* (Mo. App.) 103; *Miller v. Fincke, Id.*

\*An appeal from an order overruling a motion to set aside a nonsuit and grant a new trial dismissed because of a defective record.—*Downs v. Hammond Packing Co.* (Mo. App.) 1117.

\*In an action against a carrier for injury caused to one falling from a train, plaintiff's bill of exceptions under complaint against the exclusion of testimony held insufficient to show error.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

\*An assignment that the court erred in not sustaining defendant's demurrer to plaintiff's petition could not be reviewed where it did not appear that the demurrer was presented to or acted on by the trial court.—*Stockton v. Brown* (Tex. Civ. App.) 423.

#### § 10. — Scope and contents of record.

Jurisdiction to allow an amendment held not devested by an application for change of venue, and hence no bill of exceptions having been filed in the court from which the change was taken, error, if any, in the allowance of the amendment, is not available.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

Under Rev. St. 1899, § 4074 [Ann. St. 1906, p. 2217], a notice of appeal from a justice's court must affirmatively appear on the face of the record, and an affidavit filed by appellant in the Court of Appeals having attached thereto, as an exhibit, a notice, service of which appears to be acknowledged by appellee, cannot be considered.—*Drake v. Gorrell* (Mo. App.) 1080.

#### § 11. — Abstracts of record.

Where appellant reconstructed a missing abstract of title put in evidence at the trial from notes and other memoranda of the trial, it was proper for respondent to embody the true abstract of title, when subsequently found, in his counter abstract.—*Gardner v. Robertson* (Mo.) 645.

\*On equity appeals the abstract of the record should contain all the evidence.—*Collier v. Catherine Lead Co.* (Mo.) 971.

Though an abstract of record failed to show a record entry, required by Rev. St. 1899, §§ 819, 1685 [Ann. St. 1906, pp. 791, 1222], to show a substitute judge's authority to sit, held

the defect was cured.—*Collier v. Catherine Lead Co. (Mo.)* 971.

\*An appellant should not be permitted as a matter of right to correct jurisdictional defects in an original abstract by supplemental abstract filed out of time.—*In re Boeckenkamp's Estate (Mo. App.)* 103; *Miller v. Fincke, Id.*

\*Respondents *held* entitled to a dismissal of an appeal for appellant's failure to serve a printed abstract, statement, and brief within 20 days prior to the date the case was set for hearing, as required by Court of Appeals rule 15 (87 S. W. vi).—*Wray v. Woodard (Mo. App.)* 570.

\*Where there is no printed abstract in the record on appeal in short form, as required by Rev. St. 1899, § 813 [Ann. St. 1906, p. 783], and appellant only files a "statement, points, and authorities," containing a short recital of some facts only, the appeal will be dismissed.—*Dean & Ratcliffe v. Brockman (Mo. App.)* 592.

## § 12. — Authentication and certification.

So much of a clerk's certificate to a transcript as certifies to oral testimony *held* surplusage which may be disregarded.—*Cagle v. Gray (Ark.)* 939.

## § 13. — Transmission, filing, printing, and service of copies.

\*Appeal dismissed for failure to file record within the time required by Civ. Code Prac. § 738.—*Hatfield v. Holloway (Ky.)* 1192.

Transcript on appeal from an order appointing a receiver *held* filed in due time.—*Kipy v. Redwater Lumber Co. (Tex. Civ. App.)* 474.

## § 14. — Defects, objections, amendment, and correction.

\*Statement as to correcting and striking out of bills of exceptions by the lower court after perfecting of appeal.—*Stark v. Harris (Tex. Civ. App.)* 887.

## § 15. — Questions presented for review.

\*Where the entire evidence is not preserved by bill of exceptions, the court on appeal will not pass upon a question controlled entirely or practically by the evidence.—*Dee v. Nachbar (Mo.)* 35.

\*Refusal of trial court to give requested instruction *held* not error on appeal where evidence to support it was not in abstract.—*Dee v. Nachbar (Mo.)* 35.

Where an appellant fails to show cause for omission to show in the abstract the facts of filing and overruling of a motion for new trial and the filing of bill of exceptions, and also fails to obtain leave to amend, the appellate court must consider the cause as though no motion or bill of exceptions had been filed.—*In re Boeckenkamp's Estate (Mo. App.)* 103; *Miller v. Fincke, Id.*

\*Where record fails to set out excluded testimony, appellate court cannot determine its relevancy or prejudice from ruling.—*Western Commercial Travelers' Ass'n v. Tennent (Mo. App.)* 1073.

\*The exclusion of evidence cannot be reviewed unless the bill of exceptions indicates what the excluded answer of the witness would have been.—*Thompson v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.)* 910.

## § 16. Assignment of errors.

\*An assignment of error will not be considered which is not in conformity with the rule requiring the statement to embrace such parts of the record as will be sufficient to support the

proposition.—*Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.)* 155.

\*Assignment of error *held* not to be considered for failure of the statement under it to support it.—*Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.)* 155.

In an action based on an order drawn by a contractor on funds in hands of the owner of a building, *held*, that the appellate court would not consider a proposition, under assignments of error, as to a recovery on an implied contract not applicable to the case.—*Foley v. Houston Co-op. & Mfg. Co. (Tex. Civ. App.)* 160.

Under court rule 24, an assignment of error *held* not to specify the error relied on so as to permit review.—*St. Louis Southwestern Ry. Co. of Texas v. Hall (Tex. Civ. App.)* 194.

\*An assignment of error relating to the evidence, but making no reference to the pages of the record where the evidence in question may be found, as required by rule 31 of the Court of Civil Appeals, will not be considered.—*Stockton v. Brown (Tex. Civ. App.)* 423.

Where an assignment of error involves several points *held* they should, under the rules, be exhibited by separate propositions.—*United States Gypsum Co. v. Shields (Tex. Civ. App.)* 724.

Where assignments of error go to the admission of an entire deposition of a county clerk and an abstract of title attached thereto, they do not raise the question of the admissibility of any particular portion of the abstract.—*Frugia v. Truehart (Tex. Civ. App.)* 736.

A proposition that the recitals in an administrator's deed are conclusive on collateral attack *held* not germane to an assignment that the court erred in finding that the administrator's sale was made under authority given him as temporary administrator.—*Cruise v. O'Gwin (Tex. Civ. App.)* 757.

An assignment of error not complying with statute and rules *held* too general to require consideration.—*Cain v. State (Tex. Civ. App.)* 770.

## § 17. Briefs.

\*Appellant's brief *held* to sufficiently comply with Supreme Court Rule 15 (73 S. W. vi).—*Collier v. Catherine Lead Co. (Mo.)* 971.

\*An appeal will be dismissed where appellant fails to file briefs in the trial court and in the Court of Civil Appeals within the time prescribed by Rev. St. 1895, art. 1417, and Sup. Ct. Rule 29.—*Ft. Worth & D. C. Ry. Co. v. Moore (Tex. Civ. App.)* 190.

\*Appellant having failed to file briefs within the time prescribed by Rev. St. 1895, arts. 1022, 1417, appellee *held* entitled to a dismissal.—*Niday v. Cochran (Tex. Civ. App.)* 462.

## § 18. Dismissal, withdrawal, or abandonment.

\*Where appellant having abandoned his appeal entitling appellee to a dismissal, appellee failed to move therefor, he waived the right thereto.—*Kelly v. Keith (Ark.)* 1173.

The filing of a supplemental complaint after appeal *held* an abandonment of the appeal entitling appellee to a dismissal.—*Kelly v. Keith (Ark.)* 1173.

Payment of the docket fee required for appeal in a civil case by Laws 1907, p. 121, § 1, *held* jurisdictional, so that respondent was entitled to a dismissal for appellant's failure to pay the fee on raising the objection in any mode before or after the submission of the appeal.—*Saeger v. Wabash R. Co. (Mo. App.)* 569.

\*Point annotated. See syllabus.

**§ 19. Hearing and rehearing.**

Where the record on appeal to the Court of Civil Appeals showed jurisdiction, appellee could not object for the first time on rehearing that the notice of appeal was not given in open court, and that the order denying a new trial was not made as recited.—*Owens v. Cage & Crow* (Tex.) 880.

**§ 20. Review—Scope and extent in general.**

\*An agreed statement of facts, on which a cause is submitted, stands in lieu of a special verdict, and must be treated as such on appeal.—*Duell v. Leslie* (Mo.) 489.

Facts in an affidavit for new trial on the ground of newly discovered evidence are not substantive evidence, and do not touch the merits of the case on appeal.—*Nugent v. Armour Packing Co.* (Mo.) 648.

\*The dismissal of a petition restraining prosecutions for violation of the local option law pending final decision in a pending contest of such election *held* not to be disturbed in view of the decision in that contest sustaining the election.—*Edgar v. McDonald* (Tex. Civ. App.) 1135.

**§ 21. — Interlocutory, collateral, and supplementary proceedings and questions.**

On appeal from the appointment of a joint receiver for one of two corporations in a consolidated suit *held*, that the consolidation would not be reviewed.—*Ripy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

**§ 22. — Parties entitled to allege error.**

\*A party cannot complain of an instruction which is in harmony with one given at his own request.—*Lange v. Missouri Pac. Ry. Co.* (Mo.) 660.

\*Objections to evidence elicited by plaintiff as being merely the conclusions of the witness *held* not ground for reversal where defendant pursued the same line of questioning.—*Kirby v. Manufacturers' Coal & Coke Co.* (Mo. App.) 1069.

\*A party cannot complain of an error in an instruction given by the court after he had requested a similar charge.—*Thompson v. Planters' Compress Co.* (Tex. Civ. App.) 470.

\*A party may not complain of an improper instruction where at his request an instruction subject to the same objection is given.—*Galveston, H. & S. A. Ry. Co. v. Gillespie* (Tex. Civ. App.) 707.

\*A party may not complain because the court submits an issue where he requests the submission of such issue in a charge given.—*Texas & P. Ry. Co. v. Tucker* (Tex. Civ. App.) 764.

\*A defendant in an action for negligent death by the widow and mother of decedent cannot complain of the apportionment of the verdict between them.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

**§ 23. — Presumptions.**

Where the transcript does not contain depositions read as testimony in the case, the court on appeal must presume that the findings of the chancellor are correct.—*East v. Key* (Ark.) 201.

Appellant has the burden of showing that the findings of the chancellor are clearly contrary to the weight of the evidence.—*East v. Key* (Ark.) 201.

Where an order of attachment was not in the record on appeal, it would be presumed that it complied with the law.—*Morgan v. Joe Morgan & Co.* (Ky.) 800.

\*When the record on appeal does not contain the instructions given on the trial, it will

be presumed that the jury was properly instructed.—*Chesapeake & O. Ry. Co. v. Pace* (Ky.) 1176.

\*When the trial court in granting a new trial gives its reasons for so doing, as required by Rev. St. 1899, § 801 [Ann. St. 1906, p. 764], it will be presumed on appeal from such order that the ruling was based only on the grounds stated.—*Gould v. St. John* (Mo.) 23.

\*It will be presumed on appeal that the action of the trial court in granting a new trial is correct.—*Gould v. St. John* (Mo.) 23.

\*An assignment of error that the judgment was for the wrong party throws the burden on appellant to show reversible error; the presumption being that the judgment was correct.—*Gardner v. Robertson* (Mo.) 645.

**§ 24. — Discretion of lower court.**

\*The action of the trial court in granting a new trial on the ground that the verdict was against the evidence will not be disturbed on appeal; no abuse of discretion being shown.—*Gould v. St. John* (Mo.) 23.

**§ 25. — Questions of fact, verdicts, and findings.**

\*The findings of the chancellor are presumptively correct, and will be sustained unless clearly contrary to the weight of the evidence.—*East v. Key* (Ark.) 201.

\*A finding of the chancellor supported by the evidence will not be set aside on appeal.—*Begley v. Combs* (Ky.) 246.

\*A finding of the trial court on conflicting evidence will not be set aside on appeal where the evidence is such that the Court of Appeals is in doubt as to which view of the transaction is correct.—*Oman v. American Nat. Bank* (Ky.) 277.

\*The rule as to the conclusiveness of a verdict stated.—*Louisville, H. & St. L. R. Co. v. Davis* (Ky.) 304.

The Court of Appeals *held* empowered to set aside a verdict involving punitive damages.—*Louisville & N. R. Co. v. Brown* (Ky.) 795.

Where the evidence is conflicting, and on the whole case the mind is left in doubt as to the truth, the chancellor's judgment will not be disturbed.—*Morgan v. Joe Morgan & Co.* (Ky.) 800.

\*Where on all the evidence the mind is left in doubt, the Court of Appeals will not disturb the conclusions of the chancellor.—*Wilson v. Nantz* (Ky.) 801.

\*Where the evidence as to plaintiff's mental capacity at the time he executed a release of liability for personal injuries is about equally divided, a finding against his capacity will not be disturbed on appeal.—*Chesapeake & O. Ry. Co. v. Roberts* (Ky.) 835.

\*The findings of a trial court will be sustained on appeal, though opposed to the testimony of the greater number of witnesses.—*Boyd v. Morris* (Ky.) 867.

\*Where the evidence is conflicting in action for personal injuries, but the verdict is not excessive under the plaintiff's evidence, it will not be disturbed.—*Louisville & N. R. Co. v. Clark* (Ky.) 1184.

\*A finding of the trial court will not be interfered with unless there is an absence of substantial evidence to sustain it.—*Vincent v. Means* (Mo.) 8.

\*Findings of fact by the trial court on conflicting testimony will not be disturbed on appeal.—*Squires v. Kimball* (Mo.) 502.

\*Statement as to review of finding on weight of evidence.—*Lanyon v. Chesney* (Mo.) 522.

\*Point annotated. See syllabus.

\*In equity cases, the finding of fact of the trial court is conclusive on the appellate court.—*Gottfried v. Bray* (Mo.) 639.

\*A referee's finding, if supported by substantial testimony is conclusive on appeal.—*Martin v. Whites* (Mo. App.) 608.

\*A finding of the trial court sitting as a jury on conflicting evidence is binding on the appellate court.—*Holbrook-Blackwelder Real Estate & Trust Co. v. Hartman* (Mo. App.) 1115.

\*While the Court of Civil Appeals may reject a finding of fact of the trial court and find the fact differently, it cannot enter judgment contrary to a finding of fact on conflicting evidence.—*Taber v. Dallas County* (Tex.) 332.

\*A verdict supported by evidence and found on conflicting evidence will not be disturbed on appeal.—*San Antonio & A. P. Ry. Co. v. Keirsev* (Tex. Civ. App.) 163.

\*A finding of the trial judge supported by evidence held not to be disturbed on appeal.—*Southern Pac. Co. v. Allen* (Tex. Civ. App.) 441.

\*A finding upon conflicting evidence is conclusive on appeal.—*West Bros. v. Thompson & Greer* (Tex. Civ. App.) 1134.

\*A verdict based on conflicting evidence will not be disturbed on appeal.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1147.

#### § 26. — Harmless error in general.

An error in a decree in a suit by a purchaser of the dower interest of a widow for the assignment of the dower interest granting an accounting for rents since the owner's death held harmless.—*Flowers v. Flowers* (Ark.) 949.

\*Rulings by the trial court on evidence and motions held not ground for reversal where they could not have changed the result of the trial.—*Dee v. Nachbar* (Mo.) 35.

A suit in equity being triable de novo on appeal, appellant is not prejudiced by the court's refusal to make separate findings of fact and conclusions of law, under Rev. St. 1899, § 695 [Ann. St. 1906, p. 704].—*Miller v. McCaleb* (Mo.) 655.

\*If counsel's argument was improper, the error was cured by the withdrawal of the remarks and an instruction to the jury not to consider them.—*San Antonio & A. P. Ry. Co. v. Keirsev* (Tex. Civ. App.) 163.

The use of indorsements on a deposition by counsel in argument held harmless error.—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

\*In an action against a railroad company for injuries to a brakeman, an erroneous charge held favorable to defendant, and not to authorize the reversal of a judgment against it.—*Missouri, K. & T. Ry. Co. v. Wise* (Tex. Civ. App.) 465.

Submission of issue to jury held harmless error.—*Memphis Coffin Co. v. Patton* (Tex. Civ. App.) 697.

\*In an action against a carrier for the loss of goods, the evidence as to the loss being practically undisputed, a charge misleading and confusing as to the value of the goods held not to avail defendant, being detrimental, if at all, only to plaintiff.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

Refusal of the trial court to file specific conclusions of law held not prejudicial to appellant where the court adopted the agreed statement of facts as its conclusions of fact and the same was sent up as a full statement of facts on appeal.—*Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas* (Tex. Civ. App.) 782.

\*An instruction assuming that certain of the services sued for were performed without charge was not prejudicial to defendant.—*Harris v. Jackson* (Tex. Civ. App.) 1144.

\*Defendant was not prejudiced by the erroneous submission of an issue to the jury, where no damages were found with reference thereto.—*Harris v. Jackson* (Tex. Civ. App.) 1144.

#### § 27. — Harmless error in rulings on pleading.

Under Rev. St. 1899, § 865 [Ann. St. 1906, p. 812], error in ruling that a petition stated a cause in equity rather than at law held not ground for reversal where the case was disposed of on demurrer to plaintiff's evidence.—*Baird v. Granniss* (Mo.) 980.

\*Error, if any, of the trial court in holding that different causes of action were properly joined in a complaint, held cured by its action in withdrawing one of the causes from the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*An erroneous ruling of the court upon an exception to a paragraph of a petition is harmless error where the right result on the paragraph was reached in the verdict.—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

\*In an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, the error, if any, in overruling exceptions to certain portions of the petition held harmless.—*Nacogdoches & S. E. R. Co. v. Beene* (Tex. Civ. App.) 456.

Overruling an exception to an allegation of the petition held not reversible error where the issue presented by it was not submitted to the jury.—*Gorham v. Dallas, C. & S. W. Ry. Co.* (Tex. Civ. App.) 930.

Any error in overruling plaintiff's exception to allegations of the answer was harmless, where the issue raised by such allegations was ignored in the instructions and treated in the judgment as a nullity.—*Harpold v. Moss* (Tex. Civ. App.) 1131.

#### § 28. — Harmless error in rulings on evidence in general.

Though the question to an expert was improper as calling for a conclusion, held, the answer was proper.—*Rogers v. Rundell* (Mo. App.) 1096.

\*Though it is permissible to ask a witness, when called to contradict another, whether certain words were used, refusal to allow such questions is not ground of reversal, when the witness' testimony shows a positive denial of the expressions attributed to him.—*Northrup v. Diggs* (Mo. App.) 1123.

\*In trespass to try title, rejection of evidence as to facts otherwise established held harmless.—*Mars v. Morris* (Tex. Civ. App.) 430.

#### § 29. — Prejudicial effect in admission of evidence.

\*There being proof of the execution and contents of a lost instrument, held immaterial that a copy thereof was read in evidence, though such instrument was not so acknowledged as to entitle it to record.—*Belcher v. Polly* (Ky.) 818.

\*Though answer of witness needed no explanation, evidence introduced in an attempt to make it clearer held without injury to defendant.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

Where, notwithstanding an objection to a question was sustained, the witness answered it, and the answer was not withdrawn, the ruling was not prejudicial.—*Brown v. Quincy, O. & K. C. R. Co.* (Mo. App.) 551.

\*Point annotated. See syllabus.

\*The admission of evidence is not prejudicial error where, if it had been excluded, the court could properly have directed the verdict it did.—*Mings v. Griggsby Const. Co.* (Tex. Civ. App.) 192.

The error in admitting certain evidences in a personal injury action *held* harmless.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 194.

\*Error in the admission of evidence was harmless where its admission did not affect the result of the trial.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*Reading to the jury the indorsements on a deposition envelope *held* harmless error.—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

\*Error in permitting the obligee of a replevin bond given in a sequestration proceeding to show what the principal did with rents collected was harmless, there being no controversy as to the amount collected.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

\*In an action by certain tenants for breach of their landlords' oral contract to furnish water to irrigate the crop, erroneous admission of evidence of the making of a similar contract between defendants and W. *held* prejudicial.—*Stockton v. Brown* (Tex. Civ. App.) 423.

In trespass to try title, admission of certain evidence *held* prejudicial error in view of the defense of estoppel.—*Mars v. Morris* (Tex. Civ. App.) 430.

Admission of evidence *held* harmless.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

\*Appellant *held* not prejudiced by admission of a letter written by deceased containing declarations not materially different from the testimony of witnesses offered by appellant.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

### § 30. — Harmless error in admission of opinion evidence.

\*Notwithstanding a witness who gave an expert opinion may have been incompetent to testify as an expert, yet his answer *held*, under the evidence, not prejudicial.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*In a personal injury action, the admission of certain evidences *held* not reversible error in view of the damages awarded.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 194.

\*On a trial by the court without a jury, it is harmless error to admit a conclusion of a witness where the facts were given on which his conclusion was formed.—*City of Texarkana v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 915.

### § 31. — Harmless error in admission of facts otherwise established.

\*In an action on an accident policy, defendant *held* not prejudiced by the erroneous admission of evidence that when the issuing agent paid the premium to defendant's general agent he received it without protest, and at the same time examined a stub book evidently containing insured's name.—*Travelers' Ins. Co. of Hartford, Conn., v. Crawford's Adm'r* (Ky.) 290.

\*Any error in admitting evidence was harmless where the facts established thereby were abundantly shown by other evidence.—*Metropolitan Life Ins. Co. v. Thomas* (Ky.) 1175.

\*Plaintiff's adoption having been incontrovertibly established, defendant was not harmed by evidence that plaintiff's adopting parent intended to adopt plaintiff, and thought he had

done so.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 690.

\*Error, if any, in the admission of evidence as to the general reputation of plaintiff for truth and veracity, *held* harmless where other witnesses testified to the same facts.—*Missouri, K. & T. Ry. Co. of Texas v. Price* (Tex. Civ. App.) 700.

\*In an action against a railway company for the death of an engineer in a derailment, any error in admitting in evidence the watch found on his body *held* harmless.—*Galveston, H. & S. A. Ry. Co. v. Gillespie* (Tex. Civ. App.) 707.

\*Where a cause was tried by the judge and there was competent testimony to establish a fact, the error in admitting erroneous evidence to prove the fact was not ground for reversal.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

\*Where a cause was tried by the judge, the error in admitting in evidence a deposition in support of a fact otherwise established by competent testimony is harmless.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

\*In an action by a landlord for conversion of a crop, error in the admission of certain evidence *held* harmless in view of the petition.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

In an action for personal injuries, the admission of evidence that plaintiff was in a destitute condition when the suit was brought *held* reversible error notwithstanding defendant's evidence.—*Dallas Consol. Electric St. Ry. Co. v. Summers* (Tex. Civ. App.) 891.

### § 32. — Defect supplied or objection removed subsequently.

In an action for death of a railroad engineer, defendant *held* not prejudiced by evidence that it had not provided a sufficient force of men nor a sufficient amount of materials to keep the road in a proper and safe condition.—*Hach v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 525.

\*In an action by a parent for injuries to his minor son, incompetent evidence of loss of earning power of the son *held* harmless.—*Brown v. St. Louis & Suburban Ry. Co.* (Mo. App.) 83.

\*Where a deed, in the light of the evidence received, without objection, demanded the construction placed on it by the court, error in admitting other evidence was harmless.—*Parish v. Mills* (Tex.) 882.

\*A ruling admitting testimony will not be reviewed where the same testimony was given at another time during the trial without objection.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

### § 33. — Harmless error in instructions.

\*In a personal injury action, the court having not only erased objectionable words in an instruction, but admonished the jury to disregard them, defendant *held* in no way prejudiced by the action of the court.—*Cumberland Telephone & Telegraph Co. v. Overfield* (Ky.) 242.

Defendant *held* not prejudiced by an instruction authorizing the jury, if they found for plaintiffs, to include in their verdict certain attorney's fees and court costs expended by plaintiffs in another suit, where the amount awarded did not include an allowance for such fees and costs.—*Katterjohn v. Nahm* (Ky.) 1179.

\*Appellant cannot complain of instructions merely because of their extreme length and number, where they are as favorable to him as he was entitled to.—*Owensboro Brick & Sewer Pipe Co. v. Glenn* (Ky.) 1193.

\*Point annotated. See syllabus.

An error in a declaration of law *held* not prejudicial to the party complaining.—*Vincent v. Means* (Mo.) 8.

Where a case is tried by the court and the finding and judgment could not have been otherwise than they were, the giving of an improper declaration of law is not reversible error.—*Beattie Mfg. Co. v. Clark* (Mo.) 29.

In an action against a street railway company for running over plaintiff's child, an instruction permitting the jury to consider plaintiffs' circumstances in life in determining their contributory negligence *held* not prejudicial.—*Cornovski v. St. Louis Transit Co.* (Mo.) 51.

\*In an action for injuries to a passenger, defendant *held* not prejudiced by an instruction which was objectionable in assuming that the steps of a car from which plaintiff slipped and fell were dangerous because of being covered with snow and ice.—*Haas v. St. Louis & S. F. R. Co.* (Mo. App.) 599.

In an action for services rendered defendants in settling an indebtedness due by a third person, an inaccuracy in an instruction *held* not ground for reversal of a judgment for plaintiff.—*Rutledge & Kilpatrick Realty Co. v. Gartside* (Mo. App.) 1126.

\*In an action on an order drawn on funds in the hands of the owner of a building and due a contractor, and accepted on conditions, which conditions were fulfilled, an instruction as to damages sustained by the owner *held* harmless error.—*Foley v. Houston Co-op. & Mfg. Co.* (Tex. Civ. App.) 160.

\*In an action against a railroad for the wrongful ejection of a passenger, error in an instruction as to damages *held* not to require a reversal of the judgment.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 895.

\*Error in refusing to instruct that no recovery could be had as to an item of damages not proved *held* not ground for reversal of a judgment for plaintiff, provided he remitted the amount of such item from the judgment.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*Error, if any, as to the measure of damages on verdict for vendors *held* immaterial where there was a verdict for vendee.—*Smith v. Lander* (Tex. Civ. App.) 703.

Error in submitting an issue *held* harmless.—*Wood v. Limbaugh* (Tex. Civ. App.) 771.

In an action by the state against a foreign corporation for violations of the anti-trust act of March 31, 1903 (Laws 1903, p. 119, c. 94), the error in a charge submitting an issue *held* not ground for reversal.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

\*Errors in instructions *held* harmless.—*Currie v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 1149.

#### § 34. — Error waived in appellate court.

\*An assignment of error as to admitting testimony will be overruled where the testimony improperly admitted is not pointed out.—*Gardner v. Robertson* (Mo.) 645.

\*The appellate court is bound to consider instructions with reference to the specific objections made thereto, and not with reference to objections not urged.—*Laughlin v. Schnitzer* (Tex. Civ. App.) 908.

#### § 35. — Subsequent appeals.

\*A decision on appeal in a personal injury action that plaintiff was not a trespasser and not guilty of contributory negligence is conclusive on a subsequent appeal upon the same facts.—*Louisville, H. & St. L. R. Co. v. Davis* (Ky.) 304.

\*Where a declaration of law was simply copied in the record, but no point was made thereon, or any mention of it in the opinion, the declaration was not approved, and was not the law of the case on a subsequent trial.—*Vincent v. Means* (Mo.) 8.

#### § 36. Determination and disposition of cause.

\*Where the facts are insufficient to support a verdict for plaintiff, the court on appeal will reverse the judgment and dismiss the case.—*Waters-Pierce Oil Co. v. Van Elderen* (Ark.) 947; *Same v. Egner* (Ark.) 948.

\*A judgment will not be reversed because of a failure to award plaintiff nominal damages.—*White v. Glazer* (Ky.) 289.

\*In an action for the price of goods sold, where the evidence was conflicting, but showed an admitted overcharge against defendant, the judgment for plaintiff will be reversed and a judgment directed for the same amount less the overcharge.—*Pulaski Stave Co. v. Sale* (Ky.) 786.

\*Defendant *held* entitled to restoration of property on reversal of judgment on which plaintiff obtained possession thereof.—*Lanyon v. Chesney* (Mo.) 522.

An overruled motion to affirm a judgment will not be reopened and sustained merely because respondent was not served with a copy of the suggestions and affidavits of appellant on which the denial of the motion was based.—*Gardner v. Robertson* (Mo.) 645.

\*Where it appears that the cause has been fully developed in the lower court, there being no fact necessary to the determination of the rights of the parties which needs to be ascertained, it is the duty of the Supreme Court on appeal, if it reverse the judgment of the trial court, to enter such judgment as should have been entered by that court.—*Krause v. City of El Paso* (Tex.) 121.

The Supreme Court, on the presentation of an application for a writ of error, *held* authorized to direct the clerk of the Court of Civil Appeals to recall a mandate issued by him.—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

\*The appellate court *held* entitled under the facts to reverse a judgment for plaintiff and render one for defendant.—*Jaggers v. Stringer* (Tex. Civ. App.) 151.

On writ of error from a judgment against husband and wife *held* not proper to affirm the judgment as against him and the sureties on the error bond.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

\*Where on a writ of error from a default judgment against a foreign insurance company for the amount of a policy together with damages and an attorney's fee the only error claimed was that the judgment was excessive because of such damages and fee which plaintiff remitted in the Court of Civil Appeals, the judgment will be reformed and affirmed under Rev. St. 1895, art. 1023a.—*New York Life Ins. Co. v. Herbert* (Tex. Civ. App.) 421.

\*Under Rev. St. 1895, art. 1024, a plaintiff, having obtained an excessive recovery, *held* entitled to remit the excess in the Court of Civil Appeals after removal of the case by writ of error.—*New York Life Ins. Co. v. Herbert* (Tex. Civ. App.) 421.

\*Where a verdict in a personal injury case was not itemized, and it was impossible to tell what sum had been given for medical attention, a remittitur *held* not to cure an erroneous instruction not limiting the recovery for medical

\*Point annotated. See syllabus.

attention to the sum asked in the petition.—*Houston Electric Co. v. Green* (Tex. Civ. App.) 463.

Where an action was tried by the court without a jury, and conclusions of fact filed, but judgment was erroneously rendered for only one-half of defendant's liability, the Court of Appeals on reversal would render such judgment as the trial court should have rendered.—*Will A. Watkin Music Co. v. Basham* (Tex. Civ. App.) 734.

Where the evidence is so conclusive that the lower court should have directed a verdict for the unsuccessful parties, the judgment may be reversed and rendered for them on appeal.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

## APPEARANCE.

Objection to service, overruled on special appearance, *held* not waived by answer, still maintaining the objection.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 940.

\*An answer for a husband and wife, though informal, if authorized by the wife, *held* sufficient to make her a party to the suit, though she was not served.—*Owens v. Cage & Crow* (Tex.) 880.

A defendant in conversion *held* not to make itself a party after its dismissal from the case by its answer to a pleading of a codefendant seeking relief against it.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

Where, in conversion against several, a defendant, after having been dismissed by plaintiff, entered an appearance and answered a pleading of a codefendant, he entered a new appearance, and was before the court in respect to any relief asked by codefendant.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

## APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 8.

## APPLICATION.

For continuance in criminal prosecution, see "Criminal Law," § 17.

## APPOINTMENT.

Of officers in general, see "Officers," § 1.

Of receiver, see "Receivers," § 2.

Of tax officers, see "Taxation," § 5.

## APPROPRIATION.

Of water rights in general, see "Waters and Water Courses," § 1.

## ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 1½.

In criminal prosecutions, see "Criminal Law," § 21.

## ARRAIGNMENT.

See "Criminal Law," § 5.

## ARREST.

See "Bail."

Of witness pending trial in criminal prosecution, see "Criminal Law," § 19.

\*Point annotated. See syllabus.

## ASSAULT AND BATTERY.

Sufficiency of instructions in general, see "Criminal Law," § 23.

### § 1. Criminal responsibility.

\*A teacher punishing a scholar *held* not guilty of assault.—*Greer v. State* (Tex. Cr. App.) 359.

Where a teacher corrects a scholar, the presumption is that the same is done in the exercise of his lawful authority.—*Greer v. State* (Tex. Cr. App.) 359.

\*To constitute assault and battery the violence inflicted must have been inflicted with an intention of causing injury.—*Greer v. State* (Tex. Cr. App.) 359.

On the trial of a teacher for assaulting his scholar, certain evidence *held* inadmissible.—*Greer v. State* (Tex. Cr. App.) 359.

## ASSESSMENT.

Of damages, see "Damages," § 6.

Of expenses of public improvements, see "Municipal Corporations," § 4.

Of loss on insured, see "Insurance," § 10.

Of tax, see "Taxation," § 3.

## ASSETS.

Of estate of decedent, see "Executors and Administrators," § 1.

## ASSIGNMENT OF ERRORS.

See "Appeal and Error," §§ 5, 9, 16, 23, 34; "Criminal Law," § 37.

## ASSIGNMENTS.

Admeasurement or assignment of dower, see "Dower," § 1.

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

Operation and effect of acknowledgment of assignment of judgment, see "Acknowledgment," § 3.

### § 1. Requisites and validity.

\*The assignee of a contract may not sue thereon, where because of personal trust reposed in the assignor by the other party to the contract it is nonassignable.—*Allen v. Camp* (Tex.) 315.

\*An order drawn by a contractor on the owner of a building in favor of a materialman, is an equitable assignment of so much of the fund on hand due the contractor on the contract as it was given for.—*Foley v. Houston Co-op. & Mfg. Co.* (Tex. Civ. App.) 160.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

## ASSOCIATIONS.

See "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 10.

**ASSUMPSIT, ACTION OF.**

See "Money Paid"; "Work and Labor."

Action in assumpsit for value of timber cut as waiver of action for trespass, see "Election of Remedies."

Waiver of trespass in cutting timber to sue in assumpsit for value of timber cut, see "Action," § 2.

**ASSUMPTION.**

As to facts in charge to jury, see "Trial," § 3.  
Of risk by employé, see "Master and Servant," §§ 5, 11.

Of risks by passenger, see "Carriers," § 9.

**ASYLUMS.**

See "Hospitals."

Acts 1868, p. 154 (Kirby's Dig. § 4227), authorizing the board of trustees of the charitable institutions of the state to elect a superintendent of the School for the Blind to hold office during the pleasure of the board, was repealed by Act 1907.—*Lucas v. Futrall* (Ark.) 667.

Directions given by individual members of the state board of trustees of charitable institutions, directing the incumbent of the office of superintendent of the State School for the Blind to continue in office, notwithstanding the election of his successor, until the succeeding meeting of the board, *held* ineffective to entitle the incumbent to hold such office.—*Lucas v. Futrall* (Ark.) 667.

Complainant having been duly elected superintendent of the State School for the Blind, under Act 1907, the board of trustees of the state charitable institutions was without power to revoke such election and appoint another in complainant's stead, but can only remove him for cause.—*Lucas v. Futrall* (Ark.) 667.

**ATTACHMENT.**

See "Execution"; "Sequestration."

Exemptions, see "Homestead."

In action for rent, see "Landlord and Tenant," § 6.

Limitations applicable in action on attachment bond, see "Limitation of Actions," § 1.

Presumption on appeal or writ of error as to matters not shown by record, see "Appeal and Error," § 23.

Priority of attorney's lien, see "Attorney and Client," § 1.

**§ 1. Liabilities on bonds or undertakings.**

\*Fees paid an attorney to defend an attachment suit, and other expenditures made by reason thereof, *held* not recoverable in an action on an attachment bond.—*State ex rel. Conway v. Binney* (Mo. App.) 1114.

**ATTENDANCE.**

Of juror, see "Jury," § 2.

**ATTORNEY AND CLIENT.**

Argument and conduct of counsel at trial in civil actions, see "Trial," § 1½.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 21.

Attorney's fees in action by stockholder against corporation, see "Corporations," § 2.

Attorney's fees in action for divorce, see "Divorce," § 3.

Attorney's fees in action on attachment bond, see "Attachment," § 1.

Attorney's fees in action on insurance policy, see "Insurance," § 9.

Attorney's fees in foreclosure proceedings, see "Mortgages," § 3.

Attorneys in fact, see "Principal and Agent."

Intentional absence of attorney from court as criminal contempt, see "Contempt," § 1.

Privileged communication, see "Witnesses," § 1.

**§ 1. Compensation and lien of attorney.**

\*Under Ky. St. 1903, § 107, the attorney for defendant partner in a suit by partners to settle the partnership *held* entitled to a lien for his services.—*T. Harlan & Co. v. Bennett, Robbins & Thomas* (Ky.) 287.

\*Under Ky. St. 1903, § 107, and Civ. Code Prac. § 732, subsec. 34, defendant's attorney *held* entitled to a lien for his services on the property involved in litigation where he obtains an affirmative judgment for defendant.—*T. Harlan & Co. v. Bennett, Robbins & Thomas* (Ky.) 287.

\*A lien for attorney's services *held* to relate back and take effect from the time of the commencement of the services, and to be superior to an attachment subsequently levied on the interest of the attorney's client in the property involved in the action.—*T. Harlan & Co. v. Bennett, Robbins & Thomas* (Ky.) 287.

**ATTORNEY GENERAL.**

Quo warranto by, see "Quo Warranto," § 2.

**AUTHORITY.**

Of agent, see "Principal and Agent," § 1.

Of broker, see "Brokers," § 1.

Of justice of the peace, see "Justices of the Peace," § 1.

**BAIL.****§ 1. In criminal prosecutions.**

Certain facts *held* no defense to sureties on a bail bond.—*Moore v. State* (Tex. Cr. App.) 358.

Under the statute, the record on appeal from a judgment of forfeiture of a bail bond must be filed as in civil cases, the limit being 90 days.—*Moore v. State* (Tex. Cr. App.) 358.

Under Acts 30th Leg. p. 31, c. 19, *held* improper to remand to custody, during the trial, one charged with assault with intent to murder, and under bond.—*Spencer v. State* (Tex. Cr. App.) 386.

\*Under Acts 30th Leg. p. 31, c. 19, § 2, where one accused of felony is on trial and has given bail, the act of the court in forcing him into the custody of the sheriff pending the trial *held* unauthorized.—*Choice v. State* (Tex. Cr. App.) 387.

**BAILMENT.**

Distinguished from sale, see "Sales," § 1.

Embezzlement or larceny by bailee, see "Embezzlement."

*Particular species of bailments, and bailments incident to particular occupations.*

See "Banks and Banking," § 1; "Carriers," §§ 2-4; "Depositaries"; "Innkeepers."

\*Point annotated. See syllabus.



## BALLOTS.

For county seat election, see "Counties," § 1.

## BANKRUPTCY.

### § 1. Assignment, administration, and distribution of bankrupt's estate.

Ordinarily the title of nonexempt property of a bankrupt passes to his trustee, who, pending the bankruptcy proceedings, is alone entitled to sue to enforce rights incident thereto.—Briggs v. Avary (Tex. Civ. App.) 904.

If a trustee in bankruptcy exercises his right to reject onerous or unprofitable property within a reasonable time, the bankrupt may assert title thereto.—Briggs v. Avary (Tex. Civ. App.) 904.

A written waiver by a trustee in bankruptcy of any rights of the bankrupt in a certain water power privilege held adversely to the bankrupt and grant of permission to the bankrupt to sue to protect any rights that he might have with reference thereto *held* to support the conclusion that the trustee never accepted the bankrupt's right to the privilege.—Briggs v. Avary (Tex. Civ. App.) 904.

### § 2. Rights, remedies, and discharge of bankrupt.

The court of bankruptcy *held* without jurisdiction of exempt property except to set it aside to the bankrupt.—Brooks v. Eblen (Ky.) 308.

A creditor *held* not entitled to subject to his debt land set aside by the bankruptcy court as the exempt property of the debtor.—Brooks v. Eblen (Ky.) 308.

## BANKS AND BANKING.

Bank as depository of county funds, see "Depositories."

Certification of instrument by bank, operation as certified check, see "Bills and Notes," § 1. Combination between banks to suppress bidding for county funds, see "Contracts," § 1.

Deposits by guardian of insane person, see "Insane Persons," § 2.

Interpleader in action to recover deposit, see "Interpleader," § 1.

### § 1. Functions and dealings.

\*Money deposited in a bank by a guardian to his credit as guardian is the property of the ward, and the bank cannot apply it to the payment of any order made by the guardian in any other character than that of guardian.—Moore v. Hanscom (Tex.) 876.

In an action to recover a bank deposit, limitations *held* unavailable either to the bank or to plaintiff as against a third party claimant.—McCormick v. National Bank of Commerce (Tex. Civ. App.) 747.

### § 2. National banks.

The president of a bank *held* not individually liable on the certificate of a noncommercial instrument in his official capacity which was ultra vires the bank's powers.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

Under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455], a national bank cannot bind itself by contracts of suretyship or guaranty made for the sole benefit of others.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

Under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455], a national bank had no power to certify a noncommercial instrument by which

the drawers sought to indemnify their surety for liability on a bond.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

Where the president and cashier of a bank had no authority to bind it by the certification of a noncommercial instrument, the bank was not estopped to plead that such certification was ultra vires and void.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

Certification by the president of a bank of an indemnity instrument issued by the drawers to their surety on a building contractor's bond *held* not a representation that the drawers had the amount specified in the instrument on deposit in the bank.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

## BAR.

Of action by former adjudication, see "Judgment," § 7.

Of action by limitation, see "Limitation of Actions," § 3.

## BASTARDS.

Right of action for death of mother, see "Death," § 2.

### § 1. Illegitimacy in general.

\*The presumption that children are legitimate is not confined to children born after marriage, where by statute children born before marriage are legitimated by subsequent marriage and recognition.—Stein's Adm'r v. Stein (Ky.) 860.

\*Evidence examined, and *held* sufficient to show that a child was the legitimate son of a decedent.—Stein's Adm'r v. Stein (Ky.) 860.

\*Under Ky. St. 1903, § 1398, the recognition of a child by a man as his son *held* not sufficient to render him legitimate, in the absence of evidence that he was the father of the child.—Stein's Adm'r v. Stein (Ky.) 860.

## BATTERY.

See "Assault and Battery."

## BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 10.

## BEQUESTS.

See "Wills."

## BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

## BIAS.

Of juror, see "Jury," § 3.

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BILL OF EXCHANGE.

See "Bills and Notes."

\*Point annotated. See syllabus.

## BILLS AND NOTES.

Amendment of pleading in action on note, see "Pleading," § 6.  
 Authority of agent to execute note, see "Principal and Agent," § 1.  
 Computation of interest, see "Interest," § 1.  
 Conclusion in pleading in action on note, see "Pleading," § 1.  
 Gift of, see "Gifts," § 1.  
 Liability of partner on notes executed for firm, see "Partnership," § 3.  
 Materiality of alteration of note as to place of payment, see "Alteration of Instruments."  
 Of minors, see "Infants," § 1.

### § 1. Requisites and validity.

One of two co-makers of certain notes *held* liable for the entire debt, though his co-obligor had been released by the holder's agreement not to sue her on the notes.—Will A. Watkin Music Co. v. Basham (Tex. Civ. App.) 734.

An instrument, certified by a national bank, by which the drawers agreed to indemnify their surety for liability on a bond, *held* not to constitute a certified check drawn in the ordinary course of business.—Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas (Tex. Civ. App.) 782.

### § 2. Rights and liabilities on indorsement or transfer.

\*Erasures and interlineations in a note *held* notice to a transferee of alteration avoiding it.—Mitchell v. Reed's Ex'r (Ky.) 833.

### § 3. Payment and discharge.

In the absence of proof that a renewal note was accepted with the understanding that it was to operate as an absolute payment of the debt, or that the original note was to be canceled and extinguished, the presumption was that the renewal note was taken as a conditional payment only.—Keyser v. Hinkle (Mo. App.) 98.

### § 4. Actions.

An answer in an action on a note *held* not to state a defense founded on the fraud of a vendor.—Wheatly v. Hardin Nat. Bank (Ky.) 289.

Where, in an action on a promissory note, defendant admitted that he executed the note, the admission curtailed the scope of a general traverse by excluding therefrom the defense of non est factum.—Keyser v. Hinkle (Mo. App.) 98.

In an action on an order accepted on condition, a requested instruction *held* not based on the evidence.—Foley v. Houston Co-op. & Mfg. Co. (Tex. Civ. App.) 160.

In an action on an order drawn by a contractor in favor of a materialman on the owner of a building, and accepted by him on a certain condition, in which the contractor is brought in as a party by the defendant, instructions as to damages against the contractor for delay in completing the work were properly refused; the evidence showing that the condition of acceptance was fulfilled.—Foley v. Houston Co-op. & Mfg. Co. (Tex. Civ. App.) 160.

In an action on an order drawn by a contractor on the owner of a building in favor of a materialman, evidence considered, and *held* sufficient to show that at the time the order was presented to the owner he had sufficient funds due the contractor to pay the order.—Foley v. Houston Co-op. & Mfg. Co. (Tex. Civ. App.) 160.

A plea of non est factum in an action on a note *held* to require plaintiff to prove its execution.—Memphis Coffin Co. v. Patton (Tex. Civ. App.) 697.

In an action on a note, evidence *held* to require submission of the issue of execution to the jury.—Memphis Coffin Co. v. Patton (Tex. Civ. App.) 697.

Under the evidence, in an action on notes, *held* proper to direct a verdict for plaintiff.—Harpold v. Moss (Tex. Civ. App.) 1131.

## BLIND.

Superintendent of school for blind as public officer, see "States," § 2.

## BOARDS.

Of school examiners, see "Schools and School Districts," § 1.

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.  
 Of lands, see "Vendor and Purchaser," § 4.  
 Of standing timber, see "Logs and Logging."

## BONDS.

Change of venue in action on, see "Venue," § 1.

Collateral attack on order discharging sureties on guardian's bond, see "Judgment," § 6.  
 Limitations applicable in action on bond, see "Limitation of Actions," § 1.  
 Of contractor for municipal improvements, see "Municipal Corporations," § 4.  
 Sureties on bonds, see "Principal and Surety."

*Bonds for performance of duties of trust or office.*

Guardians of insane persons, see "Insane Persons," § 1.

*Bonds in judicial proceedings.*

See "Appeal and Error," §§ 6, 8; "Attachment," § 1; "Bail"; "Sequestration."  
 Appeal from justice's court, see "Justices of the Peace," § 3.  
 Appeal in criminal prosecution, see "Criminal Law," § 32.  
 Probate proceedings, see "Wills," § 3.

## BOOKS.

School books, see "Schools and School Districts," § 1.

## BOOKS OF ACCOUNT.

Admissibility in evidence, see "Evidence," § 8.

## BOUNDARIES.

Agreement as to boundary of property constituting homestead, see "Homestead," § 1.  
 Agreements relating to boundaries, requirements of statute of frauds, see "Frauds, Statute of," § 2.

Judgment on pleading in suit involving, see "Pleading," § 9.

Persons to whom estoppel as to boundary is available, see "Estoppel," § 2.

Taking case or question from jury in boundary dispute, see "Trial," § 2.

### § 1. Description.

\*Under the facts *held* proper to reverse the calls of a patent to discover where the mistake in the calls of the patent occurred.—Combs v. Virginia Iron, Coal & Coke Co. (Ky.) 815.

\*Point annotated. See syllabus.

\*The call of a patent "south 18° west 220 poles" held to be a clerical error for "south 81° west 220 poles."—*Combs v. Virginia Iron, Coal & Coke Co. (Ky.)* 815.

The original survey and accompanying plot may always be considered to correct a mistake in the calls of a patent.—*Combs v. Virginia Iron, Coal & Coke Co. (Ky.)* 815.

\*The courts, by grading the dignity of the different classes of calls in deeds, intended only to establish a rule for arriving at the boundaries actually established.—*Jaggers v. Stringer (Tex. Civ. App.)* 151.

\*The general rule that monuments and natural objects prevail over calls for course and distance in cases of conflict held not applicable where the circumstances show that the monuments and natural objects were placed by mistake.—*Jaggers v. Stringer (Tex. Civ. App.)* 151.

## § 2. Evidence, ascertainment, and establishment.

\*Evidence held to sustain a finding that the description in a patent covered the land in controversy and did not leave vacant land between the survey patented and an adjoining survey.—*Wilson v. Nantz (Ky.)* 801.

\*Evidence held to sustain a finding that a division line ran along the center of a lane.—*Turner v. Dixon (Ky.)* 814.

\*Where a division of land was made by persons of legal age and competent to contract, and had been acquiesced in for over 40 years, it will not be disturbed because the forms of law were not invoked in establishing it.—*Turner v. Dixon (Ky.)* 814.

Evidence held to warrant a finding that adjoining owners under overlapping patents had anciently agreed on the boundary line between them.—*J. D. Hughes Lumber Co. v. Valentine (Ky.)* 839.

\*An ancient agreement between adjoining owners, establishing a boundary line between overlapping surveys, under which they had acted and held possession for many years, will be enforced by the courts.—*J. D. Hughes Lumber Co. v. Valentine (Ky.)* 839.

In an action involving a boundary dispute, requested instruction on issue of estoppel held properly refused.—*Dee v. Nachbar (Mo.)* 35.

Plaintiff in trespass to try title by proof of location of a corner held required to show with reasonable certainty the existence of the monument or natural object relied on.—*Jaggers v. Stringer (Tex. Civ. App.)* 151.

In trespass to try title, where the description of the lot in controversy is dependent on the location of another lot, the actual location of the other lot can be shown without specially pleading it, where the purpose was to show the true location of the lot in controversy.—*McKeon v. Roan (Tex. Civ. App.)* 404.

\*In trespass to try title, parol evidence tending to show the true location of the lot on which depends the description of the land in controversy is admissible.—*McKeon v. Roan (Tex. Civ. App.)* 404.

In trespass to try title to recover a city lot, plaintiff could show a mistake in the description in a deed more than 10 years old in order to prove the actual location of the lot in controversy.—*McKeon v. Roan (Tex. Civ. App.)* 404.

\*Where the boundary between two lots of land is in dispute, the owners may agree upon a division line as the true boundary between them.—*McKeon v. Roan (Tex. Civ. App.)* 404.

\*In an action to recover land, where a survey called for certain corners of other tracts as a

common point, which corners did not coincide, the issue as to which call should govern held for the jury.—*Titterton v. Kirby (Tex. Civ. App.)* 899.

## BREACH.

Of condition, see "Insurance," § 4.  
Of contract for sale of goods, see "Sales," § 4.  
Of contract for sale of land, see "Vendor and Purchaser," § 3.  
Of covenant, see "Covenants," § 2; "Insurance," § 4.  
Of warranty, see "Insurance," § 4.

## BREACH OF THE PEACE.

\*Accused held not guilty of disturbing the peace.—*Hale v. State (Tex. Cr. App.)* 354.

## BRIBERY.

Corroboration of accomplices, see "Criminal Law," § 14.

## BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 17.

Propositions under assignment of errors, see "Appeal and Error," § 18.

## BROKERS.

See "Principal and Agent."

Applicability of instruction to pleadings and evidence in action for brokers' commissions, see "Trial," § 6.

Consideration for modification of contract to pay broker's commission, see "Contracts," § 3.  
Evidence as to custom of business in action for compensation, see "Evidence," § 3.

Insurance brokers, see "Insurance," § 1.  
Pleading inconsistent defenses in action for broker's commissions, see "Pleading," § 3.

## § 1. Employment and authority.

Under Laws 1903, p. 161 [Ann. St. 1903, § 1993-1], evidence held sufficient to show that plaintiff was authorized in writing to sell defendant's land.—*Holbrook-Blackwelder Real Estate & Trust Co. v. Hartman (Mo. App.)* 1115.

\*Real estate agents held authorized to execute a contract of sale in behalf of the owner of property.—*Colvin v. Blanchard (Tex.)* 323.

\*Real estate agents held not authorized by the owner of land to accept notes payable "on or before" in part payment of purchase price.—*Colvin v. Blanchard (Tex.)* 323.

## § 2. Compensation and lien.

\*An objection by plaintiff to goods negotiated for by defendants under a contract to purchase for plaintiff and then purchasing direct from the owner does not give defendants a cause of action against plaintiff.—*Allen v. Hodge (Ky.)* 255.

\*Where plaintiff, employed by defendant to sell a mining lease, contracted with the purchaser's agent to pool commissions and received commissions from the purchaser without defendant's knowledge, such transactions constituted a defense to plaintiff's right to recover commissions from defendant.—*Corder v. O'Neill (Mo.)* 10.

\*An agent employed by an owner to procure a lessee who induced the lessee pending negotiations to pay him a commission held not entitled to commission from the owner.—*Winter v. Carey (Mo. App.)* 539.

\*Point annotated. See syllabus.

\*One employed by the owner of a lease to negotiate a sale thereof, who begins the negotiations which finally result in a sale as authorized, may recover the compensation agreed on.—*Northrup v. Diggs* (Mo. App.) 1123.

\*In an action for commission for negotiating the sale of a lease, defendant *held* not liable to plaintiff for commission where he afterwards made the sale for the same price to the same party through a different agent.—*Northrup v. Diggs* (Mo. App.) 1123.

\*No time having been fixed, an agency to sell real estate may be revoked after a reasonable time, provided it is done in good faith.—*Newton v. Conness* (Tex. Civ. App.) 892.

\*Broker not having procured a purchaser willing to pay the sum stipulated, but only a less sum, the owner *held* entitled to reject the offer and sell the remainder of the land, after the sale of a portion by him, and not liable for commissions on such sale.—*Newton v. Conness* (Tex. Civ. App.) 892.

\*Though a broker may have given the name of the intending purchaser to the owner of the land, and the owner utilized that knowledge, yet under the facts the broker *held* not entitled to a commission.—*Newton v. Conness* (Tex. Civ. App.) 892.

\*An owner *held* not entitled to evade the payment of commissions by discharging the broker and selling the property at a lower price, where he does so for the purpose of defrauding the broker out of his commissions.—*Newton v. Conness* (Tex. Civ. App.) 892.

\*A real estate broker is entitled to a commission where he is the efficient cause of a sale, though it is concluded by the owner himself.—*West Bros. v. Thompson & Greer* (Tex. Civ. App.) 1134.

\*Where a real estate broker's commission depended upon a sale, he was not entitled to it upon the execution of a contract giving an option to purchase.—*Wilson v. Ellis* (Tex. Civ. App.) 1152.

### § 3. Actions for compensation.

\*In an action for a broker's commission, evidence *held* not to preponderate in favor of plaintiff.—*Gould v. St. John* (Mo.) 23.

\*Evidence in an action for a real estate broker's commission for selling land *held* to sustain a judgment for plaintiff.—*Morris v. McDaniel* (Mo. App.) 1107.

In an action by a broker to recover commissions on the sale of land, evidence *held* to support a finding that an option authorizing plaintiff to sell the land had not expired before the sale.—*Holbrook-Blackwelder Real Estate & Trust Co. v. Hartman* (Mo. App.) 1115.

\*In an action for commission for sale of a lease, the petition in which alleges that defendant authorized plaintiff to negotiate a sale, the word "negotiate" should be construed to mean conversation in arranging the terms of a contract.—*Northrup v. Diggs* (Mo. App.) 1123.

Instructions in an action by a broker for commission *held* erroneous.—*Northrup v. Diggs* (Mo. App.) 1123.

In an action for a real estate broker's commission, *held* not necessary for the owner to plead that a contract relied upon by the broker was not consummated by a sale of the land.—*Wilson v. Ellis* (Tex. Civ. App.) 1152.

### § 4. Rights, powers, and liabilities as to third persons.

\*The owner of land *held* not to have ratified the acts of his agents in making an unauthorized sale of his land by remaining silent and ig-

noring the transaction.—*Colvin v. Blanchard* (Tex.) 823.

## BUILDING AND LOAN ASSOCIATIONS.

Taxation, see "Taxation," § 2.

Building and loan associations are a peculiar kind of corporation, more in the nature of co-operative home building partnerships than commercial bodies.—*Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n* (Ky.) 221.

## BUILDING CONTRACTS.

Construction of, as question for jury, see "Contracts," § 2.

Discharge of contractor's sureties, see "Principal and Surety," § 3.

## BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 6.

## BURGLARY.

Competency of witness convicted of burglary in another state, see "Witnesses," § 1.

Evidence of other offenses, see "Criminal Law," § 8.

Harmless error, see "Criminal Law," § 43.

Sufficiency of instructions in general, see "Criminal Law," § 23.

Testimony of accomplices, see "Criminal Law," § 14.

### § 1. Prosecution and punishment.

Evidence *held* not to sustain a conviction as an accomplice to a burglary.—*Hall v. State* (Tex. Cr. App.) 379.

## BURIAL GROUNDS.

See "Cemeteries."

## BY-LAWS.

Of insurance associations, see "Insurance," § 10.

## CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Cancellation of deed of community property, see "Husband and Wife," § 4.

Cancellation of insurance certificate, see "Insurance," § 10.

Cancellation of note by giving renewal note, see "Bills and Notes," § 3.

Rescission of contracts for sale of goods, see "Sales," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

### § 1. Right of action and defenses.

The rule that a subsequent grantee may not maintain a suit to set aside for fraud a prior deed from his grantor to a third person *held* not to apply where the grantee had a prior equitable right in the subject of the grant.—*Weissenfels v. Cable* (Mo.) 1028.

### § 2. Proceedings and relief.

While inadequacy of consideration is insufficient to warrant a court of equity in annulling a sale of land, yet in connection with other facts it may be considered in determining the

\*Point annotated. See syllabus.

question as to whether an actual fraud has been committed.—*Derby v. Donahoe* (Mo.) 632.

Burden of proof *held* upon plaintiff in a suit to cancel notes to dissolve a joint-stock company and for an accounting to prove his allegation.—*Harpold v. Moss* (Tex. Civ. App.) 1131.

## CARNAL KNOWLEDGE.

See "Rape."

## CARRIERS.

Amendment of pleading affecting limitations in action for injuries to passenger, see "Limitation of Actions," § 2.

Applicability of instructions to pleadings and evidence in action for death of passenger, see "Trial," § 6.

Assessment of damages in action for injuries to passenger, see "Damages," § 6.

Construction and operation of instruction in action for injuries to passenger, see "Trial," § 8.

Construction of statute imposing penalty for failure to furnish cars, see "Statutes," § 6.

Direct or remote consequences of injuries to passenger, see "Damages," § 1.

Evidence of damages in action for injuries to passenger, see "Damages," § 5.

Examination of witnesses in action for injuries to passenger, see "Witnesses," § 2.

Excessive damages for injuries to passenger, see "Damages," § 3.

Harmless error in action for ejection of passenger, see "Appeal and Error," § 33.

Harmless error in action for injuries to passenger, see "Appeal and Error," § 33.

Harmless error in action for loss of shipment, see "Appeal and Error," § 26.

Opinion evidence in action for injuries to live stock, see "Evidence," § 10.

Opinion evidence in action for loss of shipment, see "Evidence," § 10.

Province of court and jury in action for injuries to passenger, see "Trial," § 3.

Requests for instruction in action for injuries to passenger, see "Trial," § 7.

Review in action for injuries to passenger as dependent on record on appeal or writ of error, see "Appeal and Error," § 9.

### § 1. Control and regulation of common carriers.

An application to a carrier for cars *held* insufficient to subject the carrier to the penalty, under *Sayles' Ann. Civ. St. 1897, arts. 4497-4499*.—*Texas & P. Ry. Co. v. Blocker* (Tex. Civ. App.) 718.

Where plaintiff is precluded from recovering the penalty, under *Sayles' Ann. Civ. St. 1897, arts. 4498, 4499*, for failure to furnish cars, he will also be precluded from recovering damages under that statute.—*Texas & P. Ry. Co. v. Blocker* (Tex. Civ. App.) 718.

### § 2. Carriage of goods—Transportation and delivery by carrier.

\*In an action against a carrier for loss of goods, the burden of proof *held* to be on the defendant to justify nondelivery.—*Hammett & Katter v. Wabash R. Co.* (Mo. App.) 1106, 1107.

The right of a carrier to sell goods on the refusal of the consignee to accept them can only be exercised after notice to the consignor and due notice of sale.—*Missouri, K. & T. Ry. Co. of Texas v. Groce* (Tex. Civ. App.) 720.

A sale of goods by a carrier on the refusal of the consignee to accept them *held* unauthorized.—*Missouri, K. & T. Ry. Co. of Texas v. Groce* (Tex. Civ. App.) 720.

### § 3. — Loss of or injury to goods.

\*Under a custom, a carrier *held* entitled to assume, on failure of the shipper to give notice that he desired the ventilators of a car changed, that the shipper did not desire them changed, and not liable for failure to do so.—*B. F. Schwartz & Co. v. Erie R. Co.* (Ky.) 1188.

\*A carrier *held* not responsible for injury to goods due to their own inherent nature, without fault on the carrier's part, or the shipper's negligence.—*B. F. Schwartz & Co. v. Erie R. Co.* (Ky.) 1188.

Where a carrier's agent takes note of damaged goods and reports to carrier, who investigates, *held*, that consignee need not give notice required by contract of shipment.—*Nairn v. Missouri, K. & T. Ry. Co.* (Mo. App.) 102.

\*Where goods delivered to a carrier in good condition are delivered to consignee in damaged condition, it may be inferred that they were damaged by the carrier and through its negligence.—*Nairn v. Missouri, K. & T. Ry. Co.* (Mo. App.) 102.

In an action against a carrier for loss of freight, where plaintiff pleads the contract of carriage, its provisions inure to the benefit of defendant without being pleaded by it.—*Houston & T. C. R. Co. v. Groves* (Tex. Civ. App.) 416.

\*A shipper *held* not estopped from claiming damages for injury to his goods caused by the car's defective roof simply because he objected to the carrier's substitution of another car after he had gone to the expense of loading his goods.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

### § 4. — Connecting carriers.

The mere receipt by a connecting carrier of its proportionate share of the general freight rate charged does not render it jointly liable for a loss of the goods occurring on another connecting line.—*Houston & T. C. R. Co. v. Groves* (Tex. Civ. App.) 416.

The fact that a connecting carrier receives and hauls a car of goods and collects the charges does not render it jointly liable for damages to the goods with the company that executed the bill of lading, or operate as a ratification by it of the contract for shipment.—*Houston & T. C. R. Co. v. Groves* (Tex. Civ. App.) 416.

An arrangement between two carriers that each should receive traffic from the other and one collect the entire toll does not create such an agency or relation between them as to render one liable for loss caused by the other.—*Houston & T. C. R. Co. v. Groves* (Tex. Civ. App.) 416.

*Sayles' Rev. Civ. St. 1897, art. 331b*, *held* not to apply to an interstate shipment.—*Houston & T. C. R. Co. v. Groves* (Tex. Civ. App.) 416.

In an action against connecting carriers for the loss of goods, the inference that the managers of the companies had such an understanding regarding shipments as to bring a contract of transportation within *Rev. St. 1895, art. 331a*, *held* warranted.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

A contract to transport goods *held* within *Rev. St. 1895, art. 331a*, making connecting carriers agents of each other for the transportation of goods.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

### § 5. Carriage of live stock.

\*Contract for carriage of cattle, limiting liability to carrier's own line, exempts it from liability for damage on connecting line from negligence of the connecting carrier.—*Chicago, R. I. & P. Ry. Co. v. Slaughter* (Ark.) 208.

\*Point annotated. See syllabus.

In an action for injuries to cattle shipped on defendant's line, evidence *held* sufficient to warrant a finding that a line to which the cattle were transferred was a connecting carrier.—Chicago, R. I. & P. Ry. Co. v. Slaughter (Ark.) 208.

\*Under Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], it is the duty of a railroad to be reasonably well prepared to care for live stock at the places where it is unloaded for rest, water, and feed.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

\*In an action against several carriers for injuries to freight, none of them will be responsible for damages occurring beyond the end of their lines, in the absence of a special contract.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

\*A contract with an initial carrier for the shipment of live stock *held* binding on all connecting carriers.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

Where freight is injured by the negligence of any of the connecting carriers an action may be brought against the initial carrier in the county where the contract was made.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

In an action against an initial carrier for injuries to freight, all the connecting carriers may be made parties defendant, and if brought before the court, as provided by Civ. Code Prac. § 51, a judgment may be given against any one or all of them.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

In an action against connecting carriers for injury to live stock in shipment *held*, that there was no variance or failure of proof, under Civ. Code Prac. §§ 129, 131.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

\*In an action against a railroad for injuries to live stock, an instruction on the measure of damages *held* correct.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

\*In an action against connecting carriers for injuries to live stock in shipment, the refusal to give a peremptory instruction for one of defendants *held* not error.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

In an action against several carriers for injuries to freight, in the absence of a special contract, the jury should be instructed to find a separate verdict against each carrier for the damages on its line.—Illinois Cent. R. Co. v. Curry (Ky.) 294.

\*A carrier, having received a mule for shipment in good condition, *held* liable for its safe delivery, unless its death was caused by an act of God, public enemy, inherent vice of the animal, or some conduct of plaintiff.—International & G. N. R. Co. v. Nowaski (Tex. Civ. App.) 437.

In an action against a carrier for death of a mule delivered to it for transportation, evidence of the appearance of the mule's remains, their condition and surroundings, was only admissible to establish the cause of death.—International & G. N. R. Co. v. Nowaski (Tex. Civ. App.) 437.

\*Delivery of a mule to a carrier for transportation being shown, proof that the mule was dead when it arrived at destination was sufficient to create a prima facie case of liability against the carrier.—International & G. N. R. Co. v. Nowaski (Tex. Civ. App.) 437.

### § 6. Carriage of passengers—Relation between carrier and passenger.

\*Ordinarily, when one goes to a railroad station with the intention of taking the next passenger train, he becomes, in contemplation of law, a passenger, whether he has actually

bought a ticket or not.—Texas Midland R. R. v. Griggs (Tex. Civ. App.) 411.

\*A passenger in alighting at an intermediate station for any purpose consistent with the character of a passenger *held* not to lose his character as a passenger, and entitled to the protection due a passenger in his efforts to board the train.—Missouri, K. & T. Ry. Co. of Texas v. Price (Tex. Civ. App.) 700.

\*A passenger in alighting from a train to get a lunch *held* not to cease to be a passenger, and, not having entered the train sooner, the conductor was bound to hold the same in accordance with his answer as to the time the train would stop.—Missouri, K. & T. Ry. Co. of Texas v. Price (Tex. Civ. App.) 700.

### § 7. — Performance of contract of transportation.

In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, evidence *held* insufficient to sustain a charge of incivility on the part of the conductor.—Smith v. St. Louis & S. F. R. Co. (Mo. App.) 108.

\*In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, a judgment for \$100 *held* excessive.—Smith v. St. Louis & S. F. R. Co. (Mo. App.) 108.

\*In an action against a railroad for failure to afford plaintiff a reasonable opportunity to leave the train, the measure of damages should be reasonable compensation for actual inconvenience and loss of time and labor of returning to her original destination.—Smith v. St. Louis & S. F. R. Co. (Mo. App.) 108.

### § 8. — Personal injuries.

In an action against a railroad company for illness caused by lack of accommodations at a station, evidence *held* competent to show whether the station was a regular or only a flag station.—Choctaw, O. & G. Ry. Co. v. Stanford (Ark.) 205.

In an action by a passenger for personal injuries, in view of the testimony, *held*, that each party was entitled to an instruction presenting their respective theories.—Flaherty v. St. Louis Transit Co. (Mo.) 15.

In an action by a passenger for personal injuries, an instruction *held* not open to the objection that it permitted plaintiff to recover without a finding that the car had stopped when plaintiff sought to enter.—Flaherty v. St. Louis Transit Co. (Mo.) 15.

\*Where a passenger was injured by falling from the icy platform and steps of a railroad car, the carrier was not chargeable with negligence merely because vestibuled cars were not provided.—Haas v. St. Louis & S. F. R. Co. (Mo. App.) 599.

A request to charge that a carrier was not bound to remove ice and snow accumulating on car platforms and steps en route before permitting passengers to alight *held* properly refused as not stating the degree of care required.—Haas v. St. Louis & S. F. R. Co. (Mo. App.) 599.

An instruction absolutely relieving a carrier from the duty of removing ice from its car steps, where the ice accumulated en route, *held* properly refused.—Haas v. St. Louis & S. F. R. Co. (Mo. App.) 599.

In an action for injuries to a passenger, testimony as to the speed of the train at the time of its derailment *held* properly admitted.—Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.) 155.

\*In an action for injuries to a passenger, *held*, that the questions of the negligence of the de-

\*Point annotated. See syllabus.

fendant and its employes were for the jury.—*Texas & N. O. R. Co. v. Clippenger* (Tex. Civ. App.) 155.

In an action for injuries to a passenger, an instruction that if defendant was negligent in running its train over an open switch at an excessive rate of speed, or failed to exercise due care and foresight in regard to the condition of the switch, and such conduct constituted negligence, the defendant was liable. *held* not erroneous.—*Texas & N. O. R. Co. v. Clippenger* (Tex. Civ. App.) 155.

In an action for personal injuries by derailment of a train, evidence *held* to support a verdict for plaintiff.—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

\*Where a person accompanies a passenger into a train at the carrier's invitation, it should hold the train a reasonable time to allow him to alight.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham* (Tex. Civ. App.) 407.

\*A person accompanying a passenger *held* authorized to enter the train to assist her, and to rely on information furnished by an employe as to the length of stop.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham* (Tex. Civ. App.) 407.

An instruction in an action against a railroad company for injuries caused by alighting from a moving train, as to the duty of the company to hold the train, *held* not misleading.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham* (Tex. Civ. App.) 407.

\*A carrier is held to the highest degree of care to prevent injury to its passengers.—*Texas Midland R. R. v. Griggs* (Tex. Civ. App.) 411.

Where a railroad in compliance with the express requirements of Rev. St. 1895, art. 4521, opened its station one hour before the departure of a train, it was not liable to a prospective passenger for injuries and suffering resulting to the passenger from exposure before the station was opened.—*Texas Midland R. R. v. Griggs* (Tex. Civ. App.) 411.

\*If a boy passenger on a railway train had intelligence enough to understand that it was more dangerous to ride on a car platform or on the steps than inside the car, no duty devolved upon the company to prevent him from so riding.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

\*In an action for injury to a passenger through an alleged defective car step, evidence of the condition of the step at times after the date of the accident is immaterial, in the absence of proof that at such times it was in the same condition as when the accident occurred.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

\*Scope of authority of conductor of a train *held* to extend to the announcement to a passenger of the name of a station, a statement of the time the train would remain there, and the holding of the train in accordance with such statement.—*Missouri, K. & T. Ry. Co. of Texas v. Price* (Tex. Civ. App.) 700.

#### § 9. — Contributory negligence of person injured.

\*In an action against a street railway company for injuries to a passenger, an instruction as to plaintiff's contributory negligence *held* proper.—*Simonton v. St. Louis Transit Co. (Mo.)* 46.

In an action for injuries sustained by the derailment of the train, evidence examined, and *held* not to show contributory negligence.—*Ft.*

*Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

Instructions in an action against a railroad company for injuries caused by alighting from a moving train, as to contributory negligence of plaintiff, *held* not objectionable.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham* (Tex. Civ. App.) 407.

In an action against a railroad for injuries in alighting from a moving train, requests for instructions as to contributory negligence *held* properly refused.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham* (Tex. Civ. App.) 407.

\*Under the facts stated, a boy passenger, riding on the platform and a defective step of a railway car, *held* to assume the risk of injury through such a step and swaying of the train caused by defective track and roadbed.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

In an action for injury to a boy while riding on a railway car platform, the burden *held* upon him to prove he lacked sufficient intelligence and discretion to appreciate the danger of so riding.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

In an action against a carrier for injury to a youth who fell from a moving train, an instruction *held* not objectionable.—*Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.) 417.

\*Whether a passenger was guilty of contributory negligence in attempting to board the train while it was moving *held* for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Price* (Tex. Civ. App.) 700.

\*In an action by a husband to recover for injuries to his wife while alighting from a railroad car, evidence *held* insufficient to show that the wife was guilty of contributory negligence.—*Chicago, R. I. & P. R. Co. v. Cleaver* (Tex. Civ. App.) 721.

\*It is not negligence per se to board a slowly moving train or to alight from one which merely slows up at the station instead of stopping.—*Chicago, R. I. & P. R. Co. v. Cleaver* (Tex. Civ. App.) 721.

#### § 10. — Ejection of passengers and intruders.

In an action against a railroad for the wrongful ejection of a passenger, certain evidence *held* admissible under the pleadings.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*In an action against a railroad for wrongful ejection of a passenger, a verdict for \$400 *held* not excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*In an action against a railroad for the ejection of a passenger, the giving of an instruction and the refusal of a requested instruction *held* not reversible error.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

### CARRYING WEAPONS.

See "Weapons."

### CATTLE.

See "Animals."

### CAUSE OF ACTION.

See "Action."

\*Point annotated. See syllabus.

**CEMETERIES.**

\*Where a cemetery lot owner permitted the carcass of a dog to be buried in her lot contrary to the rules of the cemetery corporation, the fact that it was not a physical nuisance did not prevent an adjoining lot owner requiring its removal.—*Hertle v. Riddell* (Ky.) 282.

\*Though a purchaser of a lot from a cemetery corporation does not acquire a fee-simple title, he has a property right which he may protect from invasion by trespassers or from the unauthorized and illegal acts of the cemetery company.—*Hertle v. Riddell* (Ky.) 282.

\*The owner of a cemetery lot may maintain either trespass for damage or an injunction to protect his rights in the lot from invasion, either against a trespasser or the cemetery corporation.—*Hertle v. Riddell* (Ky.) 282.

\*The owner of a cemetery lot purchased under a rule of the corporation that it should be used for the burial of the white race only *held* entitled to compel the removal of the remains of a dog which an adjoining lot owner had permitted to be buried in her lot.—*Hertle v. Riddell* (Ky.) 282.

**CENSUS.**

Judicial notice of population, see "Evidence," § 1.

**CERTIFICATE.**

As to result of local option election, see "Intoxicating Liquors," § 2.

Certification of cause by Court of Appeals to Supreme Court, see "Courts," § 3.

Certified copies, see "Evidence," § 8.

Liability of bank officer on certificate of non-commercial instrument, see "Banks and Banking," § 2.

Of acknowledgment of written instrument, see "Acknowledgment," § 2.

Of record for purpose of review, see "Appeal and Error," § 12.

**CERTIFIED CHECKS.**

See "Bills and Notes," § 1.

**CERTIORARI.**

Review of contempt proceedings, see "Contempt," § 2.

**CHALLENGE.**

To juror, see "Jury," § 3.

**CHAMPERTY AND MAINTENANCE.**

\*A contract of sale of land by a trustee holding the title in trust for his grandchildren is void, as being champertous, where the evidence shows that the cestui que trust was in adverse possession at the time of sale.—*Cyrus v. Holbrook* (Ky.) 300.

Certain possession of the surface of land by putting a tenant on it *held* not an actual possession of the mineral rights within the champerty statute.—*Combs v. Virginia Iron, Coal & Coke Co.* (Ky.) 815.

**CHANGE OF VENUE.**

Of civil actions, see "Venue," § 1.

Of criminal prosecutions, see "Criminal Law," § 3.

**CHARACTER.**

Of accused in criminal prosecutions, see "Criminal Law," § 8.

Of witness, see "Witnesses," § 3.

**CHARGE.**

By telephone companies, see "Telegraphs and Telephones," § 2.

To jury in civil actions, see "Trial," §§ 3-8.

To jury, in criminal prosecutions, see "Criminal Law," § 23.

**CHARITIES.**

See "Hospitals."

Exemption from taxation, see "Taxation," § 2.

State charitable institutions, see "Asylums."

Superintendent of state school for the blind as public officer, see "Officers," § 1.

**§ 1. Construction, administration, and enforcement.**

\*Where a hospital is maintained as a charitable institution either by the government or by a corporation or by an individual, there is no liability for injuries to a patient therein for torts of the employees in charge thereof.—*University of Louisville v. Hammock* (Ky.) 219.

**CHARTER.**

Of corporation, see "Corporations," § 3.

**CHATTEL MORTGAGES.**

Fraud as to creditors, see "Fraudulent Conveyances," § 1.

Of crop by tenant, see "Landlord and Tenant," § 6.

**§ 1. Requisites and validity.**

\*A lease, so far as it related to a lien reserved therein, *held* a chattel mortgage creating a valid lien as between the parties.—*Saunders v. Ohlhausen* (Mo. App.) 541.

**§ 2. Rights and liabilities of parties.**

In replevin by a chattel mortgagee in which a pledgee of the note secured intervened, evidence *held* insufficient to sustain a finding that the intervener had no interest in the note.—*Owen v. Mulkey* (Ark.) 937.

In an action in replevin by the payee of a note to recover personal property described in a chattel mortgage, given to secure the note, in which action another party filed as intervener, claiming to hold the note as collateral security on a debt due him from the payees, evidence of fraud by payee in procuring execution of the note and mortgage *held* properly admitted where there was nothing to show that such payee had abandoned his claim as plaintiff.—*Owen v. Mulkey* (Ark.) 937.

**§ 3. Rights and remedies of creditors.**

Evidence *held* not to warrant the inference of a change of possession of property, within Rev. St. 1890, § 3404 [Ann. St. 1906, p. 1936], providing that to dispense with the necessity of recording a chattel mortgage there must be a change of possession.—*Saunders v. Ohlhausen* (Mo. App.) 541.

\*A lease, in effect a chattel mortgage as to a lien reserved therein, *held* void as to the lien so reserved as to a third person where it was not recorded or filed for record, as required by Rev. St. 1890, § 3404 [Ann. St. 1906, p. 1936], nor possession of the mortgaged property delivered to mortgagee.—*Saunders v. Ohlhausen* (Mo. App.) 541.

\*Point annotated. See syllabus.



\*A chattel mortgage *held* fraudulent as giving the mortgagor possession and right to sell the goods mortgaged.—Independent Packing Co. v. Barth (Mo. App.) 1121.

#### § 4. Removal or transfer of property by mortgagor.

\*A chattel mortgagee *held* entitled to foreclosure of property sold by mortgagor as against both mortgagor and purchaser, and not compelled to take a personal judgment.—Ranger Mercantile Co. v. Terrett (Tex. Civ. App.) 1145.

\*A person furnishing a tenant supplies and taking in payment mortgaged cotton also incumbered with a landlord's lien *held* liable to the mortgagee for the amount of the debt less the amount of the landlord's lien.—Ranger Mercantile Co. v. Terrett (Tex. Civ. App.) 1145.

### CHEAT.

See "False Pretenses"; "Fraud."

### CHECKS.

See "Bills and Notes."

### CHILDREN.

See "Adoption"; "Bastards"; "Infants." Applicability of instructions to evidence in action for injuries to minor, see "Trial," § 6. Care required as to, see "Negligence," § 8. Construction and operation of instruction in action for injury to child, see "Trial," § 8. Contradiction of witness as to adoption of child, see "Witnesses," § 3. Evidence of damages in action for injuries to, see "Damages," § 5. Harmless error in action for death of child, see "Appeal and Error," § 33. Harmless error in action for injuries to child, see "Appeal and Error," § 32. Injuries to children as passengers, see "Carriers," § 9. Liability for injuries to child, caused by operation of railroad, see "Railroads," § 7. Negligence of child as question for jury, see "Negligence," § 4. Right of action for death of parent, see "Death," § 2. Rights as to homestead, see "Homestead," § 2.

### CITATION.

See "Process."

### CITIES.

See "Municipal Corporations."

### CITIZENS.

Privileges and immunities, see "Constitutional Law," § 3.

### CIVIL RIGHTS.

See "Constitutional Law," § 3.

### CLAIM AND DELIVERY.

See "Replevin."

### CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 4.

\*Point annotated. See syllabus.

## CLASS LEGISLATION.

See "Constitutional Law," § 8.

## CLOUD ON TITLE.

See "Quieting Title."

## COLLATERAL ATTACK.

On judgment, see "Judgment," § 6.  
On judgment of foreclosure, see "Mortgages," § 3.  
On organization of school district, see "Schools and School Districts," § 1.  
On sale of property of decedent's estate, see "Executors and Administrators," § 5.

## COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

## COLLECTION.

Of taxes, see "Taxation," § 5.

## COLLEGES AND UNIVERSITIES.

Hospitals maintained by, see "Hospitals."

## COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

## COMBINATIONS.

See "Monopolies," § 1.

## COMITY.

Between courts, see "Courts," § 5.

## COMMERCE.

Carriage of goods and passengers, see "Carriers."

§ 1. Means and methods of regulation.  
\*Neither the Constitution nor laws of the United States prohibit a state from taxing the property of persons and corporations engaged in foreign and interstate commerce where the property is located in such state.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

\*The national government alone has power to tax and regulate foreign and interstate commerce.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

## COMMERCIAL PAPER.

See "Bills and Notes."

## COMMISSION.

To take testimony, see "Depositions."

## COMMISSIONERS.

Acknowledgment before commissioner of deeds, see "Acknowledgment," §§ 2, 4.

## COMMISSIONS.

Of broker, see "Brokers," § 2.  
Of insurance agents, see "Insurance," § 1.

**COMMON CARRIERS.**

See "Carriers."

**COMMON LAW.**

See "Quo Warranto," § 2.  
Common-law wife as party in ejectment, see "Ejectment," § 2.  
Construction of statutes in derogation of common law, see "Statutes," § 6.  
Judicial notice of construction, see "Evidence," § 1.  
Liability for injuries to animals frightened by operation of railroad, see "Railroads," § 8.  
Marriage, see "Marriage."  
Notice in contempt proceedings, see "Contempt," § 2.  
Pleading, see "Pleading," § 1.  
Presumptions as to construction, see "Evidence," § 2.  
Recovery of costs, see "Costs," § 1.

**COMMON SCHOOLS.**

See "Schools and School Districts," § 1.

**COMMUNITY PROPERTY.**

See "Husband and Wife," § 4.

**COMPENSATION.**

*Of particular classes of officers or other persons.*  
See "Brokers," § 2.  
Insurance agents, see "Insurance," § 1.  
School examiners, see "Schools and School Districts," § 1.

**COMPETENCY.**

*Of evidence in civil actions,* see "Evidence," § 3.  
*Of evidence in criminal prosecutions,* see "Criminal Law," § 9.  
*Of experts as witnesses,* see "Evidence," § 10.  
*Of jurors,* see "Jury," § 3.  
*Of witnesses in general,* see "Witnesses," § 1.

**COMPLAINT.**

*In civil actions,* see "Pleading," § 2.  
*In criminal prosecutions,* see "Criminal Law," § 4; "Indictment and Information."

**COMPOSITIONS WITH CREDITORS.**

See "Compromise and Settlement."

**COMPROMISE AND SETTLEMENT.**

See "Accord and Satisfaction"; "Payment"; "Release."

Admissibility in evidence, see "Evidence," § 5.

\*An agreement by a grantor held available as a defense to a suit by him to set aside his deed on the ground of the fraud of the grantee.—*Wade v. Wade* (Tex. Civ. App.) 188.

**COMPUTATION.**

*Of interest,* see "Interest," § 1.  
*Of period of limitation,* see "Limitation of Actions," § 2.

**CONCEALED WEAPONS.**

See "Weapons."

**CONCLUSION.**

*In pleading,* see "Pleading," § 1.  
*Of information,* see "Indictment and Information," § 1.  
*Of witness,* see "Evidence," § 10.

**CONCURRENT JURISDICTION.**

*Of courts,* see "Courts," § 5.

**CONDITIONAL FEE.**

*Creation by will,* see "Wills," § 4.

**CONDITIONAL SALES.**

*Distinguished from mortgage,* see "Mortgages," § 1.

**CONDITIONS.**

*In contracts and conveyances.*

See "Deeds," § 3; "Wills," § 4.

*Insurance policies,* see "Insurance," § 4.

*Precedent to actions or other proceedings.*

*To redeem from mortgage foreclosure,* see "Mortgages," § 4.

**CONFESSION.**

*Admissibility in evidence,* see "Criminal Law," § 15.

**CONFIDENTIAL RELATIONS.**

*Disclosure of communications,* see "Witnesses," § 1.

**CONFIRMATION.**

*Of sale of property of decedent's estate,* see "Executors and Administrators," § 5.

**CONFLICT OF LAWS.**

See "Insurance," § 10.

*Conflicting jurisdiction of courts,* see "Courts," § 5.

*Jurisdiction of court in action for personal injuries,* see "Courts," § 1.

**CONNECTING CARRIERS.**

See "Carriers," §§ 4, 5.

**CONSIDERATION.**

*For modification of contract,* see "Contracts," § 3.

*Of contract in general,* see "Contracts," § 1.

*Of contract to pay another to become surety,* see "Principal and Surety," § 1.

*Of deed,* see "Deeds," § 1.

*Parol evidence,* see "Evidence," § 9.

**CONSOLIDATION.**

*Bill of exceptions in consolidated action,* see "Exceptions, Bill of," § 1.

**CONSPIRACY.**

*Combinations to monopolize trade,* see "Monopolies," § 1.

*Evidence of acts and declarations of conspirators,* see "Criminal Law," § 11.

\*Point annotated. See syllabus.

## CONSTITUTION.

Of mutual benefit insurance associations, see "Insurance," § 10.

## CONSTITUTIONAL LAW.

### *Provisions relating to particular subjects.*

See "Courts," §§ 1, 3; "Elections," § 1; "Jury," § 1; "Officers," § 1; "Pardon"; "Taxation," § 1.

Enactment and validity of statutes, see "Statutes," § 1.

Special or local laws, see "Statutes," § 2.

Subjects and titles of statutes, see "Statutes," § 3.

### § 1. Distribution of governmental powers and functions.

\*Statement as to how far a statute requiring a railroad company to construct and maintain a station at a certain point was reviewable by the court on the ground of reasonableness.—*Louisiana & A. Ry. Co. v. State* (Ark.) 960.

### § 2. Retrospective and ex post facto laws.

Acts 1906, p. 115, c. 22, art. 3, held not, because imposing retrospective taxation, in violation of either the state or federal Constitutions.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

Acts 1906, p. 115, c. 22, art. 3, providing for the taxation of lands long omitted, held not an ex post facto act.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

### § 3. Privileges or immunities, and class legislation.

Act May 27, 1899 (Laws 1899, p. 262, c. 153), making it lawful for laborers to form trade unions, held not to infract any exemptions on the anti-trust act of May 25, 1899 (Laws 1899, p. 246, c. 146), nor to render the same invalid.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

### § 4. Due process of law.

An ordinance prohibiting the soliciting of customers for a hotel on a depot platform held not a prohibition of a lawful business.—*Emerson v. Town of McNeil* (Ark.) 479.

Acts 1906, p. 115, c. 22, art. 3, providing for the taxation of lands long omitted, held not in violation of the federal and state Constitutions as not being due process of law.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

\*The absolute prohibition of the sale of intoxicating liquors within portions of the state held a lawful exercise of the police power of the state, and not to deprive one of property without due course of law in violation of the federal and state Constitutions.—*Edgar v. McDonald* (Tex. Civ. App.) 1135.

## CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

## CONTEMPT.

Violation of injunction, see "Injunction," § 4.

### § 1. Acts or conduct constituting contempt of court.

The absence from the courtroom of an attorney to the delay and embarrassment of a trial, if it amounts to a contempt, is an indirect and not a direct contempt.—*Ex parte Clark* (Mo.) 990.

\*Point annotated. See syllabus.

Conduct of an attorney in intentionally absenting himself from the court room, thereby delaying the trial, constitutes criminal contempt.—*Ex parte Clark* (Mo.) 990.

\*A direct contempt is a contempt committed in the face of the court, and may consist of improper conduct tending to defeat or impair.—*Ex parte Clark* (Mo.) 990.

\*A person who fails or refuses to do something which he has been ordered to do, or does something that he has been ordered not to do, for the benefit of the opposite party to a cause, is guilty of civil contempt.—*Ex parte Clark* (Mo.) 990.

\*Criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority.—*Ex parte Clark* (Mo.) 990.

An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due administration of justice.—*Ex parte Clark* (Mo.) 990.

### § 2. Power to punish and proceedings therefor.

\*The adjudged punishment of a criminal contempt is a judgment in a criminal case from which no appeal or writ of error will lie, but the proceedings may be reviewed on certiorari or habeas corpus.—*Ex parte Clark* (Mo.) 990.

\*A judgment entry in a contempt proceeding held not to sufficiently show notice and hearing.—*Ex parte Clark* (Mo.) 990.

\*The fact that a contemner was in court when adjudged guilty of an indirect contempt, and had actual notice of what was going on, does not give him the notice expressly required by Rev. St. 1899, § 1618 [Ann. St. 1906, p. 1200], relating to the procedure in punishing contempts, nor the notice required at common law.—*Ex parte Clark* (Mo.) 990.

\*Under the express provisions of Rev. St. 1899, § 1618 [Ann. St. 1906, p. 1200], as well as at common law, direct contempts may be punished summarily without notice or hearing, while in proceedings to punish for an indirect or constructive contempt the contemner is entitled to notice, reasonable time, and a hearing.—*Ex parte Clark* (Mo.) 990.

Where a notice of a motion to punish for contempt of court brings the person accused into court, where a hearing is had on the charge contained in the motion, an error in the notice as to the time the act of contempt was alleged to have been done does not affect the validity of a conviction.—*Ex parte Testard* (Tex.) 319; *Ex parte Howard* (Tex.) 321.

The record in a contempt proceeding held sufficient to show jurisdiction of the court.—*Ex parte Testard* (Tex.) 319; *Ex parte Howard* (Tex.) 321.

## CONTEST.

Of county seat election, see "Counties," § 1.  
Of election, see "Elections," § 1.  
Of will, see "Wills," § 3.

## CONTINUANCE.

In criminal prosecutions, see "Criminal Law," § 17.

Review of rulings on motion for as dependent on record on appeal or writ of error, see "Criminal Law," §§ 37, 38.

Review of rulings on motion for in criminal prosecution as dependent on presentation in lower court of grounds of review, see "Criminal Law," § 31.

\*A party by reason of his want of diligence *held* not entitled to a continuance on the ground of the absence of a witness.—Beckwith Organ Co. v. Malone (Ky.) 809.

\*Under the facts, court's discretion *held* not to have been abused in refusing postponement of trial to secure attendance of witness.—Missouri, K. & T. Ry. Co. of Texas v. Price (Tex. Civ. App.) 700.

## CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Damages for breach, see "Damages," § 2.

Direct or remote consequences of breach of, see "Damages," § 1.

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 9.

Reformation, see "Reformation of Instruments."

Specific performance, see "Specific Performance."

### *Contracts of particular classes of persons.*

See "Carriers," §§ 4, 5; "Corporations," § 3; "Infants," § 1; "Master and Servant"; "Municipal Corporations," §§ 3, 4.

Banks, see "Banks and Banking," § 2.

School district, see "Schools and School Districts," § 1.

### *Contracts relating to particular subjects.*

See "Boundaries," § 2; "Interest."

Cutting and removal of standing timber, see "Logs and Logging."

Limitation of liability of carrier, see "Carriers," § 5.

Transportation of goods, see "Carriers," § 4.

Transportation of live stock, see "Carriers," § 5.

### *Particular classes of express contracts.*

See "Bills and Notes"; "Covenants"; "Depositories"; "Guaranty"; "Indemnity"; "Insurance"; "Mortgages"; "Partnership"; "Sales." Agency, see "Principal and Agent."

Employment, see "Master and Servant."

For transportation of goods, see "Carriers," § 4.

For transportation of live stock, see "Carriers," § 5.

Leases, see "Landlord and Tenant."

Limitation of liability of carrier, see "Carriers," § 5.

Mutual benefit insurance, see "Insurance," § 10.

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

### *Particular classes of implied contracts.*

See "Contribution"; "Covenants," § 1; "Indemnity"; "Money Paid"; "Work and Labor."

### *Particular modes of discharging contracts.*

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."

### § 1. *Requisites and validity.*

\*A contract entered into by one of the parties for an illegal purpose is not void as to the other, though he had knowledge of such illegal purpose, if he did nothing in furtherance thereof.—Hollenberg Music Co. v. Berry (Ark.) 1172.

Evidence in an action to set aside a contract whereby a father gave to his son the use of his

two farms for a year without rent *held* not to show any fraud or undue influence by the son.—Wright's Ex'r v. Wright (Ky.) 856.

\*Where the maker of a contract had mind enough to understand the nature of the transaction, and was executing a fixed purpose of his own, the contract *held* not to be set aside for undue influence.—Wright's Ex'r v. Wright (Ky.) 856.

\*Certain fact *held* not to justify an inference of fraud or undue influence in the execution of a contract.—Wright's Ex'r v. Wright (Ky.) 856.

A combination between several banks to suppress bidding for county funds *held* illegal.—Henry County v. Citizens' Bank of Windsor (Mo.) 622; Same v. Farmers' Bank of Windsor (Mo.) 630.

### § 2. *Construction and operation.*

\*The court in arriving at the intention of the parties to a contract *held* required to give effect to the provisions thereof.—Mississippi Home Ins. Co. v. Adams & Boyle (Ark.) 209.

\*A contract must, in case of doubt, be construed against him who used the doubtful wording.—Mississippi Home Ins. Co. v. Adams & Boyle (Ark.) 209.

A contract to pay the dues and assessments on a policy of life insurance construed.—Vaughan v. Reddick (Ky.) 292.

A provision of a building contract *held* as a matter of law to have been a part of the original contract, and not added after the original contract had been executed, as contended by the contractor.—Katterjohn v. Nahm (Ky.) 1179.

A contract *held* not to have been made for the benefit of a third person.—Beattie Mfg. Co. v. Clark (Mo.) 29.

\*In order that a person may sue on a contract made between other persons, the contract must be made for his benefit.—Beattie Mfg. Co. v. Clark (Mo.) 29.

\*Where a grant from the state or from a private person is susceptible of two constructions, one of which would render the grant void and the other make it legal, the latter should be adopted.—State ex inf. Sager v. Lewin (Mo. App.) 581.

### § 3. *Modification and merger.*

\*A promise to pay a real estate broker's commission *held* not enforceable, being without consideration.—Wilson v. Ellis (Tex. Civ. App.) 1152.

## CONTRADICTION.

Of witness, see "Witnesses," § 3.

## CONTRIBUTION.

Where defendant and S. were co-obligors, an agreement by the creditor not to sue S. did not relieve her from liability to contribute to defendant in case he was required to pay more than his just proportion of the debt.—Will A. Watkin Music Co. v. Basham (Tex. Civ. App.) 734.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

Instructions on issue of, see "Negligence," § 4.

Of passenger, see "Carriers," § 9.

Of person injured by operation of railroad, see "Railroads," §§ 6, 7.

Of person injured on street, see "Municipal Corporations," § 7.

Of servant, see "Master and Servant," §§ 6, 9-11.

\*Point annotated. See syllabus.

## CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

## CONVEYANCES.

Contracts to convey, see "Vendor and Purchaser," § 3.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

### *Conveyances by or to particular classes of persons.*

See "Executors and Administrators," § 5;

"Husband and Wife," §§ 1, 4.

Devisees or legatees, see "Wills," § 5.

Trustee or cestui que trust, see "Trusts," § 3.

*Conveyances of particular species of, or estates or interests in, property.*

See "Easements," § 1; "Homestead," § 1.

Community property, see "Husband and Wife," § 4.

### *Particular classes of conveyances.*

See "Chattel Mortgages"; "Deeds"; "Mortgages."

Partition deeds, see "Partition," § 1.

## CONVICTS.

Pardon, see "Pardon."

## CORPORATIONS.

Action for deceit in sale of stock, see "Fraud," § 2.

Bond on appeal from order appointing receiver of, see "Appeal and Error," § 6.

Computation of limitations in action by minority stockholders to compel satisfaction of judgment, see "Limitation of Actions," § 2.

Default judgment against foreign insurance company, see "Judgment," § 3.

Excessive penalties for violation of anti-trust law, see "Penalties," § 1.

Harmless error in action by state against foreign corporation for violation of anti-trust law, see "Appeal and Error," § 33.

Judgment in action by minority in stockholders as bar to subsequent action to compel satisfaction of judgment against corporation for tort, see "Judgment," § 7.

Jurisdiction of Supreme Court to appoint receiver of, see "Courts," § 3.

Liability for discharging servant, see "Master and Servant," § 1.

Maintenance of nuisance by, see "Nuisance," § 1.

Misnomer of, as ground for abatement, see "Abatement and Revival," § 1.

Receiver of in general, see "Receivers," § 2.

Replication in action by minority stockholders to compel satisfaction of judgment, see "Pleading," § 4.

Review of interlocutory orders appointing receiver of, see "Appeal and Error," § 21.

Review of order appointing receiver of as dependent on finality of determination, see "Appeal and Error," § 3.

Review of question as to suing corporation by wrong name as dependent on presentation in lower court of grounds for review, see "Appeal and Error," § 5.

Scope and effect of stay of order appointing receiver of pending appeal, see "Appeal and Error," § 8.

Separate appeal from order appointing receiver of corporation, see "Appeal and Error," § 1.

Taxation of corporations and corporate property, see "Taxation," §§ 1-3.

Taxation of property of corporation engaged in interstate commerce, see "Commerce," § 1.

Violation by corporation of municipal ordinances relating to licenses, see "Municipal Corporations," § 5.

Violation by, of anti-trust law, see "Monopolies," § 1.

### *Particular classes of corporations.*

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads"; "Street Railroads."

Cemetery associations, see "Cemeteries."

Insurance companies, see "Insurance."

Mutual benefit insurance associations, see "Insurance," § 10.

Telegraph and telephone companies, see "Telegraphs and Telephones."

### **§ 1. Corporate name, seal, domicile, by-laws, and records.**

Letter heads and billheads held not advertising matter, within Ky. St. 1903, § 576, requiring corporations to have printed the word "incorporated" on advertising matter.—Commonwealth v. National Biscuit Co. (Ky.) 799.

### **§ 2. Members and stockholders.**

In a suit by minority stockholders, attorney's fees paid by the corporation in defense of an action against it held not recoverable.—Dodd v. Pittsburg, C., C. & St. L. R. Co. (Ky.) 787.

In an action against the stockholders of a corporation to recover the amount of their unpaid subscriptions for stock, evidence examined, and held to show that the stock was full paid.—O'Bear-Nester Glass Co. v. Antiexplor Co. (Tex. Civ. App.) 180.

### **§ 3. Corporate powers and liabilities.**

\*Where the complaint alleges that defendant is a corporation, a denial of corporate existence is a defense.—Chicago, R. I. & P. Ry. Co. v. State (Ark.) 199.

A corporation misappropriating the funds of another corporation by virtue of its control held not entitled to defeat an action for the loss sustained, brought by the minority stockholders on the theory that the misappropriation was ultra vires.—Dodd v. Pittsburg, C., C. & St. L. R. Co. (Ky.) 787.

A corporation wrongfully dividing the earnings of another corporation, which it controlled, held liable for the loss sustained at the suit of the minority stockholders.—Dodd v. Pittsburg, C., C. & St. L. R. Co. (Ky.) 787.

A loss suffered by a corporation held the result of a tort committed by one controlling the corporation, rendering the latter liable for the entire loss recoverable in a suit by minority stockholders.—Dodd v. Pittsburg, C., C. & St. L. R. Co. (Ky.) 787.

A prosecution of a corporation for a violation of Ky. St. 1903, § 576, must be brought within the county in which it has its principal place of business.—Commonwealth v. Montenegro-Reihm Music Co. (Ky.) 812.

A corporation held authorized by its charter to contract with persons to supply medical treatment and to contract with physicians to render medical and surgical services.—State ex inf. Sager v. Lewin (Mo. App.) 581.

\*The powers granted a corporation should be most strictly construed.—State ex inf. Sager v. Lewin (Mo. App.) 581.

\*Under Rev. St. 1899, §§ 995, 996 [Ann. St. 1906, pp. 876, 878], relating to service of summons on corporations, the fact that the president or other chief officer could not be found on the day of service held to warrant service by

\*Point annotated. See syllabus.

another statutory method.—*Cornwall v. Star Bottling Co.* (Mo. App.) 591.

#### § 4. Insolvency and receivers.

Under Rev. St. 1895, art. 1465, the court was warranted in placing in a receiver's hands the property of a corporation which had failed to pay its franchise tax.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

#### § 5. Foreign corporations.

\*Service on the traveling salesman of a foreign corporation held insufficient.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 940.

\*An objection that a foreign insurance company, having acquired land in Missouri under foreclosure sale, held it for more than six years, in violation of Const. 1875, art. 12, § 7 [Ann. St. 1906, p. 304], could only be raised by the state.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

\*A motion by defendant to dismiss a suit by a foreign corporation pending his appeal from a justice on the ground that the corporation has not complied with the requirements of the statutes to entitle it to maintain the action, must be denied.—*Scientific American Club v. Horschitz* (Mo. App.) 1117.

\*A compliance with the law by a foreign corporation suing in the courts of the state will be presumed, and noncompliance is available only as a defense.—*Scientific American Club v. Horschitz* (Mo. App.) 1117.

### CORRECTION.

Of assessment of taxes, see "Taxation," § 3.  
Of irregularities and errors at trial, see "Criminal Law," § 27.

Of judgment, see "Judgment," § 4.

Of record on appeal or writ of error, see "Appeal and Error," § 14.

### CORROBORATION.

Of witness in general, see "Witnesses," § 3.

### COSTS.

Review of judgment relating to costs, see "Appeal and Error," § 3.

*In particular actions or proceedings.*

See "Sequestration."

Contest of county seat election, see "Counties," § 1.

Foreclosure, see "Mortgages," § 3.

For violation of municipal ordinance, see "Municipal Corporations," § 5.

To collect taxes, see "Taxation," § 5.

To redeem from mortgage foreclosure, see "Mortgages," § 4.

#### § 1. Nature, grounds, and extent of right in general.

A tender of judgment before a justice held insufficient to entitle defendant to have costs taxed against plaintiff, where defendant appealed from the judgment.—*Ayer v. Jones & Merrill* (Ark.) 1171.

\*Statement by defendant's attorney that he was willing to confess judgment for the amount shown by plaintiff's books held not a sufficient offer of judgment to justify taxing costs against plaintiff.—*Ayer v. Jones & Merrill* (Ark.) 1171.

\*Where a decree reforming a deed granted relief according to the claims of both parties, it was proper that each should be required to pay his own costs.—*White v. Glazer* (Ky.) 289.

\*At common law no recovery of costs was permitted, and statutes authorizing their al-

lowance will be strictly construed.—*Lucas v. Brown* (Mo. App.) 1089.

Under Rev. St. 1899, §§ 1547, 1548, 1550, 1551, 1552 [Ann. St. 1906, pp. 1174-1177], plaintiff in ejectment, having recovered judgment, held entitled to have all the costs taxed against defendant, though defendant answered by a general denial and also pleaded a counterclaim.—*Lamm v. Railey* (Mo. App.) 1095.

#### § 2. Amount, rate, and items.

Rev. St. 1899, §§ 1547, 3259, 3260, 4661, 4662, 4671, 9464 [Ann. St. 1906, pp. 1174, 1855, 2545, 2547, 4345], held to require, in order that witness fees and the fees for issue and service of subpoenas may be recovered as costs, that the subpoenas when issued by the clerk contain the names of such witnesses.—*Lucas v. Brown* (Mo. App.) 1089.

The universality of the practice of attorneys to fill in witnesses' names in subpoena blanks held not to be permitted to defeat the plain import of the statutes that the subpoena when issued by the clerk shall contain the witnesses' names, so as to make costs incurred under such practice recoverable.—*Lucas v. Brown* (Mo. App.) 1089.

#### § 3. On appeal or error, and on new trial or motion therefor.

\*Damages will not be awarded on the dismissal of an appeal from a judgment which cannot be enforced by execution.—*Hatfield v. Holloway* (Ky.) 1192.

\*Where, through error of computation, an excessive judgment was rendered against defendant, held, that on his appeal costs will not be taxed against him, even though plaintiff remit the excess.—*National Bank of Commerce of St. Louis v. Duffy* (Mo. App.) 83.

Appellant would be required to pay the costs of an appeal though the judgment was reformed because of an error in the judgment not called to the attention of the trial court.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

### COUNCIL.

See "Municipal Corporations," §§ 1, 4.

### COUNTERCLAIM.

See "Set-Off and Counterclaim."

### COUNTERFEITING.

See "Forgery."

### COUNTIES.

See "Municipal Corporations."

Combination between banks to suppress bidding for county funds, see "Contracts," § 1.

Depositaries of county funds, see "Depositaries."

Judicial notice of county seats, see "Evidence," § 1.

Judicial notice of population, see "Evidence," § 1.

Place of record of deed, in unorganized county, see "Deeds," § 2.

#### § 1. Government and officers.

Statement of rights, under Kirby's Dig. §§ 7992, 7042, 7044, of appointee to office of county collector, on the sheriff being suspended and failing to qualify as collector.—*Remley v. Matthews* (Ark.) 482.

\*A director of a levee district created by Act Feb. 15, 1893 (Acts 1893, p. 24), as amended by

\*Point annotated. See syllabus.

Acts 1893, p. 119, *held* not a county officer with-in Kirby's Dig. § 7984.—State v. Higginbotham (Ark.) 484.

Under the statute relating to costs in contested election cases *held*, that successful contestants should be required to pay only the costs created by them.—Durham v. Rogers (Tex. Civ. App.) 906.

On a county seat election contest, the votes of a certain precinct *held* not to be excluded for irregularities in making the returns.—Durham v. Rogers (Tex. Civ. App.) 906.

Ballots at a county seat election *held* not to be excluded for not bearing the signature of the presiding election officer.—Durham v. Rogers (Tex. Civ. App.) 906.

On appeal from a judgment ordering a new election on a county seat election contest *held*, that judgment should be rendered in favor of a certain place as county seat as claimed by the appellees, who had filed cross-assignments of error, notwithstanding their failure to perfect an appeal.—Durham v. Rogers (Tex. Civ. App.) 906.

## § 2. Actions.

\*Counties cannot be sued except by express provision of statute, or by necessary implication from some express power given.—First Nat. Bank v. Christian County (Ky.) 831.

\*An action does not lie against a county to recover taxes paid by mistake.—First Nat. Bank v. Christian County (Ky.) 831.

## COUNTY SEATS.

See "Counties," § 1.

## COURSES AND DISTANCES.

See "Boundaries," § 1.

## COURTS.

Contempt of court, see "Contempt."

Courts of bankruptcy, see "Bankruptcy," § 2.

Judicial power, see "Constitutional Law," § 1.

Jurisdiction of district court of election contest, see "Elections," § 1.

Jurisdiction of exempt property of bankrupt, see "Bankruptcy," § 2.

Justices' courts, see "Justices of the Peace."

Power of district court to require new parties to be joined in will contest appealed from county court, see "Wills," § 3.

Province of court and jury, see "Trial," § 3.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Trial by court without jury, see "Trial," § 11.

## § 1. Nature, extent, and exercise of jurisdiction in general.

The mere fact that a division of the circuit court is assigned criminal cases which occupy its whole time does not change its character as a constitutional court, under Const. art. 6, § 1 [Ann. St. 1906, p. 212], nor its jurisdiction as a circuit court proceeding according to the common law, as prescribed by section 22 et seq. [page 234].—Ex parte Clark (Mo.) 990.

\*Nonresidence of the parties does not, in the absence of a statute of the forum to that effect, deprive the court of jurisdiction of a tort occurring outside of its state.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

The right to sue for injury to the person or to personalty is not confined to the place where the cause of action arises.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

A certain fact *held* to show conclusively that it is not against the public policy of a state to entertain jurisdiction of an action based on an act occurring elsewhere.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*The courts of Texas *held* to possess jurisdiction of an action by an employé for injuries received in Arizona.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*Where the law of the state in which an action is brought and the law of the state in which the cause of action arose both give a right of action, and the redress given the injured party in the state where the cause of action arose may be enforced in the former state, the courts thereof have jurisdiction.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*As a general rule, neither citizenship nor residence is requisite to entitle a person to sue in the courts of Texas.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*The courts of Texas *held* not to have jurisdiction of an action for personal injuries received in the territory of New Mexico, under Laws N. M. 1903, p. 51, c. 33.—Southern Pac. Co. v. Dusablon (Tex. Civ. App.) 766.

A substantial compliance with legislative requirements limiting the manner in which a court of general jurisprudence shall exercise its power in cases of a designated character is sufficient.—Swinson v. McKay (Tex. Civ. App.) 934.

## § 2. Establishment, organization, and procedure in general.

Defendants *held* not entitled to notice of an application for nunc pro tunc record entries.—Collier v. Catherine Lead Co. (Mo.) 971.

\*A state court in determining questions of jurisdiction need not follow the decisions of the federal courts, unless a principle controlled by the federal Constitution is involved.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*Under Sayles' Ann. Civ. St. 1897, arts. 1120, 1146, the clerk *held* without authority, after the approval of the minutes and the adjournment of the term, to change the minutes.—Faris v. Gilder (Tex. Civ. App.) 896.

\*A holding by the Supreme Court was not within the principle of stare decisis, where unnecessary to a decision of the case.—Littler v. Dielmann (Tex. Civ. App.) 1137.

## § 3. Courts of appellate jurisdiction.

An action to recover taxes, interest, and penalties under a void city tax deed does not involve the title to real estate so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12 [Ann. St. 1906, p. 218].—Russell v. Woerner (Mo.) 49.

An action to recover taxes, interest, and penalties paid under a void city tax deed does not involve a construction of the revenue laws so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12 [Ann. St. 1906, p. 218].—Russell v. Woerner (Mo.) 49.

\*To raise a constitutional question, so as to give the Supreme Court jurisdiction on appeal, the specific provision of the Constitution infringed must be pointed out in the trial court; a general allegation that a statute is unconstitutional and void is not sufficient.—State v. Kuehner (Mo.) 60.

\*Where a section of the city charter has been declared unconstitutional, the question cannot be raised in a subsequent action in order to give the Supreme Court jurisdiction on an appeal.—Dickey v. Holmes (Mo.) 511, 513; Same v. Orr. (Mo.) 513.

\*Point annotated. See syllabus.

Claim of agister's lien of \$1,100 to \$1,200 by defendants in replevin for cattle *held* insufficient to give Supreme Court jurisdiction of appeal.—*Cable v. Duke* (Mo.) 643.

Under Rev. St. 1899, § 4473 [Ann. St. 1906, p. 2452], where the answer in replevin is a general denial, and there is judgment for plaintiff, no amount in dispute is shown to give Supreme Court jurisdiction of appeal.—*Cable v. Duke* (Mo.) 643.

In the absence of a constitutional or federal question, the only ground of jurisdiction of the Supreme Court of an appeal is the amount in dispute.—*Cable v. Duke* (Mo.) 643.

\*Title to real estate *held* not involved in the sense that the Supreme Court had jurisdiction of an appeal and not the Court of Appeals.—*Hough v. Jasper County Light & Fuel Co.* (Mo. App.) 547.

The Court of Appeals will not certify a cause to the Supreme Court on the ground that its opinion is in conflict with a Supreme Court decision, where during the pendency of the motion a decision adopting principles of law in conformity with the decision of the Court of Appeals is rendered by the Supreme Court.—*Hartley v. Calbreath* (Mo. App.) 570.

A decision of the Court of Civil Appeals, that a railroad company must keep cattle guards in good condition, *held* not in conflict with certain other decisions respecting the railroad's liability for killing stock which escaped through openings in the railroad's right of way fence at private crossings.—*Texas & P. R. Co. v. Willson* (Tex.) 325.

An alleged conflict between decisions of Courts of Civil Appeals *held* not within Laws 1899, p. 170, c. 98, providing for the certification of questions to the Supreme Court.—*Texas & P. R. Co. v. Willson* (Tex.) 325.

Under Const. art. 5, § 3, and the statutes the Supreme Court *held* without authority, under its original or appellate jurisdiction, to appoint a receiver of a corporation against which a judgment for a violation of the anti-trust laws has been rendered.—*Waters-Pierce Oil Co. v. State* (Tex.) 328.

#### § 4. United States courts.

\*Where the relation of master and servant is unaffected by statute, the question of the responsibility of the master caused to be in his service is one of the general laws, in regard to which the courts of the United States are not bound to follow the state courts.—*Chandler v. St. Louis & S. F. R. Co.* (Mo. App.) 553.

\*In an action by a servant for injuries caused by the negligence of a fellow servant in Indian Territory *held*, that the decisions of the federal courts were the test of the master's liability, under Act Cong. May 2, 1890, c. 182, §§ 29-31, 26 Stat. pp. 93-96, and Mansf. Dig. Ark. § 566, and not the decisions of the Arkansas state courts.—*Chandler v. St. Louis & S. F. R. Co.* (Mo. App.) 553.

#### § 5. Concurrent and conflicting jurisdiction, and comity.

The right of a court of one state to take jurisdiction of a transitory action founded on an occurrence in another if not contrary to the public policy of the forum, arises from comity.—*Southern Pac. Co. v. Allen* (Tex. Civ. App.) 441.

## COVENANTS.

In insurance policies, see "Insurance," § 4.

#### § 1. Requisites and validity.

\*The words "grant, bargain, and sell," contained in a deed not limited by express words,

\*Point annotated. See syllabus.

*held* to import a covenant against incumbrances, under Kirby's Dig. § 731.—*Crawford v. McDonald* (Ark.) 206.

#### § 2. Performance or breach.

\*A lease on land in force at the time the land was sold under deed containing a covenant against incumbrances *held* to constitute a breach thereof.—*Crawford v. McDonald* (Ark.) 206.

#### § 3. Actions for breach.

Where a lease which constituted a breach of covenant against incumbrances covered the entire land conveyed, there could be no apportionment of damages occasioned by such breach.—*Crawford v. McDonald* (Ark.) 206.

## COVERTURE.

See "Husband and Wife."

## CREDIBILITY.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances." Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 3.

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

## CRIMINAL LAW.

See "Bail," § 1; "Habeas Corpus"; "Pardon"; "Witnesses."

Conviction of offense included in that charged, see "Indictment and Information," § 5.

Indictment, information, or complaint, see "Indictment and Information." Penalties, see "Penalties."

Offenses by particular classes of persons.

See "Corporations," § 3; "Druggists."

#### Particular offenses.

See "Adultery"; "Assault and Battery," § 1; "Breach of the Peace"; "Burglary"; "Contempt"; "Embezzlement"; "False Pretenses"; "Forgery"; "Homicide"; "Larceny"; "Lewdness"; "Libel and Slander," § 4; "Malicious Mischief"; "Obscenity"; "Obstructing Justice"; "Perjury"; "Rape"; "Seduction," § 1.

Against laws for protection of fish, see "Fish." Against liquor laws, see "Intoxicating Liquors," §§ 5, 7.

Against stock law, see "Animals."

Carrying weapons, see "Weapons."

Obstruction of highway, see "Highways," § 1.

Violations of municipal ordinances, see "Municipal Corporations," § 5.

#### § 1. Nature and elements of crime and defenses in general.

\*An offense punishable by imprisonment in the penitentiary absolutely or in the alternative is a felony.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

#### § 2. Parties to offenses.

A charge of being an accomplice to a crime *held* in the nature of a charge of a compound offense, and it must be shown that accused advised the offense, etc., that he was not present when it was committed, and that the principals committed the crime.—*Hall v. State* (Tex. Cr. App.) 379.



**§ 3. Venue.**

Statement of venue of offense of railroad company in not complying with requirement of statute that it construct and maintain a station at a certain point.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

\*In a prosecution for embezzlement, the conversion of the money *held* to have occurred in a certain jurisdiction.—State v. Mispagel (Mo.) 513.

On an application for change of venue, witnesses should not have been permitted to testify that accused could obtain a fair trial in the county where the offense was committed.—State v. Vickers (Mo.) 999.

On an issue of prejudice of the inhabitants of a county, on an application for a change of venue, a witness should have been permitted to testify that the people were highly incensed at the time, and that the sentiment was against defendant.—State v. Vickers (Mo.) 999.

\*Evidence *held* insufficient to establish the existence of such prejudice against accused as would prevent him from having a fair trial in the county where the offense was committed.—State v. Vickers (Mo.) 999.

\*One accused of murder *held* not entitled to a change of venue for local prejudice.—Cason v. State (Tex. Cr. App.) 337.

**§ 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.**

\*The lack of an original complaint in a criminal case upon which an information can be based deprives the court of jurisdiction; but the court's jurisdiction is not affected where a complaint had been on file but it was lost at the time a transcript was made and subsequently found.—Ross v. State (Tex. Cr. App.) 340.

**§ 5. Arraignment and pleas, and nolle prosequi or discontinuance.**

A plea *held* to be considered as a preliminary one going to the validity or invalidity of the statute, on the ground of reasonableness.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

Evidence *held* admissible on the preliminary plea to the reasonableness of the statute under which the prosecution was had.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

\*Under the Code a special plea of insanity is not required, but insanity may be shown on a plea of not guilty.—State v. Speyer (Mo.) 505.

**§ 6. Evidence—Judicial notice, presumptions, and burden of proof.**

\*Insanity is not an issue to be passed on separately, but, like any other issue, is involved in the defense of not guilty, upon which the burden of proof is upon the state.—State v. Speyer (Mo.) 505.

**§ 7. — Facts in issue and relevant to issues, and res gestæ.**

\*Evidence that a man came to deceased and told him that defendant wanted him to come to defendant's tent after deceased had eaten his dinner, and that deceased went, *held* admissible as res gestæ to show that deceased received the information and to explain why he went to defendant's tent.—State v. Kennedy (Mo.) 57.

\*Certain letters *held* properly excluded in view of the state of the evidence which they were offered to refute.—State v. Speyer (Mo.) 505.

\*In a criminal prosecution, it is proper to show that accused resisted arrest.—Mitchell v. State (Tex. Cr. App.) 124.

\*Evidence *held* admissible.—Reinhard v. State (Tex. Cr. App.) 123.

Defendant *held* not entitled to show that none of his kinsmen had committed or been charged with crime.—Reinhard v. State (Tex. Cr. App.) 123.

In a homicide case, the sustaining of objections to questions asked a witness for accused *held* proper.—Earles v. State (Tex. Cr. App.) 138.

\*In a homicide case, evidence that within 10 minutes of the fatal shooting decedent, in reply to questions, stated to several persons that accused shot him, was admissible as a part of the res gestæ.—Tinsley v. State (Tex. Cr. App.) 347.

**§ 8. — Other offenses, and character of accused.**

\*On a trial for playing a game of chance, in violation of Rev. St. 1899, § 2212 [Ann. St. 1906, p. 1410], certain testimony *held* admissible, though it supported a charge founded on section 2197 [page 1406], punishing the keeping of a gambling house.—State v. Landrum (Mo. App.) 1111.

\*In a prosecution for burglary, evidence of the commission by accused of an independent burglary *held* inadmissible.—Lightfoot v. State (Tex. Cr. App.) 345.

\*Evidence of other sales of liquor *held* admissible to show the manner of sale and that accused was running a "Blind Tiger."—Gorman v. State (Tex. Cr. App.) 384.

**§ 9. — Materiality and competency in general.**

\*In a rape case, evidence that prosecutrix had complained of accused's attentions to her *held* admissible, in view of certain evidence admitted for accused.—Brown v. State (Tex. Cr. App.) 368.

**§ 10. — Admissions, declarations, and hearsay.**

An admission of accused *held* admissible in evidence.—Clark v. Commonwealth (Ky.) 1191.

The defense of insanity admits nothing more than that the accused committed the act with which he is charged, and does not admit that it was a crime, nor the grade of offense charged.—State v. Speyer (Mo.) 505.

\*Declarations by defendant and his mother after the shooting *held* admissible against him.—Reinhard v. State (Tex. Cr. App.) 123.

\*Declarations made by defendant to another in the nature of a confession while he was not under arrest are admissible against him.—Reinhard v. State (Tex. Cr. App.) 123.

On a trial for the murder of a police officer by accused while resisting arrest, evidence that the officer had been instructed to arrest accused *held* admissible.—Earles v. State (Tex. Cr. App.) 138.

\*In a trial for carrying a pistol, evidence *held* inadmissible as relating to self-serving acts and declarations.—Caldwell v. State (Tex. Cr. App.) 343.

In a prosecution for running a "Blind Tiger," certain evidence *held* inadmissible as hearsay.—Gorman v. State (Tex. Cr. App.) 384.

\*Certain evidence *held* inadmissible as hearsay.—Choice v. State (Tex. Cr. App.) 387.

\*A statement made by another person in the absence of accused *held* inadmissible in evidence.—Holmes v. State (Tex. Cr. App.) 1160.

In a criminal case, evidence as to statements made by accused relative to the alleged offense *held* competent.—Smith v. State (Tex. Cr. App.) 1161.

\*Point annotated. See syllabus.

**§ 11. — Acts and declarations of conspirators and codefendants.**

\*Offer of statements of a co-conspirator against another, made in the absence of the latter, will be rejected, unless the statements or acts are in furtherance of the common design.—*Choice v. State* (Tex. Cr. App.) 337.

**§ 12. — Documentary evidence and exclusion of parol evidence thereby.**

\*In a prosecution for running a "Blind Tiger," slips made by an express agent from the books held not admissible.—*Gorman v. State* (Tex. Cr. App.) 384.

**§ 13. — Opinion evidence.**

\*Statement of a witness in a homicide case held not objectionable as an opinion of the witness.—*Earles v. State* (Tex. Cr. App.) 138.

\*In a homicide case, held not error to permit a state's witness to testify that the pistol used by accused was a deadly weapon.—*Earles v. State* (Tex. Cr. App.) 138.

**§ 14. — Testimony of accomplices and co-defendants.**

In a prosecution for bribery of witness, evidence of accomplices held not sufficiently corroborated under the statute.—*Birch v. State* (Tex. Cr. App.) 344.

\*A person present at the time of an alleged theft, testifying to everything that was seen and done, and receiving a portion of the proceeds of the theft, held an accomplice.—*Schilling v. State* (Tex. Cr. App.) 357.

\*In a prosecution for being an accomplice to a crime, where the state relies on the testimony of accomplice, they must be corroborated equally on the questions of the accused's advice or assistance and the consummation of the offense.—*Hall v. State* (Tex. Cr. App.) 379.

\*The fact that a burglary was committed held not to corroborate the alleged burglar as to an accused's connection with it as an accomplice, nor as to the offense being committed by the alleged burglar.—*Hall v. State* (Tex. Cr. App.) 379.

In a trial for assault with intent to murder, evidence held inadmissible to show a conspiracy, but proper to show that one was not an accomplice but a detective.—*Spencer v. State* (Tex. Cr. App.) 386.

\*An accomplice may not be corroborated by his statements, made in the absence of him against whom he is testifying.—*Spencer v. State* (Tex. Cr. App.) 386.

\*An accomplice's testimony must be corroborated, but a detective's need not be.—*Spencer v. State* (Tex. Cr. App.) 386.

**§ 15. — Confessions.**

Permitting a committing magistrate to testify in a criminal case that on the hearing before him he warned accused that any statement he made would be used against and not for him held not reversible error.—*Mitchell v. State* (Tex. Cr. App.) 124.

\*Defendant held under arrest at the time his confession was made, and hence, not having been warned, it was error to admit the same.—*Jones v. State* (Tex. Cr. App.) 126.

Evidence was not inadmissible on the ground that at the time of the occurrence referred to in the testimony defendant was under arrest for a prior offense.—*Reinhard v. State* (Tex. Cr. App.) 128.

\*In a prosecution for murder, statements by defendant relative to the offense held inadmissible when made under arrest.—*Buckner v. State* (Tex. Cr. App.) 363.

\*Where on a trial for homicide there was an issue whether the confession of defendant was voluntarily made, certain evidence held erroneously excluded.—*Garrett v. State* (Tex. Cr. App.) 389.

**§ 16. — Evidence at preliminary examination or at former trial.**

\*Refusal of continuance for a witness to contradict prosecutrix on an immaterial and collateral issue held not an abuse of discretion.—*Morphew v. State* (Ark.) 480.

\*Statements of an accused made on a former trial are admissible against him, notwithstanding Rev. St. 1899, § 3149 [Ann. St. 1906, p. 1788], relating to the use of testimony preserved by bill of exceptions, which has no application to a defendant in any case.—*State v. Speyer* (Mo.) 505.

\*To rebut evidence as to accused's insanity the state may introduce in evidence the testimony of accused on former trials.—*State v. Speyer* (Mo.) 505.

\*That certain footprints correspond with the shoes of accused held not to exclude every other reasonable hypothesis than that they were made by accused.—*Warren v. State* (Tex. Cr. App.) 132, 133.

The res gestae statement of decedent that accused shot him, inflicting a fatal wound, has as much weight as dying declarations, and is in some respects a stronger criminative statement.—*Tinsley v. State* (Tex. Cr. App.) 347.

**§ 17. Time of trial and continuance.**

\*Refusal to grant an application for a continuance in a criminal case on the ground of an absent witness held not error.—*Mitchell v. State* (Tex. Cr. App.) 124.

\*Certain testimony expected to be given by an absent witness held of sufficient materiality to require a continuance.—*Lopez v. State* (Tex. Cr. App.) 336.

\*In a prosecution under Pen. Code 1895, art. 645, defendant held entitled to a continuance to secure the attendance of absent witnesses.—*Hardin v. State* (Tex. Cr. App.) 352.

\*In a criminal prosecution, the rule with regard to cumulative testimony does not apply to the first application for a continuance, especially where defendant himself is practically the only witness in his behalf.—*Hardin v. State* (Tex. Cr. App.) 352.

\*In a trial for keeping a disorderly house, refusal of a continuance for absent testimony held improper.—*Furvis v. State* (Tex. Cr. App.) 355.

\*A motion for a continuance held too general.—*Blue v. State* (Tex. Cr. App.) 1157.

\*The diligence required in obtaining process for the presence of witnesses is much more strict on an application for a second continuance than on first application.—*McCrimmon v. State* (Tex. Cr. App.) 1158.

\*A motion for a continuance to procure the attendance of witnesses held properly denied for lack of diligence.—*McCrimmon v. State* (Tex. Cr. App.) 1158.

**§ 18. Trial—Course and conduct of trial in general.**

\*Under Cr. Code Prac. §§ 155, 157, 180, 182, 184, a defendant indicted for a misdemeanor and duly summoned or on bail may be tried in his absence, and, though absent, may by counsel put in any plea save that of guilty.—*Walston v. Commonwealth* (Ky.) 224.

\*Accused, indicted for misdemeanor, though on bail, may be tried in his absence, under Cr.

\*Point annotated. See syllabus.

Code Prac. § 184.—Walston v. Commonwealth (Ky.) 224.

\*In a murder trial, the taking of testimony, in accused's absence from the courtroom, *held* not reversible error in the circumstances.—Cason v. State (Tex. Cr. App.) 337.

\*Under White's Ann. Code Cr. Proc. art. 633, the court erred in allowing trial of accused for a misdemeanor involving imprisonment to be had in his absence.—Washington v. State (Tex. Cr. App.) 361.

\*The excusing of an attorney appointed for the defense by the court in a criminal case *held* not erroneous.—Brown v. State (Tex. Cr. App.) 368.

#### § 19. — Reception of evidence.

\*A witness having testified to a telephonic communication with defendant succeeding the offense, it was not error for the court to have previously admitted evidence of another as to what the former witness stated through the telephone in such conversation.—State v. Vickers (Mo.) 999.

\*The fact that evidence received in rebuttal in a criminal case was not rebuttal did not make it inadmissible, where it was introduced before the trial terminated.—Earles v. State (Tex. Cr. App.) 138.

Arrest of a witness for accused during trial and holding him in custody *held* to deprive accused of a fair trial.—Dodson v. State (Tex. Cr. App.) 378.

On a prosecution for rape, certain evidence *held* competent in rebuttal of matter which defendant had sought to bring out on cross-examination of prosecutrix.—Smith v. State (Tex. Cr. App.) 1161.

#### § 20. — Objections to evidence, motions to strike out, and exceptions.

\*An objection alleged to a question *held* not to amount to an objection.—State v. Speyer (Mo.) 505.

Under complaint against the admission of evidence that one has been previously charged with assault to murder, or other grave offense, *held* the bill of exceptions should show the date of the occurrence.—Caldwell v. State (Tex. Cr. App.) 343.

#### § 21. — Arguments and conduct of counsel.

\*Conduct of court and counsel in a criminal case relating to reading to the jury extracts from reports and a charge prepared by the trial court *held* not error.—Buchanan v. State (Tex. Cr. App.) 134.

\*That the district attorney misstated the law was no ground for reversal, though a juror testified that he was misled thereby.—Davis v. State (Tex. Cr. App.) 144.

A statement by the district attorney that a witness was a "henchman" of defendant *held* not error.—Davis v. State (Tex. Cr. App.) 144.

\*It is erroneous for counsel in his argument to state facts not in evidence.—McKinley v. State (Tex. Cr. App.) 342.

\*The county attorney's argument in a trial for violating the local option law *held* improper, and the error not cured by the court's instruction.—McKinley v. State (Tex. Cr. App.) 342.

\*Comments of counsel should be founded on the evidence introduced against accused.—Lightfoot v. State (Tex. Cr. App.) 345.

\*It is error for the district attorney in his argument to refer to defendant's failure to testify.—Vaden v. State (Tex. Cr. App.) 867.

\*On a trial for homicide, *held*, that a certain remark by the assistant county attorney ought

not to have been permitted.—Garrett v. State (Tex. Cr. App.) 389.

#### § 22. — Province of court and jury in general.

\*In a misdemeanor case, the punishment being by fine only, the judge, having power to set aside a verdict of acquittal, has also the power to direct a verdict of guilty, where the facts are undisputed and where guilt from all the evidence is the only inference that can be drawn.—Roberts v. State (Ark.) 952.

\*In a prosecution for practicing medicine without a license, in violation of Kirby's Dig. § 5241, providing for punishment by fine or imprisonment, or both, the court erred in instructing the jury to return a verdict of guilty.—Roberts v. State (Ark.) 952.

\*An instruction authorizing the jury to consider accused's manner and demeanor when accused of the offense, etc., *held* objectionable as a comment on the evidence.—State v. Vickers (Mo.) 999.

\*An instruction authorizing the jury to consider false statements made by defendant when accused of the crime, etc., *held* objectionable as assuming that accused had made false statements.—State v. Vickers (Mo.) 999.

\*A charge in a homicide case *held* not on the weight of the evidence.—Tinsley v. State (Tex. Cr. App.) 347.

\*It is proper to instruct that a witness was an accomplice, instead of submitting the question to the jury, where the facts are apparent.—Spencer v. State (Tex. Cr. App.) 386.

#### § 23. — Necessity, requisites, and sufficiency of instructions.

\*Where accused was tried for a misdemeanor in his absence, and judgment rendered against him by default, and a jury was required to assess the punishment, it was properly charged to find defendant guilty and to assess such punishment.—Walston v. Commonwealth (Ky.) 224.

\*In a prosecution for larceny, instruction, when considered in connection with other instructions given, *held* not error.—State v. Soper (Mo.) 8.

\*Giving of numerous and repetitious instructions disapproved.—State v. Soper (Mo.) 3.

In a prosecution for larceny, certain evidence *held* to have warranted an instruction on flight.—State v. Soper (Mo.) 3.

\*In a prosecution for burglary, refusal to submit the issue of insanity *held* not error.—Mitchell v. State (Tex. Cr. App.) 124.

An instruction in a prosecution for assault *held* not misleading.—Ross v. State (Tex. Cr. App.) 340.

\*It is the better practice not to attempt to define technical terms in the instructions in a criminal case.—Tinsley v. State (Tex. Cr. App.) 347.

\*A charge on the defense of alibi *held* proper.—Tinsley v. State (Tex. Cr. App.) 347.

\*Where, in a homicide case, the *res gestæ* declarations of decedent that accused shot him were received in evidence, the refusal to charge on circumstantial evidence was proper.—Tinsley v. State (Tex. Cr. App.) 347.

\*It is proper for the court in a homicide case to charge the jury that, if they have a reasonable doubt as to the degree, they must find accused guilty of murder in the second degree.—Tinsley v. State (Tex. Cr. App.) 347.

\*On a prosecution for perjury, an instruction *held* not misleading.—Schooler v. State (Tex. Cr. App.) 359.

\*Point annotated. See syllabus.

\*An instruction on the trial of a teacher for assaulting a scholar *held* erroneous as placing the burden on the teacher to prove his innocence beyond a reasonable doubt.—Greer v. State (Tex. Cr. App.) 339.

\*An instruction as to the necessity of corroboration of the evidence of an accomplice *held* properly refused where there was no evidence that the witness was an accomplice.—Powell v. State (Tex. Cr. App.) 362.

\*In a prosecution for theft, the court *held* to have properly instructed the jury to assess defendant's punishment at confinement in the reformatory if they found her guilty.—Cummings v. State (Tex. Cr. App.) 808.

#### § 24. — Requests for instructions.

\*In a prosecution for larceny, refusal of requested instructions covered by instructions given *held* not error.—State v. Soper (Mo.) 3.

\*Request to charge covered by the main charge may be properly refused.—Norris v. State (Tex. Cr. App.) 186.

#### § 25. — Custody, conduct, and deliberations of jury.

\*Rule as to separation of jurors, under Kirby's Dig. § 2390, before the submission of the case stated, and one accused of murder, *held* not entitled to complain that before the completion of the jury the first nine jurors selected were permitted to separate.—Reeves v. State (Ark.) 945.

Misconduct of the jury in discussing a former trial and verdict *held* no ground for reversal.—Smith v. State (Tex. Cr. App.) 1161.

\*The circumstances under which a verdict of conviction will be set aside for misconduct of the jury in discussing a former trial or conviction stated.—Smith v. State (Tex. Cr. App.) 1161.

#### § 26. — Verdict.

In a homicide case, a verdict *held* properly amended by the court.—Tinsley v. State (Tex. Cr. App.) 347.

#### § 27. — Waiver and correction of irregularities and errors.

\*In prosecution for larceny, error in admission of certain testimony *held* cured by striking out and instructions.—State v. Soper (Mo.) 3.

#### § 28. Motions for new trial and in arrest.

Evidence respecting a motion for a new trial must be filed during the trial term.—Reinhard v. State (Tex. Cr. App.) 128.

A motion for a new trial in a criminal case on the ground of newly discovered evidence *held* properly denied.—Mitchell v. State (Tex. Cr. App.) 135.

\*In a prosecution for assault with intent to murder, newly discovered evidence that prosecutor had a pistol at the time of the difficulty *held* immaterial.—Davis v. State (Tex. Cr. App.) 144.

\*A new trial will not be granted for newly discovered evidence unless accused showed diligence in attempting to procure it, and also that, if it had been introduced, a more favorable verdict than that returned would probably have been reached.—Davis v. State (Tex. Cr. App.) 144.

\*An objection that the court misdirected the jury as to the law of the case *held* too general to constitute a valid ground for a new trial.—Mercer v. State (Tex. Cr. App.) 365.

Misconduct of jury in discussing matters not in evidence *held* to warrant a new trial.—Hall v. State (Tex. Cr. App.) 379.

#### § 29. Judgment, sentence, and final commitment.

Under Cr. Code Prac. §§ 155, 157, 180, 182, 184, on trial of an indictment for misdemeanor in defendant's absence, judgment may go against him by default if no plea is entered, and if the fine is fixed by law, it may be imposed by the court without a jury, otherwise a jury is required.—Walston v. Commonwealth (Ky.) 224.

#### § 30. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

\*Where on appeal it appears that no judgment has been entered on the verdict of conviction, the submission of the appeal will be set aside and the case remanded with directions to enter judgment.—State v. Hodges (Mo.) 51.

A judgment *held*, under Code Cr. Proc. 1895, arts. 845, 846, not a final judgment from which an appeal could be taken.—Traylor v. State (Tex. Cr. App.) 142.

#### § 31. — Presentation and reservation in lower court of grounds of review.

\*Defendant *held* not entitled to complain of testimony admitted without objection, and exclusion of which was not sought.—Morphew v. State (Ark.) 480.

\*In a criminal prosecution, error in instructions not presented in the motion and grounds for a new trial in the lower court cannot be reviewed on appeal.—Jones v. Commonwealth (Ky.) 802.

\*Ruling of trial court excluding evidence *held* not reviewable on appeal in the absence of exception taken at the time.—State v. Soper (Mo.) 3.

\*An objection to the record of a witness' conviction cannot be made for the first time on appeal.—State v. Kennedy (Mo.) 57.

\*An objection to the admission of evidence cannot be raised for the first time in a motion for new trial or an appeal.—State v. Speyer (Mo.) 506.

An objection that a question to the witness on redirect examination was incompetent and immaterial *held* insufficient to present the objection on appeal that the question was improper redirect examination.—State v. Vickers (Mo.) 990.

Objections to the admission of testimony in a criminal case *held* not available where there is no proof of facts injected into the objection and relied on as grounds therefor.—Mitchell v. State (Tex. Cr. App.) 124.

\*On appeal the court's action in overruling a motion to quash a special venire will not be reviewed where no bill of exceptions has been reserved.—Reinhard v. State (Tex. Cr. App.) 128.

\*Accused cannot for the first time on appeal complain of the court's failure to give a charge.—Boy v. State (Tex. Cr. App.) 149.

\*A ruling refusing a continuance cannot be reviewed where there is no bill of exceptions thereto.—Cason v. State (Tex. Cr. App.) 337.

Where accused waived a special venire and made only a general objection to the court's method of impaneling the jury, he could not on appeal complain of that method.—Tinsley v. State (Tex. Cr. App.) 347.

A motion for a new trial on a conviction of obtaining property fraudulently *held* insufficient to present for review certain objections to the charge.—White v. State (Tex. Cr. App.) 1167.

#### § 32. — Proceedings for transfer of cause, and effect thereof.

Accused having failed to give a recognizance at the term at which he was convicted, the court

\*Point annotated. See syllabus.

at a subsequent term had no jurisdiction, pending appeal, to accept a recognizance, or to take any other steps except to supply lost papers.—*Ex parte Bumbaugh* (Tex. Cr. App.) 362.

\*Appeal dismissed for an insufficient recognizance.—*Blackman v. State* (Tex. Cr. App.) 1155.

An appeal by several persons from a criminal conviction must be dismissed where the recognizance is joint.—*Yates v. State* (Tex. Cr. App.) 1166.

\*A recognizance reciting a different punishment and fine from that actually imposed held fatally defective.—*Davis v. State* (Tex. Cr. App.) 1169.

**§ 33. — Scope and contents of record.**

On appeal in a criminal case, the question whether the verdict is contrary to the law and the evidence cannot be reviewed in the absence of a statement of facts or bill of exceptions.—*Epps v. State* (Tex. Cr. App.) 1154.

On a criminal appeal, the question whether the verdict is contrary to the law and against the weight of the evidence cannot be reviewed where there is neither statement of facts nor bill of exceptions in the record.—*McGullus v. State* (Tex. Cr. App.) 1156.

A charge cannot be reviewed in the absence of statement of facts in the record.—*White v. State* (Tex. Cr. App.) 1167.

**§ 34. — Bill of exceptions.**

\*Where the bill of exceptions is not filed until after the expiration of the time allowed by court, held, that it cannot be considered on appeal.—*State v. Bragg* (Mo.) 23.

Where the bill of exceptions is not filed in time, all that may be reviewed on appeal is the record proper.—*State v. Bragg* (Mo.) 23.

In the absence of a bill of exceptions, the information being in proper form and the record in other respects free from error, judgment will be affirmed.—*State v. Klug* (Mo.) 51.

A bill of exceptions need not be considered where it was refused by the court and was not otherwise verified.—*Reinhard v. State* (Tex. Cr. App.) 123.

\*The admission in evidence of the voluntary statement of accused, made at the examining trial, cannot be reviewed where there is no bill of exceptions reserved to the statement.—*Mitchell v. State* (Tex. Cr. App.) 135.

An order denying a motion to quash the venire cannot be reviewed where it is not presented by a bill of exceptions.—*Norris v. State* (Tex. Cr. App.) 136.

Where a verified motion to quash a venire alleged matters of fact, the denial of the motion could not be reviewed in the absence of a bill of exceptions preserving the evidence.—*Norris v. State* (Tex. Cr. App.) 137.

A bill of exceptions complaining of the overruling of objections to questions asked accused while testifying, which does not show the answers, is defective.—*Earles v. State* (Tex. Cr. App.) 138.

A bill of exceptions to the exclusion of certain evidence to support the credibility of certain witnesses, who defendant claimed were strangers in the county, held not in effect a certificate of the court that such witnesses were strangers.—*State v. Hill* (Tex. Cr. App.) 145.

\*The grounds of a motion for a new trial cannot be considered on appeal in the absence of a statement of facts or bill of exceptions.—*Perkins v. State* (Tex. Cr. App.) 343.

A statement of facts and bill of exceptions filed after adjournment cannot be considered on appeal.—*Aden v. State* (Tex. Cr. App.) 1154.

Qualifications of the trial judge to a bill of exceptions will control, in the absence of a contest by appellant in the form of a bill by bystanders.—*McCrimmon v. State* (Tex. Cr. App.) 1158.

Under Code Cr. Proc. 1895, art. 723, held, that a fundamental error respecting a charge cannot be reviewed unless objection is reserved by a bill of exceptions, or in the motion for a new trial.—*White v. State* (Tex. Cr. App.) 1167.

**§ 35. — Case or statement of facts.**

\*Where the record on appeal in a criminal case shows that the statement of facts was filed after the adjournment of court, but does not show any order allowing it to be so filed, the statement cannot be considered on appeal.—*Ross v. State* (Tex. Cr. App.) 340.

On appeal in a criminal case, held, that the conviction must be affirmed.—*Zimmerman v. State* (Tex. Cr. App.) 1160.

**§ 36. — Conclusiveness and effect.**

A bill of exception prepared by defendant held the bill to be considered rather than the bill filed by the court.—*Vaden v. State* (Tex. Cr. App.) 367.

**§ 37. — Questions presented for review.**

\*Objections to instructions given and to the refusal to give others will not be considered where the abstract fails to set out the instruction sought to be reviewed.—*Emerson v. Town of McNeil* (Ark.) 479.

Where a trial is by the court, and no declarations of law are asked or given, if the judgment is substantially supported by the evidence, it must be affirmed.—*State v. Willis* (Mo. App.) 584.

Statements in a motion for a new trial or assignments of error concerning matters of fact on which a ruling is based are insufficient to justify a review of the rulings in the absence of a bill of exceptions preserving the evidence introduced.—*Norris v. State* (Tex. Cr. App.) 137.

\*An order denying accused a continuance cannot be reviewed where it is not presented by a bill of exceptions.—*Norris v. State* (Tex. Cr. App.) 137.

In the absence of any bills of exceptions, there is nothing for the court on appeal to review save the sufficiency of the indictment and of the evidence.—*Boy v. State* (Tex. Cr. App.) 149.

\*Where there is no bill of exceptions, matters complained of in a motion for a new trial cannot be reviewed.—*Ross v. State* (Tex. Cr. App.) 340.

\*Where the bill of exceptions complaining of comments by the prosecuting attorney does not show what the comments were, the comments cannot be passed on by the appellate court.—*Tinsley v. State* (Tex. Cr. App.) 347.

\*Statements of witness explaining the possession of recently stolen property are admissible.—*Cagle v. State* (Tex. Cr. App.) 356.

\*In the absence of the facts, the question whether an instruction should have been given on aggravated assault on a prosecution for assault with intent to murder cannot be reviewed.—*Mims v. State* (Tex. Cr. App.) 1157.

\*Whether a verdict is contrary to the evidence and the charge cannot be reviewed in the absence of a statement of facts.—*Farrell v. State* (Tex. Cr. App.) 1157.

\*Point annotated. See syllabus.

\*Error in refusing a continuance cannot be reviewed where no application to continue appears in the record, and there is no bill of exceptions to the overruling of the motion.—*Mims v. State* (Tex. Cr. App.) 1157.

\*In view of the condition of the record, certain alleged errors *held* not reviewable on appeal.—*Sumners v. State* (Tex. Cr. App.) 1168.

**§ 38. — Matters not apparent of record.**

Recital in a judgment overruling an application for continuance, that accused "excepted," *held* not to authorize a review on appeal in the absence of a bill of exceptions reserved during the term.—*Norris v. State* (Tex. Cr. App.) 137.

**§ 39. — Scope and extent of review in general.**

\*Under Cr. Code Prac. § 281, the Court of Appeals *held* without jurisdiction to review the action of the trial court in passing on certain objection where first brought to the trial court's attention on motion for new trial.—*Sims v. Commonwealth* (Ky.) 214.

**§ 40. — Presumptions.**

A bill of exceptions *held* insufficient to show error in a remark of the prosecuting attorney to the jury.—*Reinhard v. State* (Tex. Cr. App.) 128.

\*In the absence of evidence of matters of fact on which a ruling was based, the Court of Criminal Appeals will presume that the ruling was correct.—*Norris v. State* (Tex. Cr. App.) 187.

On appeal it will be presumed, in the absence from the record of the testimony, that the charge was correct and applicable to the facts.—*White v. State* (Tex. Cr. App.) 1167.

**§ 41. — Discretion of lower court.**

\*The denial of an application for a change of venue for prejudice of the inhabitants of a county will not be reversed unless the trial court's discretion has been abused.—*State v. Vickers* (Mo.) 999.

**§ 42. — Questions of fact, verdicts, and findings.**

\*Under Cr. Code Prac. § 340, the Court of Appeals *held* without power to reverse a conviction where there is some evidence of guilt.—*Sims v. Commonwealth* (Ky.) 214.

\*In a criminal case, the Court of Appeals is not authorized to reverse a judgment on the ground that the verdict is against the evidence or is not supported by sufficient evidence.—*Martin v. Commonwealth* (Ky.) 863.

\*Unless manifest error occurred on the trial of an issue of prejudice of the inhabitants, on an application for change of venue, the Supreme Court is bound by the circuit court's finding.—*State v. Vickers* (Mo.) 999.

\*A verdict on conflicting evidence will not be set aside.—*Tyler v. State* (Tex. Cr. App.) 363.

**§ 43. — Harmless error.**

\*In a trial for homicide, remarks of the prosecuting attorney and the admission of certain evidence *held* not prejudicial to defendant.—*Crofton v. State* (Ark.) 671.

\*Rejection of evidence *held* not ground of reversal of conviction, though technically admissible, unless important to defendant.—*Sims v. Commonwealth* (Ky.) 214.

\*In a prosecution for murder, error in admitting incompetent evidence will not authorize granting a new trial or the reversal of a judgment, unless the evidence was prejudicial to the party complaining.—*Jones v. Commonwealth* (Ky.) 802.

\*In a prosecution for larceny, error in instructions as to embezzlement *held* not ground for

reversal where defendant was convicted of larceny.—*State v. Soper* (Mo.) 3.

\*In a criminal prosecution, improper admission of evidence of matters otherwise established *held* harmless.—*State v. Speyer* (Mo.) 505.

In a prosecution for rape, accused *held* not prejudiced by two objectionable instructions authorizing the jury to consider his demeanor and statements when accused of the offense.—*State v. Vickers* (Mo.) 999.

On an application for a change of venue, accused *held* not prejudiced by the striking of certain answers of a witness to the prejudice of the inhabitants, that the people were highly incensed at the time, and that the sentiment was against accused.—*State v. Vickers* (Mo.) 999.

That a witness was permitted to testify that accused could have a fair trial in the county where the offense was committed *held* not prejudicial to him.—*State v. Vickers* (Mo.) 999.

\*Objections urged to laying the predicate for the introduction of a record in a criminal prosecution cannot avail when there is no showing that the record went before the jury.—*Mitchell v. State* (Tex. Cr. App.) 124.

\*In a prosecution for burglary, rejection of testimony that accused had joined the army will not be considered prejudicial when there is no showing as to the materiality of the testimony.—*Mitchell v. State* (Tex. Cr. App.) 124.

Though technically correct, an objection that no predicate was laid for impeaching evidence *held* obviated by witness' answer fixing the time and place.—*Jones v. State* (Tex. Cr. App.) 126.

\*The admission of improper evidence in a criminal case which will require a reversal must tend to strengthen the state's case, and where by no process of reasoning the evidence can be so construed, its admission is harmless.—*Tinsley v. State* (Tex. Cr. App.) 347.

On a trial for homicide, action of the court in withdrawing certain evidence from the jury *held* more injurious than if it had remained before them.—*Garrett v. State* (Tex. Cr. App.) 389.

Error, if any, in the admission of hearsay evidence *held* not reversible.—*Blue v. State* (Tex. Cr. App.) 1157.

**§ 44. Successive offenses and habitual criminals.**

\*Where an indictment alleges a prior conviction to enhance punishment, the record of such prior conviction is admissible.—*Mitchell v. State* (Tex. Cr. App.) 124.

**§ 45. Punishment and prevention of crime.**

Pen. Code, 1895, art. 16, exempting from punishment all persons who may have offended against a repealed law, *held* to exempt a defendant from punishment, convicted under Acts 30th Leg. p. 154, c. 75, where pending his appeal the provision under which he was convicted was repealed by Acts 30th Leg. p. 161.—*Hall v. State* (Tex. Cr. App.) 149.

## CROPS.

Conversion of crop by tenant, see "Landlord and Tenant," § 6.

Harmless error in action by landlord for conversion of crop, see "Appeal and Error," § 31. Measure of damages for destruction of, see "Damages," § 2.

Special findings of jury as to damages to crop, see "Trial," § 10.

\*Point annotated. See syllabus.

## CROSS-EXAMINATION.

See "Witnesses," § 2.

## CROSSINGS.

Railroad crossings, see "Railroads," § 6.

## CRUELTY.

Ground for divorce, see "Divorce," §§ 1, 2.

## CURTESY.

See "Dower."

## CUSTODY.

During trial of person on bail, see "Bail," § 1.  
Of jury, see "Criminal Law," § 25; "Trial," § 9.

## CUSTOMS AND USAGES.

Evidence as to custom or course of business, see "Evidence," § 3.

## DAMAGES.

For frivolous appeal and delay, see "Costs," § 3.  
Necessity and subject-matter of instruction in action for, see "Trial," § 4.  
Requests for instructions as to damages, see "Trial," § 7.  
Special findings of jury as to damages, see "Trial," § 10.

### *Damages for particular injuries.*

See "Death," § 2; "Libel and Slander," § 3; "Nuisance," § 1; "Trespass," 1.  
Breach by seller of contract for sale of goods, see "Sales," § 7.  
Breach of covenant, see "Covenants," § 3.  
Ejection of passenger, see "Carriers," § 10.  
Failure to deliver or delay in delivering telegrams, see "Telegraphs and Telephones," § 2.  
Failure to extend telephone line, see "Telegraphs and Telephones," § 2.  
Injuries to live stock by carrier, see "Carriers," § 5.  
Wrongful sequestration, see "Sequestration."

*Recovery in particular actions or proceedings.*  
See "Trespass," § 1.

For breach of contract to transport passenger, see "Carriers," § 7.

### **§ 1. Grounds and subjects of compensatory damages.**

\*In an action for injuries, expense of nursing held, under the evidence, a proper element of damages.—Flaherty v. St. Louis Transit Co. (Mo.) 15.

\*Damages resulting from breach of contract or tort are recoverable where they naturally and proximately result from the breach or tort, though they are not manifest at the time of the wrong.—Carter v. Wabash R. Co. (Mo. App.) 611.

\*In an action for injuries held, that there was evidence to support an instruction that the reasonable value of medicine and medical supplies furnished by plaintiff might be considered in estimating the damages.—Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.) 155.

Mental anguish is an element of damages for which a recovery may be had, though no actual personal injury was inflicted.—Missouri, K. & T. Ry. Co. of Texas v. Lightfoot (Tex. Civ. App.) 395.

\*In an action by a husband for personal injuries to his wife, defendant held liable for the nurse's bill, although the nurse was the mother of the injured, and it was not shown whether or not she intended to charge for her services.—Ft. Worth & D. C. Ry. Co. v. Walker (Tex. Civ. App.) 400.

A person negligently injured while boarding a street car, although physically unsound before the accident, is entitled to damages for such injury as aggravated her previously diseased condition.—Houston Electric Co. v. Green (Tex. Civ. App.) 463.

### **§ 2. Measure of damages.**

Where a person who has contracted to pay the dues and assessments on a policy of life insurance to maturity defaults and allows the policy to lapse, the measure of damages is the cash value of the policy at the time of default.—Vaughan v. Reddick (Ky.) 292.

\*The measure of damages for property destroyed by fire negligently set is the value of the property consumed at the time and place of its destruction.—Carter v. Wabash R. Co. (Mo. App.) 611.

\*In ordinary cases the measure of damages for the destruction of a crop of grass by fire is its value at the time of the fire.—Carter v. Wabash R. Co. (Mo. App.) 611.

\*In an action by a husband for injuries to his wife, specific proof of the value of her services is not necessary to take the question to the jury as an element of damages.—Chicago, R. I. & P. R. Co. v. Cleaver (Tex. Civ. App.) 721.

### **§ 3. Inadequate and excessive damages.**

\*A verdict in a personal injury action held not excessive.—University of Louisville v. Hammock (Ky.) 219.

\*A verdict of \$7,500 in a personal injury action against a telephone company held not so excessive as to justify a reversal.—Cumberland Telephone & Telegraph Co. v. Overfield (Ky.) 242.

\*\$10,000 is an excessive recovery for injury to a foot and other parts of plaintiff's body, where the injuries do not appear to be permanent, though punitive damages are allowable.—Louisville & N. R. Co. v. Brown (Ky.) 795.

\*\$3,000 damages held excessive in a personal injury case.—Lexington Ry. Co. v. Woodward (Ky.) 853.

\*In an action against a railway company for personal injuries, judgment of \$7,500 held not excessive.—Flaherty v. St. Louis Transit Co. (Mo.) 15.

\*In an action for injuries to plaintiff, a verdict allowing plaintiff \$2,800 held not excessive.—Lattimore v. Union Electric Light & Power Co. (Mo. App.) 543.

\*\$30,000 held not an excessive recovery for personal injury to an 18-year old boy.—Waters-Pierce Oil Co. v. Snell (Tex. Civ. App.) 170.

\*A verdict for \$8,500 awarded a passenger for personal injury held not excessive.—Missouri, K. & T. Ry. Co. of Texas v. Price (Tex. Civ. App.) 700.

### **§ 4. Pleading, evidence, and assessment—Pleading.**

\*General damages need not be averred, being such as the law presumes to have accrued from the wrong.—Cumberland Telephone & Telegraph Co. v. Overfield (Ky.) 242.

\*A petition in a personal injury action held sufficient to authorize a recovery for permanent reduction in power to earn money.—Cumberland Telephone & Telegraph Co. v. Overfield (Ky.) 242.

\*Point annotated. See syllabus.

\*Allegation in personal injury action *held* broad enough to cover injuries both to plaintiff's hand and side.—*Chesapeake & O. Ry. Co. v. Roberts (Ky.)* 835.

\*In a personal injury action, allegations *held* to sustain recovery for future physical suffering.—*Waters-Pierce Oil Co. v. Snell (Tex. Civ. App.)* 170.

\*In a personal injury action, allegation *held* to warrant proof of embarrassment arising from the staring of people who meet him.—*Waters-Pierce Oil Co. v. Snell (Tex. Civ. App.)* 170.

All damages that are the proximate, natural, and probable consequences of the act complained of may be recovered under a general allegation of damages.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot (Tex. Civ. App.)* 395.

#### § 5. — Evidence.

In an action for the killing of a mare, evidence *held* to sustain a verdict that it was plaintiff's mare that was killed.—*St. Louis, I. M. & S. Ry. Co. v. Miller (Ark.)* 484.

Evidence in a personal injury action *held* to justify a finding both as to the character of plaintiff's injuries and the cause thereof in accordance with her contention.—*Cumberland Telephone & Telegraph Co. v. Overfield (Ky.)* 242.

\*In a personal injury action, failure to offer evidence of earning capacity *held* not fatal to a recovery for permanent reduction in power to earn money.—*Cumberland Telephone & Telegraph Co. v. Overfield (Ky.)* 242.

In an action against a railway company for injury to plaintiff in a wreck he could show mental anguish and pain suffered while pinioned in the wreck and in momentary danger of being burned to death.—*Louisville & N. R. Co. v. Brown (Ky.)* 795.

\*In an action for injury to a passenger, the weight of evidence as to the extent thereof *held* with plaintiff.—*Chesapeake & O. Ry. Co. v. Roberts (Ky.)* 835.

\*In an action by a parent for injuries caused his minor son, evidence *held* too remote and speculative to be admissible to show loss of earning power of the son.—*Brown v. St. Louis & Suburban Ry. Co. (Mo. App.)* 83.

\*In an action by a passenger for injuries, evidence of his earnings in prior years was inadmissible on the issue of loss of earnings.—*Haas v. St. Louis & S. F. R. Co. (Mo. App.)* 599.

In an action for injuries to a female passenger, evidence that she was of unchaste character *held* admissible as bearing on the amount she was entitled to recover for loss of future earnings.—*Carlton v. St. Louis & Suburban Ry. Co. (Mo. App.)* 1100.

\*In an action for personal injuries *held* reversible error to permit plaintiff to prove that she was in destitute circumstances.—*Dallas Consol. Electric St. Ry. Co. v. Summers (Tex. Civ. App.)* 891.

#### § 6. — Proceedings for assessment.

Reasonable expenses for medical attendance are a proper item of damage in an action for personal injuries, though the physicians had not yet rendered their bills.—*Frankfort & V. Traction Co. v. Hulette (Ky.)* 1193.

\*In an action for injuries an instruction on damages *held* not objectionable as leaving it to the jury to fix the amount of damages as they might deem just and proper.—*Lange v. Missouri Pac. Ry. Co. (Mo.)* 660.

Whether damages to plaintiff's marble resulted from discharges from defendant's gas plant alone

*held*, under the evidence, for the jury.—*Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.)* 594.

In an action for fire burning over a meadow, an instruction defining measure of damages *held* erroneous.—*Carter v. Wabash R. Co. (Mo. App.)* 611.

An instruction in an action for injuries to a female of unchaste character *held* objectionable as limiting the evidence of unchastity to plaintiff's credibility.—*Carlton v. St. Louis & Suburban Ry. Co. (Mo. App.)* 1100.

An instruction as to damages for injuries received in alighting from a moving train *held* proper.—*St. Louis Southwestern Ry. Co. of Texas v. Cunningham (Tex. Civ. App.)* 407.

\*An instruction in action for personal injuries *held* erroneous as not limiting the amount of recovery for medical attention to the sum asked in the petition.—*Houston Electric Co. v. Green (Tex. Civ. App.)* 463.

## DEAD BODIES.

See "Cemeteries."

## DEATH.

Applicability of instruction to pleadings and evidence in action for, see "Trial," § 6.

As penalty for rape, see "Rape," § 1.

Construction and operation of instruction in action for, see "Trial," § 8.

Expert and opinion evidence in action for, see "Evidence," § 10.

Form, requisites, and sufficiency of instructions in action for, see "Trial," § 5.

Harmless error in action for, see "Appeal and Error," §§ 31-33.

Liability for death caused by negligence of servant, see "Master and Servant," § 12.

Liability for death caused by operation of railroad, see "Railroads," § 6.

Liability for death of servant, see "Master and Servant," §§ 2-11.

Parties entitled to allege error in action for, see "Appeal and Error," § 22.

Persons concluded by judgment in action for, see "Judgment," § 8.

Pleading negligence in action for, see "Negligence," § 4.

Province of court and jury in action for, see "Trial," § 3.

Review in action for, as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

#### § 1. Evidence of death and of survivorship.

Evidence in an action under Rev. St. 1899, § 2864 [Ann. St. 1906, p. 1637], for wrongful death, *held* to justify a finding that decedent left no minor child him surviving.—*Lynch v. Chicago & A. Ry. Co. (Mo.)* 68.

#### § 2. Actions for causing death.

\*In an action for death of plaintiff's husband, she was entitled to recover such sum as would justly and fairly compensate her for the necessary injury resulting from such death, considering decedent's age, health, and earning capacity, not exceeding \$5,000.—*Hach v. St. Louis, I. M. & S. Ry. Co. (Mo.)* 525.

The statute giving a right of action for the death of a mother to her children embraces her illegitimate children.—*Galveston, H. & S. A. Ry. Co. v. Walker (Tex. Civ. App.)* 705.

Under *Sayles' Ann. Civ. St. 1897, art. 3017*, *held* a locomotive engineer may be sued for negligently causing the death of one crossing a

\*Point annotated. See syllabus.



track in front of his train.—*Texas & P. Ry. Co. v. Tucker* (Tex. Civ. App.) 764.

\*In an action for negligent death, the proof held sufficient to authorize plaintiffs to maintain the suit and to authorize the jury to fix the damages.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

\*A verdict in an action for negligent death held not excessive.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

An instruction, in an action for negligent death, defining measure of damages, held not erroneous, and a party desiring further instructions should have requested special charges.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

In an action for negligent death, an instruction held not misleading as assuming a fact the evidence as to which was conflicting.—*Dallas Consol. Electric St. Ry. Co. v. Lytle* (Tex. Civ. App.) 900.

A petition in an action for negligent death held to sufficiently specify the injuries causing death.—*Dallas Consol. Electric St. Ry. Co. v. Lytle* (Tex. Civ. App.) 900.

## DEBT, ACTION OF.

Form, requisites, and sufficiency of instructions in action of debt, see "Trial," § 5.  
Remedy for recovery of penalties, see "Penalties," § 2.

## DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

## DECEDENTS.

Estates of, see "Descent and Distribution"; "Executors and Administrators."  
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

## DECEIT.

See "Fraud."

## DECLARATION.

In pleading, see "Pleading," § 2.

## DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6.  
As evidence in criminal prosecutions, see "Criminal Law," § 10.  
Dying declarations, see "Homicide," § 6.

## DEDICATION.

### § 1. Nature and requisites.

\*Facts held to show a dedication of a strip of land for sidewalk purposes.—*Jackson v. McHargue* (Ky.) 871.

Where a landowner lays out an addition to a city and files a plat showing streets and sells lots with reference thereto, title to the streets held to vest in the city.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

In determining whether a dedication of property to a city as a street was revoked before its acceptance, evidence that land has been sold by the dedicator and described by him in the deed by the plat upon which the blocks, lots, and

streets were delineated, is admissible.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

On a question of dedication of a city street by filing a plat showing the street and selling lots with reference thereto, deeds and other instruments relating to a lot in the same part of the city held not admissible in evidence.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

## DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Admissibility in evidence, see "Evidence," § 8.  
Cancellation, see "Cancellation of Instruments."

Covenants in deeds, see "Covenants."  
Deed absolute as mortgage, see "Mortgages," § 1.

Description of property in, as establishing boundaries, see "Boundaries," § 1.

Establishment of lost deed, see "Lost Instruments."

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In performance of contract to convey, see "Vendor and Purchaser," § 3.

In trust, see "Trusts," §§ 1, 2.

Limitations applicable in action to correct deed, see "Limitation of Actions," § 1.

Mistake in deed as ground for reformation, see "Reformation of Instruments," § 1.

Mode of execution of deed under power, see "Powers," § 1.

Parol or extrinsic evidence, see "Evidence," § 9.  
Reformation, see "Reformation of Instruments."

Reregistration of deed after destruction of public records, see "Records."

Secondary evidence, see "Evidence," § 4.

Tax deed as cloud on title, see "Quieting Title," § 1.

*Deeds by or to particular classes of persons.*  
See "Executors and Administrators," § 5; "Husband and Wife," §§ 1, 4.

*Deeds of particular species of, or estates or interest in, property.*

See "Easements," § 1; "Homestead," § 1.

Community property, see "Husband and Wife," § 4.

*Particular classes of deeds.*

Of trust, see "Chattel Mortgages," § 1; "Mortgages."

Partition deeds, see "Partition," § 1.

### § 1. Requisites and validity.

\*Whenever a person through age, decrepitude, affliction, or disease, becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside.—*West v. Whittle* (Ark.) 955.

A description of land in a deed held to sufficiently identify the land when read in connection with the patent to grantor.—*Combs v. Virginia Iron, Coal & Coke Co.* (Ky.) 815.

In an action to set aside a deed on the ground that the execution thereof was fraudulently procured by defendant, evidence examined, and held to require a decree for plaintiff.—*Derby v. Donahoe* (Mo.) 632.

\*Record of a deed will not of itself constitute delivery in the absence of acceptance by the grantee, but such acceptance after record satisfies the requirement.—*Miller v. McCaleb* (Mo.) 655.

\*A deed conveying land for a nominal consideration is not vitiated as a conveyance on that ground.—*Weissenfels v. Cable* (Mo.) 1028.

\*A mistake, to furnish ground for setting aside an instrument, must be a mutual mistake of fact.—*Weissenfels v. Cable* (Mo.) 1028.

\*Point annotated. See syllabus.

\*A deed to operate as a conveyance must be delivered to and accepted by the grantee.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*Actual manual delivery of a deed need not be shown, but its delivery and acceptance may be established by circumstances showing an intention to deliver and to receive title.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*It is not necessary that a deed should be delivered to the grantee in person, but a delivery to a third person for the use and benefit of the grantee is effective if accepted by the grantee.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*Whether a deed was delivered to and accepted by the grantees therein *held* under the evidence for the jury.—*Walker v. Erwin* (Tex. Civ. App.) 164.

A conveyance of community property by a father to his children *held* a sufficient consideration for a reservation of the rents during his life.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

## § 2. Recording and registration.

\*Statement of place of record under Rev. St. 1895, art. 783, of a deed of land in an unorganized county.—*Stark v. Harris* (Tex. Civ. App.) 887.

Act March 3, 1881 (Gen. Laws 1881, p. 72, c. 67), as amended by Laws 1887, p. 94, c. 102 (Rev. St. 1895, art. 4641), relative to place of record of deed in unorganized county, *held* to refer only to the future.—*Stark v. Harris* (Tex. Civ. App.) 887.

## § 3. Construction and operation.

\*Where S. had acquired title to land by adverse possession under a tax deed, the validity of which was not questioned when the former owner executed a quitclaim deed of the land to the wife of S., the quitclaim deed conveyed nothing.—*Walker v. Helms* (Ark.) 1170.

Separate deeds to sons in consideration of agreement to care for the grantor, etc., *held* to entitle him to reside where he could be comfortable, and to require the grantees to support him there.—*Holt v. Holt* (Ky.) 811.

\*Where a grantor executes a warranty deed with the understanding that the grantee will extinguish the grantor's debt to a third person, the grantee, to perfect his title and give force to the conveyance, must pay the debt.—*Duell v. Leslie* (Mo.) 489.

\*When a conveyance of land is executed and delivered, the title to the property cannot be transferred or reinvested in the original owner by the redelivery of the deed to the grantor and the destruction thereof.—*Derby v. Donahoe* (Mo.) 632.

A deed construed, and the premises conveyed *held* bounded by a stream mentioned in the deed, continuing to flow within its ancient banks.—*Weissenfels v. Cable* (Mo.) 1028.

\*A quitclaim deed is for the purpose of transferring title as effective as any other deed.—*Weissenfels v. Cable* (Mo.) 1028.

A trust deed construed, and *held* that the corpus of the fund created thereby passed to the issue of the beneficiaries on the death of all the beneficiaries and all the trustees.—*Parrish v. Mills* (Tex.) 882.

## § 4. Pleading and evidence.

\*Evidence in ejectment *held* insufficient to show that the deed relied upon by defendant was a forgery.—*Files v. Jackson* (Ark.) 950.

\*Evidence examined, and *held* to support a finding that the grantor of a deed was mentally incapable of executing it, and that it was the result of the grantee's undue influence.—*West v. Whittle* (Ark.) 955.

\*In an action to set aside certain deeds for undue influence, etc., evidence *held* sufficient to show that plaintiff was not mentally capable of contracting with his sons on a purely business basis.—*Holt v. Holt* (Ky.) 811.

\*Acceptance of a deed by the grantee will be presumed in the absence of fraud, artifice, or imposition.—*Miller v. McCaleb* (Mo.) 655.

Facts *held* insufficient to show an acceptance of a deed by the grantee.—*Miller v. McCaleb* (Mo.) 655.

\*To set aside a deed for fraud, the fraud must be established by evidence going beyond a mere preponderance of the testimony and removing all reasonable doubt.—*Weissenfels v. Cable* (Mo.) 1028.

\*Evidence *held* insufficient to establish fraud warranting the setting aside of a deed on that ground.—*Weissenfels v. Cable* (Mo.) 1028.

The execution of a lost deed may be presumed from circumstances.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

In trespass to try title, deeds reciting a chain of title from a lost deed through which defendants claim *held* admissible.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

\*In trespass to try title, where defendants claim title under a lost deed, evidence that the land has been bought and sold by persons claiming under the lost deed is admissible.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

\*The date of the deed and not of its acknowledgment, in the absence of other evidence, is presumptively the date of delivery.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

\*Evidence *held* sufficient to show that a deed was delivered on the date of its execution and not on the date of its acknowledgment.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

Statement as to burden of proof as to when a county was organized, relative to the question of proper place of record under Rev. St. 1895, art. 783.—*Stark v. Harris* (Tex. Civ. App.) 887.

## DE FACTO SCHOOL DISTRICTS.

See "Schools and School Districts," § 1.

## DEFAMATION.

See "Libel and Slander."

## DEFAULT.

Judgment by, see "Judgment," § 3.  
Rights of insured after default, see "Insurance," § 4.

## DEFICIENCY.

On foreclosure of mortgage, see "Mortgages," § 3.

## DELEGATION.

Of power to control liquor traffic, see "Intoxicating Liquors," § 1.

## DELIVERY.

Of deed, see "Deeds," § 1.  
Of goods by carrier, see "Carriers," § 2.  
Of goods sold, see "Sales," § 4.

\*Point annotated. See syllabus.

**DEMAND.**

For payment of principal as affecting time for payment of interest, see "Interest," § 1.

**DEMURRER.**

In pleading, see "Pleading," § 5.  
To evidence, see "Trial," § 2.

**DEPOSITARIES.**

Under Rev. St. 1899, §§ 6817-6820 [Ann. St. 1906, pp. 3344, 3345], providing for the selection of a depositary of county funds after competitive bidding, only one bank can be selected as a county depositary, and two or more banks cannot jointly submit a bid.—*Henry County v. Citizens' Bank of Windsor (Mo.) 622*; *Same v. Farmers' Bank of Windsor (Mo.) 630*.

\*A bank selected as a county depositary and its sureties *held* alone responsible for the failure to account for county funds received as depositary.—*Henry County v. Citizens' Bank of Windsor (Mo.) 622*; *Same v. Farmers' Bank of Windsor (Mo.) 630*.

Where banks illegally combined to suppress bidding for county funds, a bank in the combination not receiving county funds from the bank selected as depositary *held* not liable to the county for any part of the county funds.—*Henry County v. Citizens' Bank of Windsor (Mo.) 622*; *Same v. Farmers' Bank of Windsor (Mo.) 630*.

A county suing a bank for funds alleged to have been fraudulently received by the bank from the county depositary *held* not entitled to recover on the theory that the bank and the depositary are joint tort-feasors.—*Henry County v. Citizens' Bank of Windsor (Mo.) 622*; *Same v. Farmers' Bank of Windsor (Mo.) 630*.

A county suing a bank for county funds alleged to have been fraudulently received by the bank from the county depositary pursuant to an illegal combination *held* not entitled to recover on the theory that the bank was an undisclosed principal.—*Henry County v. Citizens' Bank of Windsor (Mo.) 622*; *Same v. Farmers' Bank of Windsor (Mo.) 630*.

**DEPOSITIONS.**

See "Witnesses."

Harmless error in reading to the jury the indorsements on a deposition envelope, see "Appeal and Error," § 29.

\*The return on a deposition envelope serves only to preserve the purity of the return and is properly for the court and not for the jury as evidence.—*Ft. Worth & D. C. Ry. Co. v. Walker (Tex. Civ. App.) 400*.

A party cannot object to the admission in evidence of a deposition taken at his instance without order of the court after the adverse party had taken the deposition of the same witness and the latter deposition had been read in evidence.—*Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.) 728*.

**DEPOSITS.**

In bank, see "Banks and Banking," §§ 1, 2.

**DEPOSITS IN COURT.**

Payment into court of amount tendered, see "Tender."

**DESCENT AND DISTRIBUTION.**

See "Dower"; "Executors and Administrators"; "Homestead," § 2; "Wills."

Property and interests undisposed of by will, see "Wills," § 5.

**§ 1. Nature and course in general.**

\*Descent or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate as his heir at law.—*Parrish v. Mills (Tex.) 882*.

**§ 2. Rights and liabilities of heirs and distributees.**

The personality of an intestate's estate vests in the administratrix for the purpose of paying debts and costs of administration, and the heirs have no title to or interest in it until an order of distribution.—*Darr v. Thomas (Mo. App.) 96*.

\*Where one of several children receives money from a parent, and it does not appear in what capacity she received it, *held*, that there is no presumption that it was an advancement.—*Stephens v. Smith (Mo. App.) 533*.

**DESCRIPTION.**

Of property conveyed, see "Boundaries," § 1; "Deeds," §§ 1, 3.

**DETINUE.**

See "Replevin."

**DEVISES.**

See "Wills."

**DILIGENCE.**

In procuring evidence affecting right to continuance, see "Continuance"; "Criminal Law," § 17.

**DIRECTING VERDICT.**

In civil actions, see "Trial," § 2.

**DISABILITIES.**

Contributory negligence of persons under disability, see "Negligence," § 3.

**DISCHARGE.**

Collateral attack on order discharging sureties on guardian's bond, see "Judgment," § 6.

From employment, see "Master and Servant," § 1.

*From indebtedness, obligation, or liability.*

See "Accord and Satisfaction"; "Bankruptcy," § 2; "Compromise and Settlement"; "Release."

Liability as insurer, see "Insurance," § 8.

Liability as surety, see "Principal and Surety," § 3.

**DISCONTINUANCE.**

Of action, see "Dismissal and Nonsuit," § 1.

**DISCRETION OF COURT.**

See "Specific Performance," § 1.

Filing replication, see "Pleading," § 6.

Granting or refusing continuance in criminal prosecution, see "Criminal Law," § 17.

\*Point annotated. See syllabus.

Granting or refusing new trial, see "New Trial," § 1.  
 Permitting conversation between attorney and witness at trial, see "Trial," § 1.  
 Review in civil actions, see "Appeal and Error," § 24.  
 Review in criminal prosecutions, see "Criminal Law," § 41.  
 Taxation of costs, see "Costs," § 1.

## DISMISSAL AND NONSUIT.

*In particular actions or proceedings.*

Appeal in criminal prosecution, see "Criminal Law," § 32.  
 Appeal in proceedings for allowance to widow, see "Executors and Administrators," § 3.  
 Appeal or writ of error, see "Appeal and Error," § 18.

### § 1. Voluntary.

\*Statement of right of defendant under Rev. St. §§ 632, 797, 4499 [Ann. St. 1906, pp. 654, 761, 2463], to have action reinstated and to file amended answer on vacation dismissal of action by plaintiff.—Lanyon v. Chesney (Mo.) 522.

\*One injured by several persons concerned in a tort may sue one or all of them, and though he sues all, he may discontinue as to any of them.—Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.) 728.

Where wrongdoers are jointly sued, the court need not assess judgment against defendants according to their equitable interests.—Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.) 728.

## DISORDERLY CONDUCT.

See "Breach of the Peace."

## DISORDERLY HOUSE.

Continuance in prosecution for keeping, see "Criminal Law," § 17.

## DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

## DISTRICT AND PROSECUTING ATTORNEYS.

Argument and conduct at trial in criminal prosecution, see "Criminal Law," § 21.  
 Common-law power of prosecuting attorney to file information in nature of quo warranto, see "Quo Warranto," § 2.  
 Harmless error in remarks and conduct in criminal prosecution, see "Criminal Law," § 43.  
 Informations in criminal prosecution, see "Indictment and Information," § 1.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

## DIVIDENDS.

On insurance policy, see "Insurance," § 4.

## DIVORCE.

### § 1. Grounds.

\*A husband held guilty of cruelty warranting a divorce from bed and board.—Broyles v. Broyles (Ky.) 212.

\*Point annotated. See syllabus.

### § 2. Jurisdiction, proceedings, and relief.

\*Evidence in a divorce action held to sustain findings that defendant made certain statements causing plaintiff to leave their home.—Broyles v. Broyles (Ky.) 212.

Plaintiff's right to a divorce for cruel and inhuman treatment, under Rev. St. 1899, § 2921 [Ann. St. 1906, p. 1678], is a matter of legal right and not of discretion, where her case was proven by uncontradicted testimony.—Raney v. Raney (Mo. App.) 577.

### § 3. Alimony, allowances, and disposition of property.

\*A wife held entitled to \$2,000 alimony, a \$250 attorney's fee, and other costs.—Broyles v. Broyles (Ky.) 212.

\*A wife on obtaining a divorce held entitled to a decree vesting in her the exclusive title to certain securities for loans of her separate funds which were taken in the name of both husband and wife.—Raney v. Raney (Mo. App.) 577.

## DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.  
 As evidence in criminal prosecutions, see "Criminal Law," § 12.  
 Incorporation in bill of exceptions, see "Exceptions, Bill of," § 1.

## DONATIONS.

See "Gifts."

## DOWER.

Harmless error in action for assignment of, see "Appeal and Error," § 26.

### § 1. Rights and remedies of widow.

A conveyance by a widow of her dower interest to the administrator of the estate held valid as against the objection that the consideration therefor was inadequate, and that it was procured by the fraud of the administrator.—Flowers v. Flowers (Ark.) 949.

\*A widow's unassigned dower in the property of her deceased husband, while alienable in equity, is not so at law.—Flowers v. Flowers (Ark.) 949.

Limitation of dower assigned by decree to the tenant's widowhood held unauthorized and unenforceable and not to call for correction of the decree.—Davison v. Davison (Mo.) 1.

## DRAMSHOP.

See "Intoxicating Liquors."

## DRUGGISTS.

Under Act March 9, 1905, Laws 1905, p. 145, § 1 [Ann. St. 1906, § 3044-1], prohibiting the sale of cocaine except on prescription, etc., held, that a physician who was also a pharmacist could not sell cocaine and afterwards write a prescription to cover it.—State v. Willis (Mo. App.) 584.

## DUE PROCESS OF LAW.

See "Constitutional Law," § 4.

## DUPLICITY.

In indictment, see "Indictment and Information," § 3.

## DYING DECLARATIONS.

See "Homicide," § 6.

## EARNEST MONEY.

See "Vendor and Purchaser," § 2.

## EASEMENTS.

See "Dedication"; "Highways."

### § 1. Creation, existence, and termination.

\*It is immaterial whether the adverse use of a passway over the land of another is claimed as a matter of right or merely as a matter of convenience.—Boyd v. Morris (Ky.) 867.

\*Change of location of a passway across lands of another for the convenience of the owner *held* not to destroy the right of way nor prevent the claimant from asserting a right thereto by adverse use.—Boyd v. Morris (Ky.) 867.

\*The continuous adverse use of a passway for 15 years or more *held* to create presumption of a grant, casting the burden on any one denying the right to show that the use was permissive only.—Boyd v. Morris (Ky.) 867.

\*Evidence examined, and *held* to show the acquirement of a right of way across the lands of another by prescription.—Boyd v. Morris (Ky.) 867.

\*Where one is given permission to pass over the land of another, he acquires no rights by any length of use.—Boyd v. Morris (Ky.) 867.

## EJECTION.

Of passenger, see "Carriers," § 10.

## EJECTMENT.

See "Trespass to Try Title."

Discretion of court in taxation of costs, see "Costs," § 1.

Judgment in action for timber cut on land as bar to ejectment and recovery for use and occupation, see "Judgment," § 7.

Persons concluded by judgment, see "Judgment," § 8.

Review as dependent on nature and scope of decision, see "Appeal and Error," § 3.

### § 1. Right of action and defenses.

Under Kirby's Dig. §§ 6321, 6324, defendant in an action to recover land *held* entitled to have a commissioner's deed under which he claimed title corrected, and to have the case transferred to the chancery court for that purpose.—Gates v. Gray (Ark.) 947.

\*One cannot be ejected from land of which he holds possession under the equitable title thereto.—Gates v. Gray (Ark.) 947.

\*A certain warranty deed to defendant in ejectment, from the common source of title, *held* sufficient to defeat the action.—White v. Schroetter (Mo.) 521.

\*Plaintiff in ejectment must prove that at the commencement of the action he had the legal title and was entitled to possession.—Hough v. Jasper County Light & Fuel Co. (Mo. App.) 547.

### § 2. Jurisdiction, parties, process, and incidental proceedings.

At common law a wife, as a tenant by the entirety, could not maintain ejectment in her own name and could not be joined with her hus-

band as party plaintiff.—Hough v. Jasper County Light & Fuel Co. (Mo. App.) 547.

The common-law rule that a wife, as tenant by the entirety, could not maintain an action of ejectment, *held* not abrogated by any statutory law in force in 1886.—Hough v. Jasper County Light & Fuel Co. (Mo. App.) 547.

### § 3. Pleading and evidence.

A claimant under a tax deed void on its face by proving the deed could not establish a sufficient prima facie case in ejectment against the defendant in possession to require the latter to introduce proof of his title.—Beardsley v. Hill (Ark.) 1169.

In ejectment, evidence *held* sufficient to show the existence of a deed from plaintiff to defendant's grantor.—Vincent v. Means (Mo.) 8.

Oral evidence relating to a certain conveyance *held* inadmissible in ejectment.—White v. Schroetter (Mo.) 521.

In ejectment to recover a portion of an island insufficiently described, etc., plaintiff *held* not entitled to recover.—Ordelheide v. Berger Land Co. (Mo.) 620.

## ELECTION.

Between acts charged in indictment, see "Indictment and Information," § 3.

## ELECTION OF REMEDIES.

\*One who, instead of suing for a trespass on land in the circuit court where the land is located, sues for the value of the timber cut and appropriated in a court which does not have jurisdiction of the trespass, is bound by his election.—Roberts v. Moss (Ky.) 297.

\*Where one sued in assumpsit for the value of timber cut and appropriated by another, he waived the right to recover for any injury resulting from the trespass.—Roberts v. Moss (Ky.) 297.

## ELECTIONS.

Determination of location of county seat, see "Counties," § 1.

Of superintendent of state school for blind, see "Asylums."

### § 1. Contests.

Under the express provisions of Const. art. 5, § 8, the district court has jurisdiction of election contest cases.—Swinson v. McKay (Tex. Civ. App.) 934.

Service of notice of intention to contest an election, and statement of grounds thereof, within the time limited therefor, although copies thereof were not filed until afterwards, *held* a sufficient compliance with Sayles' Ann. Civ. St. 1897, arts. 1798, 1801, regulating the procedure in contested election cases.—Swinson v. McKay (Tex. Civ. App.) 934.

## ELECTRICITY.

Right of street railroad to use streets for transmission of electric power, see "Street Railroads," § 1.

In an action against a telephone company for the death of a horse alleged to have been killed by lightning because of the improper condition of a telephone line, evidence *held* insufficient to sustain a verdict for plaintiff.—Southwestern Telegraph & Telephone Co. v. Morris (Tex. Civ. App.) 426.

\*Point annotated. See syllabus.

**ELEVATORS.**

Care required as to trespassers, see "Negligence," § 1.  
 Liability for death of passenger caused by negligence of servant, see "Master and Servant," § 12.

**EMBEZZLEMENT.**

Locality of offense in general, see "Criminal Law," § 3.

\*Under Kirby's Dig. §§ 1837, 2241, 2242, an indictment for embezzlement *held* sufficient.—State v. Scoggin (Ark.) 969.

An accused *held* guilty of embezzlement within the meaning of Rev. St. 1899, § 1914 [Ann. St. 1906, p. 1806].—State v. Betz (Mo.) 64.

In a prosecution for embezzlement, an instruction *held* not prejudicial.—State v. Betz (Mo.) 64.

\*The statute defining embezzlement does not make a failure to account for a trust fund or a fund received by an agent or officer an offense, but the essence of the offense is the wrongful conversion of the fund, and, while failure to account therefor may constitute evidence tending to establish the act of conversion, the failure to account does not constitute the offense of embezzlement of the fund.—State v. Mispagel (Mo.) 513.

\*A charge of embezzlement or larceny of money is not sustained by proof of the embezzlement or larceny of a draft or check.—State v. Mispagel (Mo.) 513.

\*In an information for embezzlement, as in an information for larceny, the property embezzled must be described, and the proof must be in substantial accord with such description.—State v. Mispagel (Mo.) 513.

**EMINENT DOMAIN.**

Public improvements by municipalities, see "Municipal Corporations," § 4.

**EMPLOYER'S LIABILITY INSURANCE.**

See "Insurance," § 3.

**EMPLOYÉS.**

See "Master and Servant."

**ENCROACHMENT.**

On highways, see "Highways," § 1.

**ENTAIL**

See "Estates Tail."

**ENTRY, WRIT OF.**

See "Ejectment."

**EQUITABLE ASSIGNMENTS.**

See "Assignments," § 1.

**EQUITABLE DEFENSES.**

In ejectment, see "Ejectment."

**EQUITABLE ESTOPPEL.**

See "Estoppel," § 2.

**EQUITABLE MORTGAGES.**

See "Mortgages," § 1.

**EQUITY.**

Equitable assignment, see "Assignments," § 1.  
 Equitable defenses in ejectment, see "Ejectment," § 1.

Equitable estoppel, see "Estoppel," § 2.

Equitable mortgage, see "Mortgages," § 1.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Partition," § 2; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Equitable relief against judgment, see "Judgment," § 5.

**ERROR, WRIT OF.**

See "Appeal and Error."

**ESTABLISHMENT.**

Of boundaries, see "Boundaries," § 2.

Of courts, see "Courts," § 2.

Of lost instruments, see "Lost Instruments."

Of railroads, see "Street Railroads," § 1.

Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

Of will, see "Wills," § 3.

**ESTATES.**

Created by deed, see "Deeds," § 3.

Created by will, see "Wills," § 4.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant." Trusts, see "Trusts," § 2.

*Particular estates.*

See "Dower"; "Estates Tail"; "Remainders."

**ESTATES TAIL**

Creation by will, see "Wills," § 4.

\*A conveyance to C. and to the heirs of her body by the grantor begotten *held* to create an estate tail in C., which was converted by Gen. St. 1865, c. 108, § 4, into a life estate in C., with a contingent remainder in fee.—Summet v. City Realty & Brokerage Co. (Mo.) 614.

**ESTOPPEL.**

By judgment, see "Judgment," §§ 7, 8.

Of bank to plead certification of noncommercial instrument as ultra vires, see "Banks and Banking," § 2.

Of beneficiary of insurance certificate, see "Insurance," § 10.

Of shipper to claim damages to goods caused by carrier, see "Carriers," § 3.

Of tenant to dispute title of landlord, see "Landlord and Tenant," § 2.

Permitting oral misrepresentations to operate as estoppel as varying deed, see "Evidence," § 9.

\*Point annotated. See syllabus.

To allege error, see "Appeal and Error," § 22.  
 To avoid or forfeit insurance policy, see "Insurance," § 5.  
 To claim invalidity of surrender of insurance certificate, see "Insurance," § 10.  
 To claim property as street, see "Municipal Corporations," § 6.  
 To deny power of life insurance company to take a deed of trust, see "Mortgages," § 1.  
 To repudiate partition agreement, see "Partition," § 1.

### § 1. By deed.

Facts held insufficient to estop the heirs of S. from claiming that certain conveyances did not deprive him of title to the land in controversy.—Walker v. Helms (Ark.) 1170.

\*In trespass to try title a defendant held entitled to recover under conditions stated.—Mars v. Morris (Tex. Civ. App.) 430.

Though a power did not authorize the grantee to make a warranty deed, such deed passed the after-acquired title of the grantor of the power by estoppel.—J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.) 690.

### § 2. Equitable estoppel.

A company purchasing standing timber held not estopped from claiming title as against a purchaser of the land.—Garden City Stave & Heading Co. v. Sims (Ark.) 959.

\*Where one of two innocent purchasers must suffer, the one whose negligence occasioned the loss must bear it.—Begley v. Combs (Ky.) 246.

\*Statements of landowner to adjacent landowner as to boundary held admissible in favor of persons claiming under person to whom they were made.—Dee v. Nachbar (Mo.) 85.

\*The truth should not be permitted to control in determining the rights of parties where it would enable one who has misrepresented it to perpetrate a fraud upon another and innocent person.—Walker v. Erwin (Tex. Civ. App.) 164.

\*Where a person with knowledge of the truth makes a false representation of a material fact to a person ignorant of the truth under circumstances reasonably calculated to induce the other person, acting in good faith, and exercising due care, to act thereon, and he acts upon it, the person making the representation is estopped from asserting the truth.—Walker v. Erwin (Tex. Civ. App.) 164.

\*Evidence as to estoppel examined, and held not so conclusive as to warrant a directed verdict.—Walker v. Erwin (Tex. Civ. App.) 164.

\*In trespass to try title a plaintiff, claiming under a subsequent deed of gift from defendant's grantor, held bound by representations which would estop the grantor.—Mars v. Morris (Tex. Civ. App.) 430.

## EVICTIION.

Of tenant of demised premises, see "Landlord and Tenant," § 5.

## EVIDENCE.

See "Depositions"; "Witnesses."  
 Admissibility of evidence under pleading, see "Pleading," § 10.  
 Applicability of instructions to evidence, see "Trial," § 6.  
 Deposition envelope as evidence, see "Depositions."  
 Questions of fact for jury, see "Trial," § 2.  
 Reception at trial, see "Criminal Law," § 19;  
 "Trial," §§ 1, 11.

Record of prior conviction in criminal prosecution as evidence, see "Criminal Law," § 44.  
 Verdict or findings contrary to evidence, see "New Trial," § 2.

### As to particular facts or issues.

See "Acknowledgment," § 4; "Adverse Possession," §§ 1, 2; "Boundaries," § 2; "Damages," § 5; "Death," § 1; "Deeds," § 4; "Estoppel," § 2; "Gifts," § 1; "Marriage"; "Usury," § 1.  
 Acceptance of deed, see "Deeds," § 4.  
 Acquisition of way, see "Easements," § 1.  
 Adoption of local option, see "Intoxicating Liquors," § 2.  
 Alteration of notes, see "Alteration of Instruments."  
 Authority of broker, see "Brokers," § 1.  
 Change of possession of mortgaged property, see "Chattel Mortgages," § 3.  
 Contract for sale of land, see "Vendor and Purchaser," § 1.  
 Contributory negligence of passenger, see "Carriers," § 9.  
 Delivery of deed, see "Deeds," § 4.  
 Eviction of tenant, see "Landlord and Tenant," § 5.  
 Intent of testator, see "Wills," § 4.  
 Legitimacy of children, see "Bastards," § 1.  
 Payment of note, see "Bills and Notes," § 3.  
 Purchase of land in good faith, see "Vendor and Purchaser," § 4.  
 Testamentary capacity, see "Wills," § 1.  
 Undue influence in procuring making of will, see "Wills," § 2.

### In actions by or against particular classes of persons.

See "Brokers," § 3; "Carriers," §§ 2-9; "Hospitals"; "Infants," § 2; "Municipal Corporations," §§ 7, 8; "Railroads," § 7-9; "Schools and School Districts," § 1; "Street Railroads," § 2.

Foreign corporation, see "Corporations," § 5.  
 Insurance companies, see "Insurance," § 9.

### In particular civil actions or proceedings.

See "Cancellation of Instruments," § 2; "Divorce," § 2; "Ejectment," § 3; "Fraud," § 2; "Habeas Corpus," § 2; "Negligence," § 4; "Reformation of Instruments," § 2; "Replevin," § 1; "Trespass to Try Title," § 2; "Trove and Conversion," § 1; "Work and Labor."  
 For breach of contract of carriage, see "Carriers," § 7.  
 For brokers' commissions, see "Brokers," § 3.  
 For causing death, see "Death," § 2.  
 For death of servant, see "Master and Servant," § 9.  
 For failure of carrier to deliver goods, see "Carriers," § 2.  
 For indemnity, see "Indemnity."  
 For injuries from fire caused by operation of railroad, see "Railroads," § 9.  
 For injuries to animals caused by operation of railroad, see "Railroads," § 8.  
 For loss of or injuries to goods by carrier, see "Carriers," § 3.  
 For loss of or injuries to live stock by carrier, see "Carriers," § 5.  
 For malpractice, see "Physicians and Surgeons."  
 For personal injuries, see "Carriers," §§ 8, 9; "Hospitals"; "Master and Servant," § 9; "Municipal Corporations," § 7; "Railroads," § 7; "Street Railroads," § 2.  
 For price of goods sold, see "Sales," § 6.  
 For purchase money for land sold, see "Vendor and Purchaser," § 5.  
 For rent, see "Landlord and Tenant," § 6.  
 For wrongful sequestration, see "Sequestration."  
 On bill of exchange or promissory note, see "Bills and Notes," § 4.  
 On bond of school book publisher, see "Schools and School Districts," § 1.

\*Point annotated. See syllabus.

On insurance policy, see "Insurance," § 9.  
 Probate proceedings, see "Wills," §§ 1, 2.  
 Review of assessment of taxes, see "Taxation," § 3.  
 To determine boundaries, see "Boundaries," § 2.  
 To enjoin payment of claim by municipal corporation, see "Municipal Corporations," § 8.  
 To establish trust, see "Trusts," § 1.  
 To recover mortgaged property, see "Chattel Mortgages," § 2.  
 To recover penalties, see "Penalties," § 2.  
 To restrain interference with office, see "Officers," § 2.  
 To set aside deed, see "Deeds," § 1.

*In criminal prosecutions.*

See "Assault and Battery," § 1; "Burglary," § 1; "Criminal Law," § 6; "False Pretenses"; "Homicide," §§ 5-7; "Larceny," § 2; "Malicious Mischief"; "Obstructing Justice"; "Rape," § 1; "Seduction," § 1.

For carrying concealed weapons, see "Weapons."

For criminal libel, see "Libel and Slander," § 4.  
 For obstruction of highway, see "Highways," § 1.

For swearing and using obscene language, see "Obscenity."

For violation of liquor laws, see "Intoxicating Liquors," § 7.

*Review and procedure thereon in appellate courts.*

Estoppel to allege error as to rulings on, see "Appeal and Error," § 22.

Harmless error in rulings on, see "Appeal and Error," §§ 28-32; "Criminal Law," § 43; "Homicide," § 9.

Review of evidence in general, see "Appeal and Error," § 25.

Review of questions of fact and finding, see "Criminal Law," § 42.

Review of rulings on as dependent on assignment of errors, see "Appeal and Error," § 16.

Review of rulings on as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5; "Criminal Law," § 31.

Review of rulings on as dependent on record on appeal or writ of error, see "Appeal and Error," § 15; "Criminal Law," §§ 34, 37.

**§ 1. Judicial notice.**

The Supreme Court takes notice that sales for nonpayment of taxes of 1872, made in 1873, have been declared invalid by it.—*Files v. Jackson* (Ark.) 950.

\*Certain facts held matters of current history, of which judicial notice will be taken.—*Kentucky Iron, Coal & Mfg. Co. v. Adams* (Ky.) 1198.

\*The court takes judicial notice that on August 28, 1900, Coles county had less than 50,000 inhabitants, and that therefore the jurisdiction of a justice of the peace therein is controlled by Rev. St. 1899, § 3835 [Ann. St. 1906, p. 2124], and not by section 3836 [page 2126], which applies to counties having over 50,000 inhabitants.—*Ruckert v. Richter* (Mo. App.) 1081.

\*The court takes judicial notice of the direction, run, and location of important railroads within the state, and of the location of county seats, but not of towns which are not county seats.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

\*The court takes judicial notice of an act of Congress, but does not take judicial notice of the construction placed on the common law by the Supreme Court of a sister state.—*Missouri, K. & T. Ry. Co. v. Wise* (Tex. Civ. App.) 465.

\*The Court of Civil Appeals will take judicial cognizance of its records and judgments.—*Edgar v. McDonald* (Tex. Civ. App.) 1135.

**§ 2. Presumptions.**

\*The law presumes that the State Board of Equalization properly performed its duty in assessing property for taxation.—*State ex rel. Hammer v. Wiggins Ferry Co.* (Mo.) 1005.

\*In the absence of evidence of the construction the court of a sister state has placed on the common-law doctrine of fellow servants, it is presumed that the doctrine receives the same construction in the sister state that is placed on it by the courts of Texas.—*Missouri, K. & T. Ry. Co. v. Wise* (Tex. Civ. App.) 465.

**§ 3. Relevancy, materiality, and competency in general.**

\*In a personal injury action against a railway company, evidence held inadmissible as substantive testimony, but proper to contradict a witness.—*Louisville, H. & St. L. R. Co. v. Davis* (Ky.) 304.

The speed of an engine at a point held evidence of its speed a mile or a mile and a quarter therefrom downgrade.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*In an action where plaintiff claims an interest in land through a deed from his mother, certain evidence held not inadmissible as evidence of a conversation after the deed was written tending to modify the intention in the deed, especially where the same evidence was elicited by the other side.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*In an action by tenants against their landlords for breach of contract to furnish water, a contract between the landlords and an irrigation company for the water held inadmissible as res inter alios acta.—*Stockton v. Brown* (Tex. Civ. App.) 423.

\*In an action by a broker for compensation, evidence as to defendant's dealings with other brokers held inadmissible.—*J. B. Lloyd & Son v. Kerley* (Tex. Civ. App.) 696.

**§ 4. Best and secondary evidence.**

\*Under a statute providing for the admission of certified copies of recorded instruments in evidence, defendant held entitled to offer a certified copy of a recorded lease to another on proving that the original was not in his control and that he could not produce it.—*Crawford v. McDonald* (Ark.) 206.

\*Evidence as to the loss of and search for a deed held sufficient as a predicate for the introduction of secondary evidence.—*Frugla v. Trueheart* (Tex. Civ. App.) 736.

**§ 5. Admissions.**

\*Answer of defendant railroad company held competent evidence against it as an admission.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*In an action to recover the price of a gold ring, admissions of defendant made to plaintiff's attorney held admissible in evidence.—*Wood v. Duffy* (Mo. App.) 82.

A folder issued and circulated by a railway company held admissible against it, as in the nature of a declaration against interest.—*Southern Pac. Co. v. Allen* (Tex. Civ. App.) 441.

\*Testimony of a party upon a former trial is admissible as an admission.—*Littler v. Dielmann* (Tex. Civ. App.) 1137.

**§ 6. Declarations.**

\*In an action for work done on a building, evidence that defendant was the true owner

\*Point annotated. See syllabus.



thereof, together with his statements against interest, in regard to the work done thereon, *held* proper.—*Ehrhardt v. Stevenson* (Mo. App.) 1118.

### § 7. Hearsay.

\*Certain evidence *held* hearsay.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*In an action where plaintiff claimed land under an alleged deed from his mother, testimony of a witness that certain persons had told him that plaintiff had testified in an action by plaintiff's sister involving the same deed that he (plaintiff) did not claim anything under the deed is hearsay and inadmissible.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*In trespass to try title evidence of a conversation between the prior owner of the lot in controversy and his wife regarding the boundary line of the lot is hearsay and inadmissible.—*McKeon v. Roan* (Tex. Civ. App.) 404.

\*Evidence that a witness had heard of wrecks at a railroad curve, where the wreck in question occurred *held* objectionable as hearsay.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

### § 8. Documentary evidence.

\*Photographs of a railway wreck their accuracy being shown by the photographers, are admissible in evidence in an action against the company for injuries received in the wreck.—*Louisville & N. R. Co. v. Brown* (Ky.) 795.

\*Where an instrument has not been so acknowledged as to entitle it to record, it is error to allow a copy thereof made by the county court clerk to be read in evidence.—*Belcher v. Polly* (Ky.) 818.

In an action involving the validity of a deed, a judgment in a former trial involving the same deed *held* inadmissible.—*Walker v. Erwin* (Tex. Civ. App.) 164.

\*Entries in an account book of money advanced on a person's account *held* not evidence that the money was advanced at the person's request.—*Mings v. Griggsby Const. Co.* (Tex. Civ. App.) 192.

\*An abstract of title made by a county clerk and certified by him to have been taken from the record of deeds in his office is admissible in evidence.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

The fact that an ancient, duly executed deed was found among the papers of one of the grantees in possession of his daughter instead of among the public archives does not throw suspicion on it.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

\*An ancient, duly executed deed *held* admissible in evidence.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

\*When a deed by an agent is shown by circumstances to have been executed, and is more than 30 years old, the agent's power will be presumed.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

A deed *held* admissible as an ancient instrument, without being filed in the papers of the suit as a recorded instrument.—*Stark v. Harris* (Tex. Civ. App.) 887.

\*A deed *held* to come from the proper custody to be admissible as an ancient instrument.—*Stark v. Harris* (Tex. Civ. App.) 887.

Statement as to sufficiency of registration to make applicable Rev. St. 1895, art. 2312, relative to admission in evidence of registered instruments.—*Stark v. Harris* (Tex. Civ. App.) 887.

Statement as to proper filing of a registered instrument in papers of suit, so as to be ad-

missible without proof of execution.—*Stark v. Harris* (Tex. Civ. App.) 887.

\*Photographs of a railroad curve where plaintiff's decedent was killed in a wreck *held* admissible on proof of any person who knew the fact that the photographs properly represented the scene.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

### § 9. Parol or extrinsic evidence affecting writings.

Parol evidence of the existence of a deed by proof of its recognition by the grantor and grantee therein is competent, and does not alter or contradict the deed.—*Vincent v. Means* (Mo.) 8.

\*On a bill for specific performance of a written contract, parol evidence is admissible to show that through mistake the writing does not express the agreement of the parties.—*Gottfried v. Bray* (Mo.) 639.

\*The rule that the consideration of a deed is open to explanation does not let in proof overturning the operative words of a grant in a deed free from ambiguity, or contradicting the deed itself or the descriptions therein.—*Weissenfels v. Cable* (Mo.) 1028.

\*In the absence of mutual mistake or fraud, and in the absence of any ambiguity in a deed, the grantor cannot cut down the operative words of a deed by proof of his intentions.—*Weissenfels v. Cable* (Mo.) 1028.

\*Employer's liability insurance policies being obscure, acts of the parties done pursuant thereto and the conditions existing when the insurance was written may be resorted to to ascertain the meaning of the contract.—*New Amsterdam Casualty Co. v. Meaker* (Mo. App.) 561.

\*The affirmative recitals of the docket of a justice of the peace showing an appearance and confession of judgment may not be impeached by parol.—*Ruoff v. Fitzgerald* (Mo. App.) 1110.

Permitting oral misrepresentations to operate as an estoppel *held* not to contradict the language of a deed.—*Mars v. Morris* (Tex. Civ. App.) 480.

\*The consideration of a conveyance can be shown by parol.—*Ellis v. Lehman* (Tex. Civ. App.) 453.

\*Parol evidence *held* admissible to show fraudulent representations inducing a contract.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

Certain evidence *held* admissible to show one was induced by fraud to sign a contract.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

### § 10. Opinion evidence.

\*In a personal injury action, the permanency of injuries shown may be proved by the opinion of physicians.—*Cumberland Telephone & Telegraph Co. v. Overfield* (Ky.) 242.

\*Within what distance a train can be stopped in a given case with safety to property and the lives of persons thereon presents a question for expert testimony.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*A witness *held* qualified to give an opinion as to the speed of the engine which struck decedent.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*A hypothetical question is not objectionable if it substantially embraces the facts disclosed by the evidence.—*Holton v. Cochran* (Mo.) 1035.

\*A statement of witnesses *held* a statement of fact.—*Brown v. Quincy, O. & K. C. R. Co.* (Mo. App.) 551.

\*Point annotated. See syllabus.

The question to an expert *held* competent.—*Rogers v. Rundell* (Mo. App.) 1096.

Questions to expert *held* improper as calling for a conclusion, instead of an opinion.—*Rogers v. Rundell* (Mo. App.) 1096.

\*In an action for injuries to plaintiff's wife, it was proper to allow plaintiff to testify to her physical suffering.—*Texas & N. O. R. Co. v. Clippenger* (Tex. Civ. App.) 155.

Expert testimony *held* admissible in an action for injury caused by an explosion resulting from the drawing of gasoline from tanks near a furnace.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

\*A statement of a witness *held* a statement of a fact.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 194.

\*An expert may testify to a person's life expectancy.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 194.

\*In an action against a carrier for death of a mule, a witness, who was experienced in loading animals and who loaded the mule, should have been permitted to have expressed his opinion as to whether the mule was properly loaded and tied, and whether the opening left in the door of the car provided sufficient ventilation.—*International & G. N. R. Co. v. Nowaski* (Tex. Civ. App.) 437.

\*Expert opinions as to the speed of a locomotive when derailed *held* not conclusive upon a jury.—*Galveston, H. & S. A. Ry. Co. v. Gillespie* (Tex. Civ. App.) 707.

\*In an action by a landlord for conversion of a crop delivered by his tenant and subtenants to third persons made defendants, certain testimony *held* not objectionable as being the conclusion of the witness.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

In an action against a carrier for the loss of goods, experts' evidence as to the value of the goods *held* not objectionable.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

In an action against a carrier for loss of goods, evidence of experts *held* sufficient to establish the extent of loss.—*Texas & P. Ry. Co. v. Townsend* (Tex. Civ. App.) 760.

Evidence of a nonexpert witness that a railroad curve at which an accident occurred was dangerous was objectionable as an opinion.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

Evidence that witness told defendant's roadmaster that an inspector, who was claimed to have inspected the road at the point of the accident shortly prior thereto, was too inexperienced to take care of the curve at that point, *held* inadmissible.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

#### § 11. Weight and sufficiency.

Certain testimony *held* not to be regarded because of inconsistency with physical facts and laws.—*Zalotuchin v. Metropolitan St. Ry. Co.* (Mo. App.) 548.

Evidence that when plaintiff attempted to alight she was thrown by the starting of the street car so that the back of her head struck the step *held* not necessarily contrary to natural law.—*Carlton v. St. Louis & Suburban Ry. Co.* (Mo. App.) 1100.

\*Evidence in itself unsatisfactory *held* not binding on the court, merely because it was not directly contradicted by other testimony.—*Hammett & Katter v. Wabash R. Co.* (Mo. App.) 1106, 1107.

\*Certain evidence, though hearsay, yet having been admitted without objection, *held* not without probative force.—*Gray v. Fussell* (Tex. Civ. App.) 454.

## EXAMINATION.

Of expert witnesses, see "Evidence," § 10.

Of person accused of crime, see "Criminal Law," § 4.

Of witnesses in general, see "Witnesses," § 2.

## EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 5; "Criminal Law," § 31.

Taking exceptions at trial, see "Trial," § 1.

## EXCEPTIONS, BILL OF.

Conclusiveness of, in criminal prosecution, see "Criminal Law," § 36.

Correction on appeal or writ of error, see "Appeal and Error," § 14.

Filing on appeal or writ of error, see "Appeal and Error," § 9.

Necessity for purpose of review, see "Criminal Law," §§ 31, 33, 34, 37.

Taking exceptions at trial, see "Criminal Law," § 20.

### § 1. Nature, form, and contents in general.

Where causes of action are consolidated under Act May 11, 1905, pp. 798, 799, and are tried on the same evidence, one motion for a new trial and one bill of exceptions *held* sufficient to authorize a separate appeal from each judgment.—*Waters-Pierce Oil Co. v. Van Elderen* (Ark.) 947; *Same v. Eggner* (Ark.) 948.

\*Under Sess. Laws 1903, p. 105 [Ann. St. 1906, § 866] where a bill of exceptions describes documents offered in evidence and in the clerk's possession, and directs him to copy them, they become as much a part of the bill as if fully copied therein.—*Collier v. Catherine Lead Co.* (Mo.) 971.

### § 2. Settlement, signing, and filing.

\*Carrying over of motion of arrest of judgment to another term, *held* not to have extended time for signing and allowing bill of exceptions.—*In re Howard's Estate* (Mo. App.) 116; *Howard v. Strode*, Id.

\*Under Rev. St. 1899, §§ 727, 728 [Ann. St. 1906, pp. 716, 720], carrying over of motion for new trial to the next term, *held* to have extended time for allowing bill of exceptions to the next term.—*In re Howard's Estate* (Mo. App.) 116; *Howard v. Strode*, Id.

## EXCESSIVE DAMAGES.

See "Damages," § 8.

For breach of contract for carriage of passengers, see "Carriers," § 7.

For causing death, see "Death," § 2.

For ejection of passenger, see "Carriers," § 10.

For failure to deliver telegram, see "Telegraphs and Telephones," § 2.

For libel, see "Libel and Slander," § 3.

For wrongful sequestration, see "Sequestration."

## EXCESSIVE PENALTIES.

See "Penalties," § 1.

## EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

\*Point annotated. See syllabus.

## EXECUTION.

See "Attachment."

Exemptions, see "Homestead."

### § 1. Nature and essentials in general.

Rev. St. 1895, art. 2324, relating to executions, *held* to cover all final judgments and to include judgments of foreclosure of liens.—Ryan v. Raley (Tex. Civ. App.) 750.

\*An execution may issue on a judgment not in terms providing therefor.—Ryan v. Raley (Tex. Civ. App.) 750.

Under Rev. St. 1895, art. 1340, an execution to satisfy the deficiency on the foreclosure of a vendor's lien is authorized, though the judgment contains no provision therefor.—Ryan v. Raley (Tex. Civ. App.) 750.

### § 2. Stay, quashing, vacating, and relief against execution.

Under Rev. St. 1895, arts. 2731, 2732, 2989, an injunction against an execution against property of a minor, showing on its face that an order of payment had been obtained from the probate court, *held* improper.—Thompson v. Gooldsby (Tex. Civ. App.) 936.

Where, pending suit to enjoin an execution, a levy thereunder is released, and the execution is returned with the release indorsed thereon, the injunction will be denied.—Thompson v. Gooldsby (Tex. Civ. App.) 936.

## EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Conveyance by widow of dower to administrator of deceased husband's estate, see "Dower," § 1.

Process in action by public administrator, see "Process," § 1.

Testimony as to transactions with decedents, see "Witnesses," § 1.

### § 1. Assets, appraisal, and inventory.

The personality of an intestate's estate vests in the administratrix for the purpose of paying debts and costs of administration, and the heirs have no title to or interest in it until an order of distribution.—Darr v. Thomas (Mo. App.) 95.

### § 2. Collection and management of estate.

\*An administrator stands in a trust relation toward those interested in the estate of the intestate, including the widow and heirs.—Flowers v. Flowers (Ark.) 949.

\*Power to sell lands is not one of the powers conferred by law on a temporary administrator.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

### § 3. Allowances to surviving wife, husband, or children.

\*A widow's right to hold the dwelling house, and farm attached, of the deceased husband, until assignment of dower, is a personal privilege, and is not transferable.—Flowers v. Flowers (Ark.) 949.

On appeal to circuit court by widow from judgment against her by probate court on her petition for money allowance in lieu of provisions granted her by Rev. St. 1899, § 105 [Ann. St. 1906, p. 372], petitioner *held* entitled to dismiss appeal.—In re Howard's Estate (Mo. App.) 116; Howard v. Strode, Id.

### § 4. Allowance and payment of claims.

Allowance of a claim, against an estate on a note *held* not error, in view of the fact that it was a renewal of a former valid note.—McClure's Ex'r v. Corydon Deposit Bank (Ky.) 1177.

The duty of prompt payment of a secured debt with compelling resort to the security rests on the estate of a deceased debtor as fully as on the debtor in his lifetime.—Darr v. Thomas (Mo. App.) 95.

Rev. St. 1899, § 191 [Ann. St. 1906, p. 403], when construed in connection with sections 133, 143, 146, 170, 184, subds. 4, 152, 155 [pages 382, 383, 384, 388, 389, 393, 397], *held* not to prohibit an administratrix from paying secured debts of her intestate out of the personality of his estate before the security has been first exhausted by the creditor.—Darr v. Thomas (Mo. App.) 95.

Ordinarily a secured creditor can lay by his security and go upon the general estate of his debtor to satisfy his claim, only resorting to his security when he fails to collect his claim by the ordinary proceeding.—Darr v. Thomas (Mo. App.) 95.

Evidence *held* sufficient to authorize a finding against the estate of deceased of a loan of money to him.—Pittham v. Schnaitman (Mo. App.) 108.

Where a widow procured an assignment of a claim against her husband's estate on a judgment against him and another, she was entitled to collect the entire amount thereof from the husband's estate.—McCormick v. National Bank of Commerce (Tex. Civ. App.) 747.

A wife's claim to subject the proceeds of a bank deposit to an indebtedness against her husband's estate *held* to depend on whether he reserved the income of certain property conveyed to his children.—McCormick v. National Bank of Commerce (Tex. Civ. App.) 747.

### § 5. Sales and conveyances under order of court.

An order directing an administrator's sale of realty cannot be presumed where there was no confirmation of the sale nor anything indicating the passing of an order of sale.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

An order granting a temporary administrator power to sell land *held* not to authorize such sale after his appointment as permanent administrator.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

\*An administrator's sale *held* not necessarily void because the administrator violated the terms of the law and the order of the court as to the terms of credit.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

\*An administrator's sale of realty in 1841 without confirmation did not pass title, in the absence of proof that the requirements of the statute were met.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

An administrator's sale will be sustained as against collateral attack, though there was no proof of the entry of an order of sale, if there is anything of record intimating that the sale was approved by the probate court.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

That a purchaser of land from an administrator on the same day reconveyed it to the administrator as an individual, though not sufficient to set aside the sale in a collateral proceeding, was competent to explain the absence of an order confirming the sale.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

Recitals in an administrator's deed *held* insufficient to raise a presumption that an order had been granted authorizing the grantor as permanent administrator to sell land.—Cruise v. O'Gwin (Tex. Civ. App.) 757.

\*Point annotated. See syllabus.

**EXEMPLIFICATIONS.**

As evidence, see "Evidence," § 8.

**EXEMPTIONS.**

See "Homestead."

From taxation, see "Taxation," § 2.

**EXPECTANCY.**

Admissibility of expert testimony as to life expectancy, see "Evidence," § 10.

**EXPERT TESTIMONY.**

In civil actions, see "Evidence," § 10.

In criminal prosecutions, see "Criminal Law," § 13.

**EXPLOSIVES.**

Expert testimony in action for injuries from explosion, see "Evidence," § 10.

One who has handled gasoline for years is charged with knowledge of the highly inflammable character of the gases generated by it.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

It is no defense to an action for injury from an explosion caused by drawing gasoline from tanks near a furnace that the fire never before ignited gas from gasoline so drawn.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

\*The owner or controller of dangerous explosives must exercise great care to prevent an injury which a prudent man would reasonably foresee might result from an explosion.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

**EX POST FACTO LAWS.**

Constitutional restrictions, see "Constitutional Law," § 2.

**FACTORS.**

See "Brokers"; "Principal and Agent."

**FALSE PRETENSES.**

\*Evidence held insufficient to support a conviction for swindling.—*Campbell v. State* (Tex. Cr. App.) 180.

**FALSE SWEARING.**

See "Perjury."

**FEDERAL COURTS.**

See "Courts," § 4.

**FEEES.**

Dismissal of appeal for failure to pay docket fees, see "Appeal and Error," § 18.

In foreclosure proceedings, see "Mortgages," § 3.

Recovery of attorney's fees in action on attachment bond, see "Attachment," § 1.

Witnesses' fees as costs, see "Costs," § 2.

**FEE SIMPLE.**

Creation by will, see "Wills," § 4.

**FELLOW SERVANTS.**

See "Master and Servant," § 4.

**FELONY.**

Offenses punishable as, see "Criminal Law," § 1.

**FENCES.**

Railroad fences, see "Railroads," § 8.

**FERRIES.**

Taxation, see "Taxation," § 8.

**FIDELITY INSURANCE.**

See "Insurance," § 7.

**FILING.**

Abstract of record for purpose of review, see "Appeal and Error," § 11.

Bill of exceptions, see "Criminal Law," § 34;

"Exceptions, Bill of," § 2.

Bill of exceptions on appeal or writ of error, see "Appeal and Error," § 9.

Bond on appeal or writ of error, see "Appeal and Error," § 6.

Briefs on appeal or writ of error, see "Appeal and Error," § 17.

Instrument of adoption, see "Adoption."

Mechanics' liens, see "Mechanics' Liens," § 1.

Pleading, see "Pleading," § 8.

Record on appeal or writ of error, see "Appeal and Error," § 18.

Statement of case or facts for purpose of review, see "Criminal Law," § 35.

**FINAL JUDGMENT.**

Appealability, see "Appeal and Error," § 3.

Review in criminal prosecutions, see "Criminal Law," § 30.

**FINDINGS.**

Review on appeal or writ of error, see "Appeal and Error," § 25.

Setting aside, see "New Trial," § 2.

Special findings by jury, see "Trial," § 10.

**FINES.**

Imposition as punishment in criminal prosecution, see "Criminal Law," § 29.

**FIRE INSURANCE.**

See "Insurance."

**FIRES.**

Assessment of damages in action for injuries caused by, see "Damages," § 6.

Caused by operation of railroad, see "Railroads," § 9.

Ground for new trial in action for negligently setting fire, see "New Trial," § 2.

Measure of damages for injuries caused by, see "Damages," § 2.

**FISH.**

\*Act May 23, 1901 (Kirby's Dig. § 3802), prohibiting the using of fish traps in any of

\*Point annotated. See syllabus.

the waters of the state except in certain counties, *held* constitutional.—*Sherrill v. State* (Ark.) 967.

Act June 26, 1897 (Kirby's Dig. § 8600), prohibiting the placing of fish traps in waters of the state, *held* repealed in part by Act May 23, 1901 (Kirby's Dig. § 3602).—*Sherrill v. State* (Ark.) 967.

\*An indictment under Act May 23, 1901 (Kirby's Dig. § 3602), for unlawfully placing a fish trap in a river, *held* sufficient.—*Sherrill v. State* (Ark.) 967.

Acts 30th Leg. p. 101, c. 78, under which the sale of fish caught in certain portions of H. county is not prohibited, *held* to repeal Acts 30th Leg. p. 134, c. 75, prohibiting the sale of fish taken from any of the fresh water lakes or streams in H. county.—*Hall v. State* (Tex. Cr. App.) 149.

## FIXTURES.

In absence of agreement between gas company and owner of house, pipes installed by company *held* not to have become fixtures.—*Laclede Gas-light Co. v. Gas Consumers' Ass'n* (Mo. App.) 91.

## FORCIBLE DEFILEMENT.

See "Rape."

## FORECLOSURE.

Default judgment, see "Judgment," § 3.  
Of chattel mortgage, see "Chattel Mortgages," § 4.  
Of lien, see "Mechanics' Liens," § 2.  
Of mortgage, see "Mortgages," §§ 2, 8.

## FOREIGN CORPORATIONS.

See "Corporations," § 5.  
Default judgment against, see "Judgment," § 3.  
Excessive penalties for violation of anti-trust law, see "Penalties," § 1.  
Foreign railroad company, see "Railroads," § 2.  
Harmless error in action by state against, for violation of anti-trust law, see "Appeal and Error," § 33.  
Jurisdiction of Supreme Court to appoint receiver of, see "Courts," § 3.  
Taxation, see "Taxation," §§ 2, 3.  
Violation by, of anti-trust laws, see "Monopolies," § 1.

## FOREIGN COURTS.

See "Courts," § 5.

## FORFEITURES.

Of bail bond, see "Bail," § 1.  
Of insurance, see "Insurance," § 4.

## FORGERY.

Of deed, see "Deeds," § 4.

\*In a prosecution for attempting to pass a forged instrument, an allegation of the indictment that accused passed a false check to one W. is not sustained by proof that he passed it to one F., who delivered it to W.—*Morris v. State* (Tex. Cr. App.) 383.

A charge in a prosecution for passing a forged check *held* erroneous as confusing.—*Morris v. State* (Tex. Cr. App.) 383.

## FORMER ADJUDICATION.

See "Judgment," §§ 7, 8.

## FORMS OF ACTION.

See "Action," § 2; "Ejectment"; "Replevin"; "Trove and Conversion."

## FORNICATION.

See "Lewdness"; "Seduction," § 1.

## FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Parol evidence to invalidate written instrument, see "Evidence," § 9.

Pleading fraud in action on note, see "Bills and Notes," § 4.

*By particular classes of persons, or persons in particular relations.*

Applicant for insurance, see "Insurance," § 10.

*In particular classes of conveyances, contracts, transactions, or proceedings.*

See "Contracts," § 1; "Deeds," §§ 1, 4; "Sales," § 1.

Sale of community property, see "Husband and Wife," § 4.

§ 1. **Deception constituting fraud, and liability therefor.**

\*A seller is liable to an action of deceit if he fraudulently represents the quality of the thing sold to be other than it is in particulars which the buyer has not equal means of knowing.—*Hines v. Royce* (Mo. App.) 1091.

\*Plaintiff *held* entitled to recover for defendant's misrepresentations.—*Hines v. Royce* (Mo. App.) 1091.

\*Neither law nor equity will afford relief on the ground of false representation where the subject-matter is equally known to both parties, or where both parties have equal means of information, and regarding which one or the other is negligent.—*Hines v. Royce* (Mo. App.) 1091.

\*Plaintiff *held* not entitled to recover for defendant's fraud, since he had every opportunity to inform himself concerning the transaction and negligently failed to do so.—*Hines v. Royce* (Mo. App.) 1091.

\*False and material representations inducing one to sign a contract *held* a defense, though not known to be false when made.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

\*One to whom false statements are made *held* not required to investigate their truth before relying on them.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

§ 2. **Actions.**

Evidence *held* not to show that defendant was guilty of deceit, misrepresentation, or concealment in the sale of corporate stock to him by plaintiff.—*Baird v. Granniss* (Mo.) 980.

In an action for fraud, a prospectus advertising defendant's business *held* admissible, though no reference was made to it in the petition.—*Hines v. Royce* (Mo. App.) 1091.

In an action by a purchaser of corporate stock for defendant's fraud in representing the business as in a flourishing condition *held* proper to interrogate defendant as to the corporation's liabilities.—*Hines v. Royce* (Mo. App.) 1091.

\*Point annotated. See syllabus.

In an action by a purchaser of corporate stock for defendant's fraud in representing the corporation's condition, evidence examined, and *held* to show that defendant's representations were false and induced plaintiff to make the investment.—*Hines v. Royce* (Mo. App.) 1001.

\*It is a general rule that where fraud is relied on as a defense the answer must state the facts constituting the fraud.—*Main v. Hall* (Mo. App.) 1009.

## FRAUDS, STATUTE OF.

Requirements of, affecting parol lease, see "Landlord and Tenant," § 4.

### § 1. Premises to answer for debt, default, or miscarriage of another.

\*In an action for the price of goods furnished to defendant's employes subsequent to a promise by defendant to pay for same, the statute of frauds is no defense.—*Pulaski Stave Co. v. Sale* (Ky.) 786.

### § 2. Real property and estates and interests therein.

\*An agreement between adjoining landowners as to their common boundary is not within the statute of frauds.—*McKeon v. Roan* (Tex. Civ. App.) 404.

### § 3. Sales of goods.

\*An order for sashes and doors for a special purpose, to be manufactured by the seller at a stated price of \$250, to be paid on completion of the work, is a contract for the sale of goods, and not for labor, within the meaning of the statute of frauds (Rev. St. 1899, § 3419 [Ann. St. 1906, p. 1963]).—*Tower Grove Planing Mill Co. v. McCormack* (Mo. App.) 113.

## FRAUDULENT CONVEYANCES.

By mortgagor of chattels, see "Chattel Mortgages," § 4.

Chattel mortgages in fraud of creditors, see "Chattel Mortgages," § 3.

### § 1. Transfers and transactions invalid.

\*A chattel mortgage, not setting out the names of the creditors secured and the amount due each, *held* fraudulent as to creditors, as tending to hinder and delay them.—*Independent Packing Co. v. Barth* (Mo. App.) 1121.

### § 2. Remedies of creditors and purchasers.

A plaintiff cannot recover in ejectment on the ground that a deed valid on its face, under which defendant claims title, was in fact made to defraud creditors, since it could not be attacked collaterally, or otherwise than in a proceeding in equity.—*White v. Schroetter* (Mo.) 521.

## GAME.

See "Fish."

## GAMING.

Evidence of other offenses, see "Criminal Law," § 8.

Restraining use of premises for gambling, see "Injunction," § 3.

## GARNISHMENT.

See "Attachment"; "Execution."

## GAS.

Assessment of damages in action for injuries to property caused by discharges from gas plant, see "Damages," § 6.

\*Point annotated. See syllabus.

Maintaining of gas plant as nuisance, see "Nuisance," § 1.

Pipes installed by gas company as fixtures, see "Fixtures."

Gas company *held* not to have acquired right to prohibit owner of house from installing governors to regulate gas pressure.—*Laclede Gaslight Co. v. Gas Consumers' Ass'n* (Mo. App.) 91.

Neither house owner nor any one for him *held* to have right to place governor upon gas pipe, where such act would throw the gas company's meter out of plumb, cause it to leak, or its parts, connections, or seals to be broken.—*Laclede Gaslight Co. v. Gas Consumers' Ass'n* (Mo. App.) 91.

Gas company *held* entitled to injunction to restrain interference with its meter connections, decree for which should protect inherent rights of property owners.—*Laclede Gaslight Co. v. Gas Consumers' Ass'n* (Mo. App.) 91.

Certain requirement of decree restraining company installing appliances to regulate flow of gas from interfering with gas company's meter connections stated.—*Laclede Gaslight Co. v. Gas Consumers' Ass'n* (Mo. App.) 91.

## GASOLINE.

See "Explosives."

## GIFTS.

### § 1. Inter vivos.

\*A gift *held* not complete unless executed.—*Commonwealth v. Perkins* (Ky.) 810.

\*Evidence in a proceeding to tax notes as omitted property *held* not to show a change of ownership from the one proceeded against to his then minor son by gift.—*Commonwealth v. Perkins* (Ky.) 810.

\*A delivery of notes to another with the intention by the owner, whether express or implied, of divesting himself of title and vesting the same in such other, constitutes a gift.—*Clark v. Gurley* (Tex. Civ. App.) 394.

In a contest as to the title to notes executed to a decedent between decedent's heirs and one claiming under decedent's wife to whom it was alleged decedent gave the notes, the rights of creditors not being involved, the question of good faith *held* not involved.—*Clark v. Gurley* (Tex. Civ. App.) 394.

In a contest as to the title of notes, the expression "explicit intention" in an instruction *held* too strong and capable of being understood by the jury as signifying expressed intention.—*Clark v. Gurley* (Tex. Civ. App.) 394.

## GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 3.

Of purchaser, see "Bills and Notes," § 2; "Vendor and Purchaser," § 4.

## GOVERNOR.

Power to pardon, see "Pardon."

## GRAND JURY.

See "Indictment and Information."

**GRANTS.**

Construction in favor of validity, see "Contracts," § 2.  
Of right to use street, see "Municipal Corporations," § 6.

**GUARANTY.**

See "Indemnity"; "Principal and Surety."  
Power of national bank to make contract of guaranty, see "Banks and Banking," § 2.  
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

**§ 1. Construction and operation.**

\*One furnishing supplies to a person on the promise of defendant to pay therefor *held* entitled to recover.—Burkett & Barnes v. Miller (Tex. Civ. App.) 1153.

**GUARDIAN AND WARD.**

Collateral attack on order discharging sureties on guardian's bond, see "Judgment," § 6.  
Deposits in bank by guardian, see "Banks and Banking," § 1.  
Guardianship of insane persons, see "Insane Persons," § 1.  
Persons concluded by order setting aside property to guardian as homestead for minor, see "Judgment," § 8.  
Resulting trust in land purchased by guardian at execution sale under a judgment belonging to her and her ward, see "Trusts," § 1.

**HABEAS CORPUS.**

Review of contempt proceedings, see "Contempt," § 2.

**§ 1. Nature and grounds of remedy.**

\*In habeas corpus proceedings by a person imprisoned for violating an injunction, the question is not whether the writ was erroneously issued, but whether it was void.—Ex parte Testard (Tex.) 319; Ex parte Howard (Tex.) 321.

**§ 2. Jurisdiction, proceedings, and relief.**

\*In habeas corpus, where petitioner waives taking testimony of controverted facts, the case must be considered on the narrations of the judgment and commitment, and the truth of their recitals cannot be controverted, nor can facts dehors the record be considered.—Ex parte Clark (Mo.) 990.

\*In habeas corpus the doctrine of *res judicata* does not apply where the prisoner has been remanded, except that under Rev. St. 1899, § 3546 [Ann. St. 1906, p. 2017], the petition must show that no application has been made to or refused by any court, etc., superior to the one to which it is presented.—Ex parte Clark (Mo.) 990.

Even if the court on habeas corpus has authority to go behind the judgment to inquire whether there was such a hearing as would support it, such inquiry cannot be had where the entire proceedings upon the hearing are not before the court.—Ex parte Testard (Tex.) 319; Ex parte Howard (Tex.) 321.

**HABITUAL CRIMINALS.**

See "Criminal Law," § 44.

**HARMLESS ERROR.**

In civil actions, see "Appeal and Error," §§ 26-33.

In criminal prosecutions, see "Criminal Law," § 43; "Homicide," § 9.

\*Point annotated. See syllabus.

**HEARING.**

In probate proceedings, see "Wills," § 3.

**HEARSAY EVIDENCE.**

In civil actions, see "Evidence," § 7.  
In criminal prosecutions, see "Criminal Law," §§ 10, 43.

**HEIRS.**

See "Descent and Distribution."

**HIGHWAYS.**

See "Municipal Corporations," §§ 6, 7.  
Accidents at railroad crossings, see "Railroads," § 6.

**§ 1. Regulation and use for travel.**

\*Evidence *held* insufficient to sustain a conviction for obstructing a public road.—Roberts v. State (Ark.) 938.

**HISTORY.**

Judicial notice of historical facts, see "Evidence," § 1.

**HOMESTEAD.**

Partition of, see "Partition," § 2.  
Persons concluded by order setting aside property to guardian as homestead for minor, see "Judgment," § 8.

**§ 1. Transfer or incumbrance.**

The right of adjoining landowners to agree as to their common boundary is not affected by the fact that one of the lots is a homestead.—McKeon v. Roan (Tex. Civ. App.) 404.

\*A husband cannot by a sale and abandonment in fraud of his wife destroy her homestead rights.—Gray v. Fussell (Tex. Civ. App.) 454.

**§ 2. Rights of surviving husband, wife, children, or heirs.**

\*During the life of the surviving parent, the homestead rights of a minor child can only be asserted through such parent.—Williams v. Jones (Tex. Civ. App.) 755.

**§ 3. Protection and enforcement of rights.**

\*Whether lots had been dedicated as a homestead at the time they were conveyed by the husband *held* for the jury.—Gray v. Fussell (Tex. Civ. App.) 454.

**HOMICIDE.**

Amendment of verdict, see "Criminal Law," § 26.

Argument and conduct of counsel at trial, see "Criminal Law," § 21.

Competency of witness, see "Witnesses," § 1.  
Confessions in general, see "Criminal Law," § 15.

Conviction of offense included in that charged, see "Indictment and Information," § 5.

Course and conduct of trial in general, see "Criminal Law," § 18.

Cross-examination of witness, see "Witnesses," § 2.

Custody and deliberations of jury, see "Criminal Law," § 25.

Declarations by third persons as evidence, see "Criminal Law," § 10.

Formal requisites of information, see "Indictment and Information," § 1.

Grounds for change of venue in general, see "Criminal Law," § 3.  
 Grounds for new trial in general, see "Criminal Law," § 28.  
 Harmless error in rulings on evidence in general, see "Criminal Law," § 43.  
 Opinion evidence in general, see "Criminal Law," § 13.  
 Province of court and jury in general, see "Criminal Law," § 22.  
 Qualification of jurors, see "Jury," § 3.  
 Relevancy of evidence in general, see "Criminal Law," § 7.  
 Sufficiency of instructions, see "Criminal Law," § 23.  
 Testimony of accomplices, see "Criminal Law," § 14.  
 Waiver of right to trial by jury, see "Jury," § 1.

### § 1. Murder.

\*Mere words or epithets, however opprobrious or insulting, cannot justify the killing of the person who uses them, but his killing by one while in a violent passion aroused by such language, though not deliberate, is murder in the second degree, if done willfully, premeditatedly, and of malice aforethought.—*State v. Ballance* (Mo.) 60.

A conviction for murder in the first degree *held* not sustained in view of the evidence as to insanity.—*State v. Speyer* (Mo.) 505.

\*An intentional killing without deliberation is either murder in the second degree or manslaughter in the fourth degree, under Rev. St. 1890, § 1834 [Ann. St. 1906, p. 1269], which in effect covers intentional killing without malice aforethought.—*State v. Speyer* (Mo.) 505.

\*In the absence of either deliberation or premeditation there can be no murder in the first degree, for both are necessary elements of that crime.—*State v. Speyer* (Mo.) 505.

\*Deliberation is prolonged premeditation and implies a cool state of the blood.—*State v. Speyer* (Mo.) 505.

\*A killing may be premeditated, though the purpose is formed but a moment before it is executed.—*State v. Speyer* (Mo.) 505.

### § 2. Manslaughter.

\*If one while doing an act which constitutes a misdemeanor, kills another, with intent only to commit such misdemeanor, he is guilty of manslaughter.—*Commonwealth v. Couch* (Ky.) 830.

Death of deceased following a premature birth of a child caused by fright induced by defendant's illegal discharge of firearms in a public highway *held* insufficient to sustain an indictment against defendant for manslaughter.—*Commonwealth v. Couch* (Ky.) 830.

\*Involuntary manslaughter is the killing of another in doing some unlawful act, but without intent to kill.—*Commonwealth v. Couch* (Ky.) 830.

\*Mere insulting words without personal violence by deceased toward defendant *held* insufficient provocation to reduce the killing from murder to manslaughter.—*State v. Kennedy* (Mo.) 57.

\*Where accused sought out and killed deceased at the first meeting because of alleged slanderous statements made by deceased concerning accused's daughter, which had been communicated to accused, the offense was manslaughter.—*Hill v. State* (Tex. Cr. App.) 145.

\*A husband who kills his wife's insulter the first time he meets him after being informed of the insult and while so overcome by rage that his mind is incapable of cool reflection is

guilty only of manslaughter.—*Stewart v. State* (Tex. Cr. App.) 685.

### § 3. Excusable or justifiable homicide.

\*The relation existing between defendant and his paramour *held* insufficient to authorize defendant to kill deceased because of an alleged assault committed by deceased on her.—*State v. Kennedy* (Mo.) 57.

### § 4. Indictment and information.

Where the first count in an indictment charges murder and the second count charges a conspiracy to commit the murder, proof of a conspiracy is not essential in order to convict defendant of voluntary manslaughter.—*Jones v. Commonwealth* (Ky.) 802.

\*An information in a murder case *held* to sufficiently allege that the wound was inflicted by and as a result of the assault.—*State v. Ballance* (Mo.) 60.

### § 5. Evidence—Admissibility in general.

\*In a prosecution for murder, evidence of a previous difficulty between defendant's brother and the father of deceased is incompetent where there is nothing shown to connect defendant with such difficulty.—*Jones v. Commonwealth* (Ky.) 802.

\*In a prosecution for murder, admission of evidence of statements about a difficulty between defendant's brother and the father of deceased to establish a motive by showing ill feeling by defendant toward the family of deceased is not prejudicial, where a verdict for voluntary manslaughter was returned.—*Jones v. Commonwealth* (Ky.) 802.

\*Where defendant shot and killed deceased as deceased was going away from him, evidence that deceased had previously made threats against defendant was inadmissible to explain defendant's possession of a pistol at the time of the homicide.—*State v. Kennedy* (Mo.) 57.

\*In a homicide case, the exclusion of evidence of the reputation of decedent for violence *held* not erroneous.—*Earles v. State* (Tex. Cr. App.) 138.

On a trial for homicide, the refusal to strike out certain of the state's evidence *held* proper.—*Earles v. State* (Tex. Cr. App.) 138.

On a trial for the murder of a police officer by accused while resisting arrest, it was proper for the state to show a basis for a legal arrest.—*Earles v. State* (Tex. Cr. App.) 138.

\*On a trial for homicide, testimony of the appearance of accused before and at the time of the killing *held* competent.—*Earles v. State* (Tex. Cr. App.) 138.

On a trial for the murder of a police officer by accused while resisting arrest without warrant, ordinances showing the authority of a police officer to arrest without warrant were properly received in evidence.—*Earles v. State* (Tex. Cr. App.) 138.

Where defendant claimed that he killed deceased in defense of the reputation of his daughter, evidence of an uncommunicated conversation in which deceased attacked the reputation of the daughter was admissible.—*Hill v. State* (Tex. Cr. App.) 145.

In a homicide case, evidence that, two days before the killing of decedent by shooting with a pistol, accused displayed a pistol, was competent, though the weight thereof was slight.—*Tinsley v. State* (Tex. Cr. App.) 347.

\*On a trial for the killing of a negro woman, threats by defendant to kill a "guinea" *held* inadmissible against him; it not being shown that the threat was directed against decedent.—*Garrett v. State* (Tex. Cr. App.) 389.

\*Point annotated. See syllabus.



In a homicide case evidence *held* inadmissible as having no bearing on the case.—*Stewart v. State* (Tex. Cr. App.) 685.

### § 6. — Dying declarations.

\*A statement by one shot that a certain person had shot him *held* admissible in a trial for his murder.—*Jones v. State* (Tex. Cr. App.) 345.

### § 7. — Weight and sufficiency.

\*Evidence *held* to sustain a conviction of murder in the second degree.—*Reeves v. State* (Ark.) 945; *Tinsley v. State* (Tex. Cr. App.) 347.

\*Evidence examined, and *held* sufficient to sustain a conviction for manslaughter.—*Crofton v. State* (Ark.) 671.

\*In a prosecution for murder, evidence *held* sufficient to sustain a conviction for voluntary manslaughter.—*Jones v. Commonwealth* (Ky.) 802.

\*In a prosecution for murder, evidence *held* to sustain a conviction of voluntary manslaughter.—*Martin v. Commonwealth* (Ky.) 863.

\*Evidence *held* to show no deliberation in the case of a homicide.—*State v. Speyer* (Mo.) 505.

\*In a prosecution of a policeman for killing one under arrest, evidence *held* to sustain a conviction of manslaughter.—*Buchanan v. State* (Tex. Cr. App.) 134.

\*Evidence *held* to support a verdict of murder in the first degree.—*Mitchell v. State* (Tex. Cr. App.) 135.

Evidence *held* sufficient to sustain a conviction of murder.—*Jones v. State* (Tex. Cr. App.) 345.

In a prosecution under Pen. Code 1895, art. 645, evidence examined, and *held* not to support a verdict of guilty.—*Hardin v. State* (Tex. Cr. App.) 352.

\*Evidence *held* insufficient to show murder in the second degree on an offense greater than manslaughter.—*Riles v. State* (Tex. Cr. App.) 357.

Evidence in prosecution for homicide *held* to show the cause of the crime to have been an insult by deceased to defendant's wife, reducing the crime to manslaughter.—*Stewart v. State* (Tex. Cr. App.) 685.

### § 8. Trial.

In a trial for homicide, defendant *held* not entitled to complain of the instructions.—*Crofton v. State* (Ark.) 671.

\*An instruction on self-defense *held* erroneous.—*Burton v. State* (Ark.) 942.

\*On a trial for homicide, an instruction on self-defense *held* misleading because contradictory to a correct instruction on self-defense.—*Burton v. State* (Ark.) 942.

\*In a murder case, a failure to charge on manslaughter *held* not error.—*State v. Ballance* (Mo.) 60.

\*An instruction as to the effect of threats in a murder case *held* proper.—*State v. Ballance* (Mo.) 60.

\*An instruction, in a prosecution for murder in the first degree, *held* erroneous as not requiring the jury to find that the killing was done with deliberation and premeditation.—*State v. Speyer* (Mo.) 505.

Where, on a trial for the murder of a police officer by accused while resisting arrest without warrant, the evidence was conflicting on the issue whether the arrest was legal, the court properly defined a legal arrest and submitted the question to the jury.—*Earles v. State* (Tex. Cr. App.) 138.

\*Evidence of a statement made by prosecutor to defendant shortly before the assault *held* not to require a charge on the law of threats.—*Patterson v. State* (Tex. Cr. App.) 142.

\*The court did not err in limiting defendant's right of self-defense to the right of defendant to defend himself against an attack which prosecutor was making against defendant at the very time defendant attacked him.—*Patterson v. State* (Tex. Cr. App.) 142.

\*Where the knife with which defendant attacked deceased was a deadly weapon, the court was not required to charge on the size of the weapon.—*Patterson v. State* (Tex. Cr. App.) 142.

Where there were no threats made prior to the difficulty, the court did not err in failing to charge on threats.—*Davis v. State* (Tex. Cr. App.) 144.

An instruction that reasonable apprehension of death or serious bodily injury would excuse a person from using all necessary force to protect his life and person *held* not objectionable as too restrictive.—*Davis v. State* (Tex. Cr. App.) 144.

An instruction that accused was indicted for murder and was on trial for murder in the second degree, and that the court would also submit the issue of manslaughter, *held* not erroneous because accused was at the same time on trial for both.—*Hill v. State* (Tex. Cr. App.) 145.

In a prosecution for homicide in defense of the character of defendant's daughter, an instruction *held* erroneous.—*Hill v. State* (Tex. Cr. App.) 145.

\*One accused of murder *held* not entitled to complain because the court failed to instruct on the law of accomplices and principals.—*Cason v. State* (Tex. Cr. App.) 337.

Where one is charged with shooting at two persons, he cannot be convicted of shooting at any other party in the crowd, if there were more than the persons named in such crowd.—*Choice v. State* (Tex. Cr. App.) 387.

In a homicide case a charge on manslaughter *held* erroneous.—*Stewart v. State* (Tex. Cr. App.) 685.

\*In a homicide case failure to charge on self-defense *held* not error.—*Stewart v. State* (Tex. Cr. App.) 685.

### § 9. Appeal and error.

Error in an instruction on voluntary manslaughter *held* not prejudicial to defendant.—*Sims v. Commonwealth* (Ky.) 214.

\*In a prosecution for homicide, defendant *held* not prejudiced by evidence that a man came to deceased and told him that defendant wanted him to come to defendant's tent after deceased had eaten his dinner, and that deceased went.—*State v. Kennedy* (Mo.) 57.

On a trial for homicide, the allowance of questions asked accused on cross-examination *held* not prejudicial.—*Earles v. State* (Tex. Cr. App.) 138.

\*On a trial for the murder of a police officer by accused while resisting arrest, the admission of evidence of a conversation between decedent and another officer with respect to the latter's desire to arrest accused was harmless.—*Earles v. State* (Tex. Cr. App.) 138.

\*On a trial for homicide, the admission of certain evidence *held* harmless in view of the verdict.—*Earles v. State* (Tex. Cr. App.) 138.

In a homicide case, the error in admitting in evidence the clothing worn by decedent at the

\*Point annotated. See syllabus.

time of the homicide *held* harmless.—*Tinsley v. State* (Tex. Cr. App.) 347.

\*On a trial for homicide, the admission of certain evidence, though erroneous, *held* not ground for reversal.—*Tinsley v. State* (Tex. Cr. App.) 347.

## HOSPITALS.

See "Asylums."

Exemption from taxation, see "Taxation," § 2. Liability of hospital maintained as charitable institution for injuries to patient, see "Charities," § 1.

In an action for injuries to a patient in a hospital, a finding of negligence on the part of the hospital employees *held* authorized by the evidence.—*University of Louisville v. Hammock* (Ky.) 219.

A hospital maintained by a University as an adjunct to its school of medicine *held* not a charitable institution, and hence to be liable for the torts of its agents and employees resulting in injury to a patient.—*University of Louisville v. Hammock* (Ky.) 219.

Under Act April 15, 1905, Sess. Acts 1905, p. 292 [Ann. St. 1906, p. 3717], Rev. St. 1899, §§ 7808, 7809 [Ann. St. 1906, p. 3710], Act April 15, 1907 (Laws 1907, p. 37), § 27a, and Act March 19, 1907 (Laws 1907, pp. 309, 310), §§ 15, 16, *held*, that the Legislature intended the state sanatorium's receipts be used to defray the sanatorium's running expenses, and not that they go to the state's general revenue fund, and that the "Missouri state sanatorium fund" was created, though not in express terms.—*State ex rel. Eaton v. Gmelich* (Mo.) 618.

Moneys received by the State Treasurer, under Act March 19, 1907 (Laws 1907, p. 309), § 15, *held* moneys "derived from the payment into the state treasury," etc., within Act April 15, 1907 (Laws 1907, p. 37), § 27a.—*State ex rel. Eaton v. Gmelich* (Mo.) 618.

## HOTELS.

See "Innkeepers."

Ordinances prohibiting soliciting of customers on depot platform, see "Municipal Corporations," § 5.

## HOUSEBREAKING.

See "Burglary."

## HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Marriage."

Adultery, see "Adultery."

Common-law wife as party in ejectment, see "Ejectment," § 2.

Competency as witnesses, see "Witnesses," § 1. Cross-examination of as witnesses, see "Witnesses," § 2.

Determination and disposition of cause in action against, see "Appeal and Error," § 36.

Direct or remote consequences of injuries to wife, see "Damages," § 1.

Equitable relief from judgment against, see "Judgment," § 5.

Evidence in action by husband to recover for injuries to wife while a passenger, see "Carriers," § 9.

Husband and wife as parties in action to quiet title, see "Quieting Title," § 2.

Measure of damages for death of husband, see "Death," § 2.

Measure of damages for injuries to wife, see "Damages," § 2.

Operation and effect of wife's acknowledgment, see "Acknowledgment," § 3.

Proceedings constituting appearance by wife, see "Appearance."

Provision in will of husband as to share of wife, see "Wills," § 4.

Rights of survivor, see "Executors and Administrators," § 3.

### § 1. Mutual rights, duties, and liabilities.

The respective interests acquired by a husband and wife under a deed to them are fixed as of the delivery of the deed and are not otherwise affected by subsequent legislation.—*Hough v. Jasper County Light & Fuel Co.* (Mo. App.) 547.

### § 2. Wife's separate estate.

A judgment over against a married woman in favor of a surety in a mortgage *held* erroneous.—*Littler v. Dielmann* (Tex. Civ. App.) 1137.

### § 3. Actions.

\*Under the statute authorizing a married woman to sue and to be sued as a single woman, coverture at the time of the execution of an instrument, in effect a title bond, to be available as a defense, must be pleaded.—*Belcher v. Polly* (Ky.) 818.

### § 4. Community property.

\*Land conveyed to a married woman becomes community property unless paid for by her separate means, or unless the title was placed in her own name for the purpose of making a gift to her.—*Wade v. Wade* (Tex. Civ. App.) 188.

A married woman, seeking to set aside a deed of community property on the ground of the fraud of the grantee, her son, *held* not entitled to recover all the land; the son owning an interest by inheritance from her husband.—*Wade v. Wade* (Tex. Civ. App.) 188.

## HYPOTHETICAL QUESTIONS.

See "Evidence," § 10.

## ILLEGITIMATE CHILDREN.

See "Bastards."

## IMPEACHMENT.

Of witness, see "Witnesses," § 8.

## IMPLIED CONTRACTS.

See "Contribution"; "Covenants," § 1; "Indemnity"; "Money Paid"; "Work and Labor."

## IMPRISONMENT.

See "Bail."

Habeas corpus, see "Habeas Corpus."

## IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 4.

## IMPUTED NEGLIGENCE.

See "Negligence," § 3.

## INADVERTENCE.

Ground for new trial, see "New Trial," § 2.

\*Point annotated. See syllabus.

## INCOMPETENT PERSONS.

See "Insane Persons."

## INCUMBRANCES.

Covenants against, see "Covenants," §§ 1, 2.

## INDECENCY.

See "Obscenity."

## INDEMNITY.

See "Guaranty"; "Principal and Surety."

Certification by bank officer of indemnity instrument, see "Banks and Banking," § 2.

In an action by the owners of a building to recover over against a contractor for damages recovered against them by a tenant for the contractor's negligence in making alterations in the premises, the contractor's liability being limited to the injury sustained by the tenants by the contractor's negligence alone, the question whether the tenants gave permission for the performance of the work was immaterial.—Katterjohn v. Nahm (Ky.) 1179.

Defendant having been warned to defend a suit brought against plaintiffs for defendant's negligence, as he was bound to do under a covenant, he was bound by the judgment rendered in such action against plaintiffs.—Katterjohn v. Nahm (Ky.) 1179.

Where plaintiffs recovered against their landlords for breach of contract to furnish water to irrigate their crops, the landlords were not thereby entitled to recover over against an irrigation company which had agreed to furnish the water to the landlords the amount of plaintiffs' recovery.—Stockton v. Brown (Tex. Civ. App.) 423.

## INDEMNITY INSURANCE.

See "Insurance," § 7.

## INDICTMENT AND INFORMATION.

*Against particular classes of persons.*

See "Railroads," § 1.

*For particular offenses.*

See "Embezzlement"; "Forgery"; "Homicide," § 4.

Against laws for protection of fish, see "Fish."

Carrying weapons, see "Weapons."

Criminal libel, see "Libel and Slander," § 4.

### § 1. Filing and formal requisites of information or complaint.

\*An information in a murder case held sufficient without an allegation of the prosecuting attorney's title to his office, etc.—State v. Balance (Mo.) 60.

\*Where an information concluded with the words "against the peace and dignity of the state," etc., it was not objectionable because each count did not so conclude.—Mercer v. State (Tex. Cr. App.) 865.

### § 2. Requisites and sufficiency of accusation.

\*An indictment need not use the precise words of the statute if words of like import are used and all the facts constituting the offense are stated.—Sherrill v. State (Ark.) 987.

\*Point annotated. See syllabus.

### § 3. Joinder of parties, offenses, and counts, duplicity, and election.

In a prosecution for larceny of a mare and three cows, state held not required to elect upon which property it would proceed to trial.—State v. Soper (Mo.) 3.

\*Separate counts for different misdemeanors may be joined in the same information or indictment and a conviction had for each.—Roseboro v. State (Tex. Cr. App.) 134.

\*An indictment under Pen. Code 1895, art. 856, held void for duplicity.—Murdock v. State (Tex. Cr. App.) 374.

### § 4. Motion to quash or dismiss, and demurrer.

A variance in the name of defendant as given in the indictment and in the copy of the indictment served on defendant held no ground for quashing the indictment.—Smith v. State (Tex. Cr. App.) 1161.

A motion to quash a copy of the indictment served on defendant held properly overruled.—Smith v. State (Tex. Cr. App.) 1161.

### § 5. Conviction of offense included in charge.

\*Under an indictment for murder, the defendant may be prosecuted for any degree of homicide.—Commonwealth v. Couch (Ky.) 880.

One indicted under one section of a statute held subject to conviction under another.—State v. Hamill (Mo. App.) 1103.

Where one is indicted for an assault with intent to kill a specified person, he may not be convicted for shooting at another.—Spencer v. State (Tex. Cr. App.) 386.

## INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

## INFANTS.

See "Adoption."

Applicability of instruction to evidence in action for injuries to minor, see "Trial," § 6.

Assumption of risks by infant employe, see "Master and Servant," § 5.

Construction and operation of instructions in action for injuries to, see "Trial," § 8.

Contributory negligence on part of children, see "Negligence," § 3.

Harmless error in action for injuries to child, see "Appeal and Error," § 32.

Injuries to, as passengers, see "Carriers," § 9.

Persons concluded by order setting aside property to guardian as homestead for minor, see "Judgment," § 8.

Rights as to homestead, see "Homestead," § 2.

Sales of liquors to minors, see "Intoxicating Liquors," §§ 5, 6.

### § 1. Contracts.

Where a father did business in the name of his minor son, and gave a note signed by both for goods purchased, but the son had neither possession nor benefit from the goods, he was not liable.—Memphis Coffin Co. v. Patton (Tex. Civ. App.) 697.

### § 2. Actions.

In an action against a minor on a note given for goods purchased by his father in a business transacted in the minor's name, evidence held to sustain a finding that the minor had no knowledge of the transaction and was not guilty of fraud.—Memphis Coffin Co. v. Patton (Tex. Civ. App.) 697.

## INFORMATION.

Criminal accusation, see "Indictment and Information."  
In nature of quo warranto, see "Quo Warranto," § 2.

## INHERITANCE.

See "Descent and Distribution."

## INJUNCTION.

Amendment of pleading, see "Pleading," § 6.  
*Relief against particular acts or proceedings.*  
See "Execution," § 2.  
Change of beneficiaries in insurance certificate, see "Insurance," § 10.  
Enforcement of municipal ordinance, see "Municipal Corporations," § 6.  
Interference with appliance of gas company, see "Gas."  
Interference with office, see "Officers," § 2.  
Invasion of rights of owner of cemetery lot, see "Cemeteries."  
Obstruction of street, see "Municipal Corporations," § 6.  
Payment of claim by municipal corporation, see "Municipal Corporations," § 8.  
Restraining filing of mechanics' liens, see "Mechanics' Liens," § 1.  
Violation of liquor laws, see "Intoxicating Liquors," § 8.

### *Review of proceedings for injunction.*

Scope and extent of review, see "Appeal and Error," § 20.  
Stay pending appeal or writ or error, see "Appeal and Error," § 8.

§ 1. *Nature and grounds in general.*  
"Irreparable injury" defined.—Devou v. Pence (Ky.) 874.

\*A property owner *held* not to have sustained an irreparable injury by the construction of a drain with an outlet on her property, and was therefore not entitled to an injunction restraining the maintenance of the drain.—Devou v. Pence (Ky.) 874.

\*Complainant *held* without an adequate remedy at law on a counterclaim and was entitled to restrain defendants from instituting several actions at law in support of several mechanics' liens arising out of the same contract.—Aimee Realty Co. v. Haller (Mo. App.) 588.

\*Complainant *held* entitled to an injunction restraining defendant from maintaining separate actions at law in support of several mechanics' liens for labor and material under a single contract in order to avoid a multiplicity of suits.—Aimee Realty Co. v. Haller (Mo. App.) 588.

§ 2. *Subjects of protection and relief.*

\*Equity will not restrain a trespass unless it is accompanied by such peculiar circumstances as will make the injury irreparable at law.—Devou v. Pence (Ky.) 874.

\*The rule that an injunction will be granted restraining prosecution of several actions at law arising out of the same controversy does not apply where the actions may be consolidated.—Aimee Realty Co. v. Haller (Mo. App.) 588.

§ 3. *Actions for injunctions.*

In an injunction proceeding in the name of the state, under Act 29th Leg., approved April 19, 1905 (Laws 1905, p. 372, c. 153), to restrain the habitual use of premises for gambling, the petition *held* sufficient.—Cain v. State (Tex. Civ. App.) 770.

In view of Pen. Code 1895, arts. 379, 380, 382, 383, a petition in an injunction proceeding

by the state, under Act 29th Leg., approved April 19, 1905 (Laws 1905, p. 372, c. 153), to restrain the use of premises for purposes of gaming, etc., *held* not defective because not describing the game sought to be inhibited, and negating exceptions to the gaming statute relative to private residences.—Cain v. State (Tex. Civ. App.) 770.

§ 4. *Violation and punishment.*

\*A writ of injunction served on an enjoined person *held* sufficient to render him guilty of contempt in disregarding it, even though through a clerical error it was made returnable at a date prior to its issuance.—Ex parte Testard (Tex.) 319; Ex parte Howard (Tex.) 321.

## INNKEEPERS.

Laws prohibiting soliciting of customers for hotel on depot platform as denying due process of law, see "Constitutional Law," § 4.  
Ordinances prohibiting soliciting of customers on depot platform, see "Municipal Corporations," § 5.

\*In an action of conversion a hotel keeper *held* liable for the value of a suit case and its contents, left in his care.—Heiser v. Berger Catering Co. (Mo. App.) 579.

## IN PAIS.

Estoppel, see "Estoppel," § 2.

## INSANE PERSONS.

Burden of proof as to insanity in criminal prosecution, see "Criminal Law," § 6.  
Effect of plea of insanity as admission, see "Criminal Law," § 10.  
Insane delusions affecting testamentary capacity, see "Wills," § 1.  
Special plea of insanity in criminal prosecution, see "Criminal Law," § 5.

§ 1. *Guardianship.*

Under Rev. St. 1895, art. 1949, relating to guardians' bonds, an order of the county court requiring a guardian to give a new bond and discharging the sureties on an existing bond, based on the oral application of the sureties, *held* not void.—Moore v. Hanscom (Tex.) 876.

The bond of a guardian *held* satisfied by acts of the guardian, so that an order of the court discharging the surety terminated its liability.—Moore v. Hanscom (Tex.) 876.

§ 2. *Property and conveyances.*

Money deposited in a bank by a guardian to his credit as guardian *held* money of the ward within the control of the county court, under Rev. St. 1895, arts. 2640-2644.—Moore v. Hanscom (Tex.) 876.

## INSOLVENCY.

See "Bankruptcy."

Of corporation, see "Corporations," § 4.

## INSTRUCTIONS.

In civil actions, see "Trial," §§ 3-8.

In criminal prosecutions, see "Criminal Law," § 23; "Homicide," § 8.

## INSULTING LANGUAGE.

As affecting degree of homicide, see "Homicide," §§ 1, 2.

\*Point annotated. See syllabus.

## INSURANCE.

Competency of witness in action on insurance policy, see "Witnesses," § 1.  
 Construction of contract to pay assessments on policy, see "Contracts," § 2.  
 Default judgment in action against foreign insurance company, see "Judgment," § 3.  
 Determination and disposition of cause on appeal in an action on policy, see "Appeal and Error," § 36.  
 Estoppel to deny power of life insurance company to take a deed of trust, see "Mortgages," § 1.  
 Harmless error in action on policy, see "Appeal and Error," § 31.  
 Holding of real property by foreign insurance company, see "Corporations," § 5.  
 Measure of damages for breach of contract to pay assessment on policy, see "Damages," § 2.  
 Parol evidence to explain contract, see "Evidence," § 9.  
 Payment of additional premium on insurance policy as accord and satisfaction, see "Accord and Satisfaction."  
 Process in action on policy, see "Process," § 1.  
 Review in action on policy as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

### § 1. Insurance agents and brokers.

A contract of employment of an agent of an insurance company providing for the payment by the company to the agent of contingent commissions *held* to provide for the computation of the commission at the termination of the employment.—Mississippi Home Ins. Co. v. Adams & Boyle (Ark.) 209.

A contract of employment of an agent of an insurance company stipulating for payment by the company to the agent of a contingent commission construed, and *held* to give to the agent a commission on the business done after specified deductions only.—Mississippi Home Ins. Co. v. Adams & Boyle (Ark.) 209.

### § 2. The contract in general.

An insurance company in lending money to its policy holders occupies the same position as any other money lender, and is entitled only to collect the debt, with 6 per cent. interest, and a contract allowing it to demand more will not be enforced.—Emig's Adm'r v. Mutual Ben. Life Ins. Co. (Ky.) 230.

### § 3. Premiums, dues, and assessments.

Employers' liability insurance policies construed, and wages for tinnerns' work done outside *held* within the schedule, entitling the insurance company to have them included in the basis for computing premiums on the policies.—New Amsterdam Casualty Co. v. Mesker (Mo. App.) 561.

Employers' liability insurance policies construed, and the insurance company *held* entitled to a premium computed on the wages not alone of certain classes of employes, but also of certain other classes.—New Amsterdam Casualty Co. v. Mesker (Mo. App.) 561.

### § 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Under Kirby's Dig. § 4375a, a substantial compliance by the insured in a fire policy with the stipulations therein *held* sufficient.—Arkansas Mut. Fire Ins. Co. v. Stuckey (Ark.) 203.

\*A certain fact *held* not to operate as a forfeiture of a fire policy.—Arkansas Mut. Fire Ins. Co. v. Stuckey (Ark.) 203.

A provision in a life policy *held* void because discriminating against a policy holder borrowing money from the insurer; and where an insured borrowed money, the insurer must ascertain the

net reserve and deduct from it the amount of the debt and interest and use the balance for the purchase of extended insurance.—Emig's Adm'r v. Mutual Ben. Life Ins. Co. (Ky.) 230.

An insured in a life policy *held* entitled to dividends in computing the amount available for extended insurance as provided in the policy.—Emig's Adm'r v. Mutual Ben. Life Ins. Co. (Ky.) 230.

### § 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

\*In an action on an accident policy, the court properly charged that, if defendant knew when he sold the policy that insured was over 65 years old, defendant could not plead a clause that the policy should be void as to such persons, unless insured knew that the agent had no authority to issue the policy.—Travelers' Ins. Co. of Hartford, Conn., v. Crawford's Adm'r (Ky.) 290.

### § 6. Risks and causes of loss.

\*Effect of suicide on recovery under a life insurance policy stated.—Metropolitan Life Ins. Co. v. Thomas (Ky.) 1175.

### § 7. Notice and proof of loss.

\*An oral notice given by the sheriff to the local agent of a fidelity insurance company of a loss on deputies' bonds, on which the company was surety, on which notice it acted, *held* a waiver of written notice as required in the policy.—United States Fidelity & Guaranty Co. v. Paxton (Ky.) 841.

\*In an action on a life insurance policy, insurer *held* not entitled to complain because plaintiff in her proofs of loss did not disclose that insured was insane when he committed suicide.—Metropolitan Life Ins. Co. v. Thomas (Ky.) 1175.

### § 8. Payment or discharge, contribution, and subrogation.

An insurance company, having paid the insurance to the beneficiary who had been substituted for the beneficiary originally named in the policy, in good faith, and without notice of claims of the former beneficiary, *held* discharged from further liability.—Renick v. Mutual Life Ins. Co. of New York (Ky.) 310.

### § 9. Actions on policies.

\*In an action on a fire policy, issued before the passage of Act March 29, 1905 (Acts 1905, p. 307), it is improper to include in the judgment the attorney's fees and penalty authorized by the act.—Arkansas Mut. Fire Ins. Co. v. Stuckey (Ark.) 203.

\*The burden of proving that the books kept by insured in a fire policy were not a substantial compliance with the terms of the policy within Kirby's Dig. § 4375a *held* to rest on the insurer.—Arkansas Mut. Fire Ins. Co. v. Stuckey (Ark.) 203.

\*Evidence in an action on a life insurance policy defended on the ground of suicide *held* to sustain a verdict for plaintiff.—Metropolitan Life Ins. Co. v. Thomas (Ky.) 1175.

Where, in an action on a life insurance policy, insurer relied on a statement made by plaintiff in the proofs of loss as an estoppel, she could testify to the facts surrounding her when the statement was made.—Metropolitan Life Ins. Co. v. Thomas (Ky.) 1175.

### § 10. Mutual benefit insurance.

Under the laws of Illinois, a beneficiary in a mutual benefit certificate has no vested interest therein.—Franklin Life Ins. Co. v. Morrell (Ark.) 680.

Beneficiary in a mutual benefit certificate *held* estopped to claim that a surrender of the cer-

\*Point annotated. See syllabus.

tificate for value during the member's life was invalid because of the member's incapacity.—*Franklin Life Ins. Co. v. Morrell* (Ark.) 680.

\*A mutual benefit certificate issued in Illinois, where both the society and the member were domiciled at that time, *held* an Illinois contract and subject to its laws.—*Franklin Life Ins. Co. v. Morrell* (Ark.) 680.

\*An insurance association *held* not a fraternal beneficiary association within Rev. St. 1899, § 1408 [Ann. St. 1906, p. 1111].—*Western Commercial Travelers' Ass'n v. Tennent* (Mo. App.) 1073.

Amendment of 1901 (Laws 1901, p. 96) to Rev. St. 1899, § 1423 [Ann. St. 1906, p. 1119], part of the act of 1897 (Laws 1897, p. 132), relating to fraternal beneficiary associations, *held* not to bring within the provisions of the act a commercial travelers' association previously organized, and not taking advantage of section 1409 [Ann. St. 1906, p. 1113], nor complying with section 1411 [Ann. St. 1906, p. 1114].—*Western Commercial Travelers' Ass'n v. Tennent* (Mo. App.) 1073.

Commercial travelers' association not complying with the act of 1897 (Laws 1897, p. 132), relating to fraternal beneficiary associations, *held* not to forfeit its charter, but to be a mutual benefit association.—*Western Commercial Travelers' Ass'n v. Tennent* (Mo. App.) 1073.

\*Mother of member of mutual benefit association *held* not a member of insured's family or dependent on him, so as to be entitled to benefits under association constitution and Laws 1879, p. 65.—*Western Commercial Travelers' Ass'n v. Tennent* (Mo. App.) 1073.

\*On substitution of invalid for valid designation of beneficiary in benefit certificate, heirs *held* entitled to benefit.—*Western Commercial Travelers' Ass'n v. Tennent* (Mo. App.) 1073.

Contracts of an assessment insurance association with certain classes of its members whereby each class is to pay a level rate do not render the association an ordinary life insurance company, where it reserves the right to increase the rates of assessment.—*Schmidt v. Mutual Reserve Fund Life Ass'n* (Mo. App.) 1082.

An increase in the rate of assessment by a mutual benefit insurance association on its members, according to age, by basing the assessment on the rate for the age attained by the member instead of his age at his entry into the association, *held* within the provisions of the benefit certificate.—*Schmidt v. Mutual Reserve Fund Life Ass'n* (Mo. App.) 1082.

An assessment by a mutual benefit association requiring each member of a certain class to pay for his insurance the actual cost thereof on the basis of his attained age and expectancy of life, *held* not a discrimination against a member of such class on the ground that other classes of the association's members paid flat premiums on the basis of age at entry into the association.—*Schmidt v. Mutual Reserve Fund Life Ass'n* (Mo. App.) 1082.

\*Under the constitution of a "fraternal beneficiary association, its by-laws and benefit certificate, and the application therefor, and Acts 26th Leg. (Sess. Acts 1899, p. 195, c. 115), the representation that the beneficiary named was a cousin of applicant, whereas she was no blood relative, *held* to render the certificate void.—*Gray v. Sovereign Camp Woodmen of the World* (Tex. Civ. App.) 176.

Under Acts 26th Leg. (Sess. Acts 1899, p. 195, c. 115), designating who may be named as beneficiaries in a benefit certificate, *held* it is not against the policy of the state to name a cousin.—*Gray v. Sovereign Camp Woodmen of the World* (Tex. Civ. App.) 176.

\*Point annotated. See syllabus.

\*Attempted change of beneficiary of benefit certificate, not made in compliance with the constitution and by-laws of the association, *held* ineffectual.—*Gray v. Sovereign Camp Woodmen of the World* (Tex. Civ. App.) 176.

\**Held*, that a mutual benefit association could not be enjoined from issuing a new certificate changing the beneficiary as requested by the member, notwithstanding alleged equitable rights of plaintiff.—*Grand Lodge A. O. U. W. of Texas v. Jones* (Tex. Civ. App.) 184.

## INTENT.

Construction of statutes, see "Statutes," § 6.  
Criminal, see "Criminal Law," § 1.  
Element of assault, see "Assault and Battery," § 1.  
Parol evidence of intent, see "Evidence," § 9.

## INTEREST.

See "Usury."  
Declarations against interest, see "Evidence," § 6.  
On loans to policy holders, see "Insurance," § 2.

### § 1. Time and computation.

\*An order for the payment of money drawn for immediate payment out of funds due the drawer is payable on demand, and interest is rightfully allowed from the date of demand.—*Foley v. Houston Co-op. & Mfg. Co.* (Tex. Civ. App.) 180.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 3.  
Review on appeal or writ of error, see "Appeal and Error," § 21.

## INTERPLEADER.

### § 1. Proceedings and relief.

On a bill of interpleader in an action to recover a bank deposit, the court should have rendered judgment for the full amount of the deposit less an amount awarded to the bank as an attorney's fee for filing the bill.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

## INTERROGATORIES.

To witnesses, see "Depositions."

## INTERSTATE COMMERCE.

Regulation, see "Commerce."

## INTERVENTION.

In actions in general, see "Parties," § 1.

## INTER VIVOS.

Gifts, see "Gifts," § 1.

## INTESTACY.

See "Descent and Distribution."

## INTOXICATING LIQUORS.

Argument and conduct at trial in prosecution for offense against liquor law, see "Criminal Law," § 21.

Collateral attack on determination as to number of electors signing local option petition, see "Judgment," § 6.

Documentary evidence in prosecution for offense against liquor law, see "Criminal Law," § 12. Evidence of other offenses in prosecution for violation of liquor law, see "Criminal Law," § 8.

Hearsay evidence in prosecution for offense against liquor, see "Criminal Law," § 10.

Laws prohibiting sale of, as denying due process of law, see "Constitutional Law," § 4.

Scope and extent of review of dismissal of petition to restrain prosecutions for violation of local option law, see "Appeal and Error," § 20.

#### § 1. Power to control traffic.

Ordinance of a municipal corporation prohibiting the sale of intoxicating liquors within a half mile of the corporate limits and authorizing the imposition of a fine in the police court for a violation *held* invalid as in conflict with Const. § 143, though in conformity with Ky. St. § 3490, subsec. 27.—*Earle v. Latonia Agricultural Ass'n* (Ky.) 312.

A license under the Baskin-McGregor Law (Gen. Laws 30th Leg. p. 258, c. 138), relating to the liquor traffic, *held* not to authorize accused to conduct a saloon outside the saloon limits of Dallas, nor to excuse him from violation of Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2, relating to creators of public nuisances, in view of new charter of Dallas (article 2, § 3, subd. 24, and article 12, § 1) and an ordinance of the city of Dallas.—*Paul v. State* (Tex. Civ. App.) 448.

#### § 2. Local option.

The petition and order for the submission of the question of local option to the voters constitutes the record of the proceeding.—*State v. McCord* (Mo.) 27.

Jurisdiction of a proceeding to submit local option questions to the voters of a county on a petition, under Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733], having attached, was not lost by the mere fact that the order of submission found that the petition was signed by "one-tenth of the qualified voters and taxpayers" of the county, instead of one-tenth of the qualified voters.—*State v. McCord* (Mo.) 27.

A petition for the submission of local option questions *held* a substantial compliance with Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733].—*State v. McCord* (Mo.) 27.

A recital in a certificate of an order of a county judge, putting local option in force, that the election was legally held, and that a majority of the votes being for prohibition, local option was in effect in the county, *held* not a proper part of the certificate, under Sayles' Ann. Civ. St. 1897, art. 3391.—*Walker v. State* (Tex. Cr. App.) 376.

Sayles' Ann. Civ. St. 1897, art. 3391, *held* not to require the county judge to enter an order reciting publication of a local option election order with his own hand.—*Walker v. State* (Tex. Cr. App.) 376.

In a prosecution for violating the local option law, the fact that a certificate of the county court's order of publication of the result of the election, etc., contained a recital of facts having no place therein, *held* not prejudicial.—*Walker v. State* (Tex. Cr. App.) 376.

\*Sayles' Ann. Civ. St. 1897, art. 3391, relating to prima facie evidence of publication declaring the result of the local option election, etc., *held* not to prevent proof of publication by other methods.—*Gorman v. State* (Tex. Cr. App.) 334.

#### § 3. Licenses and taxes.

\*Under a license of May 28, 1907, relator *held* to have had no authority to retail intoxicat-

ing liquor on September 12, 1907; the Baskin-McGregor Law (Acts 1907, p. 258, c. 138) having gone into effect on July 12, 1907, and repealing all former laws on the subject.—*Ex parte Vaccarezza* (Tex. Cr. App.) 392.

\*In view of Gen. Laws 30th Leg. p. 258, c. 138, providing new regulations for the sale of intoxicating liquor, a defendant *held* not to have procured the necessary license and paid the taxes required by law.—*Barckell v. State* (Tex. Civ. App.) 190.

The judgment of the county court in issuing liquor licenses *held* not res judicata as to an accused's right to conduct a saloon at a place where such business was forbidden by law.—*Paul v. State* (Tex. Civ. App.) 448.

#### § 4. Regulations.

The Baskin-McGregor Law (Acts 30th Leg. p. 258 et seq., c. 138) which went into effect on July 12, 1907, not only expressly repealed all former laws with reference to the retail of intoxicating liquors, but also repealed such laws by substitution.—*Ex parte Vaccarezza* (Tex. Cr. App.) 392.

#### § 5. Offenses.

Where defendant procured orders for whisky in prohibition territory and then purchased the whisky himself and delivered it to his customers, he was not guilty of soliciting orders for whisky as an "agent," in violation of Acts 1907, p. 327.—*State v. Barles* (Ark.) 941.

\*In a prosecution for selling liquor to a minor without his parents' consent in violation of Rev. St. 1899, § 2179 [Ann. St. 1906, p. 1397], it was no defense that defendant sold the liquor as a clerk for a licensed dramshop keeper.—*State v. Gallagher* (Mo. App.) 111.

A dramshop keeper *held* subject to prosecution under either Rev. St. 1899, § 3009 [Ann. St. 1906, p. 1724], Sess. Acts 1891, p. 131, § 19, as amended by Acts 1905, p. 141, or under Rev. St. 1899, § 2179 [Ann. St. 1906, p. 1397].—*State v. Hamill* (Mo. App.) 1103.

\*Delivery of whisky to a third person, which defendant had received by express C. O. D., in consideration of money previously advanced by such third person, *held* a sale of whisky in violation of the local option law.—*Walker v. State* (Tex. Cr. App.) 376.

#### § 6. Actions for penalties.

\*No one but a dramshop keeper, defined as a licensed retailer of liquors by Rev. St. 1899, § 2990 [Ann. St. 1906, p. 1714], is liable for selling liquor to a minor, under section 3009, as amended by Laws 1905, p. 141 [Ann. St. 1906, p. 1724].—*State v. Gallagher* (Mo. App.) 111.

#### § 7. Criminal prosecutions.

\*Whether accused sold wine in quantities less than five gallons *held* for the jury.—*Sluder v. State* (Ark.) 486.

Evidence on a trial for giving away whisky on election day examined, and defendant's guilt *held* for the jury.—*Latch v. State* (Ark.) 944.

\*Evidence *held* to sustain a conviction for violating the local option law.—*Norris v. State* (Tex. Cr. App.) 137.

\*In a trial for violating the local option law, failure to define a sale *held* not reversible error.—*McKinley v. State* (Tex. Cr. App.) 342.

\*In a trial for unlawfully selling liquor, evidence *held* improper.—*McKinley v. State* (Tex. Cr. App.) 342.

\*In a prosecution for violating the local option law, an instruction that, if the jury had a reasonable doubt as to whether defendant intended to sell the whisky, he should be acquitted.

\*Point annotated. See syllabus.

ted, *held* properly refused.—Walker v. State (Tex. Cr. App.) 376.

\*Under Laws 28th Leg. p. 57, c. 40, § 407a, an internal revenue license, though *prima facie* proof that the licensee was engaged in the business mentioned in the license, *held* no proof of guilt of a particular sale or offense charged.—Gorman v. State (Tex. Cr. App.) 384.

Evidence on a trial for the violation of the local option law *held* not to support a conviction.—Gaddis v. State (Tex. Cr. App.) 1155.

#### § 8. Abatement and injunction.

Act April 6, 1907 (Gen. Laws 30th Leg. p. 166, c. 81), relating to the enjoining of creators and promoters of public liquor nuisances, *held* not unconstitutional.—Barckell v. State (Tex. Civ. App.) 190.

Under Act April 6, 1907 (Gen. Laws 30th Leg. p. 166, c. 81) § 2, *held* a temporary injunction pending the suit may be granted in actions to enjoin creators of public liquor nuisances as in other injunction cases.—Barckell v. State (Tex. Civ. App.) 190.

In the absence of a statement of facts *held* it would be presumed in favor of a temporary injunction that defendant was selling intoxicating liquor without license or payment of the required tax other than as alleged in his answer.—Barckell v. State (Tex. Civ. App.) 190.

Gen. Laws 30th Leg. p. 166, c. 81, § 1, relating to liquor nuisances, *held* to apply, not only where the sale is inhibited by the adoption of local option, under Rev. St. 1895, tit. 69, arts. 3384-3389, but in all cases where it is prohibited by any law.—Paul v. State (Tex. Civ. App.) 448.

The Baskin-McGregor Act (Gen. Laws 30th Leg. p. 258, c. 138), and the provisions of the new charter of Dallas relating to the liquor business, enacted by the same Legislature, should be considered as one act, and so construed that both may stand.—Paul v. State (Tex. Civ. App.) 448.

The Baskin-McGregor Laws (Gen. Laws 30th Leg. p. 258, c. 138) *held* not to effect a repeal of the provisions of the new charter of Dallas, enacted by the same Legislature, relating to the liquor traffic.—Paul v. State (Tex. Civ. App.) 448.

The provisions of the new charter of the city of Dallas, enacted by the Thirtieth Legislature, relating to the control of the liquor traffic, *held* excepted by the Legislature from the operation of the Baskin-McGregor Law (Gen. Laws 30th Leg. p. 258, c. 138).—Paul v. State (Tex. Civ. App.) 448.

Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2, relating to enjoining persons conducting saloons as creators of public nuisances, *held* to apply to any prescribed portion of a precinct or county where the sale of liquor is forbidden.—Paul v. State (Tex. Civ. App.) 448.

In view of the new charter of Dallas (article 14, subd. 29), declaring that provisions of the act conflicting with any state law should be held to supersede the state law, and the fact that the Baskin-McGregor Act (Gen. Laws 30th Leg. p. 258, c. 138) was passed by the same Legislature, the provisions of the charter is an express declaration of a legislative intent showing that no repeal of the charter provisions was intended by the general law.—Paul v. State (Tex. Civ. App.) 448.

## IRRIGATION.

Breach of contract by landlord to furnish water for, see "Landlord and Tenant," § 1.

\*Point annotated. See syllabus.

## ISSUES.

In civil actions, see "Pleading," § 10.  
Presented for review on appeal, see "Appeal and Error," § 5.

## JOINDER.

Of mechanics' liens in proceedings for enforcement, see "Mechanics' Liens," § 2.  
Of offenses in indictment, see "Indictment and Information," § 3.

## JOINT DEBTORS.

See "Bills and Notes," § 1.

## JUDGES.

See "Courts"; "Justices of the Peace."

## JUDGMENT.

See "Execution."

Admissibility in evidence, see "Evidence," § 8.  
Conclusiveness as against indemnitor of judgment against indemnitee, see "Indemnity."  
Decisions of courts in general, see "Courts," § 2.

Judicial notice, see "Evidence," §§ 1.  
Operation and effect of acknowledgment of assignment of judgment, see "Acknowledgment," § 3.  
Replication in action by minority stockholders to compel satisfaction of, see "Pleading," § 4.

*In particular civil actions or proceedings.*

See "Partition," § 2; "Quieting Title," § 2;  
"Reformation of Instruments," § 2.  
Foreclosure, see "Mortgages," § 3.  
On appeal or writ of error, see "Appeal and Error," § 38.  
Personal judgment for deficiency on foreclosure, see "Mortgages," § 3.

*In criminal prosecutions.*

See "Criminal Law," § 29.

*Review.*

See "Appeal and Error."

#### § 1. Nature and essentials in general.

\*A judgment must be responsive to the pleadings, and one not within the pleadings will not be sustained.—Black v. Early (Mo.) 1014.

\*A judgment must be responsive to the pleadings and within their issues.—Weissenfels v. Cable (Mo.) 1028.

#### § 2. On consent, offer, or admission.

\*Admission by defendant that a certain amount is due plaintiff less certain credits admitted by plaintiff will warrant judgment for plaintiff.—Allen v. Hodge (Ky.) 255.

#### § 3. By default.

A judgment of foreclosure and sale against a nonresident constructively summoned and who did not appear *held* erroneous for failure of plaintiff to give the bond required by Civ. Code Prac. § 410.—Highland Land & Building Co. of Dayton, Ky., v. Audas (Ky.) 866.

A foreign life insurance company, jurisdiction of which was obtained by service on the superintendent of insurance department under Rev. St. 1899, § 7991 [Ann. St. 1906, p. 8799], *held* not entitled to have a default judgment against it vacated on certain grounds; they not going to the jurisdiction of the court.—Waters v. New York Life Ins. Co. (Mo. App.) 1120.



**§ 4. Amendment, correction, and review in same court.**

\*No appeal will lie from an order amending a decree, after the term, assigning a widow dower and homestead, to correct errors of law contained in the first decree.—*Davison v. Davison* (Mo.) 1.

\*Rule as to when a court may correct clerical errors in judgments stated.—*Davison v. Davison* (Mo.) 1.

**§ 5. Equitable relief.**

\*Failure of a person not named as a party, and not summoned, against whom a judgment was rendered, to move for a new trial or appeal, *held* no objection to her right to sue to vacate the judgment.—*Owens v. Cage & Crow* (Tex.) 880.

\*Where judgment was rendered against husband and wife, the wife was entitled, in a suit to set it aside, to show that she did not authorize an appearance for her, was not a party, and that the same was invalid in so far as it affected her homestead and separate property.—*Owens v. Cage & Crow* (Tex.) 880.

In an action by a wife to set aside a judgment and cancel deeds and vendor's lien notes forming the basis thereof, an instruction that plaintiff was not a party to the former action, as matter of law, and that the judgment against her was void, *held* erroneous.—*Owens v. Cage & Crow* (Tex.) 880.

**§ 6. Collateral attack.**

A determination that a petition for a submission of local option questions was signed by the requisite number of voters *held* not subject to collateral attack in a proceeding to convict accused of violating the local option law put in force pursuant to an election under such proceedings.—*State v. McCord* (Mo.) 27.

A nunc pro tunc judgment *held* not subject to collateral attack on the ground that there was no evidence to support it.—*Collier v. Catherine Lead Co.* (Mo.) 971.

While a partition suit is pending, it is proper for the court to amend its records and judgments to conform to the facts, and when it does so, and no appeal is taken therefrom, the judgment is not subject to collateral attack.—*Collier v. Catherine Lead Co.* (Mo.) 971.

\*Certain evidence to prove that the probate court exceeded its jurisdiction and thereby impeach its judgment *held* incompetent; the proceeding being within the jurisdiction of that court, and it being entitled to the same presumption of regularity of its proceedings as a court of general jurisdiction.—*Strobel v. Clarke* (Mo. App.) 585.

\*A judgment of a court having jurisdiction of the subject-matter and of the parties *held* to impart absolute verity, and not to be assailed by evidence outside the record.—*Strobel v. Clarke* (Mo. App.) 585.

\*The jurisdiction of an inferior court over the subject-matter must affirmatively appear on the face of the record, and if it does not so appear the judgment rendered is a nullity and may be attacked in a collateral proceeding.—*Ruckert v. Richter* (Mo. App.) 1081.

\*Where the record of the county court does not negative the existence of facts authorizing the court to make an order, the law presumes, as against a collateral attack, that such facts were established.—*Moore v. Hanscom* (Tex.) 876.

\*In a collateral attack, on an order of a county court discharging sureties on a guardian's bond, the burden *held* not to rest on the sureties to prove the existence of facts sustaining the order.—*Moore v. Hanscom* (Tex.) 876.

\*Point annotated. See syllabus.

\*To sustain an order of the county court requiring a guardian to give a new bond and discharging the sureties on an existing bond, the court will presume, as against a collateral attack, that one or more of the facts enumerated in Rev. St. 1895, art. 1949, exist.—*Moore v. Hanscom* (Tex.) 876.

**§ 7. Merger and bar of causes of action and defenses.**

\*A judgment of dismissal on the merits, whether on facts shown by evidence or averred in the petition and admitted by demurrer, is a bar to another action for the same relief.—*Roberts v. Moss* (Ky.) 297.

\*A trespass on land and a conversion of goods in one continuous transaction constitutes one cause of action, and a recovery for the goods or for trespass bars an action for the other.—*Roberts v. Moss* (Ky.) 297.

\*A judgment on the merits in an action for tort or in assumpsit *held* a bar to an action for the other.—*Roberts v. Moss* (Ky.) 297.

One who is the owner of land may maintain ejectment therefor and recover, under Civ. Code Prac. § 83, subsec. 2, for use and occupation, though he has sued for the value of timber cut on the land and appropriated by another and has been defeated therein on the merits.—*Roberts v. Moss* (Ky.) 297.

\*A decision in an action by minority stockholders of a corporation to compel defendant to satisfy a judgment against the corporation in an action on contract *held* not conclusive on the right of the minority stockholders to compel defendant to satisfy a judgment in an action against the corporation for tort.—*Dodd v. Pittsburg, C. O. & St. L. R. Co.* (Ky.) 787.

Plaintiffs *held* not to have split up their cause of action by bringing two suits.—*McKenzie v. Donnell* (Mo.) 40.

\*A party will not be permitted to split his entire cause of action or defense where all the matters properly and naturally relate to the subject-matter of litigation.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

\*The rule that a party may not split his entire cause of action or defense does not apply to a set-off or counterclaim, which may be pleaded or not at the defendant's election.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

**§ 8. Conclusiveness of adjudication.**

A judgment in a prior action by defendants against the one under whom plaintiff claims *held* not to affect plaintiff's right to quiet title to minerals under the surface.—*Combs v. Virginia Iron, Coal & Coke Co.* (Ky.) 815.

\*A judgment enforcing a vendor's lien to the amount of purchase-money notes is conclusive on the question whether the notes were in part without consideration, and the defense that they were in part without consideration is not available in a suit to quiet title by the purchaser at the foreclosure sale.—*Simpson v. Adams* (Ky.) 819.

\*In an action to recover land plaintiffs *held* concluded by a judgment in a former action.—*Reno v. Blackburn* (Ky.) 840.

\*A judgment in an ejectment suit *held* not a bar to another action.—*McKenzie v. Donnell* (Mo.) 40.

\*A judgment is binding not only on the parties to the suit, but on their privies, whether in contract, estate, blood, or law.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

\*Where, in ejectment to recover property sold under a deed of trust, the defendants by cross-bill therein attacked the validity of the sale,

a judgment against them was res judicata of the due execution and validity of the trust deed.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

In an action for negligent death, the widow being the statutory representative of her minor children, a judgment for defendant as against one of the minors is conclusive in defendant's favor except for fraud participated in by it.—*Galveston, H. & S. A. Ry. Co. v. Gillespie* (Tex. Civ. App.) 707.

An order of a probate court setting aside property to a guardian as a homestead for a minor *held* not binding on the owner of an interest in the property.—*Williams v. Jones* (Tex. Civ. App.) 755.

#### § 9. Actions on judgments.

Where a claim against a husband's estate on a judgment against husband and son had been assigned to the widow, the original judgment creditor *held* not a necessary party to a suit by the widow to subject alleged assets of the husband's estate to the payment of the judgment.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

In the absence of a plea of non est factum or a denial of an assignment of a claim on a judgment to claimant under oath, the court did not err in permitting the assignment to be introduced in evidence without proof of execution.—*McCormick v. National Bank of Commerce* (Tex. Civ. App.) 747.

### JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

### JUDICIAL POWER.

See "Constitutional Law," § 1.

### JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

Resulting trust in land purchased at judicial sale, see "Trusts," § 1.

### JURISDICTION.

Effect of appearance, see "Appearance."

*Jurisdiction of particular actions or proceedings.*

See "Contempt," § 2; "Divorce," § 2; "Ejectment," § 2; "Quo Warranto," § 2.

For appointment of receiver, see "Receivers," § 2.

Relief against judgment, see "Judgment," § 5.

*Jurisdiction of particular species of property or estates.*

Exempt property of bankrupt, see "Bankruptcy," § 2.

*Special jurisdictions and jurisdictions of particular classes of courts.*

See "Courts."

Appellate jurisdiction, see "Appeal and Error," §§ 2, 7, 86; "Criminal Law," §§ 30-43.

Courts of bankruptcy, see "Bankruptcy," § 2.

Justices' courts in civil cases, see "Justices of the Peace," § 1.

### JURY.

Custody and conduct, see "Criminal Law," § 25; "Trial," § 9.

Instructions in civil actions, see "Trial," §§ 3-8.

\*Point annotated. See syllabus.

Instructions in criminal prosecutions, see "Criminal Law," § 23.

Misconduct of, as ground for new trial in criminal prosecution, see "Criminal Law," § 28.

Questions for jury in civil actions, see "Trial," § 2.

Questions for jury in criminal prosecutions, see "Criminal Law," § 22.

Review of questions as to impaneling as dependent on presentation in lower court of grounds of review, see "Criminal Law," § 31.

Review of rulings on motion to quash venire as dependent on record on appeal or writ of error, see "Criminal Law," § 34.

Taking case or question from jury at trial, see "Trial," § 2.

Verdict in civil actions, see "Trial," § 10.

Verdict in criminal prosecutions, see "Criminal Law," § 26.

#### § 1. Right to trial by jury.

\*Under Bill of Rights, Const. art. 1, § 15, and Code Cr. Proc. 1895, arts. 10, 21, 22, a person on trial for murder cannot waive his right to a trial by a constitutional jury.—*Jones v. State* (Tex. Cr. App.) 345.

\*An impartial jury, guaranteed by Const. art. 1, § 10, *held* to be 12 men in a felony case, under Const. art. 5, § 13.—*Jones v. State* (Tex. Cr. App.) 345.

\*A jury of eleven *held* unable to render a verdict in a felony case, under Const. art. 5, § 13.—*Jones v. State* (Tex. Cr. App.) 345.

#### § 2. Summoning, attendance, discharge, and compensation.

Laws 1897, p. 61, establishing terms of the Lewis county circuit court at Canton in such county, did not prevent the court from sending its venire to any part of the county for selection of jurors for service in the court, sitting at the county seat.—*State v. Vickers* (Mo.) 999.

\*Under the facts *held* that there was no waiver of the right of a defendant to be tried by a special venire, and that the failure of the court to permit defendant to be so tried was error.—*Murdock v. State* (Tex. Cr. App.) 374.

#### § 3. Competency of jurors, challenges, and objections.

\*A juror who was prejudiced against accused because of impressions derived from rumor and from newspapers *held* competent under Rev. St. 1899, § 2616 [Ann. St. 1906, p. 1550].—*State v. Vickers* (Mo.) 999.

\*Jurors in a murder trial *held* not disqualified for prejudice.—*Cason v. State* (Tex. Cr. App.) 337.

\*In a criminal prosecution, jurors who had sat on the jury in a similar prosecution of the same defendant *held* properly excluded for cause.—*Holmes v. State* (Tex. Cr. App.) 1160.

### JUSTICES OF THE PEACE.

Authority of, in another state to take acknowledgment, see "Acknowledgment," § 2.

Parol evidence to vary docket recitals, see "Evidence," § 9.

#### § 1. Civil jurisdiction and authority.

\*A record of a justice of the peace *held* not to affirmatively show jurisdiction under Rev. St. 1899, § 3835 [Ann. St. 1906, p. 2124].—*Ruckert v. Richter* (Mo. App.) 1031.

#### § 2. Procedure in civil cases.

\*Under Rev. St. 1899, § 3953 [Ann. St. 1906, p. 2117], actions which might have been instituted at different times and before different justices of the peace could not be consolidated.—*Aimee Realty Co. v. Haller* (Mo. App.) 588.

\*A statement filed with a justice of the peace *held* a sufficient basis for an amended statement filed.—*Nichols v. Hicklin* (Mo. App.) 1100.

Grounds of a motion to strike out an amended statement *held* insufficient to raise the objection that the statement before the justice had not been signed.—*Nichols v. Hicklin* (Mo. App.) 1109.

\*The record of a justice's judgment *held* sufficient to support a revival of the judgment, under Rev. St. 1899, § 4031 [Ann. St. 1903, p. 2196].—*Ruoff v. Fitzgerald* (Mo. App.) 1110.

### § 3. Review of proceedings.

\*A notice of appeal from a judgment of a justice of the peace *held* sufficient, though it mistakes by two weeks the date of the rendition of the judgment.—*Collier v. Langan & Taylor Storage & Moving Co.* (Mo. App.) 593.

\*Where a justice allowed an appeal and lodged the papers with the circuit court, that court had jurisdiction, though there may have been no affidavit for the appeal nor any bond.—*Drake v. Gorrell* (Mo. App.) 1080.

\*Under Rev. St. 1899, §§ 4075, 4076 [Ann. St. 1906, pp. 2220, 2221], failure of a garnishee to give notice of appeal from a justice's court *held* to constitute a failure to confer jurisdiction over plaintiff appellee, and it was error to dismiss the cause for want of prosecution.—*Drake v. Gorrell* (Mo. App.) 1080.

\*Under Rev. St. 1899, § 4076 [Ann. St. 1906, p. 2221], the court, on appeal from a justice's judgment, *held* authorized to affirm a judgment for the failure of appellant to serve a notice of appeal on the adverse party.—*Scientific American Club v. Horchitz* (Mo. App.) 1117.

\*Where a judgment is rendered against a plaintiff in a justice court, it is not required to give a bond on appeal.—*Johnson County Sav. Bank v. Midkiff & Caudle* (Tex. Civ. App.) 1131.

## JUSTIFICATION.

Of homicide, see "Homicide," § 3.

## KNOWLEDGE.

Of dangers of employment, see "Master and Servant," § 5.

Of illegal purpose of contract, see "Contracts," § 1.

Of insurance company of disqualification of applicant for insurance as affecting right to forfeit policy, see "Insurance," § 5.

## LACHES.

As defense in trespass to try title, see "Trespass to Try Title," § 2.

## LANDLORD AND TENANT.

Amendment of pleading affecting limitations in action for conversion of crop, see "Limitation of Actions," § 2.

Commissions of broker for sale of lease, see "Brokers," § 2.

Computation of limitations in action to recover rents, see "Limitation of Actions," § 2.

Conclusions of witness in action by landlord for conversion, see "Evidence," § 10.

Exclusion of evidence as *res inter alios acta* in action for breach of contract, see "Evidence," § 3.

Harmless error in action by landlord for conversion of crop, see "Appeal and Error," § 31.

Harmless error in action for breach of landlord's contract, see "Appeal and Error," § 29.

Lease as breach of covenant against incumbrances, see "Covenants," §§ 2, 3.

Lease as chattel mortgage, see "Chattel Mortgages," § 1.

Recovery over against irrigation company by landlord held liable for failure to furnish water to tenant, see "Indemnity."

Secondary evidence of lease, see "Evidence," § 4.

Settlement by landlord as bar to action for conversion, see "Accord and Satisfaction."

Specific performance of lease, see "Specific Performance," § 2.

### § 1. Leases and agreements in general.

In an action by tenants against their landlords on a contract to furnish water for irrigation, plaintiffs could not recover by proving a contract by which the landlords warranted that an irrigation company would perform its contract with the landlords to furnish such water.—*Stockton v. Brown* (Tex. Civ. App.) 423.

In an action for breach of a landlord's agreement to furnish water to irrigate the tenant's crop, evidence that the landlord had no water for that purpose *held* immaterial.—*Stockton v. Brown* (Tex. Civ. App.) 423.

\*An irrigation company, having contracted to furnish water to irrigate defendant's land, *Acid* not a necessary or proper party to a suit by defendants' tenants for breach of defendants' agreement to furnish water to irrigate the leased land.—*Stockton v. Brown* (Tex. Civ. App.) 423.

### § 2. Landlord's title and reversion.

Possession of land *held* not possession within the rule that a tenant cannot dispute the title of his landlord unless he first surrenders possession.—*Vincent v. Means* (Mo.) 8.

### § 3. Terms for years.

A covenant in a lease *held* to provide for one renewal only.—*Drake v. Board of Education of St. Louis* (Mo.) 650.

\*A general covenant in a lease for renewal will not be considered to imply a perpetual renewal, and the lessor is at most bound to give a renewal for one term only.—*Drake v. Board of Education of St. Louis* (Mo.) 650.

### § 4. Tenancies from year to year and month to month.

\*A parol lease for two years followed by possession and payment of rent becomes a tenancy from year to year, and the statute of frauds does not apply.—*Nichols v. Hicklin* (Mo. App.) 1109.

### § 5. Premises, and enjoyment and use thereof.

\*In an action by a landlord against a tenant for rent, evidence examined, and *held* insufficient to show constructive eviction resulting from the use of the premises by other tenants.—*French v. Pettingill* (Mo. App.) 575.

\*A constructive eviction cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises unless the landlord is responsible therefor.—*French v. Pettingill* (Mo. App.) 575.

### § 6. Rent and advances.

\*Under a lease of land providing for a deduction of rent in case of overflow and for a specific division of crops, in case the parties could not agree as to the amount of deduction, neither party was required to attempt to bring about an agreement in order to enforce the provision for the division of the crop.—*Morton v. Lacy Bros. & Kimball* (Ark.) 200.

Evidence in attachment *held* sufficient to show that plaintiffs had reasonable grounds for belief that they would lose their rent unless an at-

\*Point annotated. See syllabus.

tachment issued, within Ky. St. 1903, § 2302.—Clark v. Burton (Ky.) 823.

\*Rev. St. 1899, § 4123 [Ann. St. 1906, p. 2239], held only to afford a landlord security for rent, and not to aid in enforcing a lien on the crop acquired by the landlord for a debt of a different nature.—Saunders v. Ohlhausen (Mo. App.) 541.

In an action by a landlord for conversion of a crop removed from the premises by his tenant and delivered to a third person made a party defendant, the evidence held to authorize a recovery.—Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.) 728.

The receipt of a crop by a mortgagee in a mortgage executed by a tenant held a conversion of the crop as against the landlord having a lien thereon for rent.—Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.) 728.

\*A landlord held not to have a lien as against his tenant's creditors for supplies furnished by a third person on the landlord's security.—Ranger Mercantile Co. v. Terrett (Tex. Civ. App.) 1145.

## LARCENY.

See "Embezzlement"; "False Pretenses."

Competency of witness convicted of larceny in another state, see "Witnesses," § 1.

Election as to property, see "Indictment and Information," § 8.

Error in admission of evidence cured by instructions, see "Criminal Law," § 27.

Harmless error in instructions, see "Criminal Law," § 43.

Requests for instructions, see "Criminal Law," § 24.

Sufficiency of instructions, see "Criminal Law," § 23.

Testimony of accomplices, see "Criminal Law," § 14.

### § 1. Offenses and responsibility therefor.

\*Agent taking property purchased for his principal, though using his own funds in paying therefor, held guilty of larceny.—State v. Soper (Mo.) 3.

\*A taking to constitute theft need not be a taking from the actual possession of the owner.—Rose v. State (Tex. Cr. App.) 148.

Under an indictment for larceny committed in the original taking, an accused held not guilty if he had no knowledge of the felonious intent of another, whom he assisted in driving the cattle, or if the other intended to handle the cattle lawfully, but subsequently formed the intent of stealing them.—Warren v. State (Tex. Cr. App.) 382.

### § 2. Prosecution and punishment.

In a prosecution for larceny, certain evidence as to other transactions between prosecuting witness and accused held immaterial.—State v. Soper (Mo.) 8.

\*In a prosecution for larceny, evidence as to acts of defendant subsequent to the commission of the offense held inadmissible in his favor.—State v. Soper (Mo.) 8.

\*In a prosecution for larceny, whether complaining witness or defendant owned the property alleged to have been stolen, and whether or not there was a wrongful taking, held under the evidence a question for the jury.—State v. Soper (Mo.) 8.

\*Error held not to have been committed in denying a motion in arrest on conviction of theft on the ground of insufficiency of evidence.—Rose v. State (Tex. Cr. App.) 143.

\*Point annotated. See syllabus.

\*Under the evidence on a trial for theft, a certain charge held correct.—Rose v. State (Tex. Cr. App.) 143.

\*Instruction on trial for cattle theft, as to explanation of accused in relation to his possession of the stolen property, held erroneous.—Cagle v. State (Tex. Cr. App.) 358.

\*In a prosecution for theft, the value of the stolen property held sufficiently proved.—Cummings v. State (Tex. Cr. App.) 863.

In a prosecution for larceny, an instruction held erroneous.—Warren v. State (Tex. Cr. App.) 382.

An instruction in a larceny case held erroneous in failing to charge the whole law.—Warren v. State (Tex. Cr. App.) 382.

## LASCIVIOUS COHABITATION OR CONDUCT.

See "Lewdness."

## LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 35.

## LEADING QUESTIONS.

See "Witnesses," § 2.

## LEASES.

See "Landlord and Tenant."

## LEGACIES.

See "Wills."

## LEGITIMACY.

See "Bastards," § 1.

## LETTERS.

Libelous letters, see "Libel and Slander," §§ 1, 3.

Relevancy in criminal prosecution, see "Criminal Law," § 7.

## LEVEES.

Director of levee district as county officer, see "Counties," § 1.

## LEWDNESS.

See "Obscenity."

Under Kirby's Dig. § 1810, mere proof of sexual intercourse between unmarried persons, though living in the same house, held insufficient to constitute the offense of cohabiting together as husband and wife without being married.—McNeely v. State (Ark.) 674.

## LEX LOCI.

See "Insurance," § 10.

## LIBEL AND SLANDER.

Review in action for slander as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

**§ 1. Words and acts actionable, and liability therefor.**

A letter held libelous per se.—*S. M. Burgess & Co. v. Patterson* (Ky.) 837.

**§ 2. Privileged communications, and malice therein.**

\*Where plaintiff, in company with a friend, went to defendant and inquired why he desired her to vacate his house, the statement of defendant's reason, in the presence of the three only, in which defendant charged plaintiff with keeping a disorderly house, was conditionally privileged and not actionable in the absence of malice.—*Laughlin v. Schnitzer* (Tex. Civ. App.) 908.

\*Malice necessary to sustain a recovery for slander consisting of statements conditionally privileged cannot be found merely from the falsity of the statement.—*Laughlin v. Schnitzer* (Tex. Civ. App.) 908.

**§ 3. Actions.**

\*A libelous letter written in respect to the business of a partnership held to render all the partners liable.—*S. M. Burgess & Co. v. Patterson* (Ky.) 837.

\*Where a letter is libelous per se, it is not necessary to allege or prove special damage.—*S. M. Burgess & Co. v. Patterson* (Ky.) 837.

\*A verdict of \$1,500 for a libelous charge of theft held not so excessive as to indicate passion or prejudice.—*S. M. Burgess & Co. v. Patterson* (Ky.) 837.

A charge in an action for slander that plaintiff was entitled to recover if the statements were false held erroneous as making the case turn on the truth or falsity of the defamatory words, instead of the existence of malice.—*Laughlin v. Schnitzer* (Tex. Civ. App.) 908.

**§ 4. Criminal responsibility.**

\*Evidence held to authorize a conviction of slander in charging one with fornication.—*Morphew v. State* (Ark.) 480.

\*An indictment for charging one with fornication, declared slander by Kirby's Dig. § 1854, held sufficient.—*Morphew v. State* (Ark.) 480.

Under Cr. Code Prac. §§ 180, 225, 235, the fact that the court charged the jury as to the law in a prosecution for libel did not violate Bill of Rights, § 9, entitling accused to have the jury determine the law and the facts.—*Walston v. Commonwealth* (Ky.) 224.

## LICENSES.

By municipal corporation, see "Municipal Corporations," § 5.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 3.

Injuries to licensees, see "Railroads," § 5.

Province of court and jury in criminal prosecution for practicing medicine without license, see "Criminal Law," § 22.

To school examiners, see "Schools and School Districts," § 1.

**§ 1. For occupations and privileges.**

\*The state may collect an ad valorem tax on property used in a calling and also impose a license tax on the calling, which power may be delegated to municipalities, as is done by Rev. St. 1899, §§ 5857, 8542 [Ann. St. 1906, pp. 2961, 4015].—*City of Monett v. Hall* (Mo. App.) 579.

## LIENS.

Appellate jurisdiction of Supreme Court in proceeding to enforce agister's lien, see "Courts," § 8.

Lien of partner on firm property, see "Partnership," § 2.

Of purchaser at invalid tax sale, see "Taxation," § 7.

Persons concluded by judgment in action to enforce vendor's lien, see "Judgment," § 8.

Persons entitled to appeal in action to declare, see "Appeal and Error," § 4.

*Liens acquired by particular remedies or proceedings.*

Assessments for municipal improvement, see "Municipal Corporations," § 4.

*Particular classes of liens.*

See "Mechanics' Liens."

Attorney's lien, see "Attorney and Client," § 1.

Created by lease as chattel mortgage, see "Chattel Mortgages," § 1.

Landlord's lien for rent, see "Landlord and Tenant," § 6.

Mortgage, see "Chattel Mortgages," § 3.

Vendor's lien on lands sold, see "Vendor and Purchaser," § 5.

## LIFE ESTATES.

See "Dower"; Estates Tail"; "Remainders." Creation by will, see "Wills," § 4.

## LIFE INSURANCE.

See "Insurance."

## LIMITATION OF ACTIONS.

See "Adverse Possession."

*Particular actions or proceedings.*

See "Trespass to Try Title," § 2.

For penalties for violation of anti-trust law, see "Monopolies," § 1.

To recover bank deposit, see "Banks and Banking," § 1.

**§ 1. Statutes of limitation.**

The statute of limitations will run against a school district as well as a county, state, or town.—*Clarke v. School Dist. No. 16* (Ark.) 677.

\*The statute of limitations is not a bar to the correction of a deed, under Ky. St. 1903, § 2543, where the vendee has been in possession of the land.—*Hill v. Clark* (Ky.) 805.

An attachment bond is included under Rev. St. 1899, § 4272 [Ann. St. 1906, p. 2347], and suit may be brought thereon within 10 years from accrual of cause of action.—*State ex rel. Enterprise Milling Co. v. Brown* (Mo.) 630.

\*The right of relator to have tax bills issued against defendants to pay for the paving of a street held a liability or obligation created by statute within Rev. St. 1899, § 4273 [Ann. St. 1906, p. 2349], limiting the time to sue on such claims to five years.—*City of Moberly ex rel. Moberly Brick, Tile & Earthen-Ware Co. v. Hassett* (Mo. App.) 115.

\*Limitations do not run against the state unless so expressly enacted.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

**§ 2. Computation of period of limitation.**

\*The right of a county treasurer and a school district to recover money illegally paid as salary to the clerk of the board of school directors held barred by limitations after three years.—*Clarke v. School Dist. No. 16* (Ark.) 677.

The right of minority stockholders of a corporation to compel defendant controlling it to satisfy a judgment obtained against it, based

\*Point annotated. See syllabus.

on fraudulent conduct, *held* to accrue when the corporation is compelled to pay the judgment.—*Dodd v. Pittsburg, C., C. & St. L. R. Co. (Ky.)* 787.

\*An action by the owner of a vested remainder in certain bank stock, against the bank as an alleged trustee, for assisting in a sale of the stock by the owner of the life estate, *held* barred by the statute of limitations.—*Yeager v. Bank of Kentucky (Ky.)* 806.

\*Rule stated as to amendments to a petition which will admit the bar of the statute of limitations.—*Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.)* 155.

\*An amended petition in an action for injuries to a passenger *held* not to state a new cause of action so as to admit the bar of the statute of limitations.—*Texas & N. O. R. Co. v. Clippenger (Tex. Civ. App.)* 155.

\*An action by a landlord for conversion of a crop produced on the leased premises *held* not barred by the two-year statute of limitations.—*Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.)* 728.

\*A subsequent amended petition *held* not to state a new cause of action from that set forth in the first amended petition.—*Sexton Rice & Irrigation Co. v. Sexton (Tex. Civ. App.)* 728.

\*Right to recover rents for a mill site and water privilege, *held* limited to two years prior to the commencement of the action.—*Briggs v. Avary (Tex. Civ. App.)* 904.

### § 3. Operation and effect of bar by limitation.

In a suit to recover on tax bills issued by a city *held*, that the parties against whom they were issued, being the real parties in interest, may interpose a plea of the statute of limitations in that the bills were not issued within the statutory period after right to them accrued.—*City of Moberly ex rel. Moberly Brick, Tile & Earthen-Ware Co. v. Hassett (Mo. App.)* 115.

## LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 5.

## LIQUOR SELLING.

See "Intoxicating Liquors."

## LIS PENDENS.

One purchasing land from a purchaser holding under a recorded title deed *held* to acquire title as against the vendor, under Ky. St. 1903, §§ 500, 2358a.—*Begley v. Combs (Ky.)* 246.

## LIVE STOCK.

Carriage of, see "Carriers," § 5.

Injuries from operation of railroads, see "Railroads," § 8.

## LOAN ASSOCIATIONS.

See "Building and Loan Associations."

## LOANS.

To decedent as claim against estate, see "Executors and Administrators," § 4.

To insured, see "Insurance," § 4.

## LOCAL LAWS.

See "Statutes," §§ 2, 5.

## LOCAL OPTION.

Scope and extent of review of dismissal of petition to restrain prosecutions for violation of local option law, see "Appeal and Error," § 20.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 2.

## LOGS AND LOGGING.

Conversion of timber, see "Trove and Conversion," § 1.

Damages for trespass, see "Trespass," § 1.

Election of remedy for cutting timber, see "Election of Remedies."

Judgment in action for value of timber cut on land as bar to ejectment and recovery for use and occupation, see "Judgment," § 7.

Persons entitled to appeal in action to declare lien on logs, see "Appeal and Error," § 4.

Waiver of trespass in cutting timber to sue in assumpsit for value of timber cut, see "Action," § 2.

\*A deed of standing merchantable timber specifying no time for its removal *held* to convey an estate in the timber terminable after a reasonable time for the removal.—*Garden City Stave & Heading Co. v. Sims (Ark.)* 959.

Facts *held* to show that a purchaser of standing timber had not had a reasonable time for the removal thereof.—*Garden City Stave & Heading Co. v. Sims (Ark.)* 959.

In an action for breach of a contract entitling plaintiff to cut and haul timber, *held*, under the evidence, proper to refuse to direct a verdict for defendant.—*Freeborn Coal & Coke Co. v. Phillips (Ky.)* 302.

In an action for breach of a contract entitling plaintiff to cut and haul timber, a verdict for plaintiff *held* not flagrantly against the evidence.—*Freeborn Coal & Coke Co. v. Phillips (Ky.)* 302.

Facts *held* to show plaintiff entitled to recover for breach of a contract to cut and haul timber.—*Freeborn Coal & Coke Co. v. Phillips (Ky.)* 302.

Under Ky. St. 1903, § 1409, subsecs. 13, 14, and section 1908, a transfer of standing timber by indorsement on the back of a deed, without branding the trees, though sufficient as between the parties, was invalid regarding the trees as personalty, in the absence of record, as against a subsequent bona fide purchaser from the transferor.—*V. Bowerman & Co. v. Taylor (Ky.)* 846.

\*A contract for the sale of standing timber, which specifies no time for the removal thereof, requires their removal within a reasonable time, and operates to convert the trees into personal property.—*V. Bowerman & Co. v. Taylor (Ky.)* 846.

Under Ky. St. 1903, § 496, a transfer of standing timber by indorsement on the back of a deed, which transfer was not recorded, *held* insufficient to pass title to the trees regarded as real estate, as against a subsequent bona fide purchaser from the transferor.—*V. Bowerman & Co. v. Taylor (Ky.)* 846.

\*Where standing trees were conveyed by deed, to be removed within 10 years, they remained real estate, though they were marked for identification.—*V. Bowerman & Co. v. Taylor (Ky.)* 846.

## LOST INSTRUMENTS.

Where it is sought to establish a lost deed, evidence of sales and resales of land under the

\*Point annotated. See syllabus.

claim of ownership by the vendees, general reputation of ownership, and nonclaim by persons who would otherwise have been the owners, is admissible.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 690.

## LUMBER.

See "Logs and Logging."

## LUNATICS.

See "Insane Persons."

## MACHINERY.

Liability of employer for defects, see "Master and Servant," §§ 4, 11.  
Production and use of electricity, see "Electricity."

## MAINTENANCE.

See "Champerty and Maintenance."

## MALICE.

See "Malicious Mischief."  
Element of libel, see "Libel and Slander," § 2.

## MALICIOUS MISCHIEF.

\*Evidence held sufficient to sustain a conviction of malicious mischief by shooting stock.—*Atwood v. State* (Ark.) 953.

## MALPRACTICE.

Liability of physician, see "Physicians and Surgeons."  
Province of court and jury in action for, see "Trial," § 3.

## MANDATE.

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 36.

## MANSLAUGHTER.

See "Homicide."

## MARRIAGE.

See "Divorce"; "Husband and Wife."

In the settlement of decedent's estate, evidence held sufficient to show that the marriage between decedent and one of the defendants was legal.—*Baker v. Gibson* (Ky.) 258.

\*Open, notorious cohabitation between defendant and a woman, without a marriage contract by words de presenti, does not establish a common-law marriage.—*State v. Kennedy* (Mo.) 57.

## MARRIED WOMEN.

See "Husband and Wife."

Operation and effect of wife's acknowledgment, see "Acknowledgment," § 3.

## MASTER AND SERVANT.

See "Work and Labor."

Applicability of instruction to pleadings and evidence in action for death of servant, see "Trial," § 6.

Decisions of state courts in action for injuries to servant as rule of decision in United States court, see "Courts," § 4.

Employers' liability insurance, see "Insurance," § 3.

Harmless error in action for death of servant, see "Appeal and Error," §§ 31, 32.

Harmless error in action for injuries to servant, see "Appeal and Error," § 26.

Jurisdiction of court of action for injuries to servant in another state, see "Courts," § 1.

Laws authorizing laborers to form trade unions as class legislation, see "Constitutional Law," § 3.

Liability of charitable institution for torts of employes, see "Charities," § 1.

Liability of servant for sales of liquor to minors, see "Intoxicating Liquors," § 5.

Payment of additional premium on employer's liability insurance policy as accord and satisfaction, see "Accord and Satisfaction."

Presumptions as to laws of other states relating to fellow servants, see "Evidence," § 2.

Province of court and jury in action for death of servant, see "Trial," § 3.

Requests for instructions in action for injuries to employe, see "Trial," § 7.

Right of action against servant for causing death, see "Death," § 2.

### § 1. The relation.

\*A corporation held liable for breach of a contract of employment on discharging plaintiff because it had merged its business into another corporation.—*Chipman v. Turner, Day & Woolworth Mfg. Co.* (Ky.) 852.

### § 2. Master's liability for injuries to servant.—Nature and extent in general.

\*Where plaintiff was injured while assisting in propping a dangerous portion of the roof of a mine necessary for the furtherance of the work, it was no defense to his action for injuries that he was not acting within the scope of his employment when he was injured.—*Ballou v. Potter* (Ky.) 1178.

In an action for death of a railroad engineer, it was no defense that the derailment resulted from the acts of wreckers, if defendant was negligent in failing to properly inspect the track.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

### § 3. — Tools, machinery, appliances, and places for work.

\*Employes on a train held grossly negligent toward those on an approaching train.—*Louisville & N. R. Co. v. Brown* (Ky.) 795.

\*A railway company must furnish reasonably safe side tracks for use by its employes in switching cars.—*Cincinnati, N. O. & T. P. Ry. Co. v. Zachary's Adm'r* (Ky.) 842.

A master held to have violated his duty to furnish his employe a safe place to work.—*Owensboro Brick & Sewer Pipe Co. v. Glenn* (Ky.) 1195.

Railroad operatives held entitled to assume that the company had used reasonable care to keep the track and roadbed in a reasonably safe condition and did not assume risks of which they had no knowledge resulting from the railroad company's failure so to do.—*Hach v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 525.

\*The duty to use care to furnish an employe a safe place to work held not to extend to elevated cogwheels, so as to render the employer liable to an employe who stepped on them to steady himself.—*Leffler v. Anheuser-Busch Brewing Ass'n* (Mo. App.) 105.

\*Under Rev. St. 1899, c. 133, art. 2, §§ 8820, 8823, 8826 [Ann. St. 1906, pp. 4096, 4098, 4099], placing of a shot between two entries

\*Point annotated. See syllabus.

of a mine *held* to render the mine owner liable for the death of plaintiff's husband killed by the explosion.—*Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.*

\*A railroad company failing to use ordinary care to discover the defective condition of the standing place on the pilot of its locomotives and remedy the same *held* negligent.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

\*A railroad company *held* not entitled to delegate to its sectionmen its duty of furnishing a safe track and keeping the same in repair.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

\*Where an employé was at the place of duty ready to begin work when called on, the employer owed him the duty of exercising ordinary care.—*Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.*

Whether a railroad company was negligent in backing an engine over a certain track without a switchman on the rear thereof to keep a lookout *held* not dependent on the existence of any rule requiring a switchman to be so stationed.—*Galveston, H. & S. A. Ry. Co. v. Waffer (Tex. Civ. App.) 897.*

\*Ordinary care, as applied to a railroad's obligation to furnish reasonably safe appliances with which servants are required to perform their duties, may require a very high degree of diligence in accordance with the circumstances surrounding the situation.—*Thompson v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 910.*

#### § 4. — Fellow servants.

\*Rule as to a master's liability for injuries to servants caused by other servants stated.—*Louisville & N. R. Co. v. Brown (Ky.) 795.*

\*The rule that no recovery may be had from a master for injury to a servant, not causing death, resulting from the servant's superior officer's ordinary negligence, is limited to cases in which the superior officer has immediate control of or supervision over the servant.—*Louisville & N. R. Co. v. Brown (Ky.) 795.*

\*The engineer, conductor, and brakeman of a train *held* not fellow servants of another brakeman so as to bar recovery by him for their negligence.—*Louisville & N. R. Co. v. Brown (Ky.) 795.*

\*Employés of a railroad company who load tenders with coal *held* not such fellow servants of a brakeman as to preclude recovery by him for injuries from coal falling from the tender.—*Louisville & N. R. Co. v. Clark (Ky.) 1184.*

\*Duty of engineer and fireman discovering decedent ahead on a railroad velocipede *held* to be, on observing that he was ignorant of the approach of the engine, to warn him and stop if necessary to save his life.—*Lynch v. Chicago & A. Ry. Co. (Mo.) 68.*

The act of a chief operator who was the vice principal of a telephone company for the purpose of maintaining discipline at the switchboard, *held* an act of superintendence within the scope of his employment, and hence the telephone company was liable for an injury resulting therefrom.—*Compher v. Missouri & Kansas Telephone Co. (Mo. App.) 536.*

By the decision of the courts of the United States a section foreman in the operation of his hand car in his relation to the section hands stands not being regarded as a vice principal of the company, but as a fellow servant.—*Chandler v. St. Louis & S. F. R. Co. (Mo. App.) 553.*

\*It is not recognized by the courts of the United States as a rule, or common law, that

where a servant is injured by the concurrent negligence of a master and fellow servant no action will lie against the master.—*Chandler v. St. Louis & S. F. R. Co. (Mo. App.) 553.*

\*The act of a pit boss in a coal mine in permitting two entries to converge, and a shot to be placed in the dividing wall, the firing of which killed plaintiff's husband, *held* negligence for which the mine owner was liable, though Rev. St. 1899, c. 133, art. 2, § 8826 [Ann. St. 1906, p. 4099], requires the placing of the shot to be done by a fellow servant of the deceased.—*Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.*

\*The term "fellow servants," in connection with evidence in an action for injuries to a switchman, defined.—*Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.*

A railroad company failing to comply with the federal safety appliance act (Act March 2, 1893, c. 193, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) *held* liable for injuries received by a switchman, notwithstanding the negligence of fellow servants.—*Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.*

\*Employés charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are vice principals of the employer.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

\*Neither a roundhouse inspector nor a section foreman and his men are fellow servants of a brakeman.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

A railroad company *held* not entitled to delegate to its section foreman its duty of furnishing a safe track and keeping the same in repair.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

\*A master is liable for the injuries received by an employé in consequence of the master's negligence concurring with the negligence of a fellow servant.—*Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.*

#### § 5. — Risks assumed by servant.

\*Where work is hazardous, the fact that an employé is ordered to do the work in the most hazardous way affords him no ground of complaint if he knew of the danger incident to the doing of the work in that particular way, and with such knowledge proceeded therewith.—*Kirby v. Hillside Coal Co. (Ky.) 278.*

\*A servant who with knowledge of the hazard proceeds with the work as directed *held* to assume the risk.—*Kirby v. Hillside Coal Co. (Ky.) 278.*

\*An employé in a coal mine, injured while working in a particular manner in accordance with orders given by the employer, *held* not entitled to recover.—*Kirby v. Hillside Coal Co. (Ky.) 278.*

\*Where an infant of tender years is employed at a hazardous business, the master must at his peril see that he comprehends the dangers.—*Beckwith Organ Co. v. Malone (Ky.) 809.*

\*Employés working in and about shops using machinery and heavy articles of wood and metal assume the risks ordinarily incident to their employment.—*B. F. Avery & Sons v. Lung (Ky.) 865.*

\*An adult may assume the risks incident to insecure premises or insufficient tools, and if he does so with full knowledge of the conditions, the master is not liable for injuries resulting therefrom.—*B. F. Avery & Sons v. Lung (Ky.) 865.*

Railroad operatives *held* entitled to assume that the company had used reasonable care to

\*Point annotated. See syllabus.



keep the track and roadbed in a reasonably safe condition, and did not assume risks of which they had no knowledge, resulting from the railroad company's failure so to do.—Hach v. St. Louis, I. M. & S. Ry. Co. (Mo.) 525.

\*In an action for personal injury, plaintiff denied the recovery, since the reason of such injury was assumed by him as one of the incidents of his employment.—Chandler v. St. Louis & S. F. R. Co. (Mo. App.) 553.

\*A servant does not assume the risk of his employer's negligence.—Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.

\*The question of contributory negligence, and not of assumption of risk, *held* presented by the facts.—Rogers v. Rundell (Mo. App.) 1096.

\*The nature of the defenses of assumed risk and contributory negligence defined.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*The injuries sustained by a switchman while employed in Arizona in switching cars not equipped with sufficient automatic couplers, as required by the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), *held* to result from a risk which he did not assume, under Rev. St. 1901, Ariz. par. 2767.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*The federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) abolishes the defense of assumed risk and any other defense based on identically the same facts which would establish that defense if available.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*An employé *held* to have assumed the risk of injury.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

\*A servant *held* to have assumed the risk of his injury.—Currie v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 1149.

#### § 6. — Contributory negligence of servant.

\*In an action by an employé for injuries received through the falling of a board in defendant's factory, defendant *held* not liable.—B. F. Avery & Sons v. Lung (Ky.) 865.

\*A brakeman *held* entitled to presume that a coal tender was properly loaded.—Louisville & N. R. Co. v. Clark (Ky.) 1184.

Rev. St. 1899, c. 133, art. 2, § 8826 [Ann. St. 1906, p. 4099], *held* to merely impose diligence and caution on the shot firer, but not to render him negligent for failing to discover that the shot was dangerous.—Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.

\*A switchman who has signaled the engineer not to move cars while he is between them attempting to uncouple them has the right to act on the assumption that his signal will be obeyed.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*A violation by a servant of his master's rules is not negligence per se, and whether the servant is negligent is for the jury.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*If an engineer ran his locomotive at a speed of 50 or 60 miles an hour at the time it left the track on a curve, and such speed proximately contributed to the derailment, no recovery may be had for his death.—Galveston, H. & S. A. Ry. Co. v. Gillespie (Tex. Civ. App.) 707.

#### § 7. — Actions.

An action against a mine owner for death of a shot firer *held* not an attempt to recover for the violation of Rev. St. 1899, c. 133, art. 2, § 8823 [Ann. St. 1906, p. 4098], on account of

an injury not intended to be prevented by the statute.—Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.

#### § 8. — Pleading.

\*In an action for injuries to a servant, a petition *held* to sufficiently allege that plaintiff only continued to work a reasonable time after defendants' promise to prop the entry of a mine by their failure to perform which plaintiff was injured.—Ballou v. Potter (Ky.) 1178.

\*An allegation, in a petition in an action for death of an engineer by derailment, *held* to raise the issue of negligence in defendant's failure to inspect the track, though the wreck resulted from the intentional displacement of a rail by wreckers.—Thompson v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 910.

\*In an action for injuries to a servant, certain evidence *held* insufficient to warrant a recovery, as not within the allegations of the petition.—Currie v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 1149.

#### § 9. — Evidence.

Evidence *held* insufficient to sustain a recovery against a railroad by a sectionhand who was injured by falling from a hand car.—Louisville & N. R. Co. v. Guest's Adm'r (Ky.) 817.

\*Evidence, in an action against a railway company for the death of a conductor alleged to have been caused by a defective track, *held* insufficient to sustain a verdict for plaintiff.—Cincinnati, N. O. & T. P. Ry. Co. v. Zachary's Adm'r (Ky.) 842.

In an action for the death of plaintiff's son, who was run down while riding on a railroad velocipede, reversible error *held* not to have been committed in the admission of certain evidence.—Lynch v. Chicago & A. Ry. Co. (Mo.) 68.

Evidence in an action for the death of plaintiff's son *held* to warrant a finding that decedent was struck and killed while on his railroad velocipede by an engine running backward, that the engineer and fireman saw decedent in his position of peril, and that he was unaware thereof in ample time to have avoided running him down, and that no effort was made to check the engine's speed.—Lynch v. Chicago & A. Ry. Co. (Mo.) 68.

\*The starting of elevated cogwheels when an employé rested his foot on them *held* not to be regarded as bespeaking negligence under the doctrine of *res ipsa loquitur*.—Leffler v. Anheuser-Busch Brewing Ass'n (Mo. App.) 105.

\*In an action for injuries sustained by an employé, certain evidence *held* not to be taken as evidence from which negligence by the employer might be inferred.—Leffler v. Anheuser-Busch Brewing Ass'n (Mo. App.) 105.

In an action for injuries sustained by an employé, certain evidence *held* properly excluded.—Leffler v. Anheuser-Busch Brewing Ass'n (Mo. App.) 105.

\*Evidence in an action for injury sustained by an employé who while up a ladder was seized with a dizziness and to steady himself rested his foot on the cogwheels of a machine, which drew it in, *held* not to show that the motion of the machine was due to an imperfection in any of the arrangements of which the employer knew, or in prudence ought to have known.—Leffler v. Anheuser-Busch Brewing Ass'n (Mo. App.) 105.

Evidence *held* sufficient to show negligence in supporting the roof of a mine, by the caving of which a miner was killed.—Rogers v. Rundell (Mo. App.) 1096.

In an action for injuries to an employé operating a gin stand, evidence *held* to justify a finding that there were no defects in the ma-

\*Point annotated. See syllabus.

chinery.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

\*In an action for injuries to an employé, a finding of contributory negligence *held* justified.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

In an action against a railway company for the death of an engineer in a derailment, his watch *held* proper evidence to show time of accident as proving rate of speed.—Galveston, H. & S. A. Ry. Co. v. Gillespie (Tex. Civ. App.) 707.

\*In an action for the death of an engineer in a derailment *held* the company could not show he had been previously disciplined for negligently running his train at high speed in violation of orders.—Galveston, H. & S. A. Ry. Co. v. Gillespie (Tex. Civ. App.) 707.

\*In an action for negligent death of an employé, the evidence *held* to show that decedent was at the time of the injuries in the duty of his employment.—Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.

Evidence, in an action for injury to an employé who was run down by an engine, *held* to warrant a finding that no switchman was on the footboard of the tender to keep a look-out ahead.—Galveston, H. & S. A. Ry. Co. v. Wafer (Tex. Civ. App.) 897.

Evidence that, while defendant's employé were working on a curve in its railroad track at which decedent was killed, other parts of the track would become defective, *held* immaterial.—Thompson v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 910.

#### § 10. — Questions for jury.

\*Whether a brakeman was injured by the falling of a piece of coal from a tender *held*, under the evidence, for the jury.—Louisville & N. R. Co. v. Clark (Ky.) 1184.

\*Whether or not a master had furnished his employé a safe place to work and properly instructed him as to dangers incident to the employment *held* for the jury.—Owensboro Brick & Sewer Pipe Co. v. Glenn (Ky.) 1195.

\*Evidence in an action for the death of plaintiff's son who was run down by an engine while he was riding on a railroad velocipede *held* not to show that he was guilty of contributory negligence as a matter of law.—Lynch v. Chicago & A. Ry. Co. (Mo.) 68.

In an action for death of a railroad engineer in a wreck caused by a broken rail, evidence *held* to require submission of the question of defendant's negligence to the jury.—Hach v. St. Louis, I. M. & S. Ry. Co. (Mo.) 525.

\*In an action against a miner for death of an employé, decedent's contributory negligence *held* for the jury under the evidence.—Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.

\*Whether a switchman, injured while uncoupling cars equipped with defective automatic couplers, was guilty of contributory negligence in placing his arm between the buffers, *held* for the jury.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*Whether a switchman, injured while uncoupling cars equipped with automatic couplers which were defective, in violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), was guilty of contributory negligence in failing to use safer means, and in violation of his employer's rules, *held* for the jury.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

\*In an action against a railway company for the death of an engineer questions of negligence

and contributory negligence *held* for the jury.—Galveston, H. & S. A. Ry. Co. v. Gillespie (Tex. Civ. App.) 707.

\*In an action for negligent death of an employé, the question of decedent's contributory negligence *held* for the jury.—Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.

\*In an action for injury to an employé who was run down by an engine, whether he was guilty of negligence in standing where he did from three to five minutes *held* for the jury.—Galveston, H. & S. A. Ry. Co. v. Wafer (Tex. Civ. App.) 897.

\*In an action for death of a railroad engineer by derailment on a curve alleged to have resulted from wreckers, whether defendant was negligent in inspecting the track at that point, as plaintiff claimed, *held* for the jury.—Thompson v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 910.

#### § 11. — Instructions.

In an action for death of a railroad engineer by the derailment of his train caused by a defective portion of the track, an instruction on the question of defendant's negligence *held* proper.—Hach v. St. Louis, I. M. & S. Ry. Co. (Mo.) 525.

An instruction on contributory negligence of an employé *held* to leave out of consideration a material matter.—Rogers v. Rundell (Mo. App.) 1096.

In an action for injuries to a switchman, an instruction *held* erroneous as withdrawing a question from the jury.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

In an action for injuries to a brakeman, instruction *held* not inconsistent and misleading.—Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App.) 465.

An instruction, in an action for injuries to an employé, confusing assumed risk and contributory negligence, *held* not ground for reversal.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

In an action for injuries to an employé, an instruction, authorizing a recovery if he did not know that the machinery was defective, *held* not prejudicial to him.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

In an action for injuries to an employé, certain instructions *held* not misleading.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

\*In an action for injuries to an employé, a charge that he could not recover if he knew at the time that the machinery was defective *held* proper.—Thompson v. Planters' Compress Co. (Tex. Civ. App.) 470.

In an action against a railway company for the death of an engineer in a derailment, an instruction *held* not objectionable as requiring the company to furnish rails in a reasonably safe condition.—Galveston, H. & S. A. Ry. Co. v. Gillespie (Tex. Civ. App.) 707.

\*In an action for negligent death of an employé, a charge submitting the issue of assumed risk *held* sufficient in view of other charges.—Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.

\*A charge *held* to properly submit the issue of assumed risk under the statute.—Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.

\*In an action for negligent death of a railway engineer, a charge defining contributory negligence *held* proper under the evidence.—Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.) 773.

\*Point annotated. See syllabus.

**§ 12. Liabilities for injuries to third persons.**

Where death was caused by a passenger elevator operator's negligence, *held*, his employer cannot be held negligent merely because the operator was a boy.—*Davis' Adm'r v. Ohio Valley Banking & Trust Co. (Ky.)* 843.

\*The owner of a passenger elevator cannot escape liability for the negligent killing of a boy who was permitted to ride on top of the elevator by the operator, on the ground that the operator was unauthorized to grant such permission.—*Davis' Adm'r v. Ohio Valley Banking & Trust Co. (Ky.)* 843.

\*A master is responsible for the torts of the servant, committed within the scope of his employment.—*Compher v. Missouri & Kansas Telephone Co. (Mo. App.)* 536.

**MATERIALITY.**

Of alteration of written instrument, see "Alteration of Instruments."

Of evidence in criminal prosecutions, see "Criminal Law," § 9.

**MEASURE OF DAMAGES.**

See "Damages," § 2.

For breach of contract of carriage of passengers, see "Carriers," § 7.

For causing death, see "Death," § 2.

For injuries to shipment of live stock, see "Carriers," § 5.

**MECHANICS' LIENS.****§ 1. Proceedings to perfect.**

Complainant *held* not entitled to an injunction restraining defendants from filing several mechanics' liens for work and labor done under a single contract on the ground that defendants had been overpaid.—*Aimee Realty Co. v. Haller (Mo. App.)* 588.

Under Rev. St. 1899, § 4227 [Ann. St. 1906, p. 2317], a contractor for painting and glazing several houses under a single contract *held* entitled to file separate liens on each house; it not appearing that the lots on which the houses were located were contiguous.—*Aimee Realty Co. v. Haller (Mo. App.)* 588.

**§ 2. Enforcement.**

The rule against splitting demands does not apply so as to prevent a mechanics' lien claimant from enforcing each of several liens for material and labor furnished on several houses under single contract.—*Aimee Realty Co. v. Haller (Mo. App.)* 588.

**MEDICINES.**

See "Druggists."

**MEETINGS.**

Town meetings, see "Towns," § 1.

**MENTAL ANGUISH.**

As element of damages, see "Damages," § 1.

**MENTAL SUFFERING.**

Element of damages for failure to deliver or delay in delivering telegrams, see "Telegraphs and Telephones," § 2.

**MERGER.**

Of cause of action in judgment, see "Judgment," § 7.

**MINES AND MINERALS.**

Commissions of brokers for sale of mining lease, see "Brokers," § 2.

Liability of mine owner for injuries to or death of servant, see "Master and Servant," §§ 2-7, 9.

Sufficiency of possession of, under champerty statute, see "Champerty and Maintenance."

§ 1. **Title, conveyances, and contracts.**  
An action to quiet title to the minerals under the surface of a tract of land *held* maintainable, though plaintiff is not in actual possession of land.—*Combs v. Virginia Iron, Coal & Coke Co. (Ky.)* 815.

**MINORS.**

See "Infants."

**MISREPRESENTATION.**

See "False Pretenses"; "Fraud."

As ground of estoppel, see "Estoppel," § 2.

By applicant for insurance, see "Insurance," § 10.

**MISTAKE.**

Ground for reformation of instrument, see "Reformation of Instruments," § 1.

Ground for setting aside deed, see "Deeds," § 1.  
Parol evidence to vary written instrument, see "Evidence," § 9.

Recovery of payments made by, see "Payment," § 1.

Recovery of taxes paid to county by, see "Counties," § 2.

**MODIFICATION.**

Of contract, see "Contracts," § 3.

**MONEY PAID.**

\*A payment made by one person on account of another, where not made at the other's request, will not create as against the other an obligation in favor of the person making the payment.—*Mings v. Griggsby Const. Co. (Tex. Civ. App.)* 192.

**MONEY RECEIVED.**

Recovery of payment in general, see "Payment," § 1.

Recovery of price paid for land, see "Vendor and Purchaser," § 6.

Recovery of tax paid, see "Taxation," § 4.

**MONOPOLIES.**

Certainty of anti-trust law, see "Statutes," § 1.  
Excessive penalties for violation of anti-trust law, see "Penalties," § 1.

Grants of privileges or immunities, see "Constitutional Law," § 3.

Harmless error in action by state against foreign corporation for violation of anti-trust law, see "Appeal and Error," § 33.

§ 1. **Trusts and other combinations in restraint of trade.**

An action by the state for the penalty imposed by Anti-Trust Act May 25, 1899 (Laws 1899,

\*Point annotated. See syllabus.

p. 246, c. 146), and Act March 31, 1903 (Laws 1903, p. 119, c. 94), *held* not barred by the two and four year statutes of limitation embodied in the Revised Statutes.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

A civil action by the state for the penalties imposed by Anti-Trust Act March 31, 1903 (Laws 1903, p. 119, c. 94), *held* not barred in three years, notwithstanding Code Cr. Proc. 1895, art. 218.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

Penalties recoverable under Anti-Trust Act May 25, 1899 (Laws 1899, p. 246, c. 146), and Act March 31, 1903 (Laws 1903, p. 119, c. 94), *held* not barred in two years notwithstanding the provisions of the Penal Code and the Code of Criminal Procedure.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

The penalties imposed by Anti-Trust Act May 25, 1899 (Laws 1899, p. 246, c. 146), *held* not indefinite, but enforceable by civil action.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

An action by the state for penalties imposed by Anti-Trust Act May 25, 1899 (Laws 1899, p. 246, c. 146), and Act March 31, 1903 (Laws 1903, p. 119, c. 94), imposing penalties for violations of the provisions thereof, *held* not a criminal prosecution within Code Cr. Proc. 1895, art. 219, but a civil suit.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

In an action by the state against a Missouri corporation doing business in the state for violating Anti-Trust Act March 31, 1903 (Laws 1903, p. 119, c. 94), an instruction *held* not misleading.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

A corporation *held* guilty of violating Anti-Trust Act May 25, 1899 (Laws 1899, p. 246, c. 146), and Act March 31, 1903 (Laws 1903, p. 119, c. 94).—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

A proviso in the Anti-Trust Act March 31, 1903 (Laws 1903, p. 119, c. 94), *held* to preserve whatever rights the state had under Anti-Trust Act May 25, 1899 (Laws 1899, p. 246, c. 146), including the right to recover the penalties imposed thereby.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

## MONUMENTS.

Marking boundaries, see "Boundaries," § 1.

## MORTGAGES.

By or to husband and wife, see "Husband and Wife," § 2.

Default judgment in foreclosure, see "Judgment," § 3.

Of personal property, see "Chattel Mortgages."

### § 1. Requisites and validity.

A mortgage *held* to extend only to a life interest in the land.—*Couch v. Sisemore* (Ky.) 801.

\*There can be no mortgage without a debt.—*Duell v. Leslie* (Mo.) 489.

\*A transaction *held* either a conditional sale or a mortgage, depending on the question whether the relation of debtor and creditor remained.—*Duell v. Leslie* (Mo.) 489.

\*Distinction between the effect of an absolute deed, with agreement by the grantee to convey for a specified price, as a mortgage or as a conditional sale, stated.—*Duell v. Leslie* (Mo.) 489.

A conveyance absolute on its face *held*, under the circumstances, not a mortgage.—*Duell v. Leslie* (Mo.) 489.

\*The ultimate fact which converts an absolute deed into an equitable mortgage is that it is given merely as a security.—*Duell v. Leslie* (Mo.) 489.

\*A court of equity may declare a deed absolute on its face to be a mortgage and permit the grantor to redeem.—*Duell v. Leslie* (Mo.) 489.

\*A deed absolute on its face will not be held a mortgage unless the relation of debtor and creditor exists between the grantor and grantee, and it was the intention of the parties to secure the payment of such debt.—*Duell v. Leslie* (Mo.) 489.

\*The borrower of money from a life insurance company, and his privies, *held* estopped to deny the power of the company to lend the money and take a deed of trust as security.—*Summet v. City Realty & Brokerage Co.* (Mo.) 614.

### § 2. Foreclosure by exercise of power of sale.

Where a trustee of mortgaged property under an intermediate trust deed purchases the prior incumbrance and buys in the property for himself at his sale under the intermediate trust deed, he is not entitled to a commission as trustee for making the sale.—*Stark v. Love* (Mo. App.) 87.

\*Surplus after a sale of land under an intermediate trust deed cannot be applied on a prior incumbrance without the consent of the parties in interest.—*Stark v. Love* (Mo. App.) 87.

A junior incumbrance *held* entitled to treat a sale to a trustee at his own sale as legal and demand the surplus improperly applied to a prior incumbrance.—*Stark v. Love* (Mo. App.) 87.

A trustee of an intermediate trust deed who purchases a prior incumbrance and buys in the land at his own sale cannot apply the surplus to the prior incumbrance.—*Stark v. Love* (Mo. App.) 87.

\*A trustee of mortgaged property cannot become a purchaser of the premises at his own sale, directly or indirectly, unless authorized or consented to by the parties in interest; and such an unauthorized sale is fraudulent at law and may be set aside, although the trustee acted in good faith.—*Stark v. Love* (Mo. App.) 87.

### § 3. Foreclosure by action.

Where the holder of a lien against property on which a mortgage has been foreclosed is not made a party, his only right is that of redemption.—*Longino v. Ball-Warren Commission Co.* (Ark.) 682.

A senior mortgagee who takes possession as a purchaser at a foreclosure sale holds as a purchaser and not under the mortgage, and is not accountable for rents and profits before an offer to redeem by one not a party to the foreclosure.—*Longino v. Ball-Warren Commission Co.* (Ark.) 682.

A judgment creditor who brings suit to set aside his debtor's fraudulent conveyance of land prior to the commencement of a suit by a bona fide mortgagee from the fraudulent grantee to foreclose *held* a necessary party to the foreclosure if his right to redeem is to be barred.—*Longino v. Ball-Warren Commission Co.* (Ark.) 682.

A foreclosure proceeding is valid without making a purchaser of the mortgagor's right to redeem a party.—*Longino v. Ball-Warren Commission Co.* (Ark.) 682.

\*Beneficiary in deed of trust *held* entitled to charge the grantor with attorney's fees reasonably expended in collecting a discounted note of a third person, secured by the deed.—*Oman v. American Nat. Bank* (Ky.) 277.

\*Point annotated. See syllabus.

\*Under the express provisions of Civ. Code Prac. §§ 56, 419, a personal judgment, in a foreclosure suit against a nonresident constructively summoned and who did not appear, is void.—*Highland Land & Building Co. of Dayton, Ky., v. Audas (Ky.)* 866.

\*Under Civ. Code Prac. § 417, a purchase of property in good faith from a mortgagee who purchased at the foreclosure sale held a good defense to an action by one of the mortgagors to set aside the sale.—*Highland Land & Building Co. of Dayton, Ky., v. Audas (Ky.)* 866.

\*An original action to set aside a judgment of foreclosure of a mortgage, brought in the same court in which the decree was granted, held a direct and not a collateral attack thereon (Civ. Code Prac. § 414).—*Highland Land & Building Co. of Dayton, Ky., v. Audas (Ky.)* 866.

#### § 4. Redemption.

\*A tender of the amount due, while essential to the maintenance of an action to redeem from a mortgage foreclosure, may be made after commencement of the action.—*Longino v. Ball-Warren Commission Co. (Ark.)* 682.

\*Plaintiff in an action to redeem cannot recover any costs incurred before tender of the amount due.—*Longino v. Ball-Warren Commission Co. (Ark.)* 682.

A court of equity may declare a deed absolute on its face to be a mortgage, and permit the grantor to redeem.—*Duell v. Leslie (Mo.)* 489.

### MOTIONS.

Harmless error in rulings on, see "Appeal and Error," § 26.

Presentation of objections for review, see "Appeal and Error," § 5.

Relating to pleadings, see "Pleading," § 9.  
Review of rulings on as dependent on record on appeal or writ of error, see "Appeal and Error," § 9.

#### *For particular purposes or relief.*

Change of venue in civil actions, see "Venue," § 1.

Continuance in civil actions, see "Continuance." Continuance in criminal prosecutions, see "Criminal Law," § 17.

Direction of verdict in civil actions, see "Trial," § 2.

New trial in civil actions, see "New Trial," § 3.  
New trial in criminal prosecutions, see "Criminal Law," § 28.

Quashing indictment or information, see "Indictment and Information," § 4.

Striking out statement in justice's court, see "Justices of the Peace," § 2.

### MOTIVE.

Evidence of in prosecution for homicide, see "Homicide," § 5.

### MULTIPLICITY OF SUITS.

Restraining by injunction, see "Injunction," § 1.

### MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1; "Towns."

Acceptance of dedication of streets, see "Dedication," § 1.

Exemption of public property from taxation, see "Taxation," § 2.

Judicial notice of, see "Evidence," § 1.

Operation and effect of limitations in action on tax bills issued by, see "Limitation of Actions," § 3.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Rights of telephone companies in streets, see "Telegraphs and Telephones," § 1.

Street railroads, see "Street Railroads."

#### § 1. Proceedings of council or other governing body.

\*The repeal of an ordinance imposing a penalty pending a prosecution for the penalty does not abate the action, where the repealing ordinance provides that actions pending shall remain unaffected thereby.—*City of Monett v. Hall (Mo. App.)* 579.

#### § 2. Property.

Under Ky. St. 1903, § 3660, the trustees of a town held authorized to sell a school building to a graded school district.—*Read v. Smith (Ky.)* 1182.

#### § 3. Contracts in general.

\*Ky. St. 1903, § 2768, relating to municipal contracts, held subject to reasonable construction to prevent its evasion by mere device.—*Jacques v. City of Louisville (Ky.)* 308.

#### § 4. Public improvements.

In an action under Ky. St. 1903, § 3706, on a warrant issued to the contractor for street improvement, held, error to award a personal judgment against the property owner.—*Jackson v. McHargue (Ky.)* 871.

The exercise of discretion by the council of a city of the fourth class in regard to the nature of pavement to be laid held not to be interfered with by the courts.—*Campbell v. Southern Bitulithic Co. (Ky.)* 1189.

\*The fact that one of two bids on bitulithic pavement was sham held not to affect the validity of a contract for that pavement let to another bidder, in view of competitive bidding on bitulithic and brick pavements.—*Campbell v. Southern Bitulithic Co. (Ky.)* 1189.

\*A contract for patented bitulithic pavement held valid in view of an ordinance for bids on either brick or bitulithic pavement.—*Campbell v. Southern Bitulithic Co. (Ky.)* 1189.

A municipal assessment for benefits for a parkway held not to abate by the land on which it is a lien afterwards being condemned for a park.—*In re Spring Valley Park in Kansas City (Mo.)* 531; *Buchanan v. Kansas City, Id.*

\*Statement of date from which lien of a municipal assessment dates, even if Kansas City Charter 1889, art. 10, § 20, be unconstitutional.—*In re Spring Valley Park in Kansas City (Mo.)* 531; *Buchanan v. Kansas City, Id.*

\*A municipal lien on land condemned held to attach to the award paid into court.—*In re Spring Valley Park in Kansas City (Mo.)* 531; *Buchanan v. Kansas City, Id.*

Statement of proceedings to enforce claim where land on which a municipal assessment is a lien is condemned and the award paid into court.—*In re Spring Valley Park in Kansas City (Mo.)* 531; *Buchanan v. Kansas City, Id.*

A contractor for a street improvement held entitled, after the completion of the work and the apportionment of the cost, to allow one person a discount on the payment of his tax bill, though prior to the making of the contract he cannot agree to accept a sum less than his bid calls for.—*Kurtz v. Knapp (Mo. App.)* 537.

A tax bill for a street improvement issued to a contractor held not void merely because his partner was one of the two sureties on his contract.—*Kurtz v. Knapp (Mo. App.)* 537.

\*Point annotated. See syllabus.

Tax bills for a street improvement *held* invalid for want of jurisdiction in the city authorities to proceed with the improvement, under Rev. St. 1899, § 5989 [Ann. St. 1906, p. 3024], providing for street improvements.—*City of Marshall ex rel. Colyer v. Wisdom* (Mo. App.) 1078.

#### § 5. Police power and regulations.

Kirby's Dig. § 2456, requiring a bond for costs on appeal in certain cases, *held* not to apply to a prosecution in a municipal court for violation of an ordinance.—*Emerson v. Town of McNeil* (Ark.) 479.

\*Kirby's Dig. §§ 5438, 5454, *held* to empower a town to pass a certain ordinance.—*Emerson v. Town of McNeil* (Ark.) 479.

\*The power conferred by Kirby's Dig. §§ 5438, 5454, or an ordinance passed thereunder, prohibiting the soliciting of customers for a hotel on a depot platform, *held* not an interference with any common right, but a proper exercise of police power.—*Emerson v. Town of McNeil* (Ark.) 479.

\*An ordinance prohibiting the soliciting of customers for a hotel, on a depot platform, *held* none the less valid because the platform on which the soliciting is prohibited is the property of the railroad company.—*Emerson v. Town of McNeil* (Ark.) 479.

The act approved March 21, 1906 (Acts 1906, p. 310, c. 57, §§ 5, 6), repealing Ky. St. 1903, §§ 3011, 3012, providing for the licensing of businesses, occupations, and professions, *held* not to narrow the right to license, but to extend it.—*City of Louisville v. Roberts & Krieger* (Ky.) 1197.

A municipal ordinance *held* to render a manager of a corporation liable to the penalty imposed for assisting the corporation to conduct its business without paying the occupation tax imposed.—*City of Monett v. Hall* (Mo. App.) 579.

\*An ordinance establishing public scales and declaring that coal, etc., shall not be sold without first being weighed thereon; *held* inapplicable to a party selling coal to a state institution; the city being without authority to interfere with the purchases which Rev. St. 1899, § 7708 [Ann. St. 1906, p. 3679], authorizes the institution to make.—*City of Fulton v. Sims* (Mo. App.) 1094.

An ordinance establishing public scales, and declaring that commodities specified shall not be sold without being weighed thereon, *held* not to require one selling a commodity specified to first have it weighed on such scales, where it is weighed on the purchaser's scales.—*City of Fulton v. Sims* (Mo. App.) 1094.

#### § 6. Use and regulation of public places, property, and works.

Facts *held* to show a part of a road within a city a municipal highway for which special assessments might be levied.—*Jackson v. McHargue* (Ky.) 871.

One whose property does not abut on the part of a street vacated by a valid ordinance *held* not entitled to maintain action to enjoin enforcement of the ordinance.—*John K. Cummings Realty & Investment Co. v. Deere & Co.* (Mo.) 496.

\*An action to enjoin building on a street, the ordinance to vacate which was void, *held* one to enjoin a public nuisance, not maintainable by an individual not alleging a special damage.—*John K. Cummings Realty & Investment Co. v. Deere & Co.* (Mo.) 496.

\*A highway created by dedication *held* a street of a city on it extending its limits so as

to include the highway.—*Kurtz v. Knapp* (Mo. App.) 537.

\*A city ordinance granting defendant the right to take water from a tap for use on an adjoining building did not authorize defendant to maintain a hose taut across the sidewalk at a height dangerous to pedestrians.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

To justify a reversal of the judgment of the Court of Civil Appeals and the district court, entitling the city of El Paso to remove a part of plaintiff's house situated upon a street of the city, it must appear that the city was estopped to claim the ground as a part of the public highway, or the facts must show that the city had abandoned the use of that part of the street upon which the house is situated.—*Krause v. City of El Paso* (Tex.) 121.

The city of El Paso, after plaintiff's occupancy of property for more than 20 years, *held* estopped to claim a part of such property as public highway and to remove plaintiff's building therefrom.—*Krause v. City of El Paso* (Tex.) 121.

In an action to enjoin the city of El Paso from destroying plaintiff's house, claimed to be situated on a public highway, plaintiff *held* to have acted lawfully in the erection of the building and to have duly applied for a building permit.—*Krause v. City of El Paso* (Tex.) 121.

\*A city has the right to permit the use of its streets for the erection of poles and feed wires for use in connection with a street railway system.—*Beaumont Traction Co. v. Brock* (Tex. Civ. App.) 460.

\*Notwithstanding Sayles' Ann. Civ. St. 1897, art. 419, a telegraph and telephone company *held* entitled, under article 698, to maintain its wires and poles in the streets of a city subject to municipal regulation as provided by articles 426 and 702.—*City of Texarkana v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 915.

#### § 7. Torts.

\*In an action for injuries to a pedestrian by falling into an excavation in a city sidewalk, plaintiff *held* negligent precluding a recovery.—*Louisville Gas Co. v. Hammer* (Ky.) 826.

\*In an action for injuries to a pedestrian by falling over a hose maintained from four to eight inches above the sidewalk, the questions of defendant's negligence and plaintiff's contributory negligence *held* for the jury.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

Where plaintiff fell over a hose across a sidewalk, evidence that the hose was covered with dust so as to make its color that of the pavement *held* admissible as bearing on plaintiff's negligence.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*In an action for injuries to plaintiff by falling over a hose alleged to have been negligently maintained across a sidewalk, a city ordinance granting defendant permission to take water from a tap was irrelevant.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*An instruction that a pedestrian could not recover for falling over a hose stretched across a sidewalk unless the jury found that the hose was maintained at a height of about eight inches above the sidewalk, as alleged in the petition, *held* properly refused.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*That plaintiff momentarily glanced aside as he was walking along a sidewalk, and did not

\*Point annotated. See syllabus.

see a hose negligently stretched over the walk over which he fell, did not establish plaintiff's negligence as a matter of law.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*One is only required to use ordinary care in walking along a sidewalk to discover impediments, pitfalls, or other dangers.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

A defective notice of injuries on a defective sidewalk *held* not cured by an unsworn petition in an action for the injuries, under Rev. St. 1899, § 5724 [Ann. St. 1906, p. 2909].—*Jacobs v. City of St. Joseph* (Mo. App.) 1072.

\*A notice of injuries sustained from a defective sidewalk in a city of the second class, failing to describe the character of plaintiff's injuries, *held* not a sufficient compliance with Rev. St. 1899, § 5724 [Ann. St. 1906, p. 2909].—*Jacobs v. City of St. Joseph* (Mo. App.) 1072.

#### § 8. Fiscal management, public debt, securities, and taxation.

Evidence, in a suit to enjoin payment by a city for printing, *held* to show the company with which it contracted therefor was merely a device in an attempt to evade Ky. St. 1903, § 2768.—*Jacques v. City of Louisville* (Ky.) 308.

A city has the right, under the statutes, to retrospectively tax personal property.—*Hegan v. City of Louisville* (Ky.) 806.

## MURDER.

See "Homicide."

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 10.

## NAMES.

Misnomer of corporation as ground for abatement, see "Abatement and Revival," § 1.  
Of corporations, see "Corporations," § 1.  
Review of question as to suing corporation by wrong name as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

## NATIONAL BANKS.

See "Banks and Banking," § 2.

## NEGLIGENCE.

Applicability of instructions to pleadings in action for, see "Trial," § 6.

Causing death, see "Death," § 2.

Indemnity to party primarily liable, see "Indemnity."

Measure of damages, see "Damages," § 2.

Nature of action as for negligence or on contract, see "Action," § 2.

Opinion evidence see "Evidence," § 10.

*By particular classes of persons.*

See "Carriers," §§ 3-5, 8; "Hospitals"; "Municipal Corporations," § 7; "Railroads," §§ 4-9; "Street Railroads," § 2.

Employers, see "Master and Servant," §§ 2-11.  
Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See "Electricity"; "Explosives"; "Railroads," §§ 4-9; "Street Railroads," § 2.

Production, supply, and use of gas, see "Gas."

\*Point annotated. See syllabus.

## Contributory negligence.

Instructions on issue of, see "Negligence," § 4.

Of passenger, see "Carriers," § 9.

Of person injured by operation of railroad, see "Railroads," §§ 6, 7.

Of person injured on street, see "Municipal Corporations," § 7.

Of servant, see "Master and Servant," §§ 6, 9-11.

### § 1. Acts or omissions constituting negligence.

\*The owner of a passenger elevator *held* liable for death resulting from the operator's failure to exercise ordinary care.—*Davis' Adm'r v. Ohio Valley Banking & Trust Co.* (Ky.) 843.

\*Defendant owed a customer's employé on its premises the legal duty to exercise at least ordinary care to protect him from injury.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

\*In determining what is ordinary care in a particular case all of the surrounding circumstances must be considered, and what will be ordinary care under some circumstances will not be under others.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

### § 2. Proximate cause of injury.

\*Inevitable accident defined.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

\*A 12-year old boy's contributory negligence in riding on top of a passenger elevator and attempting to get off through an opening in the shaft *held* not necessarily to defeat recovery for his death caused by a negligent starting of the elevator.—*Davis' Adm'r v. Ohio Valley Banking & Trust Co.* (Ky.) 843.

### § 3. Contributory negligence.

\*Where one frightens another by his negligence, and while he is in that condition he is injured, such facts should be considered in passing on the question of contributory negligence.—*Lange v. Missouri Pac. Ry. Co.* (Mo.) 660.

\*Negligence of a driver of a vehicle *held* not imputable to a 16-year old passenger.—*Zalotuchin v. Metropolitan St. Ry. Co.* (Mo. App.) 548.

\*The degree of care one is required to exercise to protect oneself *held* the same whether the danger is known or unknown.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

### § 4. Actions.

Where the evidence shows that plaintiff's injury may have resulted either from the defective condition of defendant's hand car from which he fell, or from negligently losing his hold on the lever, and the inference that the injury resulted from one cause is no stronger than that it resulted from the other, plaintiff cannot recover.—*Louisville & N. R. Co. v. Guest's Adm'r* (Ky.) 817.

\*Rule as to burden of proof in negligence cases stated.—*Cincinnati, N. O. & T. P. Ry. Co. v. Zachary's Adm'r* (Ky.) 842.

\*A petition in an action for death, charging negligence in general terms, *held* sufficient.—*Davis' Adm'r v. Ohio Valley Banking & Trust Co.* (Ky.) 843.

An instruction permitting the jury to consider plaintiff's circumstances in life in determining whether they were negligent in letting their child escape into the street *held* not error.—*Cornovski v. St. Louis Transit Co.* (Mo.) 51.

The fact that the facts claimed to constitute contributory negligence were submitted to the jury in separate instructions *held* not objectionable.—*Lange v. Missouri Pac. Ry. Co.* (Mo.) 660.

\*The giving of an instruction on negligence *held* not error merely because not defining the term "negligence."—*O'Leary v. Kansas City* (Mo. App.) 94.

\*An instruction requiring plaintiff to establish that he was not negligent by a preponderance of the evidence was properly refused.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*Whether a 16-year old girl was negligent in failing to take precautions against her step-father's driving into a position of danger *held* for the jury.—*Zalotuchin v. Metropolitan St. Ry. Co.* (Mo. App.) 548.

In a personal injury action, an instruction on contributory negligence *held* objectionable as being misleading.—*Texas & P. Ry. Co. v. Tucker* (Tex. Civ. App.) 764.

\*In an action for negligent death of an employé an instruction defining contributory negligence *held* not misleading.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

\*Whether an act or omission is negligence or not is in general a question for the jury, unless such act done or omitted has been declared by law to constitute negligence.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

## NEGOTIABLE INSTRUMENTS

See "Bills and Notes."

## NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," §§ 1, 2.

Ground for new trial in criminal prosecutions, see "Criminal Law," § 28.

## NEW TRIAL.

Costs, see "Costs," § 3.

Necessity of motion for purpose of review, see "Appeal and Error," § 5.

Remand by appellate court for new trial, see "Appeal and Error," § 38.

*In particular actions or proceedings.*

In criminal prosecutions, see "Criminal Law," § 28.

*Review of proceedings.*

Necessity of motion for new trial for purpose of review, see "Criminal Law," § 31.

Presumptions on appeal or writ of error, as to rulings on motion for, see "Appeal and Error," § 23.

Review of discretionary rulings on motion for, see "Appeal and Error," § 24.

Review of rulings on motion for as dependent on nature and scope of decision, see "Appeal and Error," § 3.

### § 1. Nature and scope of remedy.

\*The granting of a new trial on the ground of newly discovered evidence rests to some extent in the sound discretion of the trial court.—*Arkansas Mut. Fire Ins. Co. v. Stuckey* (Ark.) 203.

The question of granting a new trial, where plaintiff was ill and neither she nor her counsel appeared, is not governed by Civ. Code Prac. §§ 340, 342, 344, but by section 518, subsec. 7.—*Ray v. Arnett* (Ky.) 828.

\*The granting of a new trial on the ground of newly discovered evidence is within the sound discretion of the trial court.—*Nugent v. Armour Packing Co.* (Mo.) 648.

\*Point annotated. See syllabus.

### § 2. Grounds.

\*In an action for negligently setting fire to timbered land, newly discovered evidence *held* cumulative and not ground for a new trial.—*Mobile & O. R. Co. v. Caldwell* (Ky.) 236.

\*Abandonment of a suit by an attorney without notice to plaintiff when she was unable to attend court is such an unavoidable casualty and misfortune as would, under Civ. Code Prac. § 518, subsec. 7, entitle her to a new trial.—*Ray v. Arnett* (Ky.) 828.

\*It is the duty of the trial court to grant a new trial when satisfied that the verdict is against the preponderance of the evidence.—*Gould v. St. John* (Mo.) 23.

\*A verdict may be set aside if the trial court deems it against the weight of the evidence.—*Weinstein v. Toledo, St. L. & W. R. Co.* (Mo. App.) 1125.

### § 3. Proceedings to procure new trial.

\*An order granting a new trial, specifying error in finding as to facts and law *held* not a sufficient compliance with the statute requiring such order to state the ground or grounds on which the new trial is granted.—*Ordelleide v. Berger Land Co.* (Mo.) 620.

## NEXT OF KIN.

See "Descent and Distribution."

## NONSUIT.

Before trial, see "Dismissal and Nonsuit."

## NOTES.

Promissory notes, see "Bills and Notes."

## NOTICE.

*As affecting particular classes of persons.*

See "Carriers," § 3.

Purchaser, see "Vendor and Purchaser," § 4.

Transferee of note, see "Bills and Notes," § 2.

*Of particular facts, acts, or proceedings not judicial.*

Alteration of note, see "Bills and Notes," § 2.

Construction of stockyards by railroad, see "Railroads," § 3.

Injuries caused by defective sidewalk, see "Municipal Corporations," § 7.

Injuries to shipment, see "Carriers," § 3.

Loss insured against, see "Insurance," § 7.

Retirement of partner, see "Partnership," § 4.

Town meetings, see "Towns," § 1.

*Of particular judicial proceedings.*

See "Contempt," § 2; "Lis Pendens."

Appeal from judgment in justice's court, see "Justices of the Peace," § 3.

Appointment of receiver, see "Receivers," § 2.

Contest of election, see "Elections," § 1.

Nunc pro tunc entries in record of courts, see "Courts," § 2.

## NUISANCE.

Applicability of instruction to pleadings and evidence in action for damages from nuisance, see "Trial," § 6.

Violation of liquor laws, see "Intoxicating Liquors," § 8.

### § 1. Private nuisances.

\*An action against a gas company maintaining a private nuisance *held* not maintainable in the absence of proof of certain facts.—*Brad-*



bury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*In an action for damages caused by a private nuisance, the question is mainly one of degree and location, and whether the acts complained of are a nuisance should be left to the jury, where the evidence tends to show that plaintiff's rights have been invaded to his damage.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*In an action for damages caused by a private nuisance, whether plaintiff's legal rights were invaded *held* under the evidence for the jury.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

Evidence *held* sufficient to warrant submission of the issue of the prescriptive right to maintain a private nuisance.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*Certain damages *held* not so indirect as to prevent recovery.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

An action for damages resulting in discoloration of marble caused by emission of discoloring substances from defendant's gas plant *held* not based on negligence but for maintaining a private nuisance.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*Plaintiff *held* not entitled to recover for damages from a private nuisance, if he was making an unusual use of his property in view of its location or if the property injured was of so delicate a nature as to become injured from a reasonable use of defendant's gas plant.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*The right to maintain or continue a private nuisance may be acquired by prescription though the right to maintain a public nuisance cannot.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*As a general rule an act lawful in itself is a nuisance, if done in a particular place so as to necessarily tend to damage another's property but one may reasonably use his property as he chooses, however much he may damage another, so long as he violates no legal right.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

\*As a general rule neither a private person nor a corporation has the right to erect and maintain a nuisance depriving an adjoining property owner of the beneficial use of his land without making compensation for the injury.—Bradbury Marble Co. v. Laclede Gas Light Co. (Mo. App.) 594.

## NUNC PRO TUNC.

Collateral attack on nunc pro tunc judgment, see "Judgment," § 6.

Entries in record of courts, see "Courts," § 2.

## OBJECTIONS.

Necessity for purpose of review, see "Appeal and Error," § 5.

To evidence, see "Criminal Law," § 20; "Trial," § 1.

## OBSCENITY.

Evidence *held* to sustain a conviction for swearing and using obscene language in a manner calculated to disturb the inhabitants of a private house.—Mercer v. State (Tex. Cr. App.) 365.

## OBSTRUCTING JUSTICE.

Corroboration of accomplices, see "Criminal Law," § 14.

\*In a prosecution for resisting arrest by obstructing the service of a warrant, evidence *held* insufficient to support a conviction.—Cooksey v. State (Ark.) 674.

## OBSTRUCTIONS.

Of highways, see "Highways," § 1.

Of process, see "Obstructing Justice."

## OFFER.

Of proof, see "Trial," § 1.

## OFFICERS.

Embezzlement, see "Embezzlement."

Presumption as to performance of official acts, see "Evidence," § 2.

Quo warranto, see "Quo Warranto."

Resisting officer, see "Obstructing Justice."

Revision of statutes affecting, see "Statutes," § 4.

Subject and title of statute, see "Statutes," § 3.

### Particular classes of officers.

See "Justices of the Peace"; "Receivers."

Assessors of taxes, see "Taxation," § 8.

Collectors of taxes, see "Taxation," § 5.

County officers, see "Counties," § 1.

Of fidelity insurance company, see "Insurance," § 7.

Of national banks, see "Banks and Banking," § 2.

Of state school for blind, see "Asylums."

School officers, see "Schools and School Districts," § 1.

State officers, see "States," § 2.

Town officers, see "Towns," § 1.

§ 1. Appointment, qualification, and tenure.

\*Under Act 1907, providing for an election of a superintendent of the State School for the Blind, for a term of two years, removable for specified causes, the board of trustees was without power to remove him except for the causes specified, and after notice and hearing.—Lucas v. Futrell (Ark.) 667.

The superintendent of the State School for the Blind, elected by the State Board of Trustees of Charitable Institutions under Act 1907, *held* a public officer.—Lucas v. Futrell (Ark.) 667.

\*Const. art. 5, § 11 [Ann. St. 1906, p. 208], relating to filling vacancies in elective offices by gubernatorial appointment, and length of tenure of the appointee, construed.—State ex rel. Wayland v. Herring (Mo.) 984.

\*Under Const. art. 14, § 5 [Ann. St. 1906, p. 313], and Rev. St. 1899, § 8847 [page 4112], relating to terms of office, one elected to an office having a definite date of commencement *held* not entitled to it before that date, notwithstanding his predecessor is appointed to fill a vacancy.—State ex rel. Wayland v. Herring (Mo.) 984.

The Legislature has construed Const. art. 5, § 11 [Ann. St. 1906, p. 208], to permit it, not only to determine the method of appointments to fill vacancies, but to prescribe the term of the appointee.—State ex rel. Wayland v. Herring (Mo.) 984.

Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], relating to filling vacancies in office and the termination of the term of the appointee,

\*Point annotated. See syllabus.

and section 9267 [page 4258], relating to the term of office of a tax collector, *held* not to contravene Const. art. 5, § 11 [page 208], relating to filling vacancies in office by a certain method, etc., unless otherwise provided by law.—State ex rel. Wayland v. Herring (Mo.) 984.

## § 2. Title to and possession of office.

\*Where both complainant and defendant pleaded that they were in possession of a public office, and each prayed that the other be enjoined from interfering with such possession, both the complaint and cross-complaint stated a cause for equitable relief.—Lucas v. Futrall (Ark.) 667.

In a suit to restrain defendant from interfering with plaintiff's alleged possession of the office of superintendent of the Arkansas School for the Blind, evidence *held* insufficient to show that complainant was in possession at the commencement of the action.—Lucas v. Futrall (Ark.) 667.

\*Where complainant was not in possession of an office, to which he claimed title, his remedy was by an action to recover the office, under Kirby's Dig. §§ 7981, 7983, 7987, 7988, and not a suit to restrain defendant from interfering with plaintiff's possession or management of the office.—Lucas v. Futrall (Ark.) 667.

## OPINION EVIDENCE.

Harmless error in rulings on, see "Appeal and Error," § 30.

In civil actions, see "Evidence," § 10.

In criminal prosecutions, see "Criminal Law," § 13.

## OPINIONS.

Of courts, see "Courts," § 2.

## OPTIONS.

To purchase goods, see "Sales," § 5.

## ORDER OF PROOF.

At trial, see "Trial," § 1.

## ORDERS.

As constituting equitable assignment, see "Assignments," § 1.

Review of appealable orders, see "Appeal and Error."

### Orders of court.

For sale of property of decedent, see "Executors and Administrators," § 5.

For submission of question of local option to voters, see "Intoxicating Liquors," § 2.

New trial in civil action, see "New Trial," § 3.

## ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 1, 4-6.

## PARDON.

\*Under Const. art. 6, § 18, the governor *held* empowered to pardon a criminal while the latter's case is pending final determination in the Supreme Court.—Cole v. State (Ark.) 673.

\*A pardon pending appeal from a judgment of conviction of an offense wherein a fine was imposed, absolves defendant from the payment of the fine to the state and takes away the criminal character of the judgment for costs, preventing

\*Point annotated. See syllabus.

the collection through imprisonment, but leaves in force the judgment of costs to be collected as a civil debt.—Cole v. State (Ark.) 673.

## PARENT AND CHILD.

See "Adoption"; "Bastards"; "Infants."

Applicability of instructions to evidence in action for injuries to child, see "Trial," § 6.

Construction and operation of instruction in action for injuries to child, see "Trial," § 8.

Constructive trust in land of parent for benefit of child, see "Trusts," § 1.

Contradiction of witness as to adoption of child, see "Witnesses," § 3.

Evidence of damages in action for injuries to child, see "Damages," § 5.

Harmless error in action for death of child, see "Appeal and Error," § 33.

Harmless error in action for injuries to child, see "Appeal and Error," § 32.

Injuries to child as passenger, see "Carriers," § 9.

Possession by son as adverse to father, see "Adverse Possession," § 1.

Right of action for death of parent, see "Death," § 2.

## PARKS.

In cities, see "Municipal Corporations," § 4.

## PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 12.

To establish trust, see "Trusts," § 1.

## PARTIES.

Defects ground for abatement, see "Abatement and Revival," § 1.

Interpleading, see "Interpleader."

Persons entitled to cancellation of instruments, see "Cancellation of Instruments," § 1.

In actions by or against particular classes of persons.

See "Carriers," § 5; "Schools and School Districts," § 1.

### In particular actions or proceedings.

See "Ejectment," § 2; "Partition," § 2; "Quiet-ing Title," § 2.

Criminal prosecutions, see "Criminal Law," § 2.

For breach of contract by landlord to furnish water for irrigation, see "Landlord and Tenant," § 1.

Foreclosure, see "Mortgages," § 3.

For injuries to freight by carriers, see "Carriers," § 5.

On judgment, see "Judgment," § 9.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Persons concluded by judgment, see "Judgment," § 8.

Review as to parties, and parties to proceedings in appellate courts.

See "Appeal and Error," § 4.

Parties entitled to allege error, see "Appeal and Error," § 22.

Will contest on appeal to district court from county court, see "Wills," § 3.

To conveyances, contracts, or other transactions.

See "Contracts," § 2; "Guaranty," § 1; "Usury," § 1.

Persons affected by estoppel, see "Estoppel," § 2.

**§ 1. New parties and change of parties.**

The refusal to allow a defendant to bring in a new party for its benefit *held* not erroneous.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

Defendants, who had disclaimed, *held* not entitled to object to the filing of a second amended petition joining a new defendant, in that such amendment was a surprise and not allowable under *Sayles' Ann. Civ. St. 1897, art. 1189*.—*Jolley v. Oliver* (Tex. Civ. App.) 1151.

\*It was no objection to plaintiff's right to bring in a new defendant by amended petition that the original defendants had disclaimed, and that the disclaimer had been called to the court's attention; no judgment having been rendered.—*Jolley v. Oliver* (Tex. Civ. App.) 1151.

\*Under *Sayles' Ann. Civ. St. 1797, art. 1188*, plaintiff was entitled to bring in a new defendant by amended original petition while the cause was pending.—*Jolley v. Oliver* (Tex. Civ. App.) 1151.

**§ 2. Defects, objections, and amendment.**

\*In an action against a partner, plaintiffs having alleged that the names of defendant's associates were unknown, defendant could not object to a defect of parties defendant without pleading in abatement and furnishing plaintiffs with the names and residences of the omitted partners.—*Holman v. Vickery & Coyle* (Tex. Civ. App.) 430.

**PARTITION.**

Collateral attack on judgment, see "Judgment," § 6.

**§ 1. By acts of parties.**

\*Parties to a parol agreement to partition land *held* estopped to repudiate the agreement.—*Ellis v. Campbell* (Ark.) 939.

**§ 2. Actions for partition.**

A judgment of partition and order of sale is but an interlocutory judgment; the order of distribution being the final judgment.—*Collier v. Catherine Lead Co.* (Mo.) 971.

A certified copy of an order of sale in a partition suit was not invalid as the sheriff's authority to sell the land, making the sale void, because the order had not been recorded.—*Collier v. Catherine Lead Co.* (Mo.) 971.

A homestead can be partitioned when a survivor has conveyed her interest and the guardian of minor children has not been permitted to use the same under the order of court.—*Williams v. Jones* (Tex. Civ. App.) 755.

The purchaser of a co-tenant's interest *held* a proper defendant in a suit by the other co-tenant to specifically perform a contract between the original co-tenants for partition and, in the alternative, for a partition.—*Ferguson v. Stringfellow & Hume* (Tex. Civ. App.) 762.

A co-tenant in several lots who has not assented to a sale of one of them by the other co-tenant is not bound to seek a partition of that lot only with the purchaser, but may join him and the other co-tenant in a suit to partition all of the lots.—*Ferguson v. Stringfellow & Hume* (Tex. Civ. App.) 762.

**PARTNERSHIP.**

Joinder of partners. see "Parties," § 2.

Liability of partners for libel, see "Libel and Slander," § 8.

\*Point annotated. See syllabus.

Lien of attorney for services in suit to settle partnership, see "Attorney and Client," § 1. Review in partnership accounting as dependent on record on appeal or writ of error, see "Appeal and Error," § 9.

**§ 1. The relation.**

\*In determining whether the relation between parties constitute a partnership, their intention as disclosed by the whole contract governs.—*Nugent v. Armour Packing Co.* (Mo.) 648.

**§ 2. Mutual rights, duties, and liabilities of partners.**

\*A partner has a lien on the partnership assets for his portion thereof after payment of the firm debts.—*T. Harlan & Co. v. Bennett, Robbins & Thomas* (Ky.) 287.

**§ 3. Rights and liabilities as to third persons.**

\*In a firm composed of father and son the father will be liable on notes given by the son to cover over drafts on his individual bank account for money used for firm business.—*Mathis v. Bank of Taylorsville* (Ky.) 1174.

On the issue of the existence of a partnership, an instruction *held* proper under the evidence, and if further instructions were needed to more fully present the issue the appellant should have requested them.—*Nugent v. Armour Packing Co.* (Mo.) 648.

Individuals forming a partnership *held* liable for work done in putting a building in condition for the business.—*Ehrhardt v. Stevenson* (Mo. App.) 1118.

**§ 4. Retirement and admission of partners.**

\*A partner leaving firm without notice to plaintiff *held* liable to her on a contract with the firm.—*Dunham v. France* (Mo. App.) 1077.

**§ 5. Dissolution, settlement, and accounting.**

\*In a suit for a partnership accounting, the chancellor *held* empowered to refuse to refer the matter to a master, but to make an examination of the accounts himself.—*East v. Key* (Ark.) 201.

**PASSENGERS.**

See "Carriers," §§ 6-10.

**PATENTS.**

Designation of boundaries, see "Boundaries."

**PAYMENT.**

See "Accord and Satisfaction"; "Compromise and Settlement"; "Tender."

Materiality of alteration of note as to place of payment, see "Alteration of Instruments." Recovery for money paid, see "Money Paid."

*Of particular classes of obligations or liabilities.*

See "Bills and Notes," § 3; "Insurance," § 8. Claims against estate of decedent, see "Executors and Administrators," § 4. Price of goods sold, see "Sales," § 4. Taxes, see "Taxation," § 4.

**§ 1. Recovery of payments.**

\*In an action to recover notes and securities given as fees for legal services to be rendered, such fees, in the absence of explanation, *held* unreasonable and oppressive, warranting the relief prayed.—*Pindall v. Waterman* (Ark.) 964; *Same v. Schmidt*, *Id.*

Plaintiff having paid defendants a sum of money to relieve her parents from a supposed enforceable contract to convey their land, which was in fact nonenforceable, the parents' moral obligation to perform the contract was not a sufficient consideration for the payment.—*Tucker v. Denton* (Ky.) 280.

\*Plaintiff having paid \$800 to defendants to relieve her parents from liability on a non-enforceable contract for the sale of their land, believing that the contract was enforceable, plaintiff was entitled to recover the amount so paid.—*Tucker v. Denton* (Ky.) 280.

Plaintiff held not a mere volunteer in making a payment to relieve her parents from a supposed enforceable land contract.—*Tucker v. Denton* (Ky.) 280.

Defendant, having converted certain cotton seed belonging to plaintiff, held not entitled to set off against damages a debt which plaintiff owed to the purchaser of the seed from defendant which the purchaser deducted from the proceeds remitted to defendant.—*First State Bank v. Barnett* (Tex. Civ. App.) 182.

## PEACE.

Breach of public peace, see "Breach of the Peace."

## PENALTIES.

Construction of penal laws, see "Statutes," § 6.  
Effect of repeal of ordinance imposing penalty, see "Municipal Corporations," § 1.

*For particular acts or omissions.*

Violation of anti-trust law, see "Monopolies," § 1.

Violation of regulations by carrier, see "Carriers," § 1.

Violations of liquor laws, see "Intoxicating Liquors," § 6.

### § 1. Nature and grounds, and extent of liability.

A verdict against a corporation for violation of the anti-trust acts of May 25, 1899 (Laws 1899, p. 240, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), held not excessive.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

### § 2. Actions and other proceedings.

\*An action of debt lies for the recovery of statutory penalties where the statute does not require a resort to criminal prosecutions for their enforcement, though it does not direct any method of enforcement.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

The state, in an action by it for the recovery of a statutory penalty, need prove its case only by a preponderance of the evidence.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

## PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

## PERFORMANCE.

Of contract by broker, see "Brokers," § 2.

Of contract of sale, see "Sales," § 4.

Of contract to convey land, see "Vendor and Purchaser," § 3.

Of covenant, see "Covenants," § 2.

\*Point annotated. See syllabus.

## PERJURY.

Sufficiency of instructions, see "Criminal Law," § 28.

### § 1. Offenses and responsibility therefor.

\*One giving false testimony on his trial for crime is guilty of perjury, though the jury were not sworn.—*Schooler v. State* (Tex. Cr. App.) 359.

## PERSONAL INJURIES.

*Particular causes or means of injury.*

See "Negligence."

Negligence of fellow servant, see "Master and Servant," § 4.

Operation of railroads, see "Railroads," §§ 5-7.

Operation of street railroads, see "Street Railroads," § 2.

*Particular classes of persons injured.*

Employé, see "Master and Servant," §§ 2-11.

Passenger, see "Carriers," § 8.

Patient in charitable hospital, see "Charities," § 1.

Patient in hospitals, see "Hospitals."

Traveler on highway, see "Municipal Corporations," § 7.

Traveler on highway crossing railroad, see "Railroads," § 6.

Traveler on street on or near street railroad tracks, see "Street Railroads," § 2.

*Remedies.*

Amendment of pleading affecting limitations, see "Limitation of Actions," § 2.

Applicability of instruction to pleadings and evidence, see "Trial," § 6.

Assessment of damages, see "Damages," § 6.

Decisions of state courts as rule of decision in United States court, see "Courts," § 4.

Determination and disposition of cause on appeal or writ of error, see "Appeal and Error," § 36.

Direct or remote consequences, see "Damages," § 1.

Documentary evidence, see "Evidence," § 8.

Evidence of damages, see "Damages," § 5.

Examination of witnesses, see "Witnesses," § 2.

Excessive damages, see "Damages," § 3.

Former decision as law of case on subsequent appeal, see "Appeal and Error," § 35.

Harmless error in general, see "Appeal and Error," § 28.

Harmless error in instructions, see "Appeal and Error," § 33.

Harmless error in rulings on evidence, see "Appeal and Error," §§ 29-31.

Harmless error in rulings on pleading, see "Appeal and Error," § 27.

Jurisdiction of court, see "Courts," § 1.

Measure of damages, see "Damages," § 2.

Necessity and subject-matter of instruction, see "Trial," § 4.

Opinion evidence, see "Evidence," § 10.

Pleading damages, see "Damages," § 4.

Province of court and jury, see "Trial," § 3.

Requests for instructions, see "Trial," § 7.

Res geste, see "Evidence," § 8.

Review as dependent on record on appeal or writ of error, see "Appeal and Error," § 9.

Review of questions of fact and findings, see "Appeal and Error," § 25.

## PETITION.

For local option election, see "Intoxicating Liquors," § 2.

In pleading, see "Pleading," § 2.

To list lands for taxation, see "Taxation," § 3.

## PHARMACISTS.

See "Druggists."

## PHOTOGRAPHS.

Admissibility in evidence, see "Evidence," § 8.

## PHYSICAL CONDITION.

Opinion evidence, see "Evidence," § 10.

## PHYSICIANS AND SURGEONS.

Power of corporation to contract with physicians, see "Corporations," § 3.

Privileged communications, see "Witnesses," § 1.

Province of court and jury in criminal prosecution for offense against law relating to practice of medicine, see "Criminal law," § 22.

\*The prescribing of a remedy in a single instance for another *held* not practicing medicine within Kirby's Dig. § 5243.—*Foo Lun v. State* (Ark.) 946.

\*A petition for malpractice *held* not defective for failure to allege that another physician could not have been obtained to treat deceased when defendant failed to do so.—*Blackburn's Adm'r v. Curd* (Ky.) 1186.

\*In an action for malpractice, a petition alleging that all defendant's directions as to the care of intestate's wound were complied with *held* sufficient without a minute allegation of all the directions given.—*Blackburn's Adm'r v. Curd* (Ky.) 1186.

\*In an action for malpractice, a petition *held* not defective as implying that certain directions of defendant were given, and not followed.—*Blackburn's Adm'r v. Curd* (Ky.) 1186.

\*Evidence *held* to sustain a verdict for a patient in an action against his physician for malpractice.—*Thompson v. Martin* (Mo. App.) 535.

A verdict for plaintiff sustained by the evidence *held* not to indicate by reason of its smallness that it was rendered out of sympathy for plaintiff, and not according to the law and the evidence.—*Thompson v. Martin* (Mo. App.) 535.

## PLATS.

See "Boundaries," § 1.

Filing as dedication of streets, see "Dedication," § 1.

## PLEA.

In civil actions, see "Pleading," § 3.

In criminal prosecutions, see "Criminal Law," § 5.

## PLEADING.

Admissibility of pleading in evidence as admission, see "Evidence," § 5.

Amendment affecting limitations, see "Limitation of Actions," § 2.

Amendment as curing defect as to prematurity of action, see "Action," § 3.

Amendment as to parties, see "Parties," § 1.

Applicability of instructions to pleadings, see "Trial," § 6.

As constituting appearance, see "Appearance."

Impeachment of witness, see "Witnesses," § 3.

In justice's court, see "Justices of the Peace," § 2.

Responsiveness of judgment to, see "Judgment," § 1.

*Allegations as to particular facts, acts, or transactions.*

See "Damages," § 4.

Coverture, see "Husband and Wife," § 8.

*In actions by or against particular classes of persons.*

See "Brokers," § 3; "Carriers," §§ 3, 5, 10; "Corporations," § 3; "Husband and Wife," § 3; "Municipal Corporations," § 7; "Railroads," §§ 6, 8.

*In particular actions or proceedings.*

See "Fraud," § 2; "Injunction," § 3; "Libel and Slander," § 8; "Negligence," § 4; "Quiet-ing Title," § 2; "Trespass to Try Title," § 2.

For broker's commissions, see "Brokers," § 3.

For causing death, see "Death," § 2.

For damages caused by maintaining nuisance, see "Nuisance," § 1.

For death of servant, see "Master and Servant," § 8.

For injuries to animals caused by operation of railroad, see "Railroads," § 8.

For injuries to shipment of live stock, see "Carriers," § 5.

For loss of shipment, see "Carriers," § 8.

For malpractice, see "Physicians and Surgeons."

For personal injuries, see "Master and Servant," § 8; "Municipal Corporations," § 7; "Railroads," § 6.

For price of goods sold, see "Sales," § 6.

For wrongful ejection of passenger, see "Carriers," § 10.

Indictment or criminal information or complaint, see "Indictment and Information."

On judgment, see "Judgment," § 9.

On note, see "Bills and Notes," § 4.

Pleas in criminal prosecutions, see "Criminal Law," § 5.

To determine boundaries, see "Boundaries," § 2.

*Review of decisions and pleading in appellate courts.*

Harmless error in rulings on, see "Appeal and Error," § 27.

Review of rulings on as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

Review of rulings on as dependent on record on appeal or writ of error, see "Appeal and Error," §§ 9, 10.

### § 1. Form and allegations in general.

\*An answer *held* ambiguous and bad both at common law and under the Code.—*Chicago, R. I. & P. Ry. Co. v. State* (Ark.) 199.

\*The answer in an action by an assignee of a note *held* a mere conclusion, and not sufficient to defeat a recovery.—*Wheatly v. Hardin Nat. Bank* (Ky.) 289.

An amended pleading which alleges that the proof shows a certain thing to be true, and that the proof is uncontradicted, is properly disallowed, for pleadings should allege the existence of facts.—*Simpson v. Adams* (Ky.) 819.

### § 2. Declaration, complaint, petition, or statement.

\*Matter of inducement in pleading defined.—*Armello v. Whitman* (Mo. App.) 1113.

### § 3. Plea or answer, cross-complaint, and affidavit of defense.

\*In an action by brokers for commissions for procuring a purchaser of real estate, answers by way of general denial and in avoidance *held* inconsistent and to remove from the case the issues sought to be raised by the general denial.—*Atterbury v. Hendricks* (Mo. App.) 111.

\*Special defenses in an action by brokers for commissions in procuring a purchaser of real

\*Point annotated. See syllabus.

estate *held* not inconsistent with a general denial.—*Atterbury v. Hendricks* (Mo. App.) 111.

\**Traverses* and defenses *held* available when not inconsistent.—*Atterbury v. Hendricks* (Mo. App.) 111.

**§ 4. Replication or reply and subsequent pleadings.**

In a suit by minority stockholders of a corporation to compel defendant to satisfy a judgment against the corporation, a reply advancing a new theory *held* available under Civ. Code Prac. § 101.—*Dodd v. Pittsburg, O., C. & St. L. R. Co.* (Ky.) 787.

**§ 5. Demurrer or exception.**

Where the trial is entered upon without a demurrer, every intentment will be made in favor of the pleading.—*Nairn v. Missouri, K. & T. Ry. Co.* (Mo. App.) 102.

**§ 6. Amended and supplemental pleadings and replender.**

In an action to enjoin interference with a right of way, a motion for leave to file amended answer *held* properly denied.—*Boyd v. Morris* (Ky.) 867.

\*Where defendant was allowed to file an amended answer on a trial, it was within the court's sound discretion to allow plaintiff to file a reply thereto.—*Metropolitan Life Ins. Co. v. Thomas* (Ky.) 1175.

\*The court on appeal will treat a case as if an amendment to the pleadings conforming to the evidence had been made.—*Weissenfels v. Cable* (Mo.) 1028.

District Court Rule 27 (67 S. W. xii) *held* not to have authorized defendant to present new matter before trial supplementary to that contained in his answer then on file. Rev. St. 1895, art. 1262.—*Hoffman v. Lemm* (Tex. Civ. App.) 712.

In an action on a note, *held* proper to refuse to require plaintiff to plead more specifically matter unnecessarily pleaded.—*Wood v. Limbaugh* (Tex. Civ. App.) 771.

**§ 7. Signature and verification.**

Where defendant denied under oath the correctness of plaintiff's sworn account, it was not evidence of any fact.—*Pitman v. Bloch Queensware Co.* (Tex. Civ. App.) 724.

**§ 8. Filing, service, and withdrawal.**

Defendants *held* entitled to amend and withdraw their disclaimer prior to the rendition of judgment thereon.—*Jolley v. Oliver* (Tex. Civ. App.) 1151.

**§ 9. Motions.**

In an action involving a boundary dispute, plaintiff *held* not entitled to judgment on the pleadings.—*Dee v. Nachbar* (Mo.) 35.

**§ 10. Issues, proof, and variance.**

\*A variance exists when the evidence does not sustain the pleadings on which a recovery is sought or a defense rested.—*Illinois Cent. R. Co. v. Curry* (Ky.) 294.

\*One cannot sue on one cause of action and recover on another.—*Henry County v. Citizens' Bank of Windsor* (Mo.) 692; *Same v. Farmers' Bank of Windsor* (Mo.) 630.

**§ 11. Defects and objections, waiver, and aside by verdict or judgment.**

\*In an action for injuries to a miner a verdict for plaintiff *held* to have cured an alleged defect in the petition in failing to allege that plaintiff only continued to work a reasonable time after defendants' promise to prop the entry.—*Ballou v. Potter* (Ky.) 1178.

\*Point annotated. See syllabus.

\*A defect in the petition not attacked by demurrer or otherwise is waived by answering over.—*Gardner v. Robertson* (Mo.) 645.

## POLICE POWER.

Of municipality, see "Municipal Corporations," § 5.

## POLICY.

Of insurance, see "Insurance."

## POLITICAL RIGHTS.

Suffrage, see "Elections."

## POSSESSION.

See "Adverse Possession."

Change of possession of mortgaged property, see "Chattel Mortgages," § 3.

Of land as notice to purchaser, see "Vendor and Purchaser," § 4.

Of office, see "Officers," § 2.

Of plaintiff in trespass to try title, see "Trespass to Try Title," § 1.

Sufficiency of possession of mineral rights under champerty statute, see "Champerty and Maintenance."

## POWERS.

Of attorney, see "Principal and Agent."

Of sale in mortgage, see "Mortgages," § 2.

**§ 1. Construction and execution.**

\*A deed executed pursuant to a power *held* to convey the title of the grantor in the power, though there was no reference in the deed to such power.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 690.

## PRACTICE.

Prosecution of actions in general, see "Action," § 3.

In particular civil actions or proceedings.

See "Contempt," § 2; "Divorce," § 2; "Ejectment"; "Habeas Corpus," § 2; "Interpleader"; "Prohibition"; "Quo Warranto," § 2; "Replevin"; "Trespass to Try Title," § 2.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Continuance"; "Costs"; "Damages," §§ 4-6; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial"; "Venue."

Verdict, see "Trial," § 10.

Particular remedies in or incident to actions.

See "Attachment"; "Injunction"; "Receivers"; "Sequestration"; "Supersedeas"; "Tender."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

For offenses against liquor laws, see "Intoxicating Liquors," § 7.

Procedure in exercise of special or limited jurisdiction.

In justices' courts, see "Justices of the Peace," § 2.

Procedure in or by particular courts or tribunals.

See "Courts."

*Procedure on review.*

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 3; "New Trial."

**PRECATORY TRUSTS.**

Creation by will, see "Wills," § 4.

**PREJUDICE.**

Ground for change of venue in criminal prosecution, see "Criminal Law," § 3.  
Ground for reversal in civil actions, see "Appeal and Error," §§ 26-33.

**PRELIMINARY EXAMINATION.**

On criminal charge, see "Criminal Law," §§ 4, 16.

**PREMIUMS.**

For insurance, see "Insurance," §§ 8, 4.

**PRESCRIPTION.**

Acquisition of rights, see "Adverse Possession," § 1; "Nuisance," § 1; "Waters and Water Courses," § 1.

**PRESUMPTIONS.**

As to acceptance of deed, see "Deeds," § 4.  
As to execution of lost deed, see "Deeds," § 4.  
In civil actions, see "Evidence," § 2.  
In criminal prosecutions, see "Criminal Law," §§ 6, 40.  
On appeal or writ of error, see "Appeal and Error," § 23.

**PRINCIPAL AND ACCESSORY.**

See "Criminal Law," § 2; "Homicide," § 8.

**PRINCIPAL AND AGENT.**

Theft by agent, see "Larceny," § 1.

*Agency in particular relations, offices, or occupations.*

See "Attorney and Client"; "Brokers."  
Agency of partner for firm, see "Partnership," § 8.  
Insurance agents, see "Insurance," § 1.  
Of connecting carriers, see "Carriers," § 4.

**§ 1. Rights and liabilities as to third persons.**

\*A note signed by an agent under a power of attorney *held* valid.—*McClure's Ex'r v. Corydon Deposit Bank* (Ky.) 1177.

The employment of an agent to lend money does not carry with it implied authority to lend the money to himself.—*Keyser v. Hinkle* (Mo. App.) 98.

Where defendant signed a note also signed as maker by A., the alleged agent of the payee, defendant was chargeable with notice that in becoming one of the obligors A. could not act as agent for the payee, and consequently any misrepresentation made by A. could not be imputed in law to the payee.—*Keyser v. Hinkle* (Mo. App.) 98.

\*The doctrine that a principal will not be permitted to enjoy a benefit from his agent's services and at the same time disclaim responsibility for the consequences of a wrongful act of the

agent by which the benefit was conferred has no application where the agent acts for himself, in his own interest, and adversely to that of his principal.—*Keyser v. Hinkle* (Mo. App.) 98.

\*An agent cannot serve the opposing party without the knowledge and consent of his principal, though he acts in good faith.—*Winter v. Carey* (Mo. App.) 539.

**PRINCIPAL AND SURETY.**

See "Guaranty"; "Indemnity."

Collateral attack on order discharging sureties on guardian's bond, see "Judgment," § 6.  
Power of national bank to make contract of suretyship, see "Banks and Banking," § 2.  
Surety on mortgage by husband and wife, see "Husband and Wife," § 2.

*Sureties on bonds for performance of duties of trust or office.*

Guardians of insane persons, see "Insane Persons," § 1.

*Sureties on bonds in judicial proceedings.*

See "Attachment," § 1; "Bail"; "Sequestration."

**§ 1. Creation and existence of relation.**

A contract to pay another to become surety or to lend one his credit *held* not unlawful.—*Givens v. Gridley* (Ky.) 1192.

A contract to pay another to become surety or to lend one his credit *held* based on a sufficient consideration.—*Givens v. Gridley* (Ky.) 1192.

\*A surety is one who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to indemnity from another, who ought himself to have made payment or performed the obligation before the surety was required to do so.—*Reissaus v. Whites* (Mo. App.) 603.

**§ 2. Nature and extent of liability of surety.**

\*Obligors on a bond *held* sureties, though not expressly designated as such.—*Reissaus v. Whites* (Mo. App.) 603.

\*Rule for construing sureties' contracts stated.—*Martin v. Whites* (Mo. App.) 608.

**§ 3. Discharge of surety.**

\*Changes in a building contract *held* to discharge the contractors' sureties.—*Reissaus v. Whites* (Mo. App.) 603.

\*A building contract *held* not to authorize changes in the work without the contractor's sureties' consent.—*Reissaus v. Whites* (Mo. App.) 603.

\*Notwithstanding a rule stated, a contractor's surety *held* not discharged from liability because a change in the contract which he requested was interlined in the written contract without his consent.—*Martin v. Whites* (Mo. App.) 608.

\*When parties agree upon a change in the terms of a contract, the contract is not invalidated because one of them, without the knowledge of the other, notes the alteration on the instrument.—*Martin v. Whites* (Mo. App.) 608.

Notwithstanding rules stated, a building contractor's surety *held* not discharged by payments to the contractor without the architect's certificates therefor provided for by the contract.—*Martin v. Whites* (Mo. App.) 608.

**PRIORITIES.**

Of attorney's lien, see "Attorney and Client," § 1.

\*Point annotated. See syllabus.

**PRIVATE NUISANCE.**

See "Nuisance," § 1.

**PRIVATE ROADS.**

Rights of way, see "Easements."

**PRIVILEGED COMMUNICATIONS.**

Defamatory communications, see "Libel and Slander," § 2.

Disclosure by witness, see "Witnesses," § 1.

**PROBATE.**

Of will, see "Wills," § 3.

**PROCESS.**

Effect of appearance, see "Appearance."

Resistance or obstruction, see "Obstructing Justice."

In actions against particular classes of persons.

See "Corporations," § 3.

Foreign corporation, see "Corporations," § 5.

In particular actions or proceedings.

Foreclosure, see "Mortgages," § 3.

Particular forms of writs or other process.

See "Execution"; "Injunction"; "Prohibition"; "Quo Warranto"; "Replevin"; "Sequestration."

**§ 1. Service.**

\*Rev. St. 1879, § 3489, as amended by Sess. Laws 1881, p. 174, and Rev. St. 1899, § 570 [Ann. St. 1906, p. 597], providing for the service of summons, *held* not to require a copy of the petition to be delivered to the first defendant served in each county, where the defendants are in several counties.—*Collier v. Catherine Lead Co. (Mo.)* 971.

Return to summons, of which there was substituted service against an insurance company under Rev. St. 1899, § 7982 [Ann. St. 1906, p. 3801], *held* insufficient.—*Wealaka Mercantile & Mfg. Co. v. Lumbermen's Mut. Ins. Co. (Mo. App.)* 573; *Same v. Lumber Mut. Fire Ins. Co. (Mo. App.)* 575.

\*A sheriff's return of service of notice of a motion in the probate court by the public administrator *held* conclusive unless the administrator either procured the making of a false return or had knowledge of it.—*Strobel v. Clarke (Mo. App.)* 585.

\*A return of service of process *held* conclusive on the parties so as to render certain affidavits inadmissible in support of a motion to quash the return.—*Cornwall v. Star Bottling Co. (Mo. App.)* 591.

**§ 2. Defects, objections, and amendment.**

Under Rev. St. 1879, § 3489, as amended by Sess. Laws 1881, p. 174, and Rev. St. 1899, § 570 [Ann. St. 1906, p. 597], the burden *held* upon plaintiff to prove that one of several defendants in a former suit was the first one summoned in order to show invalidity of the service upon him.—*Collier v. Catherine Lead Co. (Mo.)* 971.

Statement as amending on appeal the return to a summons.—*Wealaka Mercantile & Mfg. Co. v. Lumbermen's Mut. Ins. Co. (Mo. App.)* 573; *Same v. Lumber Mut. Fire Ins. Co. (Mo. App.)* 575.

\*Point annotated. See syllabus.

**PROHIBITION.**

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

**§ 1. Nature and grounds.**

\*Because of the adequacy of remedy by appeal, prohibition *held* not to lie to restrain a county judge from issuing orders.—*Commonwealth v. Peter (Ky.)* 806.

**PROMISSORY NOTES.**

See "Bills and Notes."

**PROOF.**

Of death, see "Death," § 1.

Of loss insured against, see "Insurance," § 7.

**PROPERTY.**

Constitutional guaranties of rights of property, see "Constitutional Law," § 4.

To which lien of attorney attaches, see "Attorney and Client," § 1.

Particular species of property.

See "Animals"; "Fish"; "Fixtures"; "Logs and Logging"; "Mines and Minerals."

Remedies involving or affecting property.

Protection of rights of property by injunction, see "Injunction," § 2.

Transfers and other matters affecting title.

See "Adverse Possession."

Dedication to public use, see "Dedication."

**PROPOSITIONS.**

Under assignment of errors, see "Appeal and Error," § 16.

**PROSTITUTION.**

See "Lewdness."

**PROVINCE OF COURT AND JURY.**

In civil actions, see "Trial," § 3.

In criminal prosecutions, see "Criminal Law," § 22.

**PROVOCATION.**

For homicide, see "Homicide," §§ 5, 7.

**PROXIMATE CAUSE.**

Direct or remote consequences of injury, see "Damages," § 1.

Of injuries to animals caused by operation of railroad, see "Railroads," § 8.

Of injury, see "Negligence," § 2.

Of injury to person on or near street railroad tracks, see "Street Railroads," § 2.

**PUBLICATION.**

Of result of local option election, see "Intoxicating Liquors," § 2.

**PUBLIC DEBT.**

See "Municipal Corporations," § 8; "Schools and School Districts," § 1.



**PUBLIC IMPROVEMENTS.**

By municipalities, see "Municipal Corporations," § 4.

**PUBLIC LANDS.**

County school lands, see "Schools and School Districts," § 1.

Designation of boundaries in patents, see "Boundaries."

**PUBLIC POLICY.**

Affecting validity of sale, see "Sales," § 1.

**PUBLIC SCHOOLS.**

See "Schools and School Districts," § 1.

**PUBLIC SERVICE CORPORATIONS.**

See "Carriers"; "Railroads"; "Street Railroads"; "Telegraphs and Telephones."

Gas companies, see "Gas."

**PUBLIC USE.**

Dedication of property, see "Dedication."

**PUNISHMENT.**

See "Criminal Law," § 45; "Pardon"; "Penalties."

For adultery, see "Adultery."

For violation of injunction, see "Injunction," § 4.

**QUANTUM MERUIT.**

See "Work and Labor."

**QUASHING.**

Indictment or information, see "Indictment and Information," § 4.

**QUESTIONS FOR JURY.**

In civil actions, see "Trial," § 2.

In criminal prosecutions, see "Criminal Law," § 22; "Homicide," § 8.

**QUIETING TITLE.**

To mineral lands, see "Mines and Minerals," § 1.

**§ 1. Right of action and defenses.**

\*A tax deed held void on its face as describing no land, and ineffective as a cloud on title.—Beardsley v. Hill (Ark.) 1169.

\*Where a tax deed was void on its face, equity would not set it aside as a cloud on title, nor enjoin the holder from an attempted transfer of his title.—Beardsley v. Hill (Ark.) 1169.

**§ 2. Proceedings and relief.**

Where title to land was revested absolutely in plaintiffs, defendants' rights are not affected by the fact that plaintiffs have not paid to a third person a sum which the decree made a lien on the land.—McKenzie v. Donnell (Mo.) 40.

\*Under Rev. St. 1899 § 650 [Ann. St. 1906, p. 667], a cross-bill to quiet title need only

allege how defendants acquired their title, and that they claim some interest in and to the premises, adverse to plaintiffs, and pray that their respective interests may be determined and adjudged.—Summet v. City Realty & Brokerage Co. (Mo.) 614.

A husband and wife, claiming to own different tracts of land separately, cannot join as plaintiffs in an action to quiet title of all the tracts.—Gardner v. Robertson (Mo.) 645.

Defendants, who do not in every instance claim interests adverse to plaintiffs in the same tracts of land, cannot be joined in an action to quiet title to all the tracts.—Gardner v. Robertson (Mo.) 645.

**QUI TAM ACTIONS.**

See "Penalties," § 2.

**QUITCLAIM.**

See "Deeds," § 3.

**QUO WARRANTO.****§ 1. Nature and grounds.**

\*Quo warranto is civil in its nature, though using forms and punishments peculiar to criminal law.—State ex rel. Black v. Taylor (Mo.) 1023.

**§ 2. Jurisdiction, proceedings, and relief.**

\*The common-law power of a prosecuting attorney to file an information for a prerogative writ held inherent in the office, and not to be given away through caprice or inattention.—State ex rel. Black v. Taylor (Mo.) 1023.

\*In the absence of a statute conferring authority, a private person cannot proceed by quo warranto in his own name without the interposition of a proper state officer.—State ex rel. Black v. Taylor (Mo.) 1023.

\*Where a prosecuting attorney permitted the use of his name in an information in the nature of quo warranto without his signature thereto, he could not at the trial control the litigation and demand the dismissal of the proceeding.—State ex rel. Black v. Taylor (Mo.) 1023.

\*Under Rev. St. 1899, § 4457 [Ann. St. 1906, p. 2442] the Attorney General and prosecuting attorneys held charged with the duty of exhibiting an information in the nature of quo warranto, and when an information has been filed, the proceeding cannot be dismissed without the consent of the relator.—State ex rel. Black v. Taylor (Mo.) 1023.

\*The power of determining whether or not a quo warranto proceeding shall be instituted is vested in the Attorney General and prosecuting attorneys, by Rev. St. 1899, § 4457 [Ann. St. 1906, p. 2442].—State ex rel. Black v. Taylor (Mo.) 1023.

\*The exercise by a prosecuting attorney of his official discretion in exhibiting an information in the nature of quo warranto is evidenced by his signature to an information in due form and its exhibition in court.—State ex rel. Black v. Taylor (Mo.) 1023.

**RAILROADS.**

See "Street Railroads."

Admissions as evidence in action against, see "Evidence," § 5.

\*Point annotated. See syllabus.

Applicability of instruction to pleadings and evidence in action for death caused by operation of, see "Trial," § 6.

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Construction and operation of instruction in action for death caused by operation of, see "Trial," § 8.

Harmless error in action for injuries caused by operation of, see "Appeal and Error," § 27.

Judicial construction of laws relating to construction of stations as encroachment on Legislature, see "Constitutional Law," § 1.

Judicial notice of, see "Evidence," § 1.

Province of court and jury in action for injuries to employé, see "Trial," § 3.

Requests for instructions in action for injuries caused by operation of, see "Trial," § 7.

Taxation, see "Taxation," § 3.

Venue of criminal prosecution for offense by railroad company against law relating to maintenance of stations, see "Criminal Law," § 3.

### § 1. Control and regulation in general.

Where defendant was misnamed in the indictment *held* an order under Kirby's Dig. § 2232 for subsequent proceedings in its name was proper.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

A prosecution of a railroad company for failing to construct and maintain a station at a certain point, as required by the act of 1905 (Laws 1905, p. 285) *held* properly by indictment.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

The reasonableness of the statute under which the prosecution is had *held* a question for the court on all the information it can obtain.—Louisiana & A. Ry. Co. v. State (Ark.) 960.

There is no legal requirement that a railroad shall be of any particular length, nor is it essential that it should own rolling stock.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

Certain steam car tracks *held* to constitute a railroad, within Rev. St. 1899, c. 149, art. 8 [Ann. St. 1906, pp. 4293-4315], providing for the assessment and taxation of railroads.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

### § 2. Railroad companies.

Whether a foreign railway corporation, sued for injuries to an employé received outside of the state, did business or had an agent in the county where the suit was brought and process served, is a question of fact.—Southern Pac. Co. v. Allen (Tex. Civ. App.) 441.

### § 3. Construction, maintenance, and equipment.

Under Kirby's Dig. § 6644, a notice to a railroad to construct stockguards must be made by the owner, and cannot be made by his tenant.—Chicago, R. I. & P. Ry. Co. v. Adams (Ark.) 200.

Under Kirby's Dig. § 6644, a notice to a railroad to repair stockguards *held* essential.—Chicago, R. I. & P. Ry. Co. v. Adams (Ark.) 200.

### § 4. Operation—Statutory, municipal, and official regulations.

A railway corporation operating a line of road *held* owning the road, within Kirby's Dig. § 6595.—Chicago, R. I. & P. Ry. Co. v. State (Ark.) 199.

### § 5. — Injuries to licensees or trespassers in general.

In an action against a railroad for injuries sustained by the plaintiff in catching his foot in a switch, the submission to the jury of de-

fendant's negligence in maintaining a switch in a street *held* erroneous.—Missouri, K. & T. Ry. Co. of Texas v. Scruggs (Tex. Civ. App.) 778.

### § 6. — Accidents at crossings.

\*If injury to one crossing a railway track was caused by an engineer's failure to keep a lookout, she can recover from the company therefor.—Louisville, H. & St. L. R. Co. v. Davis (Ky.) 304.

\*Plaintiff's pleading in a personal injury action against a railway company *held* to entitle her to show any negligence in operating the engine, whether in failing to give the customary signals or to keep a lookout.—Louisville, H. & St. L. R. Co. v. Davis (Ky.) 304.

\*In an action against a railroad for injuries to plaintiff while crossing defendant's track while the crossing gates were open, plaintiff *held* not guilty of contributory negligence as a matter of law.—Louisville Bridge Co. v. Moroney (Ky.) 870.

\*Where a team on a highway is unmanageable and running off toward a crossing, *held* one in charge of a railway engine is required to exercise ordinary care to avoid a collision at the crossing.—Chesapeake & O. Ry. Co. v. Pace (Ky.) 1176.

\*In an action against a railway company for injuries received in a collision, whether defendant was negligent in failing to stop the train so as to avoid a collision in view of the fact that plaintiff's team was running away *held* for the jury.—Chesapeake & O. Ry. Co. v. Pace (Ky.) 1176.

\*Under Starr & O. Ann. St. Ill. 1896, c. 114, par. 74, *held* negligence for a train to approach a crossing without the giving of the required statutory signals.—Weinstein v. Toledo, St. L. & W. R. Co. (Mo. App.) 1125.

\*In an action for injury in a crossing accident, the question of contributory negligence *held* one for the jury.—Weinstein v. Toledo, St. L. & W. R. Co. (Mo. App.) 1125.

A person is not guilty of negligence as a matter of law in entering a railroad crossing while the gates are down, but whether the act is negligence depends upon the attendant circumstances.—Galveston, H. & S. A. Ry. Co. v. Walker (Tex. Civ. App.) 705.

In a death action, an instruction as to evidence of defendant's negligence *held* properly refused.—Galveston, H. & S. A. Ry. Co. v. Walker (Tex. Civ. App.) 705.

\*In an action against a railway company for a collision at a public crossing, facts *held* to authorize recovery for plaintiff if the train approached at a negligently high rate of speed.—Texas & P. Ry. Co. v. Tucker (Tex. Civ. App.) 764.

\*In an action against a railway company, *held* under the evidence a question for the jury whether the accident was caused by the company's failure to maintain a signboard at its crossing.—Texas & P. Ry. Co. v. Tucker (Tex. Civ. App.) 764.

\*In an action against a railway company for the death of one struck by a train at a public crossing, *held*, under the evidence, a question for the jury whether the engineer was negligent in failing to blow the whistle and thus warn decedent of his danger.—Texas & P. Ry. Co. v. Tucker (Tex. Civ. App.) 764.

### § 7. — Injuries to persons on or near tracks.

In an action for injuries to one run over on a railroad track, facts *held* not to show that she was a trespasser at the time of the accident.—Lange v. Missouri Pac. Ry. Co. (Mo.) 660.

\*Point annotated. See syllabus.

\*In an action for injuries to a child who was run over while upon a railroad track, evidence *held* sufficient to show negligence on the part of defendant.—*Lange v. Missouri Pac. Ry. Co. (Mo.)* 660.

\*In an action for injuries to one run over on a railroad track, an instruction *held* not erroneous in that it did not require plaintiff to have been in a place of danger before defendant's brakeman was called on to use ordinary care after seeing her.—*Lange v. Missouri Pac. Ry. Co. (Mo.)* 660.

\*The statute relating to railroad signals at crossings construed, and *held* to provide for the protection of those using railroad crossings only.—*Missouri, K. & T. Ry. Co. of Texas v. Saunders (Tex.)* 821.

\*Where the evidence as to the loud blowing of a whistle on defendant's engine, which was claimed to have frightened plaintiff's horse, was conflicting, the issue was for the jury.—*Paris & G. N. Ry. Co. v. Calvin (Tex.)* 879.

\*In an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, evidence examined, and *held* to authorize a finding that the operatives of the engine discovered plaintiff's peril in time to have avoided the injury, and negligently failed to prevent it.—*Nacogdoches & S. E. R. Co. v. Beene (Tex. Civ. App.)* 456.

In an action against a railroad company for injuries to plaintiff through being struck by an engine while walking on defendant's track, an instruction *held* correct.—*Nacogdoches & S. E. R. Co. v. Beene (Tex. Civ. App.)* 456.

A railway company *held* not liable for injury to one struck by a car while attempting to cross a track, for failure to keep lookout for him.—*Texas & P. Ry. Co. v. Shivers (Tex. Civ. App.)* 894.

\*Evidence in an action for injury to one struck by a car while walking through defendant's yards *held* to show contributory negligence, entitling the company to a directed verdict.—*Texas & P. Ry. Co. v. Shivers (Tex. Civ. App.)* 894.

#### § 8. — Injuries to animals on or near tracks.

A railroad company is under a common-law liability for injuries to animals caused by fright due to the railroad company's negligent operation of its trains.—*Earl v. St. Louis, I. M. & S. Ry. Co. (Ark.)* 675.

Kirby's Dig. § 6776, providing a liability for injuries to animals by railroad trains, *held* not to cover injuries caused by mere fright, due to the operation of trains.—*Earl v. St. Louis, I. M. & S. Ry. Co. (Ark.)* 675.

\*A railroad is not liable for injuries to cattle resulting from their being frightened and caused to run by the unnecessary blowing of the engine whistle, or the escaping of steam, unless the trainmen are aware of the presence of the cattle and know that injury is liable to result to them.—*Gibson v. Louisville & N. R. Co. (Ky.)* 838.

\*In an action against a railroad for injuries to plaintiff's cattle resulting from a defective cattle guard, the complaint *held* insufficient.—*Gibson v. Louisville & N. R. Co. (Ky.)* 838.

\*A railroad operating a track passing along a highway *held* required to fence it.—*Brown v. Quincy, O. & K. C. R. Co. (Mo. App.)* 551.

\*In an action against a railroad for injuries to an animal escaping onto its right of way, certain evidence *held* competent.—*Brown v. Quincy, O. & K. C. R. Co. (Mo. App.)* 551.

An action against a railroad for injuries to a horse struck by a train *held* not an action for negligence.—*Brown v. Quincy, O. & K. C. R. Co. (Mo. App.)* 551.

Acts 29th Leg. (Laws 1905, p. 226, c. 117), amending the stock law by fixing the liability of railroads for killing stock, *held* valid when applied to a county which had prior to its enactment adopted the stock law.—*Fort Worth & D. C. Ry. Co. v. Polson (Tex. Civ. App.)* 429.

\*Acts 29th Leg. (Laws 1905, p. 226, c. 117) construed, and *held* to fix the liability of railroads for killing stock on their tracks.—*Fort Worth & D. C. Ry. Co. v. Polson (Tex. Civ. App.)* 429.

\*Evidence *held* to justify a finding that the animal was killed by defendant's train.—*Fort Worth & D. C. Ry. Co. v. Polson (Tex. Civ. App.)* 429.

\*A railroad company, having constructed gates in its right of way fence for the benefit of the adjoining proprietor, *held* not liable for animals which escaped through the gate onto the track by reason of the gate being left open or falling into disrepair.—*International & G. N. R. Co. v. Russell (Tex. Civ. App.)* 438.

\*Where plaintiff's animals escaped onto defendant's track through a right of way fence gate and were killed, the negligence of a third person in leaving the gate open during the night *held* the proximate cause of the accident.—*International & G. N. R. Co. v. Russell (Tex. Civ. App.)* 438.

#### § 9. — Fires.

In an action against a railroad for negligently setting fire to plaintiff's land, evidence considered, and *held* insufficient to authorize an instruction.—*Mobile & O. R. Co. v. Caldwell (Ky.)* 236.

\*Evidence *held* to warrant an inference that fire was emitted from a passing locomotive.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*Where plaintiff has proved that a fire was set out by defendant's engine, the burden is upon defendant to show that there was no negligence.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*Proof of proper construction and management of locomotive *held* to exclude presumption of negligence from fact that fire was occasioned by sparks from engine.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*Where a railroad proves such proper equipment, etc., as to tend to show absence of negligence in setting out a fire by sparks from its engines, the question of negligence must be determined upon the whole evidence.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*A railroad company in disproving negligence presumably established by the setting out of fire by the locomotive must negative every fact which would justify a finding of negligence.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*Evidence examined, and *held* to sustain a finding that a locomotive which caused a fire by emitting sparks was negligently operated.—*Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co. (Tex. Civ. App.)* 1140; Same v. *McFarland (Tex. Civ. App.)* 1144.

\*Point annotated. See syllabus.

## RAPE.

Competency of evidence in general, see "Criminal Law," § 9.

Contradiction of witness, see "Witnesses," § 3.  
Harmless error in instructions, see "Criminal Law," § 43.

Reception of evidence, see "Criminal Law," § 19.

Re-examination of witnesses, see "Witnesses," § 2.

### § 1. Prosecution and punishment.

\*In a rape case, evidence *held* to sustain a conviction and penalty of death.—*Brown v. State* (Tex. Cr. App.) 368.

\*On a prosecution for rape, it was proper to permit a witness who had married her after the alleged crime to testify that he had discovered that she was not a virgin.—*Smith v. State* (Tex. Cr. App.) 1161.

On a prosecution for rape, certain evidence for the state *held* properly admitted.—*Smith v. State* (Tex. Cr. App.) 1161.

\*On a prosecution for rape on defendant's minor daughter, it was proper to permit the state to show that prosecutrix did not make any outcry at the time of the crime, because she was afraid that defendant would whip her.—*Smith v. State* (Tex. Cr. App.) 1161.

\*On a trial for assault to rape, the failure to charge on aggravated assault *held* not erroneous under the evidence.—*Holman v. State* (Tex. Cr. App.) 1165.

## RATIFICATION.

Of act of broker, see "Brokers," § 4.

## REAL ACTIONS.

See "Ejectment"; "Partition"; "Trespass to Try Title."

Persons concluded by judgment in action to recover land, see "Judgment," § 8.

## REAL ESTATE AGENTS.

See "Brokers."

## RECEIVERS.

Bonds on appeal from order appointing, see "Appeal and Error," § 6.

Jurisdiction of Supreme Court to appoint, see "Courts," § 3.

Of corporations, see "Corporations," § 4.

Review of interlocutory orders appointing, see "Appeal and Error," § 21.

Review of order appointing as dependent on finality of determination, see "Appeal and Error," § 3.

Scope and effect of stay of order appointing pending appeal, see "Appeal and Error," § 8.

Separate appeal from order appointing, see "Appeal and Error," § 1.

### § 1. Nature and grounds of receivership.

\*In a suit for a receivership, allegations of petition *held* to warrant the appointment of a receiver for the reason that defendant was in imminent danger of insolvency.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

### § 2. Appointment, qualification, and tenure.

In an action for the appointment of a receiver for a corporation whose principal place of

business is in another county, the waiver of issuance of service and the appearance in the case by its officers and directors constitute a waiver of the corporation's right to have a receiver appointed for its property in the county where its principal office is located.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

Allegations in a petition *held* to give the district court jurisdiction of the subject-matter, and to appoint a receiver for the defendant corporation.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

An appearance by the directors of a corporation *held* to cure any error as to the appointment of a receiver for the corporation without notice.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

In receivership proceedings, the notice required is only as to defendant, and an appearance by defendant without objection to the appointment is conclusive as to creditors, unless there is collusion or fraud.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

### § 3. Title to and possession of property.

In an action for a receiver, the inclusion in the receivership of certain property against which there was a judgment of sale *held* proper.—*Rippy v. Redwater Lumber Co.* (Tex. Civ. App.) 474.

## RECOGNIZANCES.

In criminal prosecutions, see "Criminal Law," § 32.

## RECORDS.

Judicial notice, see "Evidence," § 1.

Record of deed as delivery, see "Deeds," § 1.

*Of particular facts, acts, instruments, or proceedings not judicial.*

See "Chattel Mortgages," § 3; "Deeds," § 2.

Instrument of adoption, see "Adoption."

*Of judicial proceedings.*

See "Courts," § 2.

Abstract for purpose of review, see "Appeal and Error," §§ 11, 19, 23.

Appeal from judgment of forfeiture of bail bond, see "Bail," § 1.

Judgment in justice's court, see "Justices of the Peace," § 2.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 9-15; "Criminal Law," §§ 33-38.

*Records as evidence, and evidence relating to matters of record.*

See "Evidence," § 8.

*Records as notice, and as affecting priorities.*

Notice to purchaser of land, see "Vendor and Purchaser," § 4.

\*If a paper required to be filed and recorded in the office of the clerk of the county court is handed to him for record outside of his office, it will be regarded as deposited for record from the time of its actual deposit and filing by the clerk.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 690.

Where a deed was authenticated so as to entitle it to registration under the law in force at its execution, and was duly recorded in 1849, its re-registration in 1894, after the destruction of the public records, is sufficient for all purposes of notice after that date under the express provisions of Rev. St. 1895, art. 4662.—*Frugia v. Trueheart* (Tex. Civ. App.) 738.

\*Point annotated. See syllabus.

**REDEMPTION.**

From mortgage, see "Mortgages," §§ 3, 4.

**REFERENCE.**

In partnership accounting, see "Partnership," § 5.

**REFORMATION OF INSTRUMENTS.**

See "Cancellation of Instruments."

**§ 1. Right of action and defenses.**

\*A description in a deed may be reformed for mistake where it was filled in from memory; the bond for the deed which contained the correct description having been lost.—Hill v. Clark (Ky.) 805.

\*In order to reform a written instrument for a mistake the mistake must be mutual.—Redding v. Badger Lumber Co. (Mo. App.) 557.

\*Grantor in a deed from which by mutual mistake a reservation of merchantable pine timber was omitted will be granted relief in equity as against grantee and also as against a third person who purchased the timber with notice of the mistake.—Mattox v. Davis (Tex. Civ. App.) 169.

**§ 2. Proceedings and relief.**

\*Where complainant sought reformation of a deed, it was proper for the chancellor to reform the deed so as to conform with the whole contract of the parties.—White v. Glazer (Ky.) 289.

\*The evidence of mistake to warrant a reformation of a written instrument must be clear and convincing.—Redding v. Badger Lumber Co. (Mo. App.) 557.

In an action on a contract, evidence held sufficient to show mutual mistake in the execution of the contract, precluding recovery.—Redding v. Badger Lumber Co. (Mo. App.) 557.

**REFORMATORIES.**

See "Asylums."

**REGISTRATION.**

See "Deeds," § 2; "Records."

**REHEARING.**

See "New Trial."

On appeal or writ of error, see "Appeal and Error," § 19.

**RELEASE.**

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment."

Right to release on bail, see "Bail," § 1.

**§ 1. Construction and operation.**

An agreement releasing defendant's co-obligor on certain notes held not a release, but a covenant not to sue such co-obligor, and did not therefore discharge defendant from liability.—Will A. Watkin Music Co. v. Basham (Tex. Civ. App.) 734.

**RELEVANCY.**

Of evidence in civil actions, see "Evidence," § 3.

Of evidence in criminal prosecutions, see "Criminal Law," § 7.

\*Point annotated. See syllabus.

**REMAINDERS.**

See "Estate Tail."

Creation by will, see "Wills," § 4.

\*The right of action of persons holding a vested remainder held to accrue on an absolute sale of the property by the holder of a life estate.—Yeager v. Bank of Kentucky (Ky.) 806.

\*Remaindermen held not barred by limitations where 15 years had not elapsed since the death of the life tenant.—Belcher v. Polly (Ky.) 818.

It was immaterial to the validity of a conveyance by contingent remaindermen joining with the life tenant to secure a loan that such remaindermen received no part of the proceeds of the loan.—Summet v. City Realty & Brokerage Co. (Mo.) 614.

Conveyances by a life tenant and all the contingent remaindermen, after having become of age, held to have covered all outstanding interests in the property.—Summet v. City Realty & Brokerage Co. (Mo.) 614.

**REMAND.**

Of cause on appeal or writ of error, see "Appeal and Error," § 36.

Power of district court to remand suit to contest will appealed from the county court, see "Wills," § 3.

**REMEDY AT LAW.**

Effect on jurisdiction of equity, see "Injunction," § 1.

Existence of as ground for denying prohibition, see "Prohibition," § 1.

**REMOVAL.**

From office in general, see "Officers," § 1.

Of school officers, see "Schools and School Districts," § 1.

**REMOVAL OF CAUSES.**

Change of venue or place of trial, see "Venue," § 1.

**§ 1. Citizenship or alienage of parties.**

That a defendant not entitled to a removal of the cause joins the nonresident defendant's application to remove held not to require a removal.—Texas & P. Ry. Co. v. Tucker (Tex. Civ. App.) 764.

**REMOVAL OF CLOUD.**

See "Quieting Title."

**RENEWAL.**

Of lease, see "Landlord and Tenant," § 3.

**RENT.**

See "Landlord and Tenant," § 6.

**REPEAL.**

Of statutes, see "Asylums"; "Fish"; "Intoxicating Liquors," § 4; "Schools and School Districts," § 1; "Statutes," § 5.

**REPLEVIN.**

Appellate jurisdiction of Supreme Court, see "Courts," § 3.  
 Harmless error in action on replevin bond, see "Appeal and Error," § 29.  
 Of mortgaged property, see "Chattel Mortgages," § 2.

**§ 1. Pleading and evidence.**

In an action to recover a grocery stock delivered under a contract for exchange for a lot, which defendant failed to convey to plaintiff, having previously deeded it to another, the deed was properly received in evidence on plaintiff's part.—*Crawford v. Hurd* (Ky.) 849.

\*In an action to recover a grocery stock delivered under a contract for exchange for a lot, which defendant failed to convey to plaintiff, having previously deeded it to another, evidence held to sustain a verdict for plaintiff.—*Crawford v. Hurd* (Ky.) 849.

**REPLICATION.**

See "Pleading," § 4.

**REPLY.**

See "Pleading," § 4.

**REPUTATION.**

Admissibility of evidence of in prosecution for homicide, see "Homicide," § 5.

**REQUESTS.**

For instructions in civil actions, see "Trial," § 7.  
 For instructions in criminal prosecutions, see "Criminal Law," § 24.

**RESALE.**

Of goods by seller, see "Sales," § 6.

**RESCISSION.**

Cancellation of written instrument, see "Cancellation of Instruments."  
 Of contract for sale of goods, see "Sales," § 3.  
 Of contract for sale of land, see "Vendor and Purchaser," § 6.

**RESERVATIONS.**

In deeds, see "Deeds," § 1.

**RES GESTÆ.**

In civil actions, see "Evidence," § 3.  
 In criminal prosecutions, see "Criminal Law," §§ 7, 16.

**RESIDENCE.**

Nonresidence of party as affecting jurisdiction of court, see "Courts," § 1.

**RES IPSA LOQUITUR.**

Application of doctrine in action for injuries to servant, see "Master and Servant," § 9.

\*Point annotated. See syllabus.

**RES JUDICATA.**

See "Judgment," §§ 7, 8.

**RESTRAINT OF TRADE.**

Trusts and other combinations, see "Monopolies," § 1.

**RESTRICTIONS.**

In deeds, see "Deeds," § 3.  
 In wills, see "Wills," § 4.

**RESULTING TRUSTS.**

See "Trusts," § 1.

**RETIRING PARTNERS.**

See "Partnership," § 4.

**RETROACTIVE LAWS.**

Constitutional restrictions, see "Constitutional Law," § 2.

**RETURN.**

Of process in general, see "Process," § 1.

**REVENUE.**

See "Taxation."

**REVIEW.**

See "Appeal and Error"; "Criminal Law," §§ 30-43; "Justices of the Peace," § 8.

**REVISION.**

Of statute, see "Statutes," § 4.

**REVOCATION.**

Of authority of broker, see "Brokers," § 2.  
 Of dedication, see "Dedication," § 1.  
 Of election of superintendent of state school for blind, see "Asylums."

**RIGHT OF WAY.**

See "Easements."

**RISKS.**

Assumed by employé, see "Master and Servant," §§ 5, 11.  
 Within insurance policy, see "Insurance," § 6.

**ROADS.**

See "Highways."  
 Streets in cities, see "Municipal Corporations," §§ 6, 7.

**RULES.**

For government of employé, see "Master and Servant," § 6.

## RULES OF COURT.

Assignment of errors, see "Appeal and Error," § 18.  
Briefs on appeal or writ of error, see "Appeal and Error," § 17.  
Relating to pleading, see "Pleading," § 6.

## SALARIES.

Of clerks of boards of school examiners, see "Schools and School Districts," § 1.

## SALES.

Conditional sale as distinguished from mortgage, see "Mortgages," § 1.  
Determination and disposition of cause on appeal in action for price of goods sold, see "Appeal and Error," § 36.  
Laws prohibiting sale of intoxicating liquors as denying due process of law, see "Constitutional Law," § 4.  
Liabilities for deceit, see "Fraud," § 1.  
Requirements of statute of frauds, see "Frauds, Statute of," §§ 1, 3.  
Review in action for breach of contract of sale as dependent on presentation in lower court of grounds of review, see "Appeal and Error," § 5.

*Sales by or to particular classes of persons.*

See "Brokers."

Carriers, on refusal of consignee to accept goods, see "Carriers," § 2.

School officers, see "Schools and School Districts," § 1.

*Sales of particular species of, or estates or interests in, property.*

See "Homestead," § 1; "Intoxicating Liquors."

Realty, see "Vendor and Purchaser."

Standing timber, see "Logs and Logging."

*Sales on judicial or other proceedings.*

Of property of decedent under order of court, see "Executors and Administrators," § 5.

On foreclosure of mortgage, see "Mortgages," §§ 2, 3.

Tax sales, see "Taxation," § 6.

To enforce vendor's lien for purchase price, see "Vendor and Purchaser," § 5.

### § 1. Requisites and validity of contract.

\*Mere knowledge of the seller of a piano that the buyer intended to use it in her bawdy house held insufficient to render the contract void as against public policy.—Hollenberg Music Co. v. Berry (Ark.) 1172.

\*The fact that goods were consigned to an accused at his risk held not conclusive that the transaction was a sale and not a bailment.—State v. Betz (Mo.) 64.

\*Plaintiff held not entitled to a reasonable time in which to accept defendant's offer to buy a car load of eggs, and not to bind defendants by an acceptance wired several hours after the offer was made.—Brewer v. Lepman (Mo. App.) 1107.

\*An arrangement by which a cotton ginner ginned cotton for a specified price, payable in money, and returned seed to his customers from a common mass at the rate of 64 pounds of seed for each 100 pounds of seed cotton ginned, was a bailment and not a sale.—First State Bank v. Barnett (Tex. Civ. App.) 182.

Evidence held material on the defense that one was induced by fraudulent representations to sign a contract for purchase of materials.—

\*Point annotated. See syllabus.

United States Gypsum Co. v. Shields (Tex. Civ. App.) 724.

Evidence held admissible to show one was induced by fraudulent representations to make a contract for purchase.—United States Gypsum Co. v. Shields (Tex. Civ. App.) 724.

### § 2. Construction of contract.

\*A contract for the sale of goods construed, and held to make delivery and payment of the price concurrent acts.—Felsberg v. Moore (Ark.) 197.

### § 3. Modification or rescission of contract.

Contract held not to obligate vendee to accept goods and endeavor to sell them in accordance with contract, where vendor did not deliver to vendee the kind of articles purchased.—Puritan Mfg. Co. v. Renaker (Ky.) 813.

\*Generally, where a contract has been obtained by fraud, the proper remedy is a suit to rescind, but one from whom goods have been purchased through fraudulent representations, upon discovering the fraud, may elect to treat the contract as a nullity, and sue to recover the specific property.—Crawford v. Hurd (Ky.) 849.

### § 4. Performance of contract.

In an action for breach of contract for the sale of goods, the question of a tender or offer to pay the price held not in issue.—Felsberg v. Moore (Ark.) 197.

\*A purchaser of vehicles held not authorized under the facts to use the vehicles until they were practically worthless and then decline to pay for them on the ground that they were not as ordered.—Noel & McGinnis v. Kauffman Buggy Co. (Ky.) 237.

\*One receiving goods sold him and using them as his own thereby accepts them.—Noel & McGinnis v. Kauffman Buggy Co. (Ky.) 237.

\*A vendee of goods who accepts them or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them, or exercises ownership over them, cannot thereafter refuse to pay for them.—Noel & McGinnis v. Kauffman Buggy Co. (Ky.) 237.

Where a contract of sale provides that the materials shall be inspected by a specified person at the buyer's cost, the inspector is the agent of both parties, and his inspection is conclusive.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

Where a buyer selects an employé to receive the materials bought, and he accepts some which are not of the character bargained for, the buyer is bound by his acceptance, though the employé had no knowledge of the terms of the contract.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

\*If a buyer accepts materials which are patently defective, it is estopped from denying that they are not of the character bargained for.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

### § 5. Operation and effect.

\*In an action for conversion, held, there was no passing of title from defendant to plaintiff's seller under a certain contract.—Hall v. Frick Co. (Ky.) 1186.

\*A purchaser from a buyer held not entitled to recover for conversion by the original seller, in view of his own breach of his contract of purchase.—Hall v. Frick Co. (Ky.) 1186.

\*A certain transaction held an option to purchase and not a sale or a "sale or return."—State v. Betz (Mo.) 64.

\*In case of an option to purchase if one likes, title will not pass until the option is determined, while in case of an option to return a purchase if one should not like it, the property passes at once subject to the right to rescind and return.—State v. Betz (Mo.) 64.

\*A delivery of an article at a fixed price to be paid for or returned constitutes a sale.—State v. Betz (Mo.) 64.

#### § 6. Remedies of seller.

\*In an action for the purchase price of vehicles sold defendants by plaintiff, an instruction *held* correct.—Noel & McGinnis v. Kauffman Buggy Co. (Ky.) 237.

\*In an action for goods sold, an instruction *held* to fairly submit the issue made by the pleadings.—Paritan Mfg. Co. v. Renaker (Ky.) 813.

In an action for the price of goods, the issue of the existence of a partnership between plaintiff and a third person *held* properly raised by the answer.—Nugent v. Armour Packing Co. (Mo.) 648.

In an action for the price of goods which defendant refused to accept, it may be shown under the plea of non est factum that defendant's signature was procured by fraudulently substituting such writing for one defendant supposed he was signing.—Main v. Hall (Mo. App.) 1090.

\*Where a seller, on the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price, and that obtained on the resale, he must resell within a reasonable time and at the best price he can reasonably obtain.—Carver, Frierson & Co. v. Graves (Tex. Civ. App.) 903.

In an action by a seller to recover on breach of the contract, an instruction *held* erroneous as ignoring the issue of the seller's diligence in making a resale.—Carver, Frierson & Co. v. Graves (Tex. Civ. App.) 903.

\*Whether a seller exercises reasonable diligence in reselling goods after breach of contract by buyer *held* for the jury.—Carver, Frierson & Co. v. Graves (Tex. Civ. App.) 903.

In an action for the contract price of iron furnished a railroad, the contract price calling for immediate shipment defendant's answer properly averred circumstances at the making of the contract to show that the parties contemplated immediate shipment which was not made.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

In an action on a contract stipulating for an inspection of material sold, where the petition alleged that the material had been inspected, an allegation that the inspection had not been made was properly pleaded in defense.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

In an action by a seller for price of materials, certain evidence *held* admissible.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

Evidence examined, and *held* not to support a finding that an inspection of goods under a contract of sale was made in bad faith.—Gorham v. Dallas, C. & S. W. Ry. Co. (Tex. Civ. App.) 930.

#### § 7. Remedies of buyer.

A buyer in an action for the sale of lumber *held* entitled under the facts to recover for breach of contract.—Felsberg v. Moore (Ark.) 197.

\*A buyer *held* entitled to recover loss of profits for the seller's failure to deliver as re-

quired by the contract.—Pitman v. Bloch Queensware Co. (Tex. Civ. App.) 724.

A buyer *held* not entitled to recover damages for extra clerk hire.—Pitman v. Bloch Queensware Co. (Tex. Civ. App.) 724.

## SANATORIUMS.

See "Hospitals."

## SATISFACTION.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Release."

## SCHOOLS AND SCHOOL DISTRICTS.

Assault on scholar by teacher, see "Assault and Battery," § 1.

Computation of limitations in action to recover money illegally paid to clerk of school board, see "Limitation of Actions," § 2.

Limitations as against school district, see "Limitation of Actions," § 1.

State school for blind, see "Asylums."

Sufficiency of instructions in prosecution of teacher for assault on scholar, see "Criminal Law," § 23.

Superintendent of state school for the blind as public officer, see "Officers," § 1.

#### § 1. Public schools.

A school district, though not a necessary party to a suit to recover money illegally paid by the county treasurer as salary to the clerk of the board of school directors, *held* not an improper party; the district having been reimbursed, being entitled to sue for the county treasurer's benefit.—Clarke v. School Dist. No. 16 (Ark.) 677.

The state *held* not a necessary party to a suit by a school district for the benefit of the county treasurer to recover money of the district which the treasurer had illegally paid and refunded to the district.—Clarke v. School Dist. No. 16 (Ark.) 677.

\*Under the express provisions of Kirby's Dig. § 7541, a school district is a corporation and may sue in any court of the state having competent jurisdiction.—Clarke v. School Dist. No. 16 (Ark.) 677.

The county treasurer having illegally paid school district funds in his hands for salary of the clerk of the board of school directors, such treasurer was entitled to recover the amount so paid on discovering his mistake.—Clarke v. School Dist. No. 16 (Ark.) 677.

Under Kirby's Dig. §§ 7630, 7631, a board of school directors has no authority to vote a salary to their clerk, who is a member of the board.—Clarke v. School Dist. No. 16 (Ark.) 677.

Act May 6, 1905 (Acts 1905, p. 753, §§ 7, 8), authorizing the state superintendent of public instruction to remove county examiners and repealing conflicting acts, *held* to repeal Kirby's Dig. § 7583, providing for such removal by the county judge.—Brown v. Smith (Ark.) 679.

\*Kirby's Dig. §§ 7559, 7562, 7565, *held* by implication to require the issuance of licenses to county examiners by the state superintendent of public instruction.—Brown v. Smith (Ark.) 679.

\*In an action for a school book publisher's breach of a bond to furnish books equal to sample copies filed with the superintendent of public instruction, evidence *held* admissible.—Rand, McNally & Co. v. Commonwealth (Ky.) 238.

\*Point annotated. See syllabus.



The taxes of a school district for school purposes *held* valid, though the taxes for interest and sinking fund for its bonds were erroneous, and a taxpayer without tendering the legal taxes cannot restrain the collection of the taxes.—*Black v. Early* (Mo.) 1014.

Under Const. art. 10, § 12 [Ann. St. 1906, p. 287], the estimate of a school district of the funds necessary to be raised by taxation *held* to properly include items for interest on its bonds and for a sinking fund rendering the tax valid.—*Black v. Early* (Mo.) 1014.

The validity of a de facto school district acting under color of law in conducting a school cannot be collaterally attacked in a suit to restrain the collection of school taxes.—*Black v. Early* (Mo.) 1014.

A school district voluntarily becoming a party to a suit to restrain the collection of school taxes *held* entitled to avail itself of the defense that its corporate existence cannot be collaterally attacked.—*Black v. Early* (Mo.) 1014.

Where county school land is sold by the trustees in good faith for full market value, the validity of the sale *held* to depend upon whether they have applied all the proceeds to the school fund, as required by Const. 1876, art. 7, § 6.—*Taber v. Dallas County* (Tex.) 332.

Fact that a purchaser of county school lands in addition to paying full value for the land agrees to release a claim against the county *held* not to invalidate the sale.—*Taber v. Dallas County* (Tex.) 332.

Fact that it should be subsequently found that county school land was in fact worth more than it brought *held* not to avoid the sale fairly made.—*Taber v. Dallas County* (Tex.) 332.

## SEALS.

Sufficiency of seal on certificate of acknowledgment, see "Acknowledgment," § 2.

## SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

## SEDUCTION.

Cross-examination of witnesses, see "Witnesses," § 2.

### § 1. Criminal responsibility.

\*A charge in a prosecution for seduction *held* erroneous as failing to properly present the law applicable to corroboration of the testimony of the female seduced.—*Taylor v. State* (Tex. Cr. App.) 366.

In a seduction trial *held* improper to exclude testimony showing that prosecutrix's sister's reputation for chastity was bad and that witness knew of her unchaste acts.—*Jeter v. State* (Tex. Cr. App.) 371.

## SELF-DEFENSE.

See "Homicide," §§ 5, 8.

## SENTENCE.

In criminal prosecutions, see "Criminal Law," § 29.

## SEPARATE ESTATE.

Of married woman, see "Husband and Wife," § 2.

\*Point annotated. See syllabus.

## SEQUESTRATION.

In reconvention for damages, actual and exemplary, for a wrongful sequestration, certain evidence *held* admissible on the question of exemplary damages.—*Falls City Clothing Co. v. Cannon* (Tex. Civ. App.) 189.

\*A judgment for \$400 actual damages for the wrongful suing out of a sequestration *held* excessive.—*Falls City Clothing Co. v. Cannon* (Tex. Civ. App.) 189.

\*Where in reconvention for damages, actual and exemplary, for a wrongful sequestration, there was a judgment for actual damages alone, *held*, that it would be presumed that certain evidence was not considered in arriving at the decision.—*Falls City Clothing Co. v. Cannon* (Tex. Civ. App.) 189.

Where property has been sequestered, rights of sureties on a replevin bond stated.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

Under Rev. St. 1895, art. 4876, *held* judgment may go against sureties on a replevin bond given on property being sequestered, without pleading as to their liability.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

For the purpose of recovery on a replevin bond in a sequestration proceeding the amount of rents collected by the principal may be shown, but not what he did with it.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

Two principals in a replevin bond in a sequestration proceeding being jointly and severally bound thereby, the sureties are bound if judgment goes against either principal.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

Evidence *held* to show that judgment against sureties on a replevin bond given in a sequestration proceeding represented no rents accruing before the bond was executed.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

Recovery may not be had against the sureties on a replevin bond given in a sequestration proceeding for rents accruing prior to the execution of the bond.—*Wandelohr v. Grayson County Nat. Bank* (Tex. Civ. App.) 413.

Under Rev. St. 1895, art. 1425, defendant *held* not entitled to complain of an award of costs in an action to recover cattle.—*Rudolph v. Snyder* (Tex. Civ. App.) 763.

Where plaintiff's right to the possession of cattle sequestered was not disputed, and no evidence was offered traversing the affidavit for the writ, he was entitled to the costs of the proceeding.—*Rudolph v. Snyder* (Tex. Civ. App.) 763.

Under Rev. St. 1895, art. 4871, *held*, if defendant was entitled to recover money paid a sheriff to regain possession of sequestered property, he should have the item taxed as costs, and could not have his right thereto determined by the jury.—*Rudolph v. Snyder* (Tex. Civ. App.) 763.

## SERVANTS.

See "Master and Servant."

## SERVICE.

Of papers on appeal or writ of error, see "Appeal and Error," § 13.  
Of process, see "Process," § 1.

**SERVICES.**

See "Work and Labor."

**SERVITUDES.**

See "Easements."

**SET-OFF AND COUNTERCLAIM.****§ 1. Subject-matter.**

\*In an action by a vendor's administrator to foreclose a vendor's lien, defendant *held* entitled to set off a claim for damages for breach of warranty in the sale, though not having filed the same as a claim against decedent's estate.—*Crawford v. McDonald* (Ark.) 206.

\*Under Civ. Code Prac. § 96, a claim for commission for purchasing tobacco for plaintiff cannot be set up by defendant as a counterclaim in an action by plaintiff for the proceeds of a sale under a different contract.—*Allen v. Hodge* (Ky.) 255.

**SETTLEMENT.**

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."  
Of bill of exceptions, see "Exceptions, Bill of," § 2.

**SHERIFFS AND CONSTABLES.**

Notice by sheriff to agent of fidelity insurance company as surety on bond, see "Insurance," § 7.

**SIDEWALKS.**

Dedication of land for, see "Dedication," § 1.  
In cities, see "Municipal Corporations," § 7.

**SLANDER.**

See "Libel and Slander."

**SPECIAL LAWS.**

See "Statutes," §§ 2, 5.

**SPECIFIC PERFORMANCE.****§ 1. Nature and grounds of remedy in general.**

\*Specific performance is not decreed as a matter of course, but rests in the sound discretion of the court.—*Gottfried v. Bray* (Mo.) 630.

**§ 2. Contracts enforceable.**

A trustee holding in trust the title to land, which trust he has voluntarily undertaken, cannot be forced to specifically perform a contract to sell the land to one who knew at the time that the cestui que trust had been in adverse possession of the land for many years.—*Cyrus v. Holbrook* (Ky.) 300.

A renewal of a lease for all time *held* to create a perpetuity contrary to the policy of the law, so that equity will not decree specific performance of the covenant for renewal therein.—*Drake v. Board of Education of St. Louis* (Mo.) 650.

**§ 3. Good faith and diligence.**

\*Parties *held* not entitled to specific performance, where their conduct has made it inequitable that it should be granted.—*Kentucky Iron, Coal & Mfg. Co. v. Adams* (Ky.) 1198.

\*Point annotated. See syllabus.

**SPEED.**

Expert testimony, see "Evidence," § 10.  
Of train, see "Railroads," § 6.  
Relevancy of evidence of, see "Evidence," § 8.

**SPIRITUOUS LIQUORS.**

See "Intoxicating Liquors."

**STARE DECISIS.**

See "Courts," § 2.

**STATEMENT.**

As pleading in justice's court, see "Justices of the Peace," § 2.  
By witness inconsistent with testimony, see "Witnesses," § 3.  
Of case or facts for purpose of review, see "Appeal and Error," § 7; "Criminal Law," §§ 33-37.

**STATES.**

Construction in favor of validity of grant from state, see "Contracts," § 2.  
Courts, see "Courts."  
Harmless error in action by state against foreign corporation for violation of anti-trust law, see "Appeal and Error," § 33.  
Limitations as against state, see "Limitation of Actions," § 1.  
Presumptions as to laws of other states, see "Evidence," § 2.  
State school for blind, see "Asylums."  
State superintendent of public instruction, see "Schools and School Districts," § 1.

**§ 1. Political status and relations.**

Acts 1906, p. 115, c. 22, art. 3, providing for the taxation of lands long omitted, *held* not in violation of the Virginia Compact.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

**§ 2. Government and officers.**

\*Under Const. 1874, art. 19, § 19, the Legislature had power to make the superintendent of the Arkansas School for the Blind a public officer, notwithstanding section 9.—*Lucas v. Futrall* (Ark.) 667.

**STATUTES.**

Adoption by United States courts of state laws as rules of decision, see "Courts," § 4.  
Indictment in language of statute, see "Indictment and Information," § 2.  
Judicial notice, see "Evidence," § 1.  
Laws denying due process of law, see "Constitutional Law," § 4.  
Laws granting special privileges or immunities, see "Constitutional Law," § 3.  
Recovery by state of penalties for violation of anti-trust law, see "Monopolies," § 1.  
Tax deed as color of title, see "Adverse Possession," § 1.  
Validity of retrospective or ex post facto laws, see "Constitutional Law," § 2.

**Provisions relating to particular subjects.**

See "Adoption"; "Adultery"; "Animals"; "Appeal and Error," §§ 3-13, 17, 18, 26, 27, 36; "Asylums"; "Attorney and Client," § 1; "Bail," § 1; "Banks and Banking," § 2; "Bastards," § 1; "Brokers," § 1; "Carriers," §§ 1, 4, 5, 8; "Chattel Mortgages," § 3; "Contempt," § 2; "Corporations," §§ 1, 3, 4; "Costs," §§ 1, 2; "Counties," § 1; "Courts,"

§§ 1, 2; "Covenants," § 1; "Criminal Law," §§ 8, 16-18, 29, 30, 34, 39, 42, 45; "Death," § 1, 2; "Deeds," §§ 2, 4; "Depositaries," "Descent and Distribution"; "Dismissal and Nonsuit," § 1; "Divorce," § 2; "Druggists"; "Ejectment," § 1; "Elections," § 1; "Embezzlement"; "Estates Tail"; "Fish"; "Hospitals"; "Insurance," § 10; "Intoxicating Liquors"; "Jury," §§ 1-3; "Justices of the Peace," §§ 1-3; "Landlord and Tenant," § 6; "Lewdness"; "Libel and Slander," § 4; "Licenses," § 1; "Limitation of Actions"; "Lis Pendens"; "Logs and Logging"; "Master and Servant," §§ 3-7; "Mechanics' Liens"; "Municipal Corporations"; "New Trial," §§ 1, 2; "Officers," §§ 1, 2; "Parties," § 1; "Physicians and Surgeons"; "Pleading," §§ 4, 6; "Process," §§ 1, 2; "Quieting Title," § 2; "Quo Warranto," § 2; "Railroads," §§ 1, 3, 4, 6, 8; "Taxation"; "Trial," §§ 1, 3, 9; "Trusts," § 1; "Wills," §§ 3, 4; "Witnesses," §§ 1-3. Statute of frauds, see "Frauds, Statute of."

### § 1. Enactment, requisites, and validity in general.

\*Though the objections that Acts 1906, p. 115, c. 22, art. 3, is unjust and oppressive were well founded, such objection *held* to afford no basis for declaring the same invalid.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

The anti-trust acts of May 25, 1899 (Laws 1899, p. 246, c. 146), and March 31, 1903 (Laws 1903, p. 119, c. 94), *held* not indefinite and uncertain, but valid.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

### § 2. General and special or local laws.

\*Acts 1906, p. 115, c. 22, art. 3, relating to the assessment of lands which have been omitted from taxation, *held* not in violation of Const. § 59, prohibiting local and special legislation.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

### § 3. Subjects and titles of acts.

\*Acts 1906, p. 88, c. 22, *held* not, as to page 115, c. 22, art. 3, in violation of Const. § 51, requiring an act to relate to but one subject, which shall be expressed in its title.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

\*Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], relating to filling by gubernatorial appointment vacancies occurring in elective offices, *held* not unconstitutional on the ground that the subject of the original bill of which it was a portion was not clearly expressed in its title.—*State ex rel. Wayland v. Herring* (Mo.) 984.

### § 4. Amendment, revision, and codification.

\*Rev. St. 1899, §§ 7028, 9267 [Ann. St. 1906, pp. 3418, 4258], *held* not unconstitutional because the amendatory acts in which they originally appeared merely set forth the statutes as amended, notwithstanding Const. art. 4, § 34

[page 189], relating to amendments.—*State ex rel. Wayland v. Herring* (Mo.) 984.

\*Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], relating to filling vacancies in offices, *held* not unconstitutional as being first enacted as a part of a revised bill, notwithstanding Const. art. 4, § 41 [page 192].—*State ex rel. Wayland v. Herring* (Mo.) 984.

### § 5. Repeal, suspension, expiration, and revival.

\*Special legislation or local laws are not repealed by a later general act unless specially mentioned in the general law, or the purpose to repeal is manifest.—*Paul v. State* (Tex. Civ. App.) 448.

\*Where a general intention is expressed by the Legislature, and also a particular intention incompatible with the general one, the particular intention will be considered an exception, and the two acts can stand together.—*Paul v. State* (Tex. Civ. App.) 448.

### § 6. Construction and operation.

\*In construing a statute, regard must be had to its various provisions, and such effect given them as they indicate they were intended to have and as will render the statute operative.—*Chicago, R. I. & P. Ry. Co. v. State* (Ark.) 199.

Where a statute is susceptible of two constructions, one inequitable as well as rendering the statute violative of the Constitution, and the other rendering the act valid and equitable, the latter construction will be applied.—*Commonwealth v. Ledman* (Ky.) 247.

\*The primary rule governing the interpretation of statutes requires the legislative intent and purpose to be ascertained.—*State ex rel. Eaton v. Gmelich* (Mo.) 618.

\*Though the courts are not bound to follow legislative construction, if the construction has been contemporaneous and long continued, it is entitled to great weight.—*State ex rel. Wayland v. Herring* (Mo.) 984.

\*That which is within the meaning of a statute is as much a part of it as if it were written therein.—*State ex rel. Hammer v. Wiggins Ferry Co.* (Mo.) 1005.

\*The rule that a statute in derogation of the common law is to be strictly construed has been abolished by statute in Texas.—*Galveston, H. & S. A. Ry. Co. v. Walker* (Tex. Civ. App.) 706.

\*Sayles' Ann. Civ. St. 1897, arts. 4497-4502, as amended by Laws 1899, p. 67, c. 48, imposing a penalty for failure of a railroad company to furnish cars on application, being penal, must be strictly construed.—*Texas & P. Ry. Co. v. Blocker* (Tex. Civ. App.) 718.

\*In construing written laws, courts are not bound by rules of grammar, and may disregard them to give effect to manifest legislative intent.—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

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## STAY.

Pending appeal or writ of error, see "Appeal and Error," § 8.  
Supersedes, see "Supersedes."

## STOCKHOLDERS.

Of corporations, see "Corporations," §§ 2, 3.

## STREET RAILROADS.

See "Railroads."

Carriage of passengers, see "Carriers."

Construction and operation of instruction in action for injuries caused by operation of, see "Trial," § 8.

Grant of right to use street, see "Municipal Corporations," § 6.

Harmless error in action for death caused by operation of, see "Appeal and Error," § 33.

Province of court and jury in action for injuries caused by operation of, see "Trial," § 3.

### § 1. Establishment, construction, and maintenance.

A city ordinance construed, and held to empower a street railway to transmit electric power over streets other than those expressly mentioned in the ordinance.—Beaumont Traction Co. v. Brock (Tex. Civ. App.) 460.

A city ordinance held to impliedly authorize a street railway to transmit electric power over streets other than those mentioned in the ordinance.—Beaumont Traction Co. v. Brock (Tex. Civ. App.) 460.

### § 2. Regulation and operation.

Instructions as to care required of a motorman to avoid a collision held erroneous.—Lexington Ry. Co. v. Woodward (Ky.) 853.

\*A street car company is required to exercise only that degree of care toward persons having a right to the common use of the street that a person of ordinary prudence would exercise under like circumstances.—Lexington Ry. Co. v. Woodward (Ky.) 853.

In an action to recover for injuries received by colliding with defendant's street car, instructions held proper under the evidence.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

In an action for injuries received by collision with a street car, held proper to prove by former employes the condition of the car shortly before the accident.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

\*The admissibility of evidence showing a negligent condition existing prior to the accident depends upon the degree of probability afforded in each case that such condition continued up to the time of the accident.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

In an action for injuries received by collision with a street car, a question as to its subsequent

disposition held proper.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

Where the brakes and signal apparatus of a street car were shown to have been out of order 10 days before an accident, the burden was on the company to show the car was not defective at the time of the accident.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

In an action against a street railway company for running over a four-year old child, it is not error to assume that as to her the curb line of a city street is the danger line in crossing the street.—Cornovski v. St. Louis Transit Co. (Mo.) 51.

In an action against a street railway company for running over plaintiff's child, an instruction that if the motorman in charge of the car saw, or by keeping a vigilant watch would have seen, her crossing the street and in a position of being struck by the car, etc., did not assume that the curb line was the danger line.—Cornovski v. St. Louis Transit Co. (Mo.) 51.

In an action against a street railway company for running over a child, an instruction held sufficient to submit the question of causal connection between the negligence of defendant and the death of the child, notwithstanding failure to use the expression "proximate cause."—Cornovski v. St. Louis Transit Co. (Mo.) 51.

\*Evidence considered, and held sufficient to take to the jury the question of motorman's negligence in not seeing a minor and avoiding the injury.—Brown v. St. Louis & Suburban Ry. Co. (Mo. App.) 83.

In an action by a parent for injuries to his minor son, struck by a street car, a requested instruction held erroneous as placing the son on an equality with an adult, and properly refused.—Brown v. St. Louis & Suburban Ry. Co. (Mo. App.) 83.

\*It is the duty of a motorman, on approaching a crossing where he has reason to anticipate the presence of vehicles and pedestrians, to keep a close lookout and give warning of the presence of the car.—Zalotuchin v. Metropolitan St. Ry. Co. (Mo. App.) 548.

Concurring negligence of another held not to relieve a street railway company from liability on the ground that its negligent acts were only a remote cause of the injury.—Zalotuchin v. Metropolitan St. Ry. Co. (Mo. App.) 548.

## STREETS.

See "Highways"; "Municipal Corporations," §§ 6, 7.

Acquisition of title to, by adverse possession, see "Adverse Possession," § 1.

## SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 2.

\*Point annotated. See syllabus.

**SUBSTITUTION.**

Of beneficiaries in insurance certificate, see "Insurance," § 10.

**SUICIDE.**

Of insured, see "Insurance," § 6.

**SUIT.**

See "Action."

**SUMMARY PROCEEDINGS.**

Collection of taxes, see "Taxation," § 5.

**SUMMONS.**

See "Process."

**SUPERSEDEAS.**

On appeal or writ of error, see "Appeal and Error," § 8.

The court, on appeal from a judgment ousting one from a public office, will not consider the nature of the judgment, authorized by Kirby's Dig. §§ 2860-2864, for the purpose of determining whether the supersedeas shall be discharged, but will, under Const. art. 7, § 4, stay the judgment.—*Williams v. Buchanan* (Ark.) 202.

Injunctions and writs of supersedeas are issued by the Supreme Court to preserve the status quo, where the justice of the case requires it.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.* (Ark.) 676.

**SUPPLEMENTAL PLEADING.**

See "Pleading," § 6.

**SUPREME COURTS.**

See "Courts," § 3.

**SURETYSHIP.**

See "Principal and Surety."

**SURVEYS.**

See "Boundaries."

**SURVIVORSHIP.**

Evidence, see "Death," § 1.  
Of devisees or legatees, see "Wills," § 4.

**SUSPENSION.**

Of officers, see "Officers," § 1.

**SWINDLING.**

See "False Pretenses."

**TAXATION.**

Appellate jurisdiction of Supreme Court in action to recover taxes as involving construction of revenue laws, see "Courts," § 3.

Failure of corporation to pay franchise tax, see "Corporations," § 4.  
Judicial notice of judgment declaring tax sales invalid, see "Evidence," § 1.  
Laws denying due process of law, see "Constitutional Law," § 4.  
Local or special laws, see "Statutes," § 2.  
Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.  
Presumption as to performance of duty by tax officers, see "Evidence," § 2.  
Recovery of taxes paid to county by mistake, see "Counties," § 2.  
Retrospective laws, see "Constitutional Law," § 2.  
Review of judgment in proceeding for refusing to list lands for taxes as dependent on nature of subject-matter, see "Appeal and Error," § 3.  
Taxation as in violation of compact between states, see "States," § 1.  
Taxation of property of corporations engaged in interstate commerce, see "Commerce," § 1.  
Tax deed as cloud on title, see "Quieting Title," § 1.  
Term of office of tax collector, see "Officers," § 1.

*Local or special taxes.*

See "Municipal Corporations," § 8; "Schools and School Districts," § 1.  
Assessments for municipal improvements, see "Municipal Corporations," § 4.

*Occupation or privilege taxes.*

See "Intoxicating Liquors," § 3; "Licenses," § 1.

**§ 1. Constitutional requirements and restrictions.**

\*Under Const. §§ 170, 171, the Legislature held to have no power to exempt from taxation, by Ky. St. 1903, § 4088, shares of capital stock in corporations paying taxes only on that part of their property situated within the state.—*Commonwealth v. Walsh's Trustee* (Ky.) 240.

Acts 1906, p. 115, c. 22, art. 3, held not in violation of Const. § 171, declaring that taxes shall be levied for public purposes only.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

Acts 1906, p. 115, c. 22, art. 3, § 1, held not in violation of the constitutional requirement that taxation shall be uniform, as being double taxation.—*Eastern Kentucky Coal Lands Corp. v. Commonwealth* (Ky.) 260.

**§ 2. Liability of persons and property.**

\*Buildings and grounds used by a sisterhood solely as a public hospital held under the Constitution exempt from taxation.—*Hot Springs School Dist. v. Sisters of Mercy of Female Academy of Little Rock, Ark.* (Ark.) 954.

Under Ky. St. 1903, § 4094, the amount of undivided earnings of a building and loan association on hand on the date provided for the assessment of such funds, less current indebtedness to such date, is taxable to the association, regardless of the association's dates for distribution of profits.—*Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n* (Ky.) 221.

Under Ky. St. 1903, § 4093, members of a building and loan association held taxable only on the amount paid in on their stock on the date of the assessment in excess of the amount of any loan or withdrawal that might have been made on such stock.—*Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n* (Ky.) 221.

Under Ky. St. 1903, §§ 4093, 4094, a building and loan association held not taxable on notes and bonds given to secure loans by borrowing members.—*Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n* (Ky.) 221.

\*Point annotated. See syllabus.

Money obtained by a building and loan association through a bond issue and loaned out on mortgages, not shown to be either surplus or undivided profits, *held* not taxable under Ky. St. 1903, § 4094.—Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n (Ky.) 221.

\*Under Ky. St. 1903, § 4088, shares of capital stock of a corporation paying taxes on that part only of its property situated in the state *held* not exempt from taxation.—Commonwealth v. Walsh's Trustee (Ky.) 240.

Where the shares of a railway company were held by a foreign corporation, organized for that purpose, which did no business except hold such shares and paid dividends to the holders of its stock given in exchange for the stock of the railway company, which dividends were paid to it by the railway company, the holding company's shares were not taxable under Ky. St. 1903, § 4085.—Commonwealth v. Ledman (Ky.) 247.

\*Where a holding corporation did no business and had no property except the shares that it held in trust, it was not subject to taxation; its mere right to be a corporation not being taxable property.—Commonwealth v. Ledman (Ky.) 247.

A foreign corporation's right to remove actions against it to the federal court does not give to its shares a taxable value under the rule forbidding the states to abridge rights guaranteed by the federal Constitution.—Commonwealth v. Ledman (Ky.) 247.

\*Under Const. § 171, Ky. St. 1903, § 4085, providing that, if a corporation pays taxes on all its property, its stock shall not be assessed against the shareholders, is applicable to foreign as well as domestic corporations.—Commonwealth v. Ledman (Ky.) 247.

\*Shares of stock of business or trading corporations required to list and pay taxes on their property are not subject to taxation in the hands of their individual owners.—Commonwealth v. Ames (Ky.) 306.

\*Though a municipality acquired all the shares of stock of a water company, the property of the water company *held* not thereby converted into public property within Const. § 170, exempting from taxation public property used for public purposes.—Bell v. City of Louisville (Ky.) 862.

### § 3. Levy and assessment.

Where all the property of a railway company was valued for taxation by the board of valuation and assessment for certain years, the revaluation for those years could not be made.—Commonwealth v. Ledman (Ky.) 247.

That a corporation organized in New Jersey and doing business in Kentucky was required to pay an annual license tax to the state of New Jersey did not enhance the value of its franchise for taxation in Kentucky.—Commonwealth v. Ledman (Ky.) 247.

The board of valuation and assessment under Ky. St. 1903, § 4079, in valuing a railway company's capital stock, is governed by the value of the company's franchise and tangible and intangible property, and not by the property value of the company's shares.—Commonwealth v. Ledman (Ky.) 247.

Money paid by a corporation to perfect its organization is not a taxable asset.—Commonwealth v. Ledman (Ky.) 247.

Defects in a petition under Acts 1906, pp. 115, 116, c. 22, art. 3, §§ 1, 2, to list lands for taxation, *held* not obviated by fact that taxpayer did not know his property or its description, nor that it would be too expensive for him to make the necessary investigation.—Eastern Kentucky Coal Lands Corp. v. Commonwealth (Ky.) 260.

A petition under Acts 1906, pp. 115, 116, c. 22, art. 3, §§ 1, 2, to list lands for taxation, *held* defective.—Eastern Kentucky Coal Lands Corp. v. Commonwealth (Ky.) 260.

Under Const. §§ 172, 227, Acts 1906, pp. 115-121, c. 22, art. 3, §§ 1-4, *held* not unconstitutional on the ground that it takes from the assessor, a constitutional officer, the power conferred on him alone by the Constitution to assess real estate.—Eastern Kentucky Coal Lands Corp. v. Commonwealth (Ky.) 260.

Construed together with Rev. St. 1899, § 1163, sections 9338, 9339, and 9344 [Ann. St. 1906, pp. 988, 4294-4296], *held* not restricted for purposes of taxation to railroads owned by railroad companies or railroad corporations, but to include all corporations, companies, or individuals owning or operating a railroad.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

\*The method pursued in assessing for taxation the property of a corporation *held* proper.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

\*Though the valuation placed on omitted real estate and taxes extended were not in compliance with Rev. St. 1899, § 9177 [Ann. St. 1906, p. 4226], yet the owner, having requested a valuation so that he might pay the taxes, *held* estopped to question the validity of the assessment.—Kansas City ex rel. Elliott v. Holmes (Mo. App.) 559.

### § 4. Payment and refunding or recovery of tax paid.

\*Where taxes have been wrongfully collected by county officials, and are in the hands of the collecting or disbursing officers, a direct action for their recovery may be brought by the taxpayer against the person holding the tax.—First Nat. Bank v. Christian County (Ky.) 831.

Where a taxpayer pays taxes irregularly assessed, and the sum paid represents the amount for which his property is justly liable, he cannot recover it.—Kansas City ex rel. Elliott v. Holmes (Mo. App.) 559.

### § 5. Collection and enforcement against persons or personal property.

\*Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], relating to filling by appointment vacancies in elective offices, and limiting the term of the appointee, *held* authorized by Const. art. 9, § 14 [page 264], and not unconstitutional.—State ex rel. Wayland v. Herring (Mo.) 984.

\*Under Rev. St. 1899, § 7028 [Ann. St. 1906, p. 3418], section 9203, as amended by Laws 1905, p. 272 [page 4236] and sections 9267 and 9247 [pages 4258, 4249], the term of one appointed to fill a vacancy in the office of collector of revenue *held* to expire on the first Monday in March of the year following the election of his successor, whether his successor was elected to fill an unexpired or a full term.—State ex rel. Wayland v. Herring (Mo.) 984.

In an action by the state to collect taxes, the exclusion of certain evidence *held* error.—State ex rel. Hammer v. Wiggins Ferry Co. (Mo.) 1005.

Under Acts 1897, p. 136, c. 103, § 9, the costs in a suit for taxes against unimproved town lots owned by one person must be taxed on the basis of the lots being one tract.—Raht v. State (Tex. Civ. App.) 900.

### § 6. Sale of land for nonpayment of tax.

\*A tax sale *held* void for noncompliance with Kirby's Dig. § 7083.—Boyd v. Gardner (Ark.) 942.

\*Point annotated. See syllabus.



### § 7. Tax titles.

A purchaser of land at a void sale is entitled to a lien thereon for all taxes paid by him.—*Files v. Jackson* (Ark.) 950.

## TELEGRAPHS AND TELEPHONES.

Grant of right to telegraph and telephone companies to use streets, see "Municipal Corporations," § 6.

### § 1. Establishment, construction, and maintenance.

\*A municipal ordinance providing for the issuance of permits for digging telephone pole holes at the discretion of the city marshal *held* void.—*City of Texarkana v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 915.

### § 2. Regulation and operation.

In an action for failure to deliver a telegram, failure to give a requested instruction that the telegram did not on its face disclose facts leading to information of any special injury to plaintiff by reason of nondelivery *held* error.—*Western Union Telegraph Co. v. Weniski* (Ark.) 486.

\*A verdict for \$1,354 for failure to deliver a telegram notifying plaintiff regarding her brother's funeral *held* excessive.—*Western Union Telegraph Co. v. Weniski* (Ark.) 486.

A telegraph company *held* not charged with information which a day telegram and a night telegram taken together would afford.—*Western Union Telegraph Co. v. Weniski* (Ark.) 486.

A telegraph company *held* not liable for special damages for failure to deliver a telegram intended to enable plaintiff to attend her brother's funeral, in the absence of notice of such purpose from the telegram or other sources.—*Western Union Telegraph Co. v. Weniski* (Ark.) 486.

Plaintiff *held* not entitled to recover for failure to deliver a message addressed to her sister, relating to the burial of her brother, unless it was intended to enable her to attend the funeral, and defendant was notified of that fact.—*Western Union Telegraph Co. v. Weniski* (Ark.) 486.

\*A telegram *held* to suggest such relationship of the parties as to notify the telegraph company that the addressee would probably suffer mental anguish if it were not promptly delivered.—*Western Union Telegraph Co. v. Gullledge* (Ark.) 957.

\*One *held* not entitled to recover for mental anguish by his failure to receive a telegram announcing the serious illness of a brother.—*Western Union Telegraph Co. v. Gullledge* (Ark.) 957.

Liability of a telephone company under a contract for the extension of its line stated.—*Eastern Kentucky Telephone & Telegraph Co. v. Hardwick* (Ky.) 307.

Liability of a telephone company for interruption of service stated.—*Eastern Kentucky Telephone & Telegraph Co. v. Hardwick* (Ky.) 307.

Right of a telephone subscriber to a deduction from his bill on account of interrupted service stated.—*Eastern Kentucky Telephone & Telegraph Co. v. Hardwick* (Ky.) 307.

A telephone company may, in its discretion, purchase other lines and add telephones to its lines, and where it becomes necessary to establish a switch board and to employ a person to take charge of it, it may require every stockholder connected with the system to pay a charge on messages.—*McDaniel v. Faubush Telephone Co.* (Ky.) 825.

\*A telephone company is a public service corporation required to transmit messages, if with-

\*Point annotated. See syllabus.

in its power to do so, with authority to prescribe reasonable rules and charges.—*McDaniel v. Faubush Telephone Co.* (Ky.) 825.

\*It is the duty of a telegraph company to transmit and deliver promptly every message that is delivered to it.—*Western Union Telegraph Co. v. True* (Tex.) 315.

\*In an action against a telegraph company for failure to send and deliver a message promptly, plaintiff *held* not entitled to recover damages for the loss of an option to buy cattle, resulting from defendant's delay.—*Western Union Telegraph Co. v. True* (Tex.) 315.

A telegraph company *held* not excused for liability for delaying a telegram, though the addressee was inaccessible, when it was delivered to him in whose care it was addressed.—*Western Union Telegraph Co. v. Gulick* (Tex. Civ. App.) 698.

In an action against a telegraph company for delay in delivering a message *held* proper to refuse to direct a verdict for the company.—*Western Union Telegraph Co. v. Gulick* (Tex. Civ. App.) 698.

In an action for delay in delivering a message *held* proper to refuse to instruct that the company was not required to deliver the message outside of the town to which it was addressed.—*Western Union Telegraph Co. v. Gulick* (Tex. Civ. App.) 698.

\*A verdict against a telegraph company for failure to deliver a death message *held* not excessive.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1147.

## TEMPORARY INJUNCTION.

Restraining liquor nuisance, see "Intoxicating Liquors," § 8.

## TENANCY IN TAIL

See "Estates Tail."

## TENDER.

As condition precedent to action to redeem from mortgage foreclosure, see "Mortgages," § 4. Of price of goods sold, see "Sales," § 4.

\*A tender having been made, it must, to preserve its legal effect, be kept good.—*Kelly v. Keith* (Ark.) 1173.

\*Where, a party having been ordered by the court to pay into court the amount tendered to the other party, the clerk gave a receipt without being paid the money, and thereafter, on the demand of the party to whom it was to be paid, the clerk was unable to pay it, his failure to pay made the tender of no effect.—*Kelly v. Keith* (Ark.) 1173.

## TERMS.

Of leases, see "Landlord and Tenant," § 3. Of office, see "Officers," § 1.

## TESTAMENT.

See "Wills."

## TESTAMENTARY CAPACITY.

See "Wills," § 1.

**TESTAMENTARY POWERS.**

Construction and execution, see "Powers," § 1.

**THEFT.**

See "Larceny."

**THREATS.**

Admissibility of evidence of, in prosecution for homicide, see "Homicide," § 5.

**TIMBER.**

See "Logs and Logging."

Conversion of, see "Trove and Conversion," § 1.

**TIME.**

When lien of attorney attaches, see "Attorney and Client," § 1.

*For particular acts in or incidental to judicial proceedings.*

Filing bill of exceptions, see "Criminal Law," § 34.

Filing bond on appeal or writ of error, see "Appeal and Error," § 6.

Filing briefs on appeal or writ of error, see "Appeal and Error," § 17.

Filing record on appeal from judgment of forfeiture of bail bond, see "Bail," § 1.

Filing transcript on appeal or writ of error, see "Appeal and Error," § 13.

Serving abstract of record on appeal or writ of error, see "Appeal and Error," § 11.

Settlement of bill of exceptions, see "Exceptions, Bill of," § 2.

*For particular acts not judicial.*

Payment of interest, see "Interest," § 1.

Removal of standing timber, see "Logs and Logging."

**TITLE.**

Color of title, see "Adverse Possession."

Jurisdiction of Supreme Court in causes involving, see "Courts," § 3.

Removal of cloud, see "Quieting Title."

Tax titles, see "Taxation," § 7.

Title of lessor, see "Landlord and Tenant," § 2.

*Particular matters affecting title.*

See "Bankruptcy."

Estoppel to assert title, see "Estoppel," § 1.

*Particular species of property or rights.*

See "Mines and Minerals," § 1.

Deposits in bank, see "Banks and Banking," § 1.

Lot in cemetery, see "Cemeteries."

Office, see "Officers," § 2.

*Title necessary to maintain particular actions.*

See "Ejectment," § 1; "Trespass to Try Title," § 1.

*Titles of particular acts or proceedings.*

See "Statutes," § 3.

**TORTS.**

Causing death, see "Death," § 2.

Ground of action as dependent on place where act was committed, see "Action," § 1.

*Liabilities of particular classes of persons.*

See "Corporations," § 8; "Hospitals"; "Municipal Corporations," § 7.

Agents, see "Principal and Agent," § 1.

Charitable institutions, see "Charities," § 1.

Employes, see "Master and Servant," § 12.

*Particular torts.*

See "Fraud"; "Libel and Slander"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

*Remedies for torts.*

See "Trove and Conversion," § 1.

Discontinuance as to joint tort-feasor, see "Dismissal and Nonsuit," § 1.

Jurisdiction of court of tort occurring outside state, see "Courts," § 1.

Measure of damages, see "Damages," § 2.

**TOWNS.**

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

§ 1. **Government and officers.**

An ordinance designating the time and place of meeting of the board of trustees of a town held not to meet the requirements of Ky. St. 1903, § 3696, and not to afford notice of a meeting at which an ordinance of annexation was passed.—Town of La Grange v. Pryor (Ky.) 235.

Where the board of trustees of a town not having passed an ordinance meeting the requirements of Ky. St. 1903, § 3696, that all meetings shall be held at the time and place designated by ordinance, it was alleged that complainants had actual notice of the meeting, the burden held on the town to prove that fact.—Town of La Grange v. Pryor (Ky.) 235.

**TRADE UNIONS.**

Laws authorizing formation of trade unions as class legislation, see "Constitutional Law," § 3.

**TRANSCRIPTS.**

As evidence, see "Evidence," § 8.

Of record for purpose of review, see "Appeal and Error," §§ 13, 23; "Criminal Law," § 33.

**TREES.**

See "Logs and Logging."

**TRESPASS.**

Action in assumpsit for value of timber cut as waiver of action for, see "Election of Remedies."

Care required as to trespassers, see "Negligence," § 1.

Ejection of trespasser, see "Carriers," § 10.

Injuries to trespassers, see "Railroads," §§ 5, 7.

Judgment in action for trespass on land as bar to recovery for goods converted at same time, see "Judgment," § 7.

On cemetery lots, see "Cemeteries."

Restraining by injunction, see "Injunction," § 2.

Waiver of trespass in cutting timber to sue in assumpsit for value of timber cut, see "Action," § 2.

§ 1. **Actions.**

Statement of the measure of recovery of the owner of standing timber, where another buys it of one without authority to sell and cuts it into ties.—Pettit v. Frothingham (Tex. Civ. App.) 907.

\*Point annotated. See syllabus.

## TRESPASS TO TRY TITLE

See "Ejectment."

Applicability of instruction to evidence, see "Trial," § 6.

Determination of boundaries, see "Boundaries," § 2.

Harmless error in rulings on evidence, see "Appeal and Error," §§ 28, 29.

Hearsay evidence, see "Evidence," § 7.

Order of proof, see "Trial," § 1.

### § 1. Right of action and defenses.

\*In trespass to try title, plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of that of defendant.—*Jaggers v. Stringer* (Tex. Civ. App.) 151.

\*Prior possession to entitle plaintiff in trespass to try title to recover as against a trespasser must have existed at the time of entry.—*Romine v. Littlejohn* (Tex. Civ. App.) 439.

\*The title, whether legal or equitable, under a contract to convey land which contains an acknowledgment of the receipt of the purchase money, will support or defend against an action of trespass to try title.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

Where a city had title to land dedicated to it as a street, and had not lost it by limitation, in taking possession of the land it was not a trespasser against whom the actual possessor could recover by merely showing his possession.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

### § 2. Proceedings.

\*Plaintiff seeking to recover a specified tract of land held required to show title to the land.—*Jaggers v. Stringer* (Tex. Civ. App.) 151.

In trespass to try title, evidence held insufficient to show title in plaintiff essential to a recovery.—*Jaggers v. Stringer* (Tex. Civ. App.) 151.

In trespass to try title, defendant may show under a plea of not guilty that the title is outstanding in other parties, and a deed held admissible for that purpose.—*Mars v. Morris* (Tex. Civ. App.) 430.

In trespass to try title, evidence of a misrepresentation constituting an estoppel held admissible.—*Mars v. Morris* (Tex. Civ. App.) 430.

In trespass to try title, a question as to whether defendant went into possession of certain land under his deed from the common grantor held proper.—*Mars v. Morris* (Tex. Civ. App.) 430.

In trespass to try title, certain misrepresentations of plaintiff's grantor to defendant, a prior grantee, held an estoppel.—*Mars v. Morris* (Tex. Civ. App.) 430.

In trespass to try title, certain evidence held inadmissible.—*Mars v. Morris* (Tex. Civ. App.) 430.

\*In trespass to try title, evidence held insufficient to establish plaintiff's right to recover by reason of prior possession.—*Romine v. Littlejohn* (Tex. Civ. App.) 439.

In trespass to try title, evidence held to require submission to the jury of the questions whether S. and wife, under whom plaintiff claimed, had acquired title by 10 years' adverse possession, and whether plaintiff's deed connected him with the land described in the petition.—*Romine v. Littlejohn* (Tex. Civ. App.) 439.

In trespass to try title, whether a deed was executed to plaintiff's husband held for the jury.—*Gray v. Fussell* (Tex. Civ. App.) 454.

In trespass to try title where defendants claim title through a lost deed, a charge held not to place on plaintiffs the burden of showing that it was not executed.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

Defendant in trespass to try title holding land under a contract to convey held not guilty of laches.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

In trespass to try title, where defendants rest upon their title and do not seek affirmative relief, pleas of the ten-year statute of limitation, laches, and stale demand, are not available.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

In trespass to try title where defendants rely on a title sufficient to afford a good defense, the pleas of laches and stale demand are not available.—*Kirby v. Cartwright* (Tex. Civ. App.) 742.

In an action for the possession of certain land, evidence held sufficient to show that the person under whom plaintiffs claim was the person to whom a certain bounty warrant was issued by the republic of Texas.—*Sanger v. McCann* (Tex. Civ. App.) 752.

The general rule that in trespass to try title plaintiff, where he specifically pleads his title, must prove the title alleged in order to recover, does not apply where the title specifically pleaded is by limitation.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

\*Plaintiff's burden of proof stated in trespass to try title to land claimed by a city under an alleged dedication, where plaintiff claimed title under the ten-year statute of limitations.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

In trespass to try title to land claimed by defendant city under an alleged dedication of it as a street, evidence of a petition of citizens to the city council asking for the removal of a fence on the land was irrelevant and improperly admitted against defendant's objection.—*City of San Antonio v. Rowley* (Tex. Civ. App.) 753.

## TRIAL.

See "New Trial"; "Witnesses."

Acquisition of title by adverse possession as question for jury, see "Adverse Possession," § 2.

Contributory negligence of passenger as question for jury, see "Carriers," § 9.

Construction of contract as question for jury, see "Contracts," § 2.

Custody during trial of person on bail, see "Bail," § 1.

Delivery of deed as question for jury, see "Deeds," § 1.

Disputed claims against estate of decedent, see "Executors and Administrators," § 4.

Existence of homestead as question for jury, see "Homestead," § 3.

Harmless error in instructions, see "Homicide," § 9.

Instructions as to contributory negligence of passenger, see "Carriers," § 9.

Instructions as to gifts, see "Gifts," § 1.

Testimony of witnesses at former trial, see "Criminal Law," § 16.

Trespass to try title to real property, see "Trespass to Try Title."

### Proceedings incident to trials.

See "Continuance."

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

\*Point annotated. See syllabus.

**Trial of actions by or against particular classes of persons.**

See "Carriers," §§ 5, 8-10; "Brokers," § 8; "Municipal Corporations," § 7; "Partnership," § 3; "Railroads," §§ 5-7, 9; "Street Railroads," § 2; "Vendor and Purchaser," § 5. Telegraph and telephone companies, see "Telegraphs and Telephones," § 2.

**Trial of particular civil actions or proceedings.**

See "Libel and Slander," § 3; "Negligence," § 4; "Trespass to Try Title," § 2; "Trove and Conversion," § 1; "Work and Labor."

For causing death, see "Death," § 2.

For broker's commissions, see "Brokers," § 8.

For damages caused by maintaining nuisance, see "Nuisance," § 1.

For death caused by operation of railroad, see "Railroads," § 6.

For death of servant, see "Master and Servant," §§ 10, 11.

For delay in delivering or failure to deliver telegram, see "Telegraphs and Telephones," § 2.

For injuries from fire caused by operation of railroad, see "Railroads," § 9.

For injuries to shipment of live stock, see "Carriers," § 5.

For malpractice, see "Physicians and Surgeons."

For penalties for violation of anti-trust law, see "Monopolies," § 1.

For personal injuries, see "Carriers," §§ 8, 9; "Master and Servant," § 10; "Municipal Corporations," § 7; "Railroads," §§ 5-7; "Street Railroads," § 2.

For price of goods sold, see "Sales," § 6.

For wrongful ejection of passenger, see "Carriers," § 10.

On bill of exchange or promissory note, see "Bills and Notes," § 4.

Probate proceedings, see "Wills," § 3.

To determine boundaries, see "Boundaries," § 2.

To recover land sold, see "Vendor and Purchaser," § 5.

**Trial of criminal prosecutions.**

See "Adultery"; "Criminal Law," §§ 17-27; "Embezzlement"; "Forgery"; "Homicide," § 8; "Larceny," § 2; "Rape," § 1; "Seduction," § 1.

For violation of liquor laws, see "Intoxicating Liquors," § 7.

**§ 1. Reception of evidence.**

Civ. Code Prac. § 606, subd. 3, providing that a person shall not testify for himself after introducing other evidence in chief, *held* not to prohibit the reading of plaintiff's deposition after other witnesses had testified in chief where the deposition was taken before the witnesses testified.—Cumberland Telephone & Telegraph Co. v. Overfield (Ky.) 242.

The action of the trial judge in permitting plaintiff's counsel to hold private conversation with defendant's witness before cross-examining him *held* not an abuse of the trial court's discretion.—Kirby v. Manufacturers' Coal & Coke Co. (Mo. App.) 1069.

\*It is error to refuse to permit a party to state what he expects to prove by a witness, on objections to questions asked the witness being made.—Ehrhardt v. Stevenson (Mo. App.) 1118.

\*An objection to evidence as a whole is not tenable where part of it is admissible.—Wandelohr v. Grayson County Nat. Bank (Tex. Civ. App.) 413.

\*Defendants in trespass to try title, claiming title in themselves, need not introduce deeds constructing links in their chain of title in the order of their execution.—Frugia v. Trueheart (Tex. Civ. App.) 736.

**§ 1½. Arguments and conduct of counsel.**

\*Improper remarks of counsel *held* not ground for reversal of a judgment.—Missouri, K. & T. Ry. Co. of Texas v. Lightfoot (Tex. Civ. App.) 395.

**§ 2. Taking case or question from jury.**

In an action involving a boundary dispute, plaintiff *held* not entitled to peremptory instruction.—Dee v. Nachbar (Mo.) 85.

\*Where evidence is undisputed and credible or the thing proves itself, the court may deal with it as a matter of law.—Cornovski v. St. Louis Transit Co. (Mo.) 51.

\*A demurrer to the evidence admits, as true, every fact and legitimate inference which the jury might draw from the evidence.—Hach v. St. Louis, I. M. & S. Ry. Co. (Mo.) 523.

\*Where defendant pleaded in reconvention *held* error to direct a verdict for plaintiff.—Allen v. Camp (Tex.) 315.

That a judge or appellate court on the same evidence might reach a conclusion contrary to the one contended for is not a reason for withdrawing the issue from the jury.—Walker v. Erwin (Tex. Civ. App.) 164.

\*The credibility of witnesses and the weight to be given their testimony are questions for the jury.—Walker v. Erwin (Tex. Civ. App.) 164.

\*Where plaintiff's title depended on whether an alleged deed was delivered and accepted, a directed verdict for defendant *held* proper only if no other conclusion was reasonable than that the instrument never became effective because not a deed or because never delivered and accepted.—Walker v. Erwin (Tex. Civ. App.) 164.

\*A directed verdict for defendant is not erroneous, although there may be sufficient evidence to go to the jury on certain issues if evidence on the issue of plaintiff's estoppel to assert his claim is so conclusive in favor of defendant that ordinary minds could not differ.—Walker v. Erwin (Tex. Civ. App.) 164.

\*Evidence, no matter how weak its probative force, if it has the dignity of evidence at all, is sufficient to go to the jury.—Gray v. Fussell (Tex. Civ. App.) 454.

\*Where defendant demurs to the evidence and plaintiff joins issue thereon, every fact and conclusion which the evidence tends to prove will be taken as admitted by the defendant.—Chicago, R. I. & P. R. Co. v. Cleaver (Tex. Civ. App.) 721.

\*Circumstances in which a verdict may be directed stated.—Harpold v. Moss (Tex. Civ. App.) 1131.

**§ 3. Instructions to jury—Province of court and jury in general.**

\*In a personal injury action, an instruction *held* not to assume that defendant negligently permitted its wire to hang over the road and obstruct public travel.—Cumberland Telephone & Telegraph Co. v. Overfield (Ky.) 242.

\*In an action for injuries received by colliding with a street car, an instruction that plaintiff had the right to drive down a street, if he did so, with his buggy wheels between the rails, *held* not to assume that he did so drive down the street.—Frankfort & V. Traction Co. v. Hulette (Ky.) 1193.

In an action for injury to a passenger, where plaintiff's testimony placed her with one foot on the run board and one on the floor of the car raising herself to enter when the car started up, it is not error to assume that plaintiff was in a position of danger at the time of the alleged start.—Flaherty v. St. Louis Transit Co. (Mo.) 15.

\*Point annotated. See syllabus.

\*Giving of instruction assuming a certain fact *held* not ground for reversal in the absence of controverting evidence in the record.—*Dee v. Nachbar* (Mo.) 35.

\*In a will contest an instruction on insane delusions, assuming that a claim made by testator against his children, whom he disinherited, was unfounded, *held* not error.—*Holton v. Cochran* (Mo.) 1036.

An instruction *held* to amount to a comment on the testimony, and is properly refused.—*Brown v. Quincy, O. & K. C. R. Co.* (Mo. App.) 551.

\*An instruction assuming as a fact a disputed contention *held* erroneous.—*Christian v. McDonnell* (Mo. App.) 1104.

\*In an action for malpractice, instructions *held* properly refused because they assumed the existence of a controverted fact.—*Hartley v. Calbreath* (Mo. App.) 570.

\*An instruction in a personal injury case criticised as being on the weight of the evidence.—*Houston Electric Co. v. Green* (Tex. Civ. App.) 463.

\*In a death action an instruction *held* not objectionable as being on the weight of the evidence.—*Galveston, H. & S. A. Ry. Co. v. Walker* (Tex. Civ. App.) 705.

\*In an action for negligent death, the evidence *held* not to authorize the court in its instructions to assume that a particular injury caused death.—*Dallas Consol. Electric St. Ry. Co. v. Lytle* (Tex. Civ. App.) 900.

\*In an action for negligent death, an instruction *held* not misleading as assuming a fact the evidence as to which was conflicting.—*Dallas Consol. Electric St. Ry. Co. v. Lytle* (Tex. Civ. App.) 900.

\*Where, in an action for death of an engineer by derailment, there was an issue as to defendant's negligence in inspecting the track, an instruction that, if the accident was caused by trespassers moving the rails, defendant was entitled to a verdict, was erroneous.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

\*Under the act of 1853 the court is not authorized to assume the existence of facts unless there is no contradictory evidence with reference thereto, or the evidence is so clearly defective as not to raise an issue.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

\*A request to charge that the "undisputed evidence" in an action for death of a servant showed that the death was caused by defendant's negligence *held* properly refused.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

\*In an action for services, the court did not err as against defendant in assuming that certain of the services were performed without charge.—*Harris v. Jackson* (Tex. Civ. App.) 1144.

#### § 4. — Necessity and subject-matter.

Omission of plaintiff to ask and of the court to give an instruction submitting the issue of negligence in a personal injury action *held* mere nondirection, and not reversible error.—*Zalotuchin v. Metropolitan St. Ry. Co.* (Mo. App.) 548.

\*It is unnecessary for the court to define the word "negligence," where he uses it in an instruction.—*Main v. Hall* (Mo. App.) 1099.

\*Where, in action for damages, there is no evidence tending to establish an item of expense for which plaintiff might recover, it is error to refuse an instruction, when requested

by defendant, that no recovery can be had as to such item.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

#### § 5. — Form, requisites, and sufficiency.

An instruction which puts certain facts to the jury and tells them that if they find that way plaintiff is entitled to recover is a general instruction.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

\*An instruction *held* properly refused, as calculated to confuse and mislead.—*Hartley v. Calbreath* (Mo. App.) 570.

Where the ordinary intelligence of the jury will suggest from the context of a paragraph in a charge that a word should have been supplied, the omission of the word is immaterial error.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

\*In an action for negligent death, a charge *held* not misleading for omission of a word.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 773.

\*An instruction in an action of debt *held* not erroneous as requiring defendant to prove that he did not owe the debt.—*Burkett & Barnes v. Miller* (Tex. Civ. App.) 1153.

#### § 6. — Applicability to pleadings and evidence.

\*In an action against a railway company for injury to one crossing a track, refusal of an instruction limiting plaintiff's right to recover *held* proper.—*Louisville, H. & St. L. R. Co. v. Davis* (Ky.) 304.

A general instruction covering the whole case should not ignore essential elements of the case made.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

\*In an action for injuries to one run over on a railroad track, a certain instruction *held* not erroneous as a departure from the petition.—*Lange v. Missouri Pac. Ry. Co.* (Mo.) 660.

\*In an action for personal injuries, a requested instruction *held* under the pleading and evidence not applicable.—*Brown v. St. Louis & Suburban Ry. Co.* (Mo. App.) 83.

\*In an action for injuries to a minor, a requested instruction *held* properly refused as outside the evidence.—*Brown v. St. Louis & Suburban Ry. Co.* (Mo. App.) 83.

\*The court properly refused a request to charge based on a city ordinance which was not admitted in evidence.—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*In a negligence action, refusal to give an instruction on contributory negligence is not error when that issue is not pleaded.—*Zalotuchin v. Metropolitan St. Ry. Co.* (Mo. App.) 548.

\*In an action against a gas company for damages from a private nuisance, an instruction *held* erroneous as ignoring defenses.—*Bradbury Marble Co. v. Laclede Gas Light Co.* (Mo. App.) 504.

\*In an action for broker's commissions an instruction ignoring the question whether plaintiff's efforts to sell the land had not been abandoned or his agency revoked before defendant and the purchaser met *held* erroneous.—*Christian v. McDonnell* (Mo. App.) 1104.

\*Where there was no evidence of a contract of guaranty by defendants of their contract with an irrigation company to furnish water defendants had agreed to furnish plaintiffs, the court properly refused to charge that, if the evidence showed such guaranty contract, plain-

\*Point annotated. See syllabus.

tiffs could not recover.—*Stockton v. Brown* (Tex. Civ. App.) 428.

In trespass to try title, an instruction *held* erroneous as being on an issue not made by the evidence.—*Mars v. Morris* (Tex. Civ. App.) 430.

In trespass to try title, a certain instruction *held* erroneous.—*Mars v. Morris* (Tex. Civ. App.) 430.

\*It is not error to refuse a charge not applicable to any issue raised by the evidence and not necessary to explain instructions.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 778.

In an action for the death of a street car passenger in a collision between cars, the refusal to give a charge *held* not erroneous in view of the charge given and the evidence.—*Dallas Consol. Electric St. Ry. Co. v. Lytle* (Tex. Civ. App.) 900.

\*In an action for death of a railroad engineer, an instruction that the railroad company was not bound to supply a perfectly safe track, etc., *held* objectionable as abstract.—*Thompson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 910.

\*An assignment of error that an item pleaded in a counterclaim was not passed on by the jury *held* not sustained, in view of the issues submitted by the charge and the verdict thereon.—*Harris v. Jackson* (Tex. Civ. App.) 1144.

\*A requested instruction that the jury should not consider certain items of damage claimed in the petition *held* properly refused.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1147.

#### § 7. — Requests or prayers.

\*A requested instruction covered by an instruction given is properly refused.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15; *Dee v. Nachbar*, Id. 35; *Brown v. St. Louis & Suburban Ry. Co.* (Mo. App.) 83; *Lattimore v. Union Electric Light & Power Co.*, Id. 543; *Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170; *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, Id. 407; *Thompson v. Planters' Compress Co.*, Id. 470; *Texas & P. Ry. Co. v. Johnson*, Id. 773; *Harris v. Jackson*, Id. 1144.

\*In an action by a passenger for injuries, where a general verdict is prayed covering all damages, an instruction putting the question of damages to the jury as the petition did is not bad in the absence of a request for a more specific instruction.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

\*Where there is evidence of nursing at a hospital by a stranger as well as by a sister at her home, and the value of nursing generally is shown, an instruction permitting recovery for nursing *held* not error in the absence of a request limiting recovery to nursing at the hospital.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

\*The court having charged that if plaintiff's injuries were caused by his failure to watch or observe his footsteps he could not recover, it was not error to refuse to charge that in order to observe his footsteps he must use his "God-given senses."—*Lattimore v. Union Electric Light & Power Co.* (Mo. App.) 543.

\*In an action for injuries to plaintiff by her horse becoming frightened at an alleged unusual blast of the whistle of defendant's engine, a request to charge *held* covered by an instruction given.—*Paris & G. N. Ry. Co. v. Calvin* (Tex.) 873.

\*An instruction in a personal injury action *held* not erroneous for failing to go further into

details in the absence of a request for amplification.—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

\*Where the correct rule for measuring damages was given by the court in its main charge, a special charge submitting a different rule was properly refused.—*Stockton v. Brown* (Tex. Civ. App.) 428.

\*In an action for injuries to a brakeman, the refusal to give a charge *held* not erroneous in view of the charge given.—*Missouri, K. & T. Ry. Co. v. Wise* (Tex. Civ. App.) 465.

\*Appellant *held* not prejudiced by the refusal of an instruction, where the court gave an instruction on the particular issue more favorable to appellant than the instruction requested.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 600.

\*If plaintiff desired that the court charge the converse of a proposition correctly presenting matters of defense, it was plaintiff's duty to have requested such charge.—*Memphis Coffin Co. v. Patton* (Tex. Civ. App.) 697.

\*Where, in an action for injury to an employé who was run down by an engine, the court gave a certain instruction, a requested instruction *held* properly refused.—*Galveston, H. & S. A. Ry. Co. v. Wafer* (Tex. Civ. App.) 897.

#### § 8. — Construction and operation.

\*An instruction ought not to be read as if it stood solitary and alone, independent of other instructions, neither should a general instruction covering the whole case ignore essential elements of the case made.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

In an action by a passenger for personal injuries, a certain instruction, alleged to permit recovery on the finding that the car had stopped, *held* not prejudicial in view of other instructions.—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

In an action against a street railway company for running over a child, if an instruction was defective in not requiring proof of the proximate cause of the injury, *held*, that it was cured by other instructions.—*Cornovski v. St. Louis Transit Co.* (Mo.) 51.

\*A clause of an instruction in an action for the death of plaintiff's son, who was run down by an engine while he was riding on a railroad velocipede, *held* not fairly susceptible of the construction that it assumed a certain fact.—*Lynch v. Chicago & A. Ry. Co.* (Mo.) 68.

\*Any omission in an instruction *held* cured by a subsequent one.—*Lange v. Missouri Pac. Ry. Co.* (Mo.) 660.

\*In an action for injury to a passenger by falling from a slippery car platform, an instruction *held* erroneous as eliminating the defense of contributory negligence, and was not cured by another instruction that defendant was not required to remove ice which accumulated en route before permitting passengers to alight.—*Haas v. St. Louis & S. F. R. Co.* (Mo. App.) 599.

\*An instruction must be construed as a part of and in connection with the entire charge of the court in the light of the evidence.—*Southern Pac. Co. v. Allen* (Tex. Civ. App.) 441.

\*The instructions must be construed as a whole, and a defect in one paragraph rendered harmless by another paragraph is not ground for reversal.—*Thompson v. Planters' Compress Co.* (Tex. Civ. App.) 470.

\*An error in one instruction *held* cured by other instructions.—*Thompson v. Planters' Compress Co.* (Tex. Civ. App.) 470.

\*Point annotated. See syllabus.

\*The transposition of the words "plaintiff" and "defendant" in a charge *held* not reversible error, where the part of the charge submitting the issues to the jury was so plain that the jury could not have been misled.—*Galveston, H. & S. A. Ry. Co. v. Wafer* (Tex. Civ. App.) 897.

\*Erroneous admission of certain evidence *held* cured by instructions.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1147.

#### § 9. Custody, conduct, and deliberations of jury.

Where, in an action on an order drawn on funds due a contractor, a verdict is rendered for the only amount for which it could be rightfully rendered, a contention that it is a subtraction verdict is unavailing.—*Foley v. Houston Co-op. & Mfg. Co.* (Tex. Civ. App.) 160.

\*An abstract of title attached to a deposition of the clerk making it, when both the abstract and deposition had been introduced separately, may be taken by the jury upon retiring, under Rev. St. 1896, art. 1303.—*Frugia v. Trueheart* (Tex. Civ. App.) 736.

#### § 10. Verdict.

The court's action in refusing to receive a verdict contrary to its instructions *held* not erroneous.—*Hines v. Royce* (Mo. App.) 1091.

\*A finding of a specific sum for each plaintiff as damages to land, without any mention in the verdict of a claim for damages to crops, was equivalent to a finding against plaintiffs on the latter issue.—*San Antonio & A. P. Ry. Co. v. Keirsey* (Tex. Civ. App.) 163.

In an action by two plaintiffs against two defendants, a verdict construed, and *held* sufficient in view of the statute.—*Missouri, K. & T. Ry. Co. of Texas v. Lightfoot* (Tex. Civ. App.) 395.

#### § 11. Trial by court.

\*A judgment *held* not erroneous because there is no special finding of facts.—*McKenzie v. Donnell* (Mo.) 40.

\*Where no declarations of law were asked, the action of the court in admitting testimony cannot be *held* error.—*Wood v. Duffy* (Mo. App.) 82.

## TROVER AND CONVERSION.

Appearance, see "Appearance."

Competency of witness, see "Witnesses," § 1.

Conversion of crop by tenant, see "Landlord and Tenant," § 6.

Conversion of property of guest, see "Innkeepers."

Harmless error in action by landlord for conversion of crop, see "Appeal and Error," § 31.

Judgment in action for trespass in land as bar to recovery for goods converted at same time, see "Judgment," § 7.

#### § 1. Actions.

In an action by buyers to recover the value of timber converted by defendants, who claimed to have purchased it of plaintiffs' vendors, the burden is on plaintiffs to prove their prior purchase from the owners and defendants' notice thereof prior to the latter's purchase.—*Johnson v. Kelley* (Ky.) 864.

In an action for the conversion of timber, evidence examined, and *held* for the jury.—*Johnson v. Kelley* (Ky.) 864.

Instructions in an action to recover for building material, claimed to have been converted by defendant while tearing down a building, *held* properly refused.—*Banner Lumber Co. v. McDermott* (Mo. App.) 583.

\*Point annotated. See syllabus.

## TRUSTEES.

In bankruptcy, see "Bankruptcy," § 1.

## TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Creation by will, see "Wills," § 4.

Deposits of trust property in bank, see "Banks and Banking," § 1.

Effect of trust on limitation, see "Limitation of Actions," § 2.

Embezzlement of trust funds, see "Embezzlement."

Sale by trustee of land held adversely, see "Champerly and Maintenance."

Trust deeds, see "Chattel Mortgages"; "Mortgages."

#### § 1. Creation, existence, and validity.

Where a father made a deed of certain land to his son, reserving possession for life, and not recording or delivering the deed, but afterwards placed the son in full possession, and after his death recognized the right of the son's children to the possession of the land and allowed their guardian to control it for them, he will be considered as holding the title in trust for the children.—*Cyrus v. Holbrook* (Ky.) 300.

Deed to a bona fide purchaser *held* good as against claim of one who purchased from the original owner's wife, who claimed an interest from payment of part of the price.—*Couch v. Sizemore* (Ky.) 801.

A case *held* not one of express trust within Rev. St. 1899, § 3416 [Ann. St. 1906, p. 1949].—*Forest v. Rogers* (Mo. App.) 1105.

\*Notwithstanding Rev. St. 1899, § 3416 [Ann. St. 1906, p. 1949], *held* an express trust could be proved by parol evidence admitted without objection.—*Forest v. Rogers* (Mo. App.) 1105.

A guardian purchasing land in her own name at an execution sale under a judgment belonging jointly to her and her wards *held* to hold an interest in the land in trust for the wards.—*Hix v. Armstrong* (Tex.) 317.

#### § 2. Construction and operation.

\*In the construction of a deed of trust, the intention of the donor, arrived at by considering every part of the instrument, governs.—*Parrish v. Mills* (Tex.) 882.

A recital in a deed of trust *held* to show an intention to make a permanent provision for the beneficiaries therein.—*Parrish v. Mills* (Tex.) 882.

#### § 3. Execution of trust by trustee or by court.

\*A trustee may buy from the cestui que trust, and the transaction is valid where there is a fair consideration, and no concealment, and the trustee takes no advantage of information acquired by him in the character of trustee.—*Flowers v. Flowers* (Ark.) 949.

## ULTRA VIRES.

Acts of bank officer, see "Banks and Banking," § 2.

## UNDUE INFLUENCE.

In procuring contract, see "Contracts," § 1.

In procuring deed, see "Deeds," § 4.

In procuring will, see "Wills," § 2.

## UNIONS.

Laws authorizing formation of trade unions as class legislation, see "Constitutional Law," § 3.

## UNITED STATES.

Courts, see "Courts," § 4; "Removal of Causes."

Federal safety appliance act, see "Master and Servant," §§ 4, 5, 10.

Regulation of interstate commerce, see "Commerce," § 1.

## USURY.

### § 1. Usurious contracts and transactions.

The laws against usury, prohibiting schemes resorted to by lenders to enable them to charge more than the legal rate of interest, are rigidly enforced, and no plan will be allowed to defeat them.—*Emig's Adm'r v. Mutual Ben. Life Ins. Co. (Ky.)* 230.

\*Where defendant pleaded usury, which was denied, defendant was not only bound to prove that usury was paid and received, but also the amount thereof.—*Oman v. American Nat. Bank (Ky.)* 277.

## VACANCY.

In office, see "Officers," § 1.

In office of tax collector, see "Taxation," § 5.

## VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 10.

## VENDOR AND PURCHASER.

See "Sales."

Execution on judgment in action to foreclose vendor's lien, see "Execution," § 1.

Persons concluded by judgment in action to enforce vendor's lien, see "Judgment," § 8.

Purchase by trustee at foreclosure sale, see "Mortgages," § 2.

Requirements of statute of frauds, see "Frauds, Statute of," § 2.

Resulting trust in land purchased, see "Trusts," § 1.

Rights and liabilities of purchasers from devisees or legatees, see "Wills," § 5.

Sales of lands held adversely, see "Champertry and Maintenance."

Specific performance of contract, see "Specific Performance."

*Sales by or to particular classes of persons.*

See "Brokers."

School officers, see "Schools and School Districts," § 1.

Trustee or cestui que trust, see "Trusts," § 3.

*Sales of particular species of, or estates or interests in, property.*

See "Homestead," § 1.

Property of municipal corporation, see "Municipal Corporations," § 2.

School lands, see "Schools and School Districts," § 1.

*Sales on judicial or other proceedings.*

Foreclosure of mortgage, see "Mortgages," § 3.

Tax sale, see "Taxation," § 7.

\*Point annotated. See syllabus.

### § 1. Requisites and validity of contract.

\*In an action to compel specific performance of a contract for the sale of land, evidence held insufficient to show that the contract expressed the agreement of the parties, so as to entitle plaintiff to a decree.—*Gottfried v. Bray (Mo.)* 639.

\*Performance by a party of acts upon which the mutuality of a contract depended held to relate back and make the contract good from the beginning.—*Taber v. Dallas County (Tex.)* 332.

\*The mutuality of a contract for sale of land held not to be destroyed by the fact that under its terms a party might terminate it by failing to pay interest.—*Taber v. Dallas County (Tex.)* 332.

### § 2. Construction and operation of contract.

Vendors in a contract of sale of real estate held jointly and severally liable to vendee for earnest money paid under the contract on failure of performance by them.—*Smith v. Lander (Tex. Civ. App.)* 708.

A contract to convey land construed.—*Kirby v. Cartwright (Tex. Civ. App.)* 742.

Where a vendor contracts to convey land if he can get the title within a certain time, and gets it within that time, the title inures to the purchaser.—*Kirby v. Cartwright (Tex. Civ. App.)* 742.

### § 3. Performance of contract.

Evidence held not to show that a deed to land was made in satisfaction of a contract to convey a different tract.—*Kirby v. Cartwright (Tex. Civ. App.)* 742.

### § 4. Rights and liabilities of parties.

\*A person who buys property in the visible possession of a third person is chargeable with notice of the title and right of that person to the premises.—*Squires v. Kimball (Mo.)* 502.

An instrument of adoption properly executed and filed for record held to charge a purchaser of land which had belonged to the adopting parent with notice that the adopted child was one of such parent's legal heirs.—*J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.)* 690.

\*Where at the time H. purchased an entire tract there was outstanding a prior unrecorded deed to a portion of the tract to another, the burden was on those claiming through H. to show that he had no knowledge of such unrecorded deed.—*J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.)* 690.

A purchaser, having paid full value for the entire tract, held presumed to have been without notice of a prior unrecorded deed from his grantor to a third person of an undivided interest.—*J. M. Guffey Petroleum Co. v. Hooks (Tex. Civ. App.)* 690.

\*An abstract of title made from public records before their destruction and recorded afterwards held not notice to a purchaser unless he would have learned of it and its contents by investigating as a prudent man in good faith would, and would have concluded that the deed recited therein as conveying the land was executed.—*Frugia v. Trueheart (Tex. Civ. App.)* 736.

A purchaser of land must take notice of the character of title under which persons in possession of any portion of the land claim an interest therein.—*Frugia v. Trueheart (Tex. Civ. App.)* 736.

\*Statement as to notice from proper registration of deed when the land is afterwards embraced in a new county.—*Stark v. Harris (Tex. Civ. App.)* 887.



**§ 5. Remedies of vendor.**

The commissioner in executing an order of sale made in an action on a purchase-money note and to enforce the vendor's lien *held* required to sell only a part of the land, if sufficient to pay the debt.—*Wheatly v. Hardin Nat. Bank (Ky.)* 289.

In an action by vendee to recover earnest money, vendee and his attorney *held* properly permitted to testify that they acted in good faith in rejecting the title.—*Smith v. Lander (Tex. Civ. App.)* 703.

In an action to recover land or for judgment on a note given therefor, where the defense was want of consideration for the note, etc., an instruction *held* erroneous as placing too great a burden on defendant.—*Hoffman v. Lemm (Tex. Civ. App.)* 712.

**§ 6. Remedies of purchaser.**

\*Where a nonenforceable contract for the sale of land was rescinded, the vendees were entitled to recover any payments made thereon.—*Tucker v. Denton (Ky.)* 280.

**VENIRE.**

See "Jury," § 2.

**VENUE.**

Harmless error in rulings on motion for change of, see "Criminal Law," § 43.

Review of discretionary ruling on application for change of, see "Criminal Law," § 41.

Review of questions of fact and findings on motion for change of, see "Criminal Law," § 42.

*Of particular actions or proceedings.*

Criminal prosecution of corporation, see "Corporations," § 3.

Criminal prosecutions in general, see "Criminal Law," § 3.

For injuries to shipment, see "Carriers," § 5.

**§ 1. Change of venue or place of trial.**

\*In an action on a school book publisher's bond, defendants *held* not entitled to a change of venue.—*Rand. McNally & Co. v. Commonwealth (Ky.)* 238.

**VERDICT.**

Directing verdict in civil actions, see "Trial," § 2.

In civil actions, see "Trial," § 10.

In criminal prosecutions, see "Criminal Law," § 26.

Manner of arriving at, see "Trial," § 9.

Operation and effect as curing defects in pleadings, see "Pleading," § 11.

Review on appeal or writ of error, see "Appeal and Error," § 25.

Setting aside, see "New Trial," § 2.

**VERIFICATION.**

Of pleading, see "Pleading," § 7.

**VESTED RIGHTS.**

Of beneficiaries in insurance certificate, see "Insurance," § 10.

**VICE PRINCIPALS.**

See "Master and Servant," § 4.

**VILLAGES.**

See "Municipal Corporations."

\*Point annotated. See syllabus.

**VOTERS.**

See "Elections."

**WAIVER.**

See "Estoppel."

*Of objections to particular acts, instruments, or proceedings.*

See "Appearance"; "Pleading," § 11.

Competency of witness, see "Witnesses," § 1.

Error waived in appellate court, see "Appeal and Error," § 34.

*Of rights or remedies.*

See "New Trial," § 2.

Notice of damage to shipment, see "Carriers," § 3.

Of rights in property of bankrupt by trustee in bankruptcy, see "Bankruptcy," § 1.

Right to dismissal of appeal, see "Appeal and Error," § 18.

Right to forfeit insurance, see "Insurance," § 5.

Right to trial by jury, see "Jury," § 1.

Trespass in cutting timber to sue in *assumpsit*, see "Action," § 2.

**WARRANTY.**

By insured, see "Insurance," § 4.

**WATERS AND WATER COURSES.**

Breach of contract by landlord to furnish water for irrigation, see "Landlord and Tenant," § 1.

Liability over of irrigation company to landlord held liable to tenant for failure to furnish water, see "Indemnity."

**§ 1. Appropriation and prescription.**

\*Occupation of a mill site and water power privilege *held* not adverse.—*Briggs v. Avery (Tex. Civ. App.)* 904.

**WAYS.**

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 6, 7.

**WEAPONS.**

Conviction of offense of shooting at another under indictment for assault with intent to kill, see "Indictment and Information," § 5.

Declarations as evidence in prosecution for carrying, see "Criminal Law," § 10.

Impeachment of witness in prosecution for carrying, see "Witnesses," § 3.

\*Evidence in a prosecution for carrying concealed weapons held to sustain a conviction.—*State v. Roan (Mo. App.)* 581.

\*It is no defense to a charge of carrying a pistol that it was unloaded.—*Caldwell v. State (Tex. Cr. App.)* 348.

\*A person who carries a broken pistol in a useless condition to a blacksmith for repairs, and finds the blacksmith absent, is not guilty of carrying a pistol when he takes it away with him and later returns with it to the blacksmith.—*Fitzgerald v. State (Tex. Cr. App.)* 365.

The indictment being for carrying a pistol, evidence showing that the pistol was carried at a public gathering *held* not a variance.—*Walker v. State (Tex. Cr. App.)* 1166.

## WEIGHTS AND MEASURES.

Municipal ordinances establishing public scales, see "Municipal Corporations," § 5.

## WIDOWS.

Dower, see "Dower."

## WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Construction and execution of powers, see "Powers," § 1.

Province of court and jury in will contest, see "Trial," § 8.

### § 1. Testamentary capacity.

\*Gross inequality of distribution of testator's estate *held* competent in connection with other evidence of testamentary incapacity or undue influence to establish the same, but not of itself to establish testamentary incapacity or undue influence.—*Bottom v. Bottom* (Ky.) 216.

\*The due execution of a will being established by propounders, they may rest their case in chief, and it is unnecessary that they then show testamentary capacity, or that there was not undue influence, or explain an unequal distribution.—*Bottom v. Bottom* (Ky.) 216.

\*A paper offered as a will *held*, under certain facts, to require proof when offered, not only of its due execution, but also that testator was of testamentary capacity.—*Bottom v. Bottom* (Ky.) 216.

\*In a will contest, evidence *held* to show that testator had not testamentary capacity at the time he executed the will, and that it was the result of undue influence.—*Holton v. Cochran* (Mo.) 1035.

On an issue of testator's insanity at the time he executed the will, evidence of his conduct at the death of his wife and father-in-law, 11 years before, was not objectionable for remoteness.—*Holton v. Cochran* (Mo.) 1035.

\*When subscribing witnesses testified to the due execution of the will, and that testator was of sound mind, such evidence established a prima facie case for proponents, and shifted the burden of proving incapacity or undue influence to contestants.—*Holton v. Cochran* (Mo.) 1035.

\*A person has testamentary capacity who is capable of comprehending all his property and all persons who reasonably come within the range of his bounty, and to know the disposition he is making thereof.—*Holton v. Cochran* (Mo.) 1035.

\*Where a delusion against testator's children existed and dominated him in making his will, he had not testamentary capacity.—*Holton v. Cochran* (Mo.) 1035.

### § 2. Requisites and validity.

In a will contest evidence *held* to show a prima facie case for proponents, and to shift the burden of proving undue influence to contestants.—*Holton v. Cochran* (Mo.) 1035.

In a will contest evidence *held* to show that the will was the result of undue influence.—*Holton v. Cochran* (Mo.) 1035.

### § 3. Probate, establishment, and annulment.

\*An instruction on a will contest defining soundness of mind of a testator *held* not erroneous because not including certain language.—*Bottom v. Bottom* (Ky.) 216.

\*The probate of a will *held* conclusive in a subsequent action between adverse claimants of land.—*P'Simer v. Steele* (Ky.) 851.

An instruction that the fact that testator committed suicide shortly after executing his will created no presumption that he was insane when the will was executed or when he committed suicide *held* properly refused.—*Holton v. Cochran* (Mo.) 1035.

An instruction requiring that testator must have been able to have comprehended the transaction of making a will, etc., "without the aid of any other person," *held* not objectionable as adding a requirement of testamentary capacity not specified by Rev. St. 1899, § 4602 [Ann. St. 1906, p. 2501].—*Holton v. Cochran* (Mo.) 1035.

An instruction in a will contest *held* not contradictory as charging that, though testator had "all" the mental requisites necessary to qualify him to make a will, the will was unsustainable if he had an insane delusion.—*Holton v. Cochran* (Mo.) 1035.

Under the statute providing that on appeal to the district court from the county court the trial shall be de novo, the district court *held* without authority to remand a cause, wherein it was sought to set aside the probate of a will, because a certain party had not been joined, since though she may have been a necessary party, yet the judgment, as to the executor, was not void.—*Marshall v. Stubbs* (Tex. Civ. App.) 435.

The district court *held* to have the power, where a will contest is appealed to it from the county court, to require new parties to be joined.—*Marshall v. Stubbs* (Tex. Civ. App.) 435.

A judgment setting aside the probate of a will *held* not to terminate the executor's official duties, so as to require him to execute on an appeal bond on appeal by him from that judgment.—*Marshall v. Stubbs* (Tex. Civ. App.) 435.

### § 4. Construction.

\*It is presumed that a testator intended to dispose of his entire estate, and the law favors such construction as will carry such intent into effect.—*Wood v. Wood* (Ky.) 226.

\*A will construed, and *held* to give testator's wife an estate in fee, under Ky. St. 1903, § 2342.—*Wood v. Wood* (Ky.) 226.

\*A will construed, and *held* not to create a precatory trust.—*Wood v. Wood* (Ky.) 226.

\*To make precatory words in a will operative to create a trust it must appear that the estate is not an absolute estate, that the disposition thereof is not unrestricted, that the subject of the devise and devisees are certain, and that the language used indicates more than a mere wish on the part of testator.—*Wood v. Wood* (Ky.) 226.

\*A will must be read as a whole, and so construed as to give effect to every part, when possible, without violating the testator's expressed intent.—*Deskins v. Williamson* (Ky.) 258.

Where the distribution of an estate is not to take effect until some time after testator's death, words of survivorship, in the absence of a contrary intention, will be *held* to refer to the period of distribution.—*Deskins v. Williamson* (Ky.) 258.

Will construed, and *held* to vest in the devisees who survived the testator and the period fixed for distribution an absolute fee in the property devised to them, though they subsequently died without issue.—*Deskins v. Williamson* (Ky.) 258.

\*Point annotated. See syllabus.

A will construed, and *held* that on the death of a life tenant the property passed absolutely to her sons then living.—*Simpson v. Adams* (Ky.) 819.

\*Where an estate is devised to one for life, with remainder to another, with gift over on the remainderman dying without issue, the words "dying without issue" are restricted to the death of the remainderman before the termination of the particular estate.—*Simpson v. Adams* (Ky.) 819.

A will construed, and *held* not to create an estate tail converted into an estate in fee under Ky. St. 1903, § 2343.—*Simpson v. Adams* (Ky.) 819.

\*A will devising real estate construed, and *held* to vest the fee simple in the beneficiaries, subject to be defeated as to either by his dying without issue at any time.—*Simpson v. Adams* (Ky.) 819.

\*Proof may be heard to show what testator meant by the words "my home farm."—*P'Simer v. Steele* (Ky.) 851.

\*Where a husband's will gave his property to his wife, a provision that so much of it as should not have been consumed by her should in case of her marriage vest in his children was valid.—*Littler v. Dielmann* (Tex. Civ. App.) 1137.

#### § 5. Rights and liabilities of devisees and legatees.

\*Where a testator by will leaves the income from his estate to his widow for life, but no disposition is made of the remainder after her death, it vests in his heirs.—*Yeager v. Bank of Kentucky* (Ky.) 806.

Purchaser at a sale to foreclose a vendor's lien for the payment of purchase-money notes *held* to acquire complete title except a contingent remainder under the will of the deceased owner.—*Simpson v. Adams* (Ky.) 819.

Certain conveyances made under a scheme to defeat the provisions of the will of the husband of one of the parties *held* invalid.—*Littler v. Dielmann* (Tex. Civ. App.) 1137.

### WITHDRAWAL.

Of pleading, see "Pleading," § 8.

### WITNESSES.

See "Depositions"; "Evidence."

Absence as ground for continuance in criminal prosecutions, see "Criminal Law," § 17.

Consultation between witnesses and counsel at trial, see "Trial," § 1.

Credibility as question for jury, see "Jury," § 2.

Experts, see "Evidence," § 10.

Opinions, see "Evidence," § 10.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," § 14.

Witnesses' fees as costs, see "Costs," § 2.

#### § 1. Competency.

\*Rule governing right of claimant against decedent's estate to testify concerning letters written decedent stated.—*Preston v. Atkins* (Ky.) 213.

\*Under Civ. Code Prac. § 606, subsec. 2, on a claim against decedent's estate for goods sold his employé, *held* the employé was an incompetent witness for claimant as to verbal transactions with decedent.—*Preston v. Atkins* (Ky.) 213.

\*Under Civ. Code Prac. § 606, subsec. 2, *held* claimant against a decedent's estate was disqualified from testifying as to any verbal trans-

action had with decedent about which claimant was not interrogated by the estate's representative.—*Preston v. Atkins* (Ky.) 213.

\*In an action on a life insurance policy, insured's wife *held* a competent witness.—*Metro-politan Life Ins. Co. v. Thomas* (Ky.) 1175.

\*A patient suing his physician for malpractice *held* to waive Rev. St. 1899, § 4639 [Ann. St. 1903, p. 2539], only so far as the action discloses the ailment treated and the treatment, and a physician examining the patient after the termination of defendant's treatment, with a view of further treatment, cannot testify.—*Hartley v. Calbreath* (Mo. App.) 570.

\*One convicted of burglary and larceny in a sister state while Gen. St. 1865, c. 201, § 66, was in force, *held* not thereby rendered incompetent to testify.—*State v. Landrum* (Mo. App.) 1111.

\*One convicted of burglary and larceny in Missouri while Gen. St. 1865, c. 201, § 66, was in force, *held* not rendered competent to testify by Rev. St. 1879, § 1378, and the act of 1895, embodied in Rev. St. 1899, § 4680 [Ann. St. 1903, p. 2549].—*State v. Landrum* (Mo. App.) 1111.

The right to object to a witness as incompetent *held* waived, unless made at the first opportunity.—*Ehrhardt v. Stevenson* (Mo. App.) 1118.

\*It is for the client, and not the attorney, to claim that a communication made by the client to the attorney is privileged, so that the attorney cannot testify thereto.—*Ehrhardt v. Stevenson* (Mo. App.) 1118.

\*In a homicide case, the exclusion of testimony as to the location and direction of the fatal bullet wound *held* proper.—*Earles v. State* (Tex. Cr. App.) 138.

\*One was incompetent to testify to criminative facts against accused where her husband, whose case under a charge of the same offense was undisposed of, did not testify.—*Spencer v. State* (Tex. Cr. App.) 396.

Evidence of statements made by defendant's grantor, since deceased, is admissible, under Rev. St. 1895, art. 2302, where the action was dismissed as to such defendant.—*McKeon v. Roan* (Tex. Civ. App.) 404.

\*In an action for conversion of a crop delivered by tenant and subtenants to third persons made defendants, the testimony of a witness based on his recollection *held* competent as testimony of a fact.—*Sexton Rice & Irrigation Co. v. Sexton* (Tex. Civ. App.) 728.

#### § 2. Examination.

In a prosecution for rape, prosecutrix's mother was properly permitted to testify on redirect examination that she delayed telling her husband of prosecutrix's complaint because the latter stated defendant would kill the husband.—*State v. Vickers* (Mo.) 999.

\*It is not error to permit plaintiff to testify on his redirect examination regarding matters brought out by defendant in cross-examining him.—*Northrup v. Diggs* (Mo. App.) 1123.

In a seduction trial *held* defendant could show, on cross-examining a state's witness who testified that prosecutrix's reputation for chastity was good, that witness had stated to another that prosecutrix's sister's reputation was bad.—*Jeter v. State* (Tex. Cr. App.) 371.

\*A question to a witness to prove a confession by defendant, charged with a homicide, *held* objectionable as leading.—*Garrett v. State* (Tex. Cr. App.) 359.

Where one side examines a witness and the other side, after cross-examining, goes into new

\*Point annotated. See syllabus.

matter, the witness as to the new matter becomes the witness of the party eliciting it.—*Stewart v. State* (Tex. Cr. App.) 685.

In a homicide case, where accused's wife is his witness, the cross-examination by the state is limited to matters brought out in her direct examination in view of Code Cr. Proc. 1895, art. 775.—*Stewart v. State* (Tex. Cr. App.) 685.

\*On a prosecution for rape, certain re-examination of prosecutrix *held* proper.—*Smith v. State* (Tex. Cr. App.) 1161.

\*In a criminal case, certain re-examination of a witness *held* proper.—*Smith v. State* (Tex. Cr. App.) 1161.

\*A question not suggesting the desired answer is not leading.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 194.

\*In an action for injuries by derailment of a train, it was not a leading question to ask a witness, "Did anybody direct your attention rather to the speed of the train?"—*Ft. Worth & D. C. Ry. Co. v. Walker* (Tex. Civ. App.) 400.

Answer of a party to an interrogatory propounded to him in a deposition *held* not objectionable.—*Hoffman v. Lemm* (Tex. Civ. App.) 712.

\*A question *held* not leading.—*United States Gypsum Co. v. Shields* (Tex. Civ. App.) 724.

\*Under the facts, leading questions *held* properly propounded to the party's own witness.—*Littler v. Dielmann* (Tex. Civ. App.) 1137.

### § 3. Credibility, impeachment, contradiction, and corroboration.

\*An unverified pleading cannot be read to the jury to affect the pleader's credibility as a witness, where the part which it is proposed to read has been expressly withdrawn.—*Lexington Ry. Co. v. Woodward* (Ky.) 853.

\*Defendant's paramour having testified in his behalf, the state was authorized by Rev. St. 1890, § 4690 [Ann. St. 1906, p. 2549], to impeach her on cross-examination by her own testimony and by the record showing her conviction of an offense.—*State v. Kennedy* (Mo.) 57.

\*Evidence as to the good character of prosecuting witness *held* erroneously admitted.—*Jones v. State* (Tex. Cr. App.) 126.

Where accused offered B. and L. as witnesses to impeach prosecutor's character covering six or eight months prior to the alleged offense, the state could introduce a petition signed about that time by B. and L. asking prosecutor's appointment as deputy sheriff.—*Norris v. State* (Tex. Cr. App.) 136.

\*That witnesses testified in a case and their testimony was controverted did not put the credibility and general reputation of the witnesses in issue.—*Hill v. State* (Tex. Cr. App.) 145.

\*In a trial for carrying a pistol, defendant could not be impeached by proof that he had been previously charged with carrying a pistol.—*Caldwell v. State* (Tex. Cr. App.) 343.

\*In a rape case, where accused seeks to contradict the prosecutrix by showing that her testimony on the examining trial was different from and not as full as that given by her on the final trial, evidence of her good reputation for veracity is admissible.—*Brown v. State* (Tex. Cr. App.) 368.

\*Under facts stated a party *held* entitled to contradict his own witness.—*Jeter v. State* (Tex. Cr. App.) 371.

\*In the absence of direct effort by defendant in a criminal prosecution to prove that a witness had made statements contradictory to that testified to on trial, statements made out of

court corroborative of the one in court cannot be introduced.—*Holmes v. State* (Tex. Cr. App.) 1160.

\*A deposition of a witness for plaintiff taken in another suit to which he was not a party *held* inadmissible against plaintiff to show contradictory statements.—*Clark v. Gurley* (Tex. Civ. App.) 394.

Evidence that an adopting parent intended to adopt the child and thought he had done so *held* admissible to contradict the testimony of a witness that when the parent filed the deed of adoption he instructed the clerk not to record it.—*J. M. Guffey Petroleum Co. v. Hooks* (Tex. Civ. App.) 690.

\*It is only where a witness denies having written a letter that the letter itself can be introduced as impeaching evidence.—*J. B. Lloyd & Son v. Kerley* (Tex. Civ. App.) 696.

## WORDS AND PHRASES.

"Appellate jurisdiction."—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

"Building and loan associations."—*Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n* (Ky.) 221.

"Civil contempt."—*Ex parte Clark* (Mo.) 990.

"Constructive contempt."—*Ex parte Clark* (Mo.) 990.

"County officer."—*State v. Higginbotham* (Ark.) 484.

"Criminal contempt."—*Ex parte Clark* (Mo.) 990.

"Deliberation."—*State v. Speyer* (Mo.) 505.

"Derived from the payment into the state treasury."—*State ex rel. Eaton v. Gmelich* (Mo.) 618.

"Descendant."—*Parrish v. Mills* (Tex.) 882.

"Descent."—*Parrish v. Mills* (Tex.) 882.

"Direct contempt."—*Ex parte Clark* (Mo.) 990.

"Dying without issue."—*Simpson v. Adams* (Ky.) 819.

"Fellow servants."—*Southern Pac. Co. v. Allen* (Tex. Civ. App.) 441.

"Felony."—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

"Final judgment."—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

"General instruction."—*Flaherty v. St. Louis Transit Co.* (Mo.) 15.

"Grant, bargain, and sell."—*Crawford v. McDonald* (Ark.) 206.

"Hereditary succession."—*Parrish v. Mills* (Tex.) 882.

"Indirect contempt."—*Ex parte Clark* (Mo.) 990.

"Inducement."—*Armello v. Whitman* (Mo. App.) 1113.

"Inevitable accident."—*Waters-Pierce Oil Co. v. Snell* (Tex. Civ. App.) 170.

"Interlocutory judgment."—*Waters-Pierce Oil Co. v. State* (Tex.) 326.

"Involuntary manslaughter."—*Commonwealth v. Couch* (Ky.) 830.

"Irreparable injury."—*Devou v. Pence* (Ky.) 874.

"Negotiate."—*Northrup v. Diggs* (Mo. App.) 1123.

"Offense."—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

"Opinion."—*Ex parte Clark* (Mo.) 990.

"Preponderance of the evidence."—*Rutledge & Kilpatrick Realty Co. v. Gartside* (Mo. App.) 1123.

"Shall."—*State ex rel. Black v. Taylor* (Mo.) 1023.

"Suit."—*Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 918.

"Surety."—*Reissaus v. Whites* (Mo. App.) 603.

"Vacancy."—*State ex rel. Wayland v. Herring* (Mo.) 984.

\*Point annotated. See syllabus.

**WORK AND LABOR.**

Admissibility of declarations against interest in action for services, see "Evidence," § 8.  
Liens for work and materials, see "Mechanics' Liens."

Province of court and jury in action for services, see "Witnesses," § 8.

In an action for services rendered defendants in settling an indebtedness against a third person, evidence *held* to support a judgment for plaintiffs.—Rutledge & Kilpatrick Realty Co. v. Gartside (Mo. App.) 1126.

In an action for services rendered defendants in settling an indebtedness against a third person, evidence *held* to warrant the admission to the jury of the question of defendant's ratification of plaintiff's action in surrendering certain notes.—Rutledge & Kilpatrick Realty Co. v. Gartside (Mo. App.) 1126.

\*In an action for services rendered defendants in settling an indebtedness against a third person, an instruction *held* proper.—Rutledge & Kilpatrick Realty Co. v. Gartside (Mo. App.) 1126.

In an action for services rendered defendants in settling an indebtedness against a third person, an instruction *held* properly refused.—Rutledge & Kilpatrick Realty Co. v. Gartside (Mo. App.) 1126.

**WRITS.**

See "Process."

*Particular writs.*

See "Execution"; "Habeas Corpus"; "Injunction"; "Prohibition"; "Quo Warranto"; "Replevin"; "Sequestration"; "Supersedeas."

Writ of error, see "Appeal and Error."

**WRONGFUL SEQUESTRATION.**

See "Sequestration."

**YEAR.**

Estates for years, see "Landlord and Tenant." Tenancy from year to year, see "Landlord and Tenant," § 4.

\*Point annotated. See syllabus.





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IN

## STATE REPORTS.

### VOL. 31, KENTUCKY LAW REPORTER.

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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.					
1	101	317	151	101	919	316	102	267	464	102	284	633	103	265	818	104	255	944	104	344
4	101	297	154	101	978	317	102	278	465	102	837	635	103	266	819	104	267	945	104	345
5	101	366	157	101	942	318	102	324	466	102	829	639	103	274	821	104	269	947	104	379
8	101	347	162	101	887	320	102	291	467	102	820	642	103	274	822	104	270	948	104	355
9	101	350	163	101	935	321	102	238	472	102	839	647	103	321	824	104	224	950	104	354
12	101	368	168	101	955	323	102	243	473	102	830	648	103	303	825	104	258	951	104	293
15	101	362	170	101	898	327	102	244	475	102	849	656	103	306	827	104	255	954	104	394
17	101	354	174	101	939	332	102	309	476	102	841	658	102	1176	828	104	263	956	104	365
19	101	397	176	101	964	335	102	248	477	102	813	658	103	309	829	104	257	957	104	647
28	102	305	179	101	1194	358	102	263	478	102	824	662	103	289	830	104	264	959	104	324
28	101	382	180	102	242	359	102	263	480	102	809	665	103	311	833	103	294	963	104	365
31	101	348	183	101	980	360	102	263	482	102	842	669	103	324	838	104	256	967	104	688
33	101	338	185	103	335	361	102	263	483	103	315	672	103	285	838	104	265	969	104	392
35	101	360	188	101	956	362	102	263	486	102	832	674	103	260	840	104	261	972	104	356
36	101	353	196	101	963	363	102	263	491	102	856	674	103	275	842	104	266	976	104	361
38	101	338	197	101	1185	364	102	263	494	102	826	676	103	321	843	104	224	978	104	368
39	101	372	201	101	974	365	102	263	497	102	840	677	103	299	844	104	261	980	104	364
40	101	341	204	100	1199	365	103	249	500	102	810	679	103	279	845	104	282	982	104	376
42	101	365	204	101	976	369	102	316	502	102	817	683	103	349	847	104	288	983	104	685
44	101	921	206	101	886	371	102	381	503	102	825	688	103	276	850	104	290	984	104	388
47	101	340	207	102	831	372	102	322	505	102	852	691	103	323	851	104	270	986	104	682
48	101	334	208	101	1192	373	102	322	508	102	867	700	103	314	851	104	276	987	104	363
50	101	360	210	101	1182	374	102	320	511	102	813	702	103	319	853	104	275	988	104	693
51	101	385	214	101	917	374	102	336	513	102	876	704	103	292	855	104	267	989	104	372
53	101	842	215	101	964	376	102	275	520	102	861	707	103	296	856	104	313	990	104	387
55	101	900	216	101	914	378	102	263	522	102	808	708	103	314	858	104	284	990	104	729
61	101	377	217	101	985	379	102	804	522	102	808	708	103	318	859	104	290	992	104	686
64	101	876	219	101	966	382	102	332	524	102	849	711	103	270	860	104	277	994	104	739
65	101	382	223	101	977	386	102	263	527	102	869	714	103	317	863	104	284	997	104	397
66	101	877	225	101	1196	388	102	263	528	102	882	716	103	287	863	104	287	997	104	743
69	101	311	226	101	964	389	102	319	529	102	883	717	103	339	865	104	308	999	104	721
70	101	330	227	101	940	390	102	319	533	102	862	718	103	342	867	104	311	1000	104	948
72	101	336	229	101	916	391	102	314	536	102	810	720	102	1199	871	104	280	1002	104	390
74	101	861	231	101	913	396	102	311	536	102	812	720	103	1199	873	104	285	1006	104	370
76	101	834	232	101	1179	399	102	318	537	102	884	721	103	354	875	104	282	1009	104	360
79	101	882	234	101	914	401	102	289	544	101	1196	722	103	272	875	104	317	1010	104	680
82	101	885	237	101	972	406	102	324	545	102	882	726	103	297	876	104	272	1013	104	377
85	101	352	240	101	969	406	102	327	546	102	863	728	103	283	878	104	279	1016	104	873
87	101	375	243	102	232	407	102	321	549	102	865	729	103	269	880	104	274	1019	104	389
89	101	908	246	101	918	408	102	337	552	102	870	731	103	960	880	104	316	1020	104	690
93	101	924	247	101	1187	408	102	338	555	102	873	733	103	291	882	104	310	1025	104	382
96	101	926	249	102	287	411	102	335	561	102	859	740	103	643	883	104	273	1033	104	687
99	101	894	251	102	233	412	102	327	563	102	867	744	103	281	886	104	308	1035	104	695
101	101	895	254	101	1194	414	102	322	564	102	872	746	103	368	887	104	325	1038	104	714
106	101	970	255	101	1191	415	102	328	566	102	879	750	103	300	888	104	640	1041	104	718
107	101	1196	257	101	1188	418	102	306	569	102	860	753	103	1199	890	104	350	1043	104	875
108	101	879	259	101	1179	419	102	828	569	102	1196	754	103	309	892	104	296	1045	104	708
108	101	1196	263	101	1186	421	102	845	570	102	1188	757	103	836	894	104	293	1047	104	707
109	101	928	266	102	300	422	102	837	576	102	1182	760	103	371	894	104	329	1049	104	721
111	101	381	268	102	273	425	102	339	579	102	1193	766	103	840	897	104	314	1050	104	701
118	101	380	270	102	235	427	102	341	583	102	858	769	103	332	899	104	326	1052	104	709
115	101	931	271	102	298	428	102	330	584	103	330	773	103	287	904	104	341	1054	104	988
118	101	930	275	102	271	429	102	298	588	102	854	775	103	354	905	104	342	1059	104	732
118	101	1197	276	102	272	430	102	321	590	103	257	788	103	714	908	104	337	1064	104	740
119	101	889	277	102	272	431	102	247	595	103	322	784	103	714	913	104	291	1069	104	727
119	101	931	278	102	278	432	102	277	596	102	1175	789	103	364	916	104	823	1072	104	703
120	101	883	284	102	274	434	102	329	597	103	251	795	103	346	917	104	831	1076	104	762
122	101	882	285	102	246	436	102	808	601	103	255	800	103	829	919	104	322	1081	104	716
123	101	893	287	102	237	438	102	823	604	103	247	801	103	721	921	104	345	1082	104	705
124	101	923	288	102	302	439	102	836	606	102	1179	805	103	717	923	104	332	1085	104	711
125	101	892	291	102	270	441	102	1196	609	102	1185	807	103	342	924	104	318	1090	104	731
128	101	882	293	102	284	442	102	799	613	103	245	807	103	719	926	104	352	1092	104	723
129	101	889	295	102	239	443	102	800	617	103	261	810	103	352	929	104	345	1095	104	698
133	102	806	298	102	295	444	102	798	624	103	254	811	103	853	930	104	387	1096	104	737
137	101	905	302	102	247	444	102	799	626	102	1175	812	103	721	931	104	320	1099	104	700
141	101	934	303	102	282	446	102	891	627	102	1184	813	103	339	934	104	319	1101	104	754
143	101	929	305	102	303	449	102	846	629	102	1185	813	103	353	936	104	359	1108	104	716
144	101	861	309	102	276	452	102	818	630	103	248	814	102	1199	937	104	323	1106	104	774
146	101	887	310	102	277	455	102	815	632	103	286	814	104	259	939					



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1117	104	693	1153	104	761	1179	104	1029	1214	104	956	1252	104
1119	104	698	1154	104	762	1182	104	964	1216	104	961	1256	104
1121	104	755	1155	104	697	1184	104	960	1219	104	969	1258	104
1126	104	725	1156	104	768	1185	104	955	1220	104	975	1259	104
1129	104	717	1158	104	711	1189	104	1031	1224	104	1033	1262	104
1130	104	758	1159	104	954	1192	104	978	1227	104	963	1265	104
1134	104	722	1161	104	750	1195	104	959	1228	104	1028	1269	104
1136	104	766	1162	104	748	1197	104	785	1229	104	993	1274	104
1138	104	749	1163	104	951	1198	104	987	1232	104	1003	1275	104
1141	104	720	1166	104	744	1201	104	958	1233	104	1034	1276	104
1142	104	776	1173	104	752	1202	104	1197	1242	104	1002	1277	104
1146	104	781	1176	104	751	1203	104	971	1244	106	1303	1281	105
1148	104	782	1177	104	970	1209	104	980	1247	104	1007	1282	104
												1024	106
												1284	106
												1016	106
												1008	106
												968	106
												1283	105
												429	105
												119	105
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